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Editorial

The ‘desert’ which has for many years characterised the African scholarship is continually being brought to its end. At Strathmore Law School, the students are playing their role in the concerted effort to create the much-needed springs of knowledge. The Strathmore Law Review is unveiling this first special issue as part of the pursuit of legal excellence in the quest to make the society a better place.

This special issue features selected dissertations from the pioneer class of Strathmore Law School. Christopher Ndegwa starts off the discussion with his article ‘In Duplum Rule in Kenya: A Critical Analysis of the Unaddressed Aspects of Section 44A of the Banking Act’. He undertakes an analysis of the in duplum rule which limits the recovery amount with respect to the principal and interest of non-performing loans. The analysis looks at the origins of the rule, Kenyan jurisprudence and conducts a brief comparative study in establishing whether it protects debtors.

Irene Otieno brings to our attention the controversies that arise due to the effects of technological developments on the law, especially in the field of intellectual property. Some of the technological advancements appear to violate already existing legal rights and leave the intellectual property rights holders unsettled. In her article ‘The Efficiency of Copyright Law in the Digital Space in Kenya: A Case for the Making Available Right in Peer-to-Peer File Sharing’, she examines Kenyan copyright law and suggests ways in which the law can catch up with the technology in order to ensure that rights are protected in the ever changing digital space.

Yvonne Muthembwa’s ‘An Analysis of the Exclusion of Child Soldiers Seeking Asylum under the 1951 Refugee Convention from the Principle of the Best Interests of the Child Perspective’, unravels the challenges that children coerced into becoming child soldiers face. Article 1F(a) of the Convention Relating to the Status of the Refugees excludes them from obtaining asylum due to their participation in commission of the prohibited crimes. The varied interpretation approaches together with the lack of a universally accepted minimum age of criminal responsibility, the author opines, are putting the best interests of the child at stake in the application of the exclusion clause.

Patrick Kimani makes his contribution on the International Criminal Court discourse in his article ‘The Implications of Stripping Immunities of Heads of States on State Cooperation and the Effectiveness of the Trial’. He posits that a tension exists
between Article 27 which strips accused incumbent heads of states of their immunity, and Article 86 which requires a situation country to cooperate with the Court. The journey from Nuremberg to The Hague has eroded the ‘invisibility cloak’ of heads of state from prosecution but also appears to have a negative side with respect to state cooperation. Using the Uhuru Kenyatta and Al Bashir cases, Patrick explains how the prosecution of incumbent heads of state remains a challenge in international criminal law.

'Walking the Tight Rope: Balancing the Property Rights of Individuals with the Right to Housing of Informal Settlers' is an attempt by Doris Matu to strike a balance between the right to property, on the one hand, and the right to accessible and adequate housing, on the other hand. This is an area that has elicited intense debate given the emotive position of land in the country’s development. She uses illegal forced evictions to illustrate how these two rights lock horns and undertakes to find a way out of the clash.

Ikoha Muhindi’s 'Occupational Safety and Health of Coal Mine Workers in Kenya: Filling the Lacuna in the Law' is an expose of the wanting working conditions the coal miners have to put up with despite their huge contributions to the economy. The article examines the ability of the occupational safety and health and related legislations to safeguard the concerns of the coal miners in Kenya as the country embarks on the coal extraction in Mui Basin.

Raphael Ng’etich’s ‘The Rejected Stone May Be the Cornerstone: A Case for the Retention of Traditional Justice Systems as the Best Fora for Community Land Disputes in Kenya’ ends the discussion in the issue with a search for the most appropriate forum for the resolution of community land disputes. It proposes that traditional justice systems, initially used by communities but phased out with the onset of colonialism on being regarded as inferior, remain the most appropriate. Their inclusive and informal nature together with the pursuit of restorative justice makes them the appropriate forum as they preserve the web of interests that characterise community land ownership.

This step is part of the continued effort in making the Strathmore Law Review one of the finest in legal literature taking the discussion deeper, far and wide in interrogating and resolving the issues affecting our society today. And as has been observed, the law is not everything and cannot resolve all the challenges but we also realize that it is not nothing either; the take home lesson being that the mountain can be moved if we all play our part well. Seize the day!
Foreword

Kenya’s 2010 Constitution has placed law and justice on the front row of our social theatre. The 2010 Constitution is slowly giving birth to a new social order we cannot ignore. It is reshaping the way the Government deals with its people, the way we understand law, and the way we deal with each other.

Most law schools curricula have been reluctant to accept this new reality; it seems as if intellectual inquiry is frozen in the past. Most teachers continue to employ the same old teaching methods. The advancement of quality legal writing has been painfully slow. In addition, there is still an unusually large part of the student population that seems uninterested in bringing this new Kenya to fruition; they simply remain in the pursuit of their own happiness, forgetting that personal happiness can never be really attained in the midst of an unhappy society.

Kenya’s legal and political order needs to find itself. Kenya did not fight secession wars or a French Revolution. Yet those are the systems that have informed the creation of our modern democratic structures, which now cry for contextualisation. Indeed, Africa was illumined by accidental means – slave trade and the colonial scramble for lands. History, whether we like it or not, marks deeply a country’s constitutional development.

This new generation of law students and young graduates are called to actualize this contextualisation. They are called to a deeper understanding of their legal institutions and their social and political realities. In order to accelerate this change in our young, brilliant and active law students we decided to publish a special edition of the Strathmore Law Review. This volume brings to light seven of the best papers written by the graduating class of 2016. A class that will always remain special in the hearts and minds of the teachers and mentors who made the impossible dream of Strathmore Law School possible. A class that did not fear love, adventure, challenge and mercy. I told them many a time to fear only the selfish pursuit of their own happiness, for they will never achieve happiness alone.

I am pleased to present in this special edition, seven engaging academic papers. Space constrains did not allow us to publish more than seven; the choice was hard. These research papers are a sample of a brilliant class for whom vic-
tory is assured, provided they keep alive their inner struggle and their core ideals. Then, one day, as they get closer to the dawn of life, they will be able to say, together with Ernest Henley:

“Beyond this place of wrath and tears
Looms but the horror of the shade,
And yet the menace of the years
Finds, and shall find, me unafraid.

It matters not how strait the gate,
How charged with punishments the scroll.
I am the master of my fate:
I am the captain of my soul.”

Luis Franceschi, LLB, LLM, LLD
Dean, Strathmore Law School
In Duplum Rule in Kenya: A Critical Analysis of the Unaddressed Aspects of Section 44A of the Banking Act

Christopher Ndegwa*

Abstract

Amendment No. 9 of 2006 of the Kenya Banking Act introduced the in duplum rule into Kenyan legislation. The rule provides that with respect to non-performing loans, only the principal owing when the loan becomes non-performing; contractual interest not exceeding the principal owing when the loan becomes non-performing; and expenses incurred in the recovery of any amounts owed by the debtor may be recovered. This statutory rule has its roots in South African common law. Kenyan jurisprudence has demonstrated a divergence from interpretations of the rule as per other jurisdictions where the rule has a long standing history such as South Africa. This is indicative of a misnomer which upon further interrogation reveals that Section 44A of the Banking Act is merely a semblance of the in duplum rule and not the in duplum rule stricto senso. The aim of this paper is to scrutinise the rule while making reference to South Africa, without carrying out a full comparative analysis, in a bid to address the issue of whether our enactment of the in duplum rule will effectively serve the purpose for which it was enacted; the protection of debtors.

1. Introduction

The in duplum rule is a rule of law which provides that when interest on a debt equates to the capital of the debt, interest ceases to continue accruing. It seeks to protect the debtor from exploitation by credit institutions. Having the objective of protecting borrowers from finding themselves entwined in a thread

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of debt that they cannot untangle; it has been generally described as being protective. So great is this principle that it draws its roots from the Code of Hammurabi in 1800 BC that forbade a collection of interest greater than that which was lawfully due. This rule made its way into the legal framework of the financial service sector via Section 44A of the Banking Act which stipulates the maximum that an institution can recover from a debtor with respect to a non-performing loan. Although this law seeks to provide protection to debtors from their creditors, it has some ambiguities that if not addressed, may hinder the objective of the law.

Kenya’s legislation that introduces this consumer protectionist rule seems to borrow from both the common law in duplum rule and the statutory in duplum rule. There is a stark difference between the two and this divergence of concepts may lead to different applications of the rule and consequently, conflicting application of the law as shall be discussed later on in this article.

The key issue to be addressed is whether Section 44A of the Banking Act sufficiently protects the consumer of credit and whether it is detrimental to credit providers as well as credit consumers. This is premised on the hypothesis that Section 44A merely enacted a semblance of the in duplum rule and as such, will not be able to serve the intended purpose for which it was enacted.

A prima facie comparison of the in duplum rule applied in Kenya vis-à-vis that implemented in South Africa reveals a variance in interpretation of the rule meant to ease the chokehold that financial institutions would have on debtors. Perhaps this is because the rule in Section 44A of the Banking Act is merely an illusion of the in duplum rule. The ramifications of this would be heavily felt by borrowers who would discover that the rule meant to shield them from overexploitation by lenders may actually leave them exposed.

Addressing the obscurity surrounding this rule will render clarity on a number of potential issues that may arise. This can only be done after interrogating the mischief that the rule was meant to address and evaluating whether or not it

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2 Kelly-Louw M, ‘Better consumer protection under statutory in duplum rule’, 337-345
5 Chapter 488, Laws of Kenya.
6 Amendment No. 9 of 2006.
7 South African jurisprudence is considered to be the bedrock of the in duplum rule. See generally, Kelly-Louw M, ‘Better consumer protection under statutory in duplum rule’, 337-345.
is capable of serving its purpose or whether it is a structure with a faulty foundation. This evaluation is approached through the lenses of consumer protection and safeguarding of creditors.

This article focuses on assessing the application of the rule to contracts that do not involve financial institutions as well as whether Section 44A (2) of the Banking Act provides an exhaustive list of elements that comprise the maximum amount that an institution can recover from a debtor with regards to a non-performing loan. Lastly, the article seeks to assess whether or not the rule stifles financial institutions under the pretext of consumer protection.

In order to adequately dissect and analyse Section 44A, a chronological approach has been adopted by the author. This begins with an introduction of the in duplum rule in Kenya and traces its legislative inception within the history of the Kenyan legal framework on governance of interest rates. This is then followed by a reference to South Africa, without a full comparative analysis, regarding the application of the in duplum rule. The outcome of the comparative study focuses on the restriction of the application of the in duplum rule regarding certain transactions and finally concludes with recommendations.

II. History of the Legal Framework on Governance of Interest Rates

i. Rationale for regulation of interest

‘If a man begets a son...who lends at interest and exacts usury – this son certainly shall not live...he shall surely die; his death shall be his own fault.’

Throughout history, the regulation of interest charged on loans has always been a bone of contention. This has been so, to prevent usury – the practice of lending money to people at unfairly high rates of interest. This regulation traces its roots back to the Code of Hammurabi dated 1750 BC which regulated the interest that could be charged on a loan. The significance of this provision was to ensure that the borrower would not be extorted and hence, have his ag-

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The Greeks shared similar sentiments regarding the regulation of interest. Both Plato and Aristotle believed usury was immoral and unjust. During the period of 800 – 600 BC the Greeks at first regulated interest, and then deregulated it. The consequences of deregulation were, *inter alia*, the creation of a colossal amount of unregulated debt as most Athenians had feeble pockets thus relied on loans from the wealthy that were accompanied by a hefty interest rate. The poor would then offer themselves as surety for the loan and upon default Athenians were sold into slavery.\textsuperscript{13}

In the year 533 AD the Roman ‘Code of Justinian’ set a graduated maximum interest rate that did not go over 8.3% for loans to ordinary citizens.\textsuperscript{14} Medieval Roman law treated those guilty of usury under stringent measures; they received a penalty of four times the amount taken whereas those guilty of robbery were fined twice the amount taken.\textsuperscript{15}

Some drastic measures have been taken in the past such as doing away with interest charged on loans completely. As early as 325 AD the first general council of the Christian Church, the Council of Nicaea, passed a canon prohibiting usury by clerics and citing the Psalm 15.\textsuperscript{16} Pope Leo the Great forbade clerics to take usury and declared laymen who take it to be guilty of ‘shameful gain.’\textsuperscript{17} It is important to understand that this stance had its root in the traditional Christian view that earning interest was a wrongful action equal to a sin. Christianity teaches that ‘…lend freely, hoping nothing nearby.’\textsuperscript{18} The Islamic faith shares this doctrine as it prohibits lending money at an interest – *riba*.\textsuperscript{19}

Such was a position that was adopted by Charlemagne in 800 AD as he outlawed interest throughout his Empire.\textsuperscript{20} It can be seen that such an approach would have stemmed from the conception that interest charged on credit would easily be prone to abuse by credit providers. This perception must have been an


\textsuperscript{13} Ackerman JM, ‘Interest rates and the law’.

\textsuperscript{14} The History of Usury, ‘Americans for fairness in lending’ https://americansforfairnessinlending.wordpress.com/the-history-of-usury/ on 31 October 2015.

\textsuperscript{15} The History of Usury, ‘Americans for fairness in lending’.

\textsuperscript{16} This particular psalm refers to conditions that must be met in order to gain admission into the kingdom of heaven and one of them is lending money without charging interest.

\textsuperscript{17} Homer S and Sylla R, A history of interest rates, 90.


\textsuperscript{19} *Riba* is defined as lending money for interest without risk to the lender. Jones, Islam and usury, 1989

informed one as usurers were depicted in the lowest ledge in the seventh circle of hell – even lower than murders – by Dante in *The Inferno*\(^{21}\) which he penned over a fifteen year period beginning in 1306.\(^{22}\)

In the 18\(^{th}\) century, the Church adopted a more tolerable approach towards interest-based lending.\(^{23}\) Concurrently, the wave of capitalism promoted the lending of money at a ‘cost’ as it was argued that the lender shared in the risk of the borrower’s venture and as such, was entitled to remuneration for the same.\(^{24}\) The pursuit of self-interest and the right to own property are some of the objectives of the law if assessed through a capitalistic lens. This connotes an absence of a natural limit to the range of an individual’s efforts in terms of profits – including interest.\(^{25}\) This effectively means that persons ought to be permitted to recover any amount from their efforts so long as it is agreed upon by the parties.\(^{26}\)

This is in contravention of the labour theory which postulates that one is entitled to the ‘work of their hands’.\(^{27}\) The absence of a limit on the amount of interest that can be recovered from an advancement of credit can easily lead to the extortion of weaker parties as seen in preceding paragraphs. Exorbitant interest may be charged or inequitable payment terms may be enforced by the credit provider to trap the credit consumer in a maze of unmanageable debt.\(^{28}\) In this regard, an efficient law ought to protect the consumer’s economic interests yet at the same time, ought to be equitable to all parties.

**ii. Attempts to regulate interest in Kenya: Donde Act**

The Central Bank of Kenya (Amendment) Act\(^{30}\) – commonly referred to as the Donde Act – was a private member’s Bill introduced in Parliament in 2001 to control bank interest rates. The Bill sought to peg bank interest rates to Treasury bill rates\(^{31}\) as well as establish a monetary policy committee. This was an attempt

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\(^{22}\) Hollander and Hollander (trans), *The Inferno by Dante*, 14.


\(^{24}\) Olechnowicz CA, ‘History of usury’, 105.


\(^{26}\) Hessen R, *Capitalism*, The concise encyclopaedia of economics.


\(^{28}\) Olechnowicz CA, ‘History of usury’, 104

\(^{29}\) This right is enshrined in Article 46, *Constitution of Kenya* (2010).

\(^{30}\) Act No. 4 of 2001.

\(^{31}\) This refers to the interest rate on the treasury bills. A treasury bill is a paperless short-term borrowing
to place reins on an already out of control banking system that had suffered the effects of deregulated interest rates due to the Banking Act of 1993.\textsuperscript{32} Such deregulation was ignorant of the oligopolistic nature of the Kenyan banking system and had led to collusion between certain banks whose increased interest rates often resulted in the borrowers paying interest equating to the principle sum advanced or even more.\textsuperscript{33}

The Donde Bill polarized debate between banks and external donors in one corner and Parliament in the other corner.\textsuperscript{34} The donors had it in their interests to maintain the deregulated interest rates thereby safeguarding the exorbitant profits that banks would make from lending at such extortionist interest rates. This would translate into handsome returns that they received on their investments – the donor funds that had been invested in the banks.\textsuperscript{35} Many Kenyans supported the Bill in its quest to curb the usurious habit of banks and scale down the suffering of Kenyan consumers of credit.\textsuperscript{36}

Although the Kenya Bankers Association (hereinafter KBA) acknowledged the unfriendly interest rates, it opposed the Bill due to its retrospective application. The Act came into force on 6 August 2001 but its commencement date was 1 January 2001. KBA challenged the constitutionality of this provision as Section 77 of the repealed Constitution protected persons from retrospective application of criminal sanctions as it contravened their right to a fair trial. The High Court held that the provision on the retrospective application of criminal sanctions was unconstitutional.\textsuperscript{37} Those provisions touching on the non-criminal civil aspects of the Donde Act were left intact. One of such integral provisions was that the maximum interest rate chargeable on all loans and advances from 1 January 2001 was ‘the 91-day Treasury bill rate published by the Central Bank of Kenya on the last Friday of each month, or the latest published 91-day Treasury bill rate, plus 4 per centum’.\textsuperscript{38}
This position was buttressed by Ochieng J in *Mohammed Gulambussein Farzal Karnali & Another v CFC Bank Limited & Garam Investments*,\(^{39}\) where he stated that the Act had come into force on 1 January 2001 thereby connoting the validity of the Act notwithstanding those elements that had been declared to be unconstitutional. Furthermore, the Act provided that ‘the maximum interest chargeable shall not exceed the principal sum, and that the Section should only apply to loans and advances made or renewed after commencement of the Act.’\(^{40}\) It is important to note that the limitation on interest so as to ensure that it does not exceed the principal sum is a precursor to the *in duplum* rule.

One of the arguments advanced by the antagonists of the Donde Bill was that the measures the Bill sought to implement to regulate interest rates would have adverse economic effects. The IMF made an ‘offer’ to send experts to the Office of the Attorney General and to Central Bank; an offer whose refusal would be reciprocated with the withholding of aid.\(^{41}\) At the same time, efforts to have Government regulate oil prices led to an outcry against the same by the United States with the then Ambassador to Kenya, Johnnie Carson, advising Kenyan MPs that, ‘*Credit, like petrol, is a commodity*’ that would dry up if wrong laws and policies such as those being proposed were implemented.\(^{42}\) Many classified this as modern colonialism.\(^{43}\) Unfortunately, this Act was repealed and can be classified as a piece of still born legislation. Its true intended effects were never felt.

### iii. Introduction of the *in duplum* rule

The *in duplum*\(^{44}\) rule generally provides that unpaid interest ought to stop running once it equals the unpaid capital amount.\(^{45}\) This, in principle, ought to prevent the consumer of credit from paying interest that is greater than the capital sum advanced to him/her.\(^{46}\) This was introduced into the Kenyan legal framework regulating the banking sector via Section 17 of the Banking (Amendment) Act that resulted in the inclusion of Section 44A in the Banking Act.\(^{47}\)

\(^{39}\) HCCC No. 3 of 2006.

\(^{40}\) HCCC No. 3 of 2006.


\(^{44}\) *Duplum* in English refers to ‘double.’

\(^{45}\) Commercial Bank of Zimbabwe v MM Builders and Suppliers PVT Ltd 1997(2) SA 285 ZHC


\(^{47}\) Chapter 488, Laws of Kenya.
The Section states that an institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to a maximum amount comprising the principal owing when the loan becomes non-performing; interest in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing and expenses incurred in the recovery of any amounts owed by the debtor.\textsuperscript{48}

This not only clearly establishes when interest on a non-performing loan ought to stop running, but it also outlines the elements that comprise the recoverable sum from the debtor. This has, to some extent, carried out the intention of the Donde Act of ensuring that borrowers are not extorted into paying back more than double the principal amount accorded to them by credit-rendering institutions.

The 1972 reiteration of the rule by the South African Transvaal Provincial Division has often been quoted as being one of the most succinct that stated,

‘…for the statement that interest may not exceed the amount of the capital itself, as soon as the interest reaches an amount equal to the capital the interest ceases to run, if the accrued interest or a part thereof is paid, it starts to run again, but again only until it is again as high as the capital.’\textsuperscript{49}

Interestingly enough, the terminology ‘\textit{in duplum}’ has been regarded as being technically incorrect as the rule itself prohibits charging of more than twice the capital. In \textit{Commercial Bank of Zimbabwe v MM Builders (Pty) Ltd},\textsuperscript{50} Gillespie J states that the proper reference to this rule ought to be ‘\textit{ultra duplum}’. This is because although the rule prohibits more than double the capital, it allows less than double; and only prohibits beyond double the capital amount when the interest is in arrears.\textsuperscript{51}

There have been, however, numerous questions raised on whether the \textit{in duplum} rule is fit for its intended purpose. It has been posited that its application in the Kenyan context may yield different results from those which it was intended to yield – the simultaneous protection of the debtor and safeguard of the creditor’s interests. The reason for this assumption is that it was derived from the South African jurisdiction but was not fully adapted to the Kenyan context.\textsuperscript{52}

\textsuperscript{48} Section 44A, \textit{Banking Act} (Chapter 488, Laws of Kenya).
\textsuperscript{49} \textit{Stroebel v Stroebel} 1973 2 SA 137 (T).
\textsuperscript{50} 1997 2 SA 285 292.
\textsuperscript{51} Vessio ML ‘The effects of the \textit{in duplum} rule and clause 103 (5) of the National Credit Bill 2005 on interest’ Unpublished LLM Thesis, University of Pretoria, 2006, 34.
\textsuperscript{52} See generally Khaseke GM, \textit{Introduction of the \textit{in duplum} rule in Kenya: A legal mechanism of equitable
Certain distinctions\(^{53}\) in its application in the Kenyan context vis-à-vis that of South Africa are visible and precipitate the question as to whether Section 44A of the Banking Act is indeed the codification of the \textit{in duplum} rule \textit{stricto senso} or whether it is a mere semblance of the same.

III. Comparative Study of Kenya and South Africa Regarding the Application of the \textit{In Duplum} Rule

\textit{i. Common law v statutory in duplum rule}

\textit{a. Common law \textit{in duplum} rule}

It is of utmost importance to note the existence of both the common law \textit{in duplum} rule as well as the statutory \textit{in duplum} rule. The former, as construed in South African law\(^{54}\) and fortified through judicial precedent, provides that interest stops running when unpaid interest equals the outstanding capital amount. If the total amount of unpaid interest – both contractual and default interest, has accrued to an amount equal to the outstanding capital sum, the defaulting debtor must first start making payments on his loan again (and so decrease the interest amount), after which interest may once again accrue to an amount equal to the outstanding capital sum.\(^{55}\)

The rule thus effectively prevents unpaid interest from accruing further once it reaches the unpaid capital sum. Even if interest is capitalised and interest is therefore charged on interest, the capitalised interest does not lose its character as interest and become part of the capital amount for purposes of applying the \textit{in duplum} rule.\(^{56}\)

Therefore, the common-law \textit{in duplum} rule implies that the total amount of unpaid interest on a loan or credit transaction may accrue only to an amount equal to the outstanding capital sum and that all arrear interest ceases to run when that interest has reached the outstanding capital amount.\(^{57}\)

\(^{53}\) These differences shall be discussed in depth in the following chapters, particularly in Chapter 3.

\(^{54}\) It is important to consider the context of South African law as the \textit{in duplum} rule has been part of their legal toolbox since 1830.


fortified in the case of *Sanlam Life Insurance Ltd v South African Breweries Ltd*\(^8\) where it was held that the *in duplum* rule only ought to apply to interest in arrears.

It is imperative to note that the rule does not mean that a creditor is prevented from collecting more than double the unpaid capital amount in interest. He or she is permitted to do so as long as he or she at no time allows the unpaid interest to reach the unpaid capital amount.\(^9\) Nevertheless, if this escalation occurs, interest ought to immediately cease to accrue. Once payments on the account are again made and the interest element of the total amount owed is decreased, the interest can start running again until it equals the outstanding capital. It is thus clear that the rule only prevents the interest from running on a temporary basis and does not set a maximum amount of interest that may be charged.\(^60\)

The common-law *in duplum* rule is not limited to interest on money-lending transactions. In fact, it applies with equal force to all types of contracts in which a capital sum is due by the debtor to the creditor and on which amount a specific rate of interest is payable. One such example is where a debtor owes money to a creditor under a contract of letting and hiring of work on which interest is payable.\(^61\)

b. **Statutory *in duplum* rule**

The common-law *in duplum* rule has been codified into statute which is commonly referred to as the statutory *in duplum* rule.\(^62\) One such example is that found in Section 103(5) of the National Credit Act of South Africa which states:

‘Despite any provision of the common law or a credit agreement to the contrary, the amounts contemplated in Section 101(1) (b) to (g) that accrue during the time that a consumer is in default under the credit agreement may not, in aggregate, exceed the unpaid balance of the principal debt under that credit agreement as at the time that the defaults occurs.’\(^63\)

The statutory *in duplum* rule has been argued by some to provide greater protection to the consumer of credit as it not only prohibits the incessant accrual of interest that surpasses the outstanding principal amount owed, but goes a step further to clearly outline the constituent amounts that accrue during the time that

\(^{58}\) 2000 (2) SA 647 (W) at 652 G-I.


\(^{62}\) KPMG, Correctly applying the *in duplum* rule, 2013.

\(^{63}\) Section 103 (5) National Credit Act (South Africa).
a consumer is in default under the credit agreement that may not, in aggregate, exceed the unpaid balance of the principal debt under that credit agreement as at the time that the defaults occur.\(^{64}\)

Since Kenya’s history does not point towards any application of the *in duplum* rule prior to the amendment made to the Banking Act, it will be taken that all references to the *in duplum* rule in a Kenyan context refer to the statutory *in duplum* rule. Certain practices synonymous with the banking industry such as the rule in *Devaynes v Noble*\(^ {65}\) (hereinafter the Clayton rule) and the capitalisation of interest have presented thorny questions with regards to the application of the *in duplum* rule.

c. Application of clayton rule to *in duplum* rule

The Clayton rule\(^ {66}\) is that payments towards running an account, such as a bank account, are applied to the earliest debt first. Thus, the most recently incurred charge is the last charge that will be paid off.\(^ {67}\) This is commonly referred to as ‘first-in-first-out principle’. The pertinent issue regarding the Clayton rule is its concurrent application with the *in duplum* rule.

In *Standard Bank of SA Ltd v Oceanate Investments (Pty) Ltd*,\(^ {68}\) Selikowitz J stated that when interest on the unpaid capital has reached an amount equal to it, then the effect of applying the *in duplum* rule would be to grant the debtor a double benefit that was not intended. This can be better grasped with the aid of an illustration.

The example of the cessation of 1,000 Kenya shillings\(^ {69}\) arrear interest having accrued from an unpaid capital amount of 1,000 Kenya shillings is apposite. If the debtor pays to the creditor 100 Kenya shillings, and the Clayton rule were

\(^{64}\) See generally Section 103(5), National Credit Act (South Africa) and Section 44A(2), Banking Act (Chapter 488, Laws of Kenya).

\(^{65}\) *Devaynes v Noble* (1816) 1 Merivale 529.

\(^{66}\) *Devaynes v Noble* (1816) 1 Merivale 529.


\(^{68}\) 1995 (4) SA 510 (C).

\(^{69}\) The original example furnished by Vessio ML refers to rand as the currency but the author has substituted this for Kenya shillings to bring the example closer to home without any material alteration of substance from the work cited.
to be applied, then 100 Kenya shillings would reduce the capital amount. At the same time the *in duplum* rule would take effect with the implicative consequence of the creditor only being able to recover 1,800 Kenya shillings in total, 900 Kenya shillings in capital and an equal 900 Kenya shillings in interest, which could not exceed the capital. In effect, this would mean that the debtor has benefited double that which he has paid, that is 200 Kenya shillings from payment of only 100 Kenya shillings. The next payment by the debtor would have much the same effect and the first-in-first-out rule would prevent interest from running after payment, as the *in duplum* rule intrinsically instructs. It seems reasonable from the aforementioned example that any payments made ought to be appropriated to the interest first only before being appropriated to the capital.

**ii. Capitalisation of interest**

The capitalisation of interest is an aspect of loan repayment from which confusion has arisen in the past regarding the application of the *in duplum* rule. This is because the capitalisation of interest has been argued to change the nature of interest thereby leading to many considering it as capital and not interest for the purposes of application of the *in duplum* rule. This was seen in the case of *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd* where Standard Bank argued that interest, once capitalised, changes its nature and is then considered as capital. One of the main arguments of Standard Bank was that the *in duplum* rule ought not to apply to overdraft accounts as interest was almost immediately capitalised in such accounts. Selikowitz J in his judgement stated that

‘...words like ‘capitalisation’ are used to describe the method of accounting used in banking practice. However, neither the description nor the practice itself affects the nature of the debit. Interest remains interest and no methods of accounting can change that.’

If interest were to be considered as capital then the capital amount of the debt would continuously increase and the bank would run no risk of a lesser capital amount being the subject matter of the rule. Furthermore, if lenders

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70 Vessio ML ‘The effects of the *in duplum* rule and clause 103 (5) of the National Credit Bill 2005 on interest’.
71 In the case of *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd* 1995 (4) SA 510 (C) one of the issues was whether capitalisation of interest ought to apply in relation to the *in duplum* rule.
72 See generally the case of *Standard Bank of SA Ltd v Oneanate Investments*. 1995 (4) SA 510 (C).
73 *Standard Bank of SA Ltd v Oneanate Investments*, para 572.
74 See generally, *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd*.
were entitled to benefit from the convenience of a book entry to convert what is interest into capital, this would afford an easy way to circumvent the *in duplum* rule. When interest is compounded it remains as interest.\(^{76}\)

*iii. What comprises the amounts that ought not to exceed the principal owing at the time of default?*

Kenyan legislation stipulates that the

‘…principal owing when the loan becomes non-performing; interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing; and expenses incurred in the recovery of any amounts owed by the debtor…’\(^{77}\)

are what ought to be considered in determining the maximum amount recoverable by an institution from a debtor with respect to a non-performing loan.

The wording of this particular Section begs for clarity as ‘...any expenses incurred in the recovery of any amounts owed by the debtor…’ can be selectively and widely interpreted to encompass a wide array of ‘expenses’.

On the contrary, South African legislation has a clearer position on the matter as it provides that,

‘A credit agreement must not require payment by the consumer of any money or other consideration, except

(a) the principal debt, being the amount deferred in terms of the agreement…
(b) an initiation fee, which –
   (i) may not exceed the prescribed amount relative to the principal debt; and
   (ii) must not be applied unless the application results in the establishment of a credit agreement with that consumer;
(c) a service fee, which-
   (i) in the case of a credit facility, may be payable monthly, annually, on a per transaction basis or on a combination of periodic and transaction basis; or
   (ii) in any other case, may be payable monthly or annually; and
   (iii) must not exceed the prescribed amount relative to the principal debt;
(d) interest, which-

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\(^{76}\) *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd*, 34.

\(^{77}\) Section 44A (2), *Banking Act* (Chapter 488, Laws of Kenya).
(i) must be expressed in percentage terms as an annual rate calculated in the prescribed manner; and
(ii) must not exceed the applicable maximum prescribed rate determined …;

(c) cost of any credit insurance provided …;

(f) default administration charges, which –

(i) may not exceed the prescribed maximum for the category of credit agreement concerned; and
(ii) may be imposed only if the consumer has defaulted on a payment obligation under the credit agreement, …; and

(g) collection costs, which may not exceed the prescribed maximum for the category of credit agreement concerned …\(^78\)

Moreover, South African legislation leaves little room for creative interpretation as it adequately provides definitions of and the limits to which the aforementioned elements enumerated in Section 101 of the National Credit Act apply. For example, the National Credit Regulations spell out the maximum limits that apply to the initiation fees that may be charged according to the different types of credit agreements,\(^79\) and list the dates upon which an initiation fee may be levied.\(^80\) Additionally, the regulations outline the maximum prescribed contractual interest rates that may be charged on the different types of credit agreements. Regulation 42 stipulates the maximum interest rate applicable to the principal debt set out and also applies to the maximum default interest that may be charged on a specific credit agreement.\(^81\) Lastly, the legislation even defines costs of credit insurance to include the credit insurance premiums payable on the permitted costs of credit insurance that may be charged.\(^82\)

This shows the stark difference in detail as regards the elements comprising the recoverable amounts under Kenyan legislation and its South African counterpart. The latter is much more detailed leaving little or no grey areas regarding its interpretation.

\(^78\) Section 101 (1) National Credit Act (South Africa).

\(^79\) Regulation 41 and 42 of the National Credit Regulations, 2006 (South Africa).

\(^80\) Kelly-Louw M, ‘Better consumer protection under statutory in duplum rule’, 22.

\(^81\) It is important to note the Kenyan legal framework makes an attempt to do so by the introduction of the Kenya Bankers’ Reference Rate (KBRR) which forms the base upon which financial institutions ought to employ in the calculation of their interest rates. However, this does not place a fixed ceiling on interest rates. As of October 2015, the interest rate on asset finance loans from KCB was 13.85% whereas that of EcoBank was 21.5%.

\(^82\) See generally Sections 101 and 106 National Credit Act (South Africa).
IV. Restriction of the Application of the in Duplum Rule

i. Application of the in duplum rule to contracts involving financial institutions

It is of paramount importance to note that Section 44A of the Banking Act clearly outlines the scope of the in duplum rule as only being applicable to loans involving institutions as seen from the wording of Section 44A (1):

‘An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan…’83

The Act further defines an institution to mean a bank or financial institution or a mortgage finance company84 and describes a loan to include any advance, credit facility, financial guarantee or any other liability incurred on behalf of any person.85 This has led to many positing that the introduction of the in duplum rule into the Kenyan legal framework was intended to govern the banking sector solely, thereby excluding its application from contracts between natural persons.86

Conversely, South African jurisprudence provides an alternate view to the same. To begin with, the common law in duplum rule has been interpreted to not only relate to money lending transactions involving financial institutions but rather to all contracts where a capital amount that is subject to interest at a fixed rate is owed.87 In *Sanlam Life Insurance Ltd v South African Breweries Ltd*,88 Blieden J said at 655D-I:

‘[T]he *In Duplum* rule is confined to arrear interest and to arrear interest alone. In my judgment the reason for this is plain: it is to protect debtors from having to pay more than double the capital owed by them at the date on which the debt is claimed…’89

In the case of *Ethekwini Municipality v Verulam Medicentre (PTY) Ltd*,90 it was stated that ‘[in duplum rule] does not relate only to money lending transactions but applies to all contracts where a capital amount that is subject to interest at a

83 Section 44A (1), Banking Act (Chapter 488, Laws of Kenya).
84 Section 2, Banking Act (Chapter 488, Laws of Kenya).
85 Section 44A (5), Banking Act (Chapter 488, Laws of Kenya).
88 2000 (2) SA 647 (W).
89 (1) SA 473 (A) at 482I-483A.
90 (2005) ZASCA 98 (457/04).
fixed rate is owing.’ This was the position that was held in *LTA Construction Bpk v Administrateur, Transvaal* and was quoted in the *Ethekwini case*.

The South African position alludes to the fact that it would be utterly unfair and somewhat counterproductive to restrict the application of the rule to money lending transactions to which financial institutions are party to. This is because the objective of the rule is to protect debtors from exploitation. The object of protection of the law in this regard is the vulnerable consumer of credit that often finds himself or herself bound by unfavourable credit terms and subsequently at the mercy of credit providers.

It ought to be duly noted that the Supreme Court of South Africa in the *Ethekwini case* was applying the common law *in duplum* rule and not the statutory *in duplum* rule. This is because the National Credit Act had not yet been passed into law hence the application of the common law *in duplum* rule.

The Kenyan position may, if not addressed, lead to a scenario where the only governing rules are that of the binding nature of a valid contract as has been expressed time and time again in local jurisprudence. ‘A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.’ The same was also expressed in the case of *Housing Finance Co. of Kenya Limited v Gilbert Kibe Njuguna* where it was held, ‘Parties only bind themselves by the terms contracted and executed and not anything else…Contracts belong to the parties and they are at liberty to negotiate and even vary the terms as and when they choose…’

Leaving such matters to the law of contract will in fact be counterproductive to the purpose of the enactment of the *in duplum* rule which is to protect debtors from overexploitation and thus stabilise the Kenyan economy by doing so.

It is interesting to note that the *in duplum* rule cannot be waived by the debtor. This can be inferred from the public policy aspect upon which the enactment of the rule is based. Additionally, jurisprudence bears testimony to this as

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91 1992 (1) SA 473 (A)at 482I- 483A.
93 Nairobi HCCC No. 1601 of 1999.
well and elaborates that the rule can neither be waived in advance nor during the lifetime of the credit agreement between the creditor and the debtor.\(^95\)

**ii. Application of the in duplum rule to judgement debts**

The position taken by Kenyan legislation on the application of the *in duplum* rule to judgment debts may prove to be detrimental to the success in achieving the objective for which the rule was enacted into law. Under the Banking Act, Section 44A is clear on whether or not judgment debts fall under its scope of application: *This Section shall not apply to limit any interest under a court order accruing after the order is made.*\(^96\)

The logical deduction that can be made in this instance is that the interest on a judgment debt can accrue such as to surpass the original judgment debt. This appears to be an instance in which the codification of the rule seems to contradict its very essence embodied in the common law rendition of the rule.

The Civil Procedure Act provides as follows:

(1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.\(^97\)

Interestingly, the position of foreign courts is that interest ought to begin running anew. Upon judgment being given, interest on the full amount of the judgment debt commences to run afresh but will once again cease to accrue when it reaches the amount of the judgment debt, being the capital and interest thereon for which cause of action was instituted. This may be seen to be due to the perceived novation of the initial debt owed. This was the position held in *Commercial Bank of Zimbabwe v MM Builders and Suppliers PVT Ltd.*\(^98\)

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95 Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd 1995 (4) SA 510 (C).
96 Section 44A (4), Banking Act (Chapter 488, Laws of Kenya).
97 Section 44A (4), Banking Act (Chapter 488, Laws of Kenya).
98 1997(2) SA 285 ZHC.
Another issue requiring utmost concern is whether or not interest continues to accrue such as to surpass the principal amount being sued for during the litigation process before the judgment is made. Section 44A (4) remains mute on this pertinent question as it only addresses itself to judgment debts – the judgment has already been issued by the court.

As aptly pointed out by Khaseke, when faced with this question the Supreme Court of South Africa observed that it was paramount to reiterate the purpose for the establishment of the *in duplum* rule in order to adequately answer the question of interest *pendente lite*.

‘It appears as previously pointed out that the rule is concerned with public interest and protects borrowers from exploitation by lenders who permit interest to accumulate. If that is so, I fail to see how a creditor who has instituted action can be said to exploit a debtor, who with the assistance of delays inherent in legal proceedings, keeps the creditor out of his money. No principle of public policy is involving in with the protection *pendente lite* against interest in excess of the double.’

Following the reasoning of the court in this matter, the creditor cannot be deemed to exploit the debtor as the former has no control over the delays present in the litigation process. The consequent suspension of the *in duplum* rule pending the outcome of a litigation dispute is thus justified. It is important to underscore that the clock is said to begin running from the time of service of the initiating process of the suit.

This position was disputed in a dissenting opinion issued by Madlanga J in the case of *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* where he went on to find that the *in duplum* rule ought to be applicable during the litigation process. In doing so he went against the contrary decision of the South African Supreme Court of Appeal in the *Standard Bank case*. The ratio of his judgement stated that failure to apply the rule demonstrated ignorance of the debtor’s right of access to courts and other valid policy considerations and, in doing so, failed to conduct a proper balancing exercise. This rendered it inappropriate for a court to make a choice one way or the other. However, this was a dissenting opinion and thus, did not form part of the main judgment to which 5 of the judges concurred.

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100 *Standard Bank of S.A Ltd v Oneanate Investments (Pty) Ltd*, 50.
102 *Standard Bank Ltd v Oneanate Investments (Pty) Ltd*.
103 *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5.
It is reasonable, therefore, to assume that the same argument would be lifted as it is and applied in the Kenyan context *mutatis mutandi*. The power of the courts to make an interim award in anticipation of the judgment to be issued alludes to the likelihood of application of the principle regarding interest pending litigation emanating from the *Standard Bank case*.

The application of the rule in the *Standard Bank case* is contentious. Although it is true that the delays, if any, in the litigation process are not the fault of the creditor, failure to apply the in duplum rule in this regard is in fact a burden that the debtor is forced to bear. The debtor is no longer afforded the protection of the in duplum rule due to the mere lack of expediency on the part of the judicial system. This, undoubtedly, is the culmination of injustice as the debtor is simply being punished for something that is beyond his or her control.

### iii. Application of in duplum rule to tax debts

Tax debts are those penalties that accrue due to failure to remit tax returns on time.¹⁰⁴ Numerous taxpayers are caught by this provision that is enshrined in the principal statutes on taxation.¹⁰⁵ The rational for such debts is to incentivise taxpayers to remit their taxes in a timely manner for fear of being slapped with penalties that incessantly increase as they are based on compound interest. It is in the interest of the government to have such penalties as it allows for efficient financial planning for the government based on consistent source of income; taxpayers’ money.¹⁰⁶

There have been debates as to whether the in duplum rule ought to apply to such debts. An argument that may be advanced in furtherance of the application of the rule to tax debts is that failure to apply the rule will lead to taxpayers having to pay penalties that may accrue to more than the principle amount owed. This is because the penalties in this case often are subject to compound interest.

The application of the rule to tax debts can be refuted by the fact that the in duplum rule is meant to protect debtors from the exploitation of the creditors. This presupposes the contractual relationship between the borrower and

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¹⁰⁴ The author chooses to focus on income tax as that is the form of tax most poorly remitted and is individual-focused as opposed to other forms of tax such as corporation tax or VAT which target legal rather than natural persons; the general subject of consumer protectionist laws such as the in duplum rule.

¹⁰⁵ Section 72D and Section 94 *Income Tax Act* (Chapter 470, Laws of Kenya).

the lender. Such a relationship is non-existent\textsuperscript{107} between a taxpayer and the state, thereby excluding the application of the \textit{in duplum} rule to tax debts.

However, a counterargument to this would be that generally, the practice of many jurisdictions is to object to increased or penalty interest on default.\textsuperscript{108} An extrapolation of this practice and application in the realm of taxation ought to, reasonably, lead to its application \textit{mutatis mutandis}. However, arguments made in opposition of this are that tax debts are owed to the government. Consequently, failure to remit taxes on time leads to a deficit in the financing of government expenditure.\textsuperscript{109} The penalty interest charged on tax debts has a twofold function. The first is to act as a deterrent for those intending to remit their taxes late, if at all. The second function is to ensure that the government is adequately compensated for the delayed taxes received.\textsuperscript{110} The penalty interest, in effect, serves to compensate the government for the opportunity lost – or rather delayed in the case of late remittance – which the government would have otherwise profited from. Simply put, the penalty interest ought to be proportional to the lost opportunity suffered by the government in this case.

In the Kenyan context, Section 44A of the Banking Act explicitly excludes the application of the \textit{in duplum} rule from tax debts as it reads: ‘An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan…’\textsuperscript{111} and further goes on to describe an ‘institution’ to mean a bank or financial institution or a mortgage finance company.\textsuperscript{112} The wording of the legislation consciously restricts the real realm of application of the rule to non-performing loans given by banks, financial institutions or mortgage finance companies.

The provisions of the Banking Act notwithstanding, the \textit{in duplum} rule ought to be applied to tax debts as its failure to do so would leave the taxpayer in the exact same situation that Amendment No 9 of 2006 was meant to protect.

\textsuperscript{107} It may be argued that the payment of tax has its roots in the Social contract theory which posits that citizens cede some of their rights to the state in order for protection. The payment of tax facilitates the provision of services by the state. See Tuckness A, ‘Locke’s Political Philosophy’ in Zalta EN (ed), \textit{The Stanford Encyclopedia of Philosophy}, 2012 http://plato.stanford.edu/entries/locke-political/ on 23 October 2015.


\textsuperscript{109} Turnovsky SJ, \textit{International macroeconomics dynamics}, 299.

\textsuperscript{110} The importance of timely tax remittance is intimately linked with the government’s financial planning as expressed in Turnovsky SJ, \textit{International macroeconomics dynamics}, 299.

\textsuperscript{111} Section 44A (1), \textit{Banking Act} (Chapter 488, Laws of Kenya).

\textsuperscript{112} Section 2, \textit{Banking Act} (Chapter 488, Laws of Kenya).
the consumer of credit from; exploitation by the creditor. Although in matters tax related, the government does not afford credit to the taxpayer, the taxpayer assumes the role of a debtor as he or she is obliged to pay the taxman just as a debtor has an obligation to his or her creditor. Continuous accrual of penalty interest will lead to the debtor finding himself or herself in a bottomless pit of debt owed to the government.

iv. **Lump sum payments**

In certain instances an agreement may be reached that the loan will not be serviced regularly, but that payment of both interest and capital will be effected in lump sum. It has been posited by scholars that the creditor is not precluded, in this particular arrangement, from making double the principal advanced in return and furthermore the interest calculation is compounded.

This seems to be a lacuna in consumer credit law that requires the application of the *in duplum* rule in order to prevent the exploitation of debtors in this regard. Further recommendations on the same will be extensively explored in the following Section.

v. **The implication of technological advancements on the in duplum rule**

The Banking Act defines ‘loans’ to include any advance, credit facility, financial guarantee or any other liability incurred on behalf of any person. This thereby increases the scope of application of the rule to credit cards.

The application of the rule to credit cards is pertinent. Interest on credit card transactions accrues compound interest on a daily basis that commences on the date of the transaction. Furthermore, penalty interest is charged on the outstanding amount owed every month and is subjected to compound interest.

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114 See generally Vessio ML ‘The effects of the *in duplum* rule and clause 103 (5) of the National Credit Bill 2005 on Interest’.
115 It may amount to more than double: ‘It was therefore regarded in our customs as not unfair for the obligation for interest to last until the principal sum had been repaid, even though the interest should overtop three or four times the amount of the principal sum, provided that it were paid piecemeal’. (Gane’s Translation of the Afrikaans original, quoted with approval by Joubert JA in *LTA Construction Bpk v Administrateur van Transvaal* (112/90) [1991] ZASCA 147).
This means that with every late payment the nature of financial debt tends to become more and more insurmountable – a snowball effect.\textsuperscript{118}

Failure to apply the \textit{in duplum} rule to such transactions would lead to a drastic increase in cases of personal bankruptcy as debtors would find themselves on the perpetual ascent of a mountain of debt whose gradient continuously becomes steeper.

\textbf{V. Conclusion and Recommendations}

The application of the \textit{in duplum} rule in Kenya ought to be subjected to a number of measures to ensure its efficient, just and equitable application. Proportionate regulation ought to be applied to the rule. There are three pillars pivotal to this approach. Firstly, the rule ought to apply to all transactions involving an advancement of credit as opposed to maintaining the status quo which only allows for the rule’s application to loans issued by financial institutions as defined by the Banking Act.\textsuperscript{119} The changes ought to ensure better consumer protection for debtors in advancements of credit or credit equivalents such as tax debts.

Secondly, the application of the rule during litigation is one that ought to be reviewed in line with the unhurried turn-around-time of the Kenyan courts.\textsuperscript{120} Despite the argument that the application of the rule would be prejudicial towards the judgment creditor, failure to apply it – taking into consideration the sluggish pace at which civil disputes are resolved – would in fact be detrimental to the judgment debtor as they would be paying interest that he or she would otherwise have not paid. Perhaps a provision ought to be made for a period \textit{pendente lite} during which the rule will be suspended and after such a period elapses, the rule may begin to apply.\textsuperscript{121} This would be another avenue of applying pressure on the judicial system to resolve litigation disputes in a timely manner.

Robust regulation is lacking thereby hindering the optimal application of the rule. Section 44A (2) of the Banking Act ought to be expanded in order to provide clarity on the maximum amount an institution shall be limited to when

\footnotesize{\begin{itemize}
\item \textsuperscript{118} Ellis D, ‘The effect of consumer interest rate deregulation on credit card volumes, charge-offs, and the personal bankruptcy rate’.
\item \textsuperscript{119} Section 44A (1) as read with (5), \textit{Banking Act} (Chapter 488, Laws of Kenya).
\item \textsuperscript{120} As of June 2012 there were 299,472 pending cases at the High Court of Kenya as per The State of the Judiciary 2011-2012 report, 18.
\item \textsuperscript{121} It is the author’s opinion that the exact duration of such a period and at what stage of the litigation process it ought to occur would be better assessed in a forum whose focus is the dispute resolution process and is concerned with means of ameliorating the same.
\end{itemize}}
recovering from a debtor with respect to a non-performing loan. Clarity in this regard will have a twofold effect: protecting debtors from overreaching by financial institutions as well as giving institutions defined boundaries that provide certainty as to what they can recover with respect to non-performing loans.

Thirdly, the harmonisation of the laws surrounding the in duplum rule is primordial in obtaining the rule’s easy and unhindered application in the Kenyan context. An example of this is the fact that any contravention of the provisions of the Banking Act does not invalidate any contractual obligation between an institution and any other person as elaborated in Section 52 of the Act. However, the same Section of the legislation states that no institution is permitted to recover in any court of law interest and other charges which exceed the maximum permitted under the provisions of the Banking Act or the Central Bank of Kenya Act. The question that arises from such conflicting Sections is whether the recovery of interest exceeding the principal owing at the time of default is valid if pursued outside a court of law.

Summarily, the inclusion of the aforementioned recommendations will lead to the fair and just treatment of both the creditor and the debtor. In the year 2000 Onyango-Otieno J advocated, through the judgment issued in Pelican Investment Ltd v National Bank of Kenya Ltd,[122] for the introduction of the in duplum rule in Kenya. The learned judge stated:

‘…such a legal proposition might be ideal in this country as it will ensure that debtors do not suffer the requirements upon them to pay extra-large interests caused by the indolence and lapse or deliberate failure by the creditors so as to let the unserviced loans accumulate interest to unimaginable levels. It will protect the debtors as well as ensuring that the creditors get their money back for further circulation and hence the economy will be healthy…’

This is a worthwhile goal whose pursuit requires our each and every effort.

122 [2000] 2 EA 488.
The Efficiency of Copyright Law in the Digital Space in Kenya: A Case for the Making Available Right in Peer-to-Peer File Sharing

Irene Otieno*

Abstract

The emergence and use of new technologies such as Peer-to-Peer (P2P) file sharing has brought with it numerous controversies particularly for intellectual property. P2P technologies function by granting its users access to files stored on another P2P user’s hard drive thus enabling them to download on-demand from users who have granted them such access. This aspect of the P2P networks (making files available for download), has been argued to be a violation of the exclusive rights granted by copyright. Consequently, a new right of making available was introduced via the World Intellectual Property Organisation (WIPO) Copyright Treaty (WCT) to supplement the existing copyright regime thus making it more adaptable to the digital age. The lack of ratification of the WCT and the lack of recognition of this right in Kenya, points to an inefficiency of Kenyan copyright laws to prevent P2P sharing of protected works in Kenya.

1. Introduction

Copyright¹ has its origins in the Statute of Anne,² enacted in England in 1710 to vest rights in book authors, which developed in response to the printing press. This right has both international and national cognizance and grants authors the exclusive right to control distribution, communication to the public

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¹ The right to copy; specifically, a property right in an original work of authorship (including literary, musical, dramatic, choreographic, pictorial, graphic, sculptural, and architectural works; motion pictures and other audio-visual works; and sound recordings) fixed in any tangible medium of expression, giving the holder the exclusive right to reproduce, adapt, distribute, perform, and display the work.

² Copyright Act 1709 8 Anne c.21.
and reproduction of their copyright protected works. Over the years, the copyright regime has undergone changes to incorporate emerging trends, such that it now also covers photographs, motion pictures and sound recordings. This development can be attributed to the digital revolution. Despite its benefits, digital revolution also creates a new conflict around the right to distribute material. This paper explains the functioning of Peer-to-Peer (hereinafter P2P) technologies in order to give the reader a deeper understanding of the unique nature of the threat it potentially poses to copyright after which the paper discusses the changes that the copyright regime had to adopt to deal with these peculiarities. It makes reference to cases from the United States in seeking to explore the issues. Finally, the paper will explore the potential remedies for Kenya.

II. The Challenge of New Media

Digital revolution refers to the change from content-specific distribution, provided by unique technologies, hardware, and methods to content independent distribution provided by a common infrastructure. This has seen the development of multi-purpose means of communication leading to unrestricted and widespread communication. Whereas it was previously close to impossible to share video and even audio files, media that could communicate textual content was adapted to support a wider range of content. Further, the essence of the technological revolution is the major development in digital communication (electronic exchange of information) and computing produced by dramatic technological advances coupled with market liberalisation and globalisation to result in the digital revolution. It is these phenomena that results in the widespread

4 When it was first established, it was as a result of the development of the printing press and copyright was aimed at protecting the authors of works developed through the printing press. With the development of technology and emergence of new printing media, the scope of works that was covered by copyright also widened. Current copyright laws cover architectural works, paintings, sculptures among others. Along with the scope of works, the time period for which protection was granted has also increased as copyright laws developed. See http://cyber.law.harvard.edu/copyrightforlibrarians/Module_3:_The_Scope_of_Copyright_Law#What_Does_Copyright_Law_Protect on 20 June 2015.
8 Kaul V, ‘The digital communication revolution’ 2 Online Journal of Communication and Media Technologies
nature of the 21st century means of communication. The digital revolution has seen the emergence of even newer technologies such as peer-to-peer file sharing which have presented conflicts with the copyright regime. Before delving into these conflicts and their possible solutions, it is important to gain an understanding of what P2P is.

P2P comprises of networks created by linking numerous individual computers, each with the capacity to create a digital copy of the shared file – an activity that many are engaging in on a global scale. In the P2P system each of the peers (users) serves as both a provider and consumer of the shared resources. The information moves from user to user whenever the protocol is activated. This entire system is based on the voluntary collaboration of the peers in the system. Like many user generated content platforms, the information and resources will only be available where users willingly make it available. The users generate the torrents and grant access to other users of those torrents to facilitate communication within the network. The system also depends on the presence of a large number of peers who all operate as equals. The speed and efficiency of the system depends on the large number of peers making a file available thus making downloads much faster.

On the technical side, the P2P infrastructure is supported by the existing telecommunications infrastructure of the web in order to facilitate the exchange of resources over the internet. The system also includes P2P applications that facilitate the resource exchange between peers. These come in the form of software which allows computers to communicate and their users (or peers) to search for, access, download and upload material stored in shared folders on the peer’s hard drive. For users to connect to the network, all that is required is an internet connection and file sharing software installed on their computers. Examples of these software applications include Bit torrent and Napster.

Napster, developed in 1999 by Shawn Fanning, was the first system and coined the term P2P. This first generation network was the first P2P application

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10 Danay R, ‘Copyright vs. free expression’, 2.

to really catch on. Illegal sharing of copyrighted material by users was claimed to be the main driver behind its success and ultimate downfall.\textsuperscript{14} The system relied on a central server which controlled the functionality of the entire system. This server indexed all the files each user had and when a client queried Napster for a file, the central server would answer with a list of all indexed clients who already possessed the file. After its demise, other systems emerged which made structural adjustments to the system, doing away with the central systems.\textsuperscript{15}

Newer P2P networks rely on the individual processor speed of each peer and establishes users as a network of nodes which interconnect each other.\textsuperscript{16} Simply put, these are virtual networks that link different computers over the internet to facilitate data transfer among the network participants. Each computer user, known as a peer in this network, has a unique address (Internet Protocol (IP) address) which identifies their device and facilitates communication within the network.\textsuperscript{17} To begin the download process, a downloader, known as a seed, must have a complete file of the resource being shared. This initial seeder creates a torrent file and uploads this file on the web.\textsuperscript{18} This file has a torrent extension containing information about the uploaded file, its name, size, that enables its identification. Downloaders request this file from the network and are then connected to other downloaders (peers). As each new piece of the file is received by a peer, the peer becomes a source (of that piece) for the other peers, relieving the original seed from having to send that piece to every peer requiring a copy.\textsuperscript{19} The pieces of a file are usually downloaded randomly and later rearranged into the correct order upon completion of the download. The file bits will be shared to peers on the network until all the peers have the sum of all parts of the file.\textsuperscript{20}


\textsuperscript{18} Acorn J, ‘Forensics of Bit torrent’, 9.


Within the network there are trackers which act as dedicated servers and are the main linkages between the peers in the network. When a request is made for a file, the tracker sends the requesting peer a list of IP addresses of peers that have the content available.\textsuperscript{21} When this is done, P2P communication commences. The tracker then connects all available peers who are associated with the particular file being downloaded. Once a channel between the peer and a seeder or leecher is opened, the peer asks the seeder or leecher for a piece of the file that the peer requires. If the piece is available, the peer receives it from the seeder or the leecher.\textsuperscript{22} The downloader therefore downloads bits and pieces of the requested file from the peers they are connected to. Seeders refer to users with the complete file being shared on the network while leechers are those peers who are still downloading the file.\textsuperscript{23}

P2P file sharing technology which is the focus of this article is not the only form of file sharing currently in use by internet users. However, it has proven to be the most popular means of file sharing today. A study in 2009 revealed that it accounted for 40\%-70\% of internet traffic by volume.\textsuperscript{24} Other file sharing methods include Rapidshare, MegaUpload and 4shared. These provide users with a downloadable link to files which have been uploaded to their websites.

\section*{III. The Challenge to Copyright Laws}

Initially, copyright as granted by the Statute of Anne granted a 21 year period of protection to works already in existence and a 14 year protection period to new works after which the copyright re-vested in the author for a further 14 years if they were still alive.\textsuperscript{25} The aim of this law, at the time, was to vest rights in authors to prevent the manual copying of their works. The proliferation of digital technology has dramatically changed the interactions between human beings and altered the basic structure of information distribution from what was present in the \textit{analogue world}.\textsuperscript{26} Digital technology has resulted in the current state

\begin{footnotes}
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of communication; characterised by instantaneous and globalised scale of communication.

In Kenya, the laws governing various aspects of the country’s legal framework were adopted from colonial laws via the East African Order-in-Council of 1897 which made English common law, doctrines of equity and statutes of general application in force in England as of the reception date applicable in Kenya. Copyright law developed from these and the 1842, 1911 and 1956 UK Copyright Acts. In the late 1960s, African states promptly began to enact and reform their copyright laws. Kenyan-bred copyright laws begun with the Copyright Act, 1966, after which the laws underwent numerous changes leading up to the 1995 amendments that saw the first attempt to adapt the laws to the changes in technology. Under the 1995 amendments, the definition of broadcast was adapted to include wired, wireless and satellite transmission; the meaning of copy was also redefined to mean ‘a reproduction of a work in any form and includes any sound or visual recording of a work and any permanent or transient storage of a work in any medium by computer technology or other electronic means.’ A major push for these changes came from pressure or their wish to comply with the provisions of the World Trade Organization’s (WTO) Trade Related Aspects of Intellectual Property (TRIPs) Agreement.

Under Kenya’s copyright laws, an author is granted rights to exclusively control the copying, sale, distribution, communication to the public and reproduction of their work as well as the right to authorise others to do any of these acts. The Copyright Act provides that;

28 Copyright Act 1842 (United Kingdom) (1 & 2 Geo V c 46).
29 Copyright Act 1911 (United Kingdom) (5 – 6 Vic c 45).
30 Copyright Act 1911 (United Kingdom) (4 & 5 Eliz 2 c 27).
32 Emphasis is placed on this term because it is not strictly speaking a purely Kenyan law. Though the law makers sought to enact a Kenyan copyright law, the resulting laws still largely reflected the earlier British laws that were in operation in Kenya. The relevance of this term will become evident later in this article in the discussion on parliament’s reservations with regard to international treaties, a discussion that lies at the heart of this article.
33 Act No. 3 of 1966.
34 Section 2, Copyright (Amendment) Act (Act No. 9 of 1995).
35 Section 2, Copyright (Amendment) Act (Act No. 9 of 1995).
‘Copyright in a literary, musical or artistic work or audio-visual work shall be the exclusive right to control the doing in Kenya of any of the following acts, namely the reproduction in any material form of the original work or its translation or adaptation, the distribution to the public of the work by way of sale, rental, lease, hire, loan, importation or similar arrangement, and the communication to the public and the broadcasting of the whole work or a substantial part thereof, either in its original form or in any form recognisably derived from the original...’

Of particular importance are the rights to distribute, reproduce and the right to communicate to the public which are claimed to be infringed upon by the use of P2P file sharing technologies on the internet. In this case, P2P technologies should only be deemed unlawful when the use of these systems allow P2P users to deal with copyrighted material in a manner that is exclusively reserved for the copyright holder. American courts have considered the question of the scope of the exclusive rights and whether these exclusive rights in copyright can prevent use of copyrighted works via digital technologies. The decisions rendered by the US courts have persuasive precedent in Kenya with the Kenyan Supreme Court noting at paragraph 100 of the ruling in Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others that international jurisprudence is pivotal in growing Kenya’s jurisprudence.

There has been a lack of consensus in the US court decisions regarding the interpretation of the right to distribute with courts interpreting the scope of this right in two ways. Some courts are of the view that the right is violated when copyright protected work is downloaded by a user on the P2P network. The second interpretation of the scope of the right to distribute takes the view that the mere act of making the work available for others to access and download is a violation of the right to distribute. In A&M Records Inc v Napster Inc, the United States Court of Appeal for the Ninth Circuit found that Napster users who uploaded a link for other users to download material violated the copyright holder’s right to distribute the work. The implication of this was that a violation occurred by the fact of the P2P user making files available for other users to download or where users downloaded the available material. Though lacking a statutory definition, the Court sought to equate the right to distribute with the right to publish. These two rights were equated due to the use of the word

38 Section 26(1), Copyright Act, (Act No. 12 of 2001).
39 [2013] eKLR.
40 239 F.3d 1004, 1014 (9th Cir. 2001).
distribute in the US copyright law. By interpreting the right to distribute in light of the right to publish, the court determined the right to distribute to mean a copyright owner’s ‘right to control the first public distribution of an authorised copy of his work which requires either ‘the distribution of copies… of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending,’ or alternatively, ‘…offering to distribute copies… to a group of persons for purposes of further distribution.

Violation of the right by merely making the copyrighted work available was later departed from. In *Re Napster*, the United States District Court in California held that distribution required there to be an actual distribution of a copy of the work. This holding would mean that to assert the right, copyright holders would have to go an extra mile to prove that the end user did in fact download the material made available to them by other users. In another instance, the Court noted that completion of all steps necessary for distribution did not mean that there was a violation of the right. This finding further cemented the requirement of proof of actual distribution of the copies made available for the right to be infringed. This interpretation is further strengthened by scholarly opinion on the matter which concurred with the latter finding of the Court. David Nimmer, a distinguished copyright law scholar and contributor to the 1978 Report of the National Commission on New Technological Uses of Copyright Works (CONUT) observes that the right to distribute is apparently not infringed on by a mere offer to distribute to members of the public. This assertion was relied on in *Atlantic Recording Corp v Howell* by the United States District Court in Arizona. Based on his argument, the use of P2P technology allowing access to copyrighted works via computer drives therefore does not violate the right to distribute. Evidence has to be adduced of actual downloading by those who gained access to the works for one to assert that the right was infringed upon. Paul Goldstein also opines that the right to distribute is violated only when it is proven that an actual transfer took place.

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42 § 101, *Copyright Act* (United States).
Another exclusive right connected to P2P activities is the author’s right to communicate the work to the public. The right is contained in Berne Convention for the Protection of Literary and Artistic Works\(^{50}\) (hereinafter the Berne Convention) and the World Intellectual Property Organization Copyright Treaty\(^{51}\) (hereinafter WCT). Neither the Berne Convention nor the WCT define the scope of the right to communicate to the public. The Berne Convention simply providing that,

‘Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing any communication to the public of the performance of their works that Authors of literary and artistic works shall enjoy the exclusive right of authorizing the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images.’\(^{52}\)

The WCT provides that,

‘authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.’\(^{53}\)

Kenyan copyright laws and courts have neither defined nor determined the scope of this right. Therefore, reference has to be made to other jurisdictions, whose decisions form persuasive precedent in Kenya for a definition of the scope of the right. The Judicature Act at Section 3\(^{54}\) lists the sources of law in Kenya, among them is common law. The UK courts\(^{55}\) have considered the scope of the right though not in relation to cases involving P2P. By making reference to the judgments of the European Court of Justice (hereinafter ECJ), which are considered good law in the UK, the court determined that the right is not violated when one provides links to users which can be used to access and download copyright protected material. Such an act according to the ECJ does

\(^{50}\) Article 11, 11\(^{11}\)th and 11\(^{11}\)th, Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886, 828 UNTS 221.


\(^{52}\) Article 11, Berne Convention for the Protection of Literary and Artistic Works.

\(^{53}\) Article 8, World Intellectual Property Organization Copyright Treaty.

\(^{54}\) 3 (1) The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with -

(c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date.

not amount to communication to the public as contemplated in Article 3(1) of the EU Directive. This right is violated when a communication to the public is made to an audience beyond that which the copyright holder authorised.

The last right connected to P2P activities is the author’s right to reproduce the work. This right is said to be violated where any communication of copyrighted works via electronic means that results in another copy being created on the device of the recipient of the communication occurs. In *Capitol Records LLC v ReDigi Inc*, the United States District Court for the Southern District of New York held that when a user downloads a digital music file to their hard disk, the file is reproduced on a new phonorecord within the meaning of the Copyright Act. Like the right to distribute, the right can only be successfully asserted if the plaintiff is able to prove that a copy of their work was created on the recipient user’s computer. If such evidence is absent, then the right to reproduce contained in the Copyright Act cannot be claimed to have been violated.

**IV. The Adaptation of the Copyright Regime: The Right to Make Available**

This challenge that the digital revolution presents to the copyright regime led to the enactment of the WCT as a supplement to the Berne Convention. The WCT entered into force globally on 6 March 2002 while the Berne Convention entered into force globally on 5 December 1887. The aim of the WCT was to make the Berne Convention more adaptable to and prevent infringement of copyright in the digital environment. This was done by introducing a new right: the making available right at Article 8 of the WCT. This is the exclusive right of the right holder to make a work available, that is, to offer copies of the work to the public who can then decide whether to access or copy the work via the in-

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57 WIPO-Standing Committee on Copyright and Related Rights (SCCR), *Study on copyright limitations and exceptions for the visually impaired*, 20 February 2007, at 52.
58 *No. 12 CIV. 95 RJS*, 2013.
61 11850 UNTS 828.
63 Sheinblatt JS, ‘The WIPO Copyright Treaty’ 535.
The Efficiency of Copyright Law in the Digital Space in Kenya

ternet and other similar networks. The right allows authors to control dealings with their works via the internet. The right, also viewed as a subset of the right to communicate to the public, is aimed at protecting rights holders’ interests on the internet. Whether this is a new exclusive right in copyright introduced by the WCT or a mere clarification of the content of the already existing exclusive rights is a question that many would want answers to. Professor Ginsburg concludes that because the Berne Convention neither included nor precluded digital technologies from the scope of the exclusive rights, the incorporation of the making available right in the WCT is a clarification of the scope of the right to communicate to the public. Consequently, countries were free to interpret the right to either include or exclude the making available right. However, on becoming a WCT member, all states would be under the obligation to adopt the right.

By virtue of Article 2(5) of the Constitution of Kenya, 2010 (hereinafter the Constitution), which provides that: ‘The general rules of international law shall form part of the law of Kenya,’ and Article 2(6) which provides that: ‘Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.’ This means that international law is made applicable in Kenya. Kenya acceded to the Berne Convention on 11 March 1993 and signed the WCT on 20 December 1996 effectively becoming a WCT member with the obligation to adopt the making available right. Leading Kenyan copyright scholars have noted the lack of express provision of this right within the Kenyan context and note its potential inclusion in forthcoming amendments to copyright statutes. What then are the consequences of Kenya’s current state of legal framework with regards to the making available right and copyright enforcement? Being a WCT member, Kenya has an obligation to adopt the making available right. This duty is fulfilled upon the ratification of the WCT and incorporation of the right into the jurisdiction, steps that Kenya is yet to take. This means that this right is yet to be recognised in Kenya. In any case, despite this absence, there is possible recourse if the scope of exclusive rights is to be interpreted as suggested by Pro-


fessor Ginsburg i.e. that countries are free to interpret the rights to either include or exclude the making available right.

Supposing Kenyan courts adopted a narrow interpretation of the exclusive rights, rights holders would need to prove that a P2P user actually distributed, reproduced or communicated their work to the public. In the absence of such evidence, their rights cannot be said to have been infringed upon. The courts may, however, adopt the wider interpretation of the scope of these rights and infer the making available right into the scope of the exclusive rights. While this worked in the American context, the same cannot apply in Kenya. This is because of the express lack of recognition of this right, evidenced by lack of ratification of the WCT, a situation that Kenyan copyright scholars such as Ben Sihanya and Marisella Ouma have recognised. In addition to this, there is a lack of existence of the special circumstances that permitted the US courts to infer the making available right in \textit{A\&M Records Inc v Napster Inc}.\textsuperscript{70} Due to the statutory wording of the US copyright laws, the right to distribute was equated to the right to publish whose definition included ‘an offer to distribute’ \textsuperscript{71} which was taken to refer to the act of making available. In the Kenyan context, there are no special circumstances to aid the court and support a wider interpretation of the scope of the exclusive rights in Kenya.

Is the adoption of the making available right the saving grace of copyright in a continuously digitalising world? The answer to this question must be in the negative. The effect of having the making available right is that rights holders will be able to assert their rights easily and more effectively in the digital environment without the need to prove that the defendant’s conduct amounted to a distribution, reproduction or communication to the public. The earlier decision of the court in \textit{A\&M Records Inc v Napster Inc},\textsuperscript{72} would therefore apply thus allowing users to reap the commercial benefits of copyright. In \textit{Capitol Records Inc BMG LLC UMG v Thomas Rasset},\textsuperscript{73} though the plaintiff was unable to prove that another user of the KaZaa P2P network had actually downloaded the copyright protected work, damages were awarded to the plaintiff in a case where the court had required the right holder to prove an actual violation of their rights even beyond the mere act of making their work available. It is however unclear whether the these damages were exclusively a penalty for the defendant having impermissibly

\textsuperscript{70} 239 F.3d 1004, 1014 (9th Cir. 2001).  
\textsuperscript{71} § 101, Copyright Act (United States).  
\textsuperscript{72} 239 F.3d 1004, 1014 (9th Cir. 2001).  
\textsuperscript{73} 579 F. Supp. 2d 1210 (D. Minn. 2008).
downloaded the protected work herself or whether it also included a penalty for the defendant’s claim relating to their right to distribute.

In Kenya, cases involving online infringement of copyright are already emerging. Through petition No. 600 of 2014, Bernsoft Interactive & two others have filed a petition stating inter alia:

Among the exclusive rights granted to the Copyright owners under the Copyright Act are the exclusive rights to reproduce the Copyrighted Recordings and to distribute the Copyrighted Recordings to the public. The Copyright owners are informed and believe that the 4th to 10th have allowed and continue to allow online media distribution websites and systems to download the Copyrighted Recordings and to allow the distribution of the Copyrighted Recordings to the public, and/or to make the Copyrighted Recordings available for distribution to others.74

With these cases already beginning to emerge in Kenya, it is important to resolve this issue before the courts are approached to resolve this issue.

V. The Need for Regulation

Currently, the exclusive rights granted by copyright in the Kenyan jurisdiction would be insufficient to prevent the use of P2P technologies in relation to protected works. Such restrictions, where the making available right is absent in the jurisdiction, would be an overreach on the part of copyright law, not to mention an infringement of the right to freedom of expression of P2P users. Because the scope of the rights discussed above are not sufficient to prevent online dealings with copyrighted materials, it will be a difficult and costly task for copyright owners to prove that a copyright violation did in fact take place online.75 To determine that an infringement has occurred, a right holder would need a forensic analyst to prove that the P2P user did in fact download the copyrighted material. Additionally, it is usually inefficient to go after infringers who mainly consist of common citizens who may not be able to pay the awards.76 Furthermore, the alternative potential defendants – Internet Service Providers (ISPs) – are in most cases protected by safe harbour provisions which exempt them from liability where they lack actual knowledge of infringements occurring on their networks.77

74 Bernsoft Interactive & 2 Others v. Communications Authority of Kenya & 9 Others (Petition No. 600 of 2014).
75 Menell PS, ‘In search of copyright’s lost ark’ 219.
77 Peguera M, ‘Internet service providers’ liability in Spain: Recent case law and future perspectives’ 1
In ensuring the effective protection of rights holders, there needs to be clarity on the scope of these rights within copyright legislation and in the court’s interpretation. This aids copyright holders in their efforts to enforce their rights where violations occur in the digital space and aids in the regulation of P2P systems which can be put to legitimate use. While there has been debate on the effects of P2P on intellectual property, there is conflicting evidence regarding the effect of P2P on the sales in the music industry. On the one hand, it has been argued that file sharing has had catastrophic effects on the entertainment industry with the music industry claiming to be most affected. Studies on this issue have, however, produced conflicting statistics. Oberholzer and Strumpf, for example, concluded that file-sharing had ‘an effect on sales which is statistically indistinguishable from zero’.\(^7\) A Japanese study from the same year found ‘very little evidence’ that file-sharing had negative effect on record sales.\(^7\) On the other hand, BPI’s Digital Music Nation report in 2010 claims that illegal file sharing cost the UK music industry £219 million in 2010.\(^6\) Despite this report, it is impossible to prove causation between P2P file sharing and the decline of music sales particularly because it is impossible to predict consumer behaviour and conclude that if the files were not available for free illegal download, they would translate into sales. This decline in revenue could be as a result of many factors including economic recession that has been experienced over the last decade.\(^7\)

Although there is contention on the effect of P2P file sharing technologies on sales of copyrighted material,\(^7\) it is agreed that P2P systems have a multiplicity of uses. It has been argued that P2P can act as a tool for enhancing the exercise of freedom of speech and free expression. This view is yet to receive global acceptance.\(^8\) Consequently, those advocating for freedom of expression have continued to raise their increasing concerns over how regulatory and legal trends might be limiting freedom of expression ‘at the very time that the Internet has become more widely recognised as a major medium for fostering global

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\(^7\) Danay R, ‘Copyright vs. free expression’, 54.

\(^8\) Benkler, The wealth of networks, 51.

communication.\textsuperscript{84} Aside from the freedom of expression argument, advocates for P2P technologies argue that its other uses far outweigh any potential damages it may have on intellectual property in copyright.\textsuperscript{85}

P2P technologies can also be used as a tool for free and paid content distribution.\textsuperscript{86} The current trend has been for content developers to share their open-source software to all internet users.\textsuperscript{87} P2P has proven to be an invaluable resource in this case as it allows users to rapidly share the content and to a much larger population than was previously possible. Different software such as Linux operating systems are publicly available at no cost. When these are made available via torrents, users are able to download the software from a variety of peers connected to the P2P network. Developers of paid software are now using P2P torrent facilities to reach a much larger market for their goods. These software, including updates, are made publicly available for download but the software developers go a step further and input payment options for users in order to gain access to the software.\textsuperscript{88}

\section*{VI. The Way Forward}

In light of the benefits that P2P presents for communication, it is vital for these systems to be effectively regulated so as to allow them to exist together with copyright. The options available to Kenya include: introduction of the making available right via an amendment of copyright legislation or ratification of the WCT, introducing a non-commercial use levy and shrinkage of safe harbour provisions for ISPs. These are among some of the global methods used since the conventional take down orders issued by courts to prevent P2P usage have over the years proven to be inefficient.\textsuperscript{89} This is largely due to the portability of

\textsuperscript{86} http://www.cs.rutgers.edu/~rmartin/teaching/fall08/cs552/position-papers/016-01.pdf on 30 November 2015.
\textsuperscript{88} http://www.cs.rutgers.edu/~rmartin/teaching/fall08/cs552/position-papers/023-01.pdf on 30 November 2015.
domain names as has been the practice among many of the file sharing sites. Government efforts to block user access has also been ineffective since a change of domain names will grant users access to the material that the government intended to restrict access to.\(^90\)

Copyright law is an adaptable body of law. Since its foundation, it has adapted to deal with or attempt to deal with the challenges presented by new technologies that enable human expression.\(^91\) Such adaptations are seen in the drafting of the WCT to supplement the Berne Convention, the adoption of the May 22, 2001 European Directive.\(^92\) From this, it is clear that the earlier provisions of copyright laws were insufficient to deal with the emerging difficulties presented by the use of the internet.\(^93\) Such legislative changes point out a need for reform of the current Kenyan Act to adopt the global changes and to keep at par with the rest of the world. Further, making a case for the need for this reform are IP scholars such as Ben Sihanya who has noted the need for the Kenyan Copyright Act to capture changes in technology.\(^94\) Furthermore, the notable lack of the making available right in the Copyright Act\(^95\) needs to be rectified so as to guide the interpretation of the act in order to avoid any ambiguities and uncertainties. It has been noted that the enforcement of the exclusive rights would be difficult where statute requires proof of actual download of the work, a task that is difficult for the rights holder to prove.\(^96\) This has possibly led to violation of these exclusive rights, such violation occurring when the defendant has made the work available. The incorporation of the making available right therefore automatically deals with the questions presented earlier regarding the ability of the scope of copyright’s exclusive rights in preventing the dealings of P2P.

The copyright legislation needs to incorporate the making available right via amendment of the existing Copyright Act or by ratification of the WCT. However, before this can be done, an inquiry needs to be conducted to determine the reasons behind the lack of ratification of the WCT 20 years after Kenya.

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\(^{94}\) Sihanya B, Copyright law in Kenya, 932.

\(^{95}\) Ouma M and Sihanya B, ‘Kenya’ 90.

\(^{96}\) Sterk D, ‘P2P file-sharing and the making available war’, 495-496.
had signed onto it. This has been noted as one of the many issues leading to the inefficiency of the Copyright Act and one of the root causes for continued piracy in the Kenyan context.\(^97\) Though the reasons for the lack of ratification are not clear, the parliamentary discussion following the second reading of the Copyright Bill 2000 on 20 November 2001 revealed some of the concerns that parliamentarians had with respect to international agreements seeking to place obligations on developing countries.\(^98\) Some concerns included the fact that the proposed Bill had objectives that were international in character as opposed to a national outlook. Some also believed that they were more inclined towards agreements that conferred tangible benefits to the country. It was also preferred that the nation not bind itself to agreements that would prevent the undertaking of activities that while beneficial to the country were contrary to international obligations. These international obligations were also viewed as a spread of hegemony and neo imperialism of ideas. The fact that Kenya consumed a lot of external copyright material as opposed to Kenyan works consumed abroad was seen as a motivation for developed nations to seek to protect their interests through international agreements which universalised the rights of these developed nations. The benefit to Kenya and other local jurisdictions was therefore only incidental.\(^99\)

As much as these fears, which point to some of the reasons behind the lack of ratification of the WCT, are rightly founded, the truth remains that with globalisation Kenya cannot afford to isolate herself by adopting policies and laws that from an international perspective are seen as archaic even when those laws serve to greatly protect her citizens. Such a position serves not only to isolate the nation, but also acts as a barrier to trade with other countries. This struggle to develop Kenyan-bred laws in most cases is futile where the laws in question, as is the case with intellectual property laws, borrow from norms that are developed from international standards. Additionally, where Kenya adopts weak laws that do not sufficiently protect all persons, this will discourage works from being introduced and/or registered in Kenya. With the need to make the laws context specific, Parliament ought to be alive to the fact that with globalisation, societal structures are changing at such a fast pace leading to increased interactions between persons who previously could only do so with great difficulty.\(^100\) This means that Kenya’s


\(^98\) Kenya National Assembly Official Record (Hansard) 20 Nov 2001, 3195.


intellectual property laws can only differ so much from the internationally agreed norms without all together losing their purpose.

Nevertheless, before the process of ratification of the WCT can be undertaken, it is important to address these concerns which may still be impeding the process towards making our Copyright Act WCT-compliant. Once the WCT is ratified, Kenya will be under the obligation to recognise the making available right as a means to make copyright laws more effective in the digital space. In so doing, the treaty will form part of the laws of Kenya and thereby allow rights holders to rely on its provisions to protect their interests where P2P networks are concerned.

Alternatively, P2P networks can continue to operate subject to the payment of a levy imposed for the use of the software. This approach mirrors the Canadian Levy imposed for the importation and manufacture of compact disks that would be used for private copying of copyright protected works, a method that has also been used in Kenya. This is evident with Kenya’s recently proposed amendment to the Copyright Act through Statute Law (Miscellaneous Amendments) (No. 2) Bill, 2015. The Bill proposes to amend Section 30(8) of the Act in order to provide for structured compensation of performers and producers of sound recordings for private copying or works in line with the international norms and practices. A similar strategy can be adopted with respect to P2P online technologies.

The Canadian method was adopted in recognition of the fact that it would be difficult if not impossible for rights holders to go after individual infringers of copyright who made copies of works onto compact discs from the comfort of their homes. The solution was therefore to impose a levy on every disc that was purchased and the levies turned over to the Collective Management Societies to distribute to its members. In using the same model, it is proposed that a levy be imposed on commercial suppliers of P2P software and services, on ISPs, computer hardware manufacturers, manufacturers of consumer electronic devices capable of being used to copy, store, perform, or transmit digital files,

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102 Netanel NW, ‘Impose a non-commercial use levy to allow free peer-to-peer file sharing’ 17 Harvard Journal of Law & Technology (2003), 35.
103 Kenya Gazette Supplement, National Assembly Bills, 2015, No. 58, 18 September 2015.
and manufacturers of storage media. This levy should further be imposed on any new and emerging technologies. The levy allows rights holders to reap the benefits of their creations while at the same time balancing the rights of users by allowing unhindered non-commercial use of P2P to copy, distribute, stream and make derivatives of protected works without the consent of the copyright holder. To qualify as a non-commercial use, the user should not be selling copies, access, or engaging in advertising in connection with the copyright-protected work or any modification of the work.

Such amounts to be levied would then be determined by statute, by the Kenya Copyright Board (KECOBO) or other relevant agencies and the distribution of the levy done by the relevant collective management societies for the particular works. This is a more workable and practical approach to reaping benefits from use of protected works via P2P networks as opposed to every right holder seeking to solely enforce their rights by pursuing sole infringers and or website owners and companies that facilitate P2P. Despite the ability of the levy system to solve the conflict between copyright and digital technologies, this system is not perfect and presents some challenges. In Canada, it is noted that there is a distribution problem which results in larger represented artists benefitting more than new and independent artists. This problem needs to be resolved to ensure that all rights holders will be able to benefit from the levy system on P2P.

Finally, another alternative would be shrinking safe harbour provisions for ISPs. The concept of safe harbour originated in the United Sates where the ISPs could pay statutory damages exceeding the actual loss suffered by the rights holder. This concept reduces the liability of ISPs in relation to certain specific acts as contained in the statutes. This protection is not automatic and is granted only when the ISPs have fulfilled certain conditions set for such protections to be afforded within their jurisdiction. In Kenya, a proposed legal framework for ISP liability was published by KECOBO on 23 September 2015 inviting public

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105 Netanel NW, ‘Impose a non-commercial use levy to allow free peer-to-peer file sharing’, 43.
106 Hagen GR and Engfield N, ‘Canadian copyright reform’ 35-36.
108 Netanel NW, ‘Impose a non-commercial use levy to allow free peer-to-peer file sharing’, 43
112 http://www.copyright.go.ke/media-gallery/news-and-updates/257-proposed-amendments-to-the-
comments on the same. These amendments seek to block access to international sites that allow free access to local Kenyan music.\textsuperscript{113} The challenge, as noted by the KECOBO legal council is the lack of legal muscle of the copyright authority to enforce the obligations on ISPs.\textsuperscript{114} In shrinking safe harbour provisions, ISPs effectively take a copyright policing role and thereby engage in deterrence as opposed to enforcement tactics.\textsuperscript{115}

\section*{VII. Conclusion}

In conclusion, the potential problem for copyright presented by P2P technologies needs to be addressed while still at its early stages in Kenya. With the 2011 Kenya ICT Board Monitoring and Evaluation Survey results revealing that P2P was among one of the top uses of internet in Kenya among 15 – 24 year-olds, and that there are about 10.2 million internet users in Kenya, these numbers are highly likely to increase with the plans to increase internet penetration throughout the country. Coupled with the fact that the survey also reveals that entertainment forms part of the top five uses of the internet for persons aged between 15 – 34 years it is safe to assume that P2P use in Kenya is a ticking time bomb for the copyright regime.

\textsuperscript{113} \textsuperscript{113} \url{https://www.eff.org/deeplinks/2012/08/tpp-creates-liabilities-isps-and-put-your-rights-risk} on 18 December 2015.

\textsuperscript{114} Kenya Copyright Board, \textit{CopyrightNews}, issue 18, 2015, 10.

\textsuperscript{115} Kenya Copyright Board, \textit{CopyrightNews}, issue 18, 2015, 10.
An Analysis of the Exclusion of Child Soldiers Seeking Asylum under the 1951 Refugee Convention from the Principle of the Best Interests of the Child Perspective

Yvonne Muthembwa*

Abstract

Article 1F (a) of the Convention Relating to the Status of the Refugees has been applied by courts of law to exclude child soldiers seeking asylum from refugee status where it is established that there are serious reasons to consider that they committed the prohibited crimes. Its current application has fallen short of the best interests principle of the Convention on the Rights of the Child. The author posits that the lack of a universally accepted minimum age of criminal responsibility has contributed to the problem. Furthermore, she contends that the legal threshold set out in Article 1F (a) has presented a challenge in applying the exclusion clause because of diverse interpretations.

I. Introduction

Article 1F (a) of the Convention Relating to the Status of the Refugees (hereinafter the Refugee Convention) excludes people who have committed crimes against peace, war crimes and crimes against humanity from gaining refugee status. It does not distinguish between adults and children. Therefore, children who are alleged to have committed the prohibited crimes can be excluded from refugee status. The Refugee Convention was made with World War

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II (hereafter WWII) fresh in the drafters’ minds and the participation of children in armed conflicts was not a problem, or, at least, was not seen as one.\(^4\)

This paper seeks to respond to the problem of whether the current application of Article 1F (a) is against the best interests principle (hereinafter BIP) in Article 3(1) of the Convention on the Rights of the Child (hereinafter CRC).\(^5\) The study is justified on the basis that although there exists a wealth of literature on refugee status determination, the treatment of child soldiers under Article 1F (a) has not been assessed in light of the best interests of a child under the CRC. The general objective of the study is to analyse Article 1F (a) of the Refugee Convention in light of the BIP in Article 3 (1) of the CRC. The specific objectives are to: examine the application of Article 1F (a) of the Refugee Convention from State practice, assess what the BIP entails and establish if a conflict exists between the application of Article 1F (a) by states and the BIP.

The questions guiding the study are: What are the implications of Article 1F (a) for child soldiers seeking asylum? What does the standard of proof ‘serious reasons to consider’ under Article 1F (a) entail? What is the liability of children who commit crimes under ICL? What is the BIP? The study is anchored on; the interest theory which explains children’s rights, the criminal justice theory which justifies the exclusion clause and the common good theory which justifies the actions of a state with respect to granting refugee status.

The paper is structured as follows: the first section analyses Article 1F (a) of the 1951 Refugee Convention. The second section examines the legal framework surrounding child soldiers, the factors considered in granting refugee status to child soldiers and the interpretation and application of Article 1F (a) by courts of law from select jurisdictions. The third section analyses the BIP in Article 3 (1) of the CRC and its application by courts of law in select jurisdictions. The fourth section identifies the issues arising from the analysis in the preceding sections. The fifth section includes recommendations and a conclusion is reached based on the analysis.


II. Article 1F (a) of the Refugee Convention

Article 1F (a) of the 1951 Refugee Convention provides that the Convention shall not apply to any person with respect to whom there are serious reasons for considering that they have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes. Article I (5) (a) of the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa has a similar provision that obliges States to deny the benefits of refugee status to persons who have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.

i. The purpose of Article 1F (a)

The purpose of Article 1F was recognized by the travaux préparatoires as being two-fold. Firstly, to deny the benefits of refugee status to persons who would otherwise qualify as refugees but who are undeserving of such benefits as there are ‘serious reasons for considering’ that they committed heinous acts. Secondly, to ensure that such persons do not misuse the institution of asylum to avoid being held legally accountable for their acts.

ii. The standard of proof of Article 1F (a) and its application

The standard of proof set in Article 1F (a) is ‘serious reasons to consider’. This standard of proof requires clear and credible evidence. It is unnecessary for an applicant to have been convicted of the criminal offence, nor does the criminal standard of proof need to be met. In the United Kingdom Supreme Court (hereafter UKSC) decision of Al-Sirri v Secretary of State for the

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6 Article 1F (a), Convention Relating to the Status of the Refugees.
7 10 September 1969, 1001 UNTS 45.
8 Article 1 (5) (a), Convention Governing the Specific Aspects of Refugee Problems in Africa.
9 Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the 24th Meeting, UN doc. A/CONF.2/SR.24, 27 Nov. 1951, Statements of Herment (Belgium) and Hoare (UK).
10 Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the 24th Meeting.
12 UNHCR, Guidelines on International Protection, 55.
it was held that ‘serious reasons’ is stronger than ‘reasonable grounds’ and the evidence from which those reasons were derived has to be clear and credible. ‘Considering’ is stronger than suspecting/believing but the decision-maker need not be satisfied beyond reasonable doubt. In exclusion procedures, the burden of proof is on the state/United Nations High Commissioner on Refugees (UNHCR) to justify the exclusion.

iii. The legal framework for the crimes prohibited

The international instruments which offer guidance on the international crimes prohibited under Article 1F (a) are: the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the four 1949 Geneva Conventions for the Protection of Victims of War and the two 1977 Additional Protocols (API and APII), the Statutes of the International Criminal Tribunal for the former Yugoslavia (hereinafter the ICTY Statute), the Statute of the International Criminal Tribunal for Rwanda (hereinafter the ICTR Statute), the Statute of the Special Court for Sierra Leone (SCSL), the Charter of the International Military Tribunal, (hereinafter the London Charter), the 1996 Draft Code of Crimes against the Peace and Security of Mankind and the

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14 [2012] UKSC 54 at 75.
19 UNSC, Statute of the Special Court for Sierra Leone, 16 January 2002.
20 82 UNTS 279.
The international crimes prohibited under Article 1F (a) are: crimes against peace, war crimes and crimes against humanity. They are discussed below.

a. A crime against peace

A crime against peace is defined in the London Charter as the planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing. The crime can only be committed by those in a high position of authority representing a state or a state-like entity. One may infer that the crime of aggression in the Rome Statute substituted the crimes against peace that is defined by State Parties as being committed when a leader of a state causes that state to illegally use force against another state, provided that the use of force constitutes by its character, gravity and scale a manifest violation of the Charter of the United Nations (hereinafter the UN Charter).

In the case of crimes against peace/ crime of aggression there are six elements. To begin with, the perpetrator planned, prepared, initiated or executed an act of aggression. Secondly, the perpetrator must have been in a position to effectively exercise control over or to direct the political or military action of the state. Thirdly, the actus reus required is the use of armed force by a state against the sovereignty of another state, or in any other manner inconsistent with the UN Charter. Additionally, the perpetrator needs to have been aware that established that the use of armed force was inconsistent with the UN Charter.

23 Article 1F (a), Convention Relating to the Status of the Refugees.
24 Article 6 (a), UN, Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (“London Agreement”).
28 Article 8, ICC, Report of the Preparatory Commission for the International Criminal Court.
29 Article 8, ICC, Report of the Preparatory Commission for the International Criminal Court.
30 Article 8, ICC, Report of the Preparatory Commission for the International Criminal Court.
Moreover, the act of aggression, by its character, gravity and scale, must have constituted a manifest violation of the UN Charter.

b. War crimes

A war crime covers, for example, wilful killing and torture of civilians, launching indiscriminate attacks on civilians, and wilfully depriving a civilian or a prisoner of war of the rights of fair and regular trial. The ICC and other tribunals have identified general elements that have to be proven against a perpetrator. In *Prosecutor v Brđanin*, the International Criminal Tribunal for the former Yugoslavia identified four preconditions for war crimes: existence of an armed conflict, the establishment of a nexus between the alleged crimes and the armed conflict, the armed conflict must be international in nature; and the victims of the alleged crimes must qualify as protected persons pursuant to the provisions of the 1949 Geneva Conventions.

c. Crimes against humanity

Crimes against humanity include acts such as murder, extermination, enslavement and deportation carried out as part of a widespread or systematic attack directed against the civilian population. The International Criminal Tribunal for the former Yugoslavia identified five elements that have to be satisfied for a perpetrator to be held liable for crimes against humanity. In *Prosecutor v Limaj, Bala and Musliu*, the Tribunal enumerated the five elements for crimes against humanity as: the occurrence of an attack, the acts of the perpetrator must be part of the attack, the attack must be directed against any civilian population, the attack must be widespread or systematic and the perpetrator must know that his or her acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population and know that his or her acts fit into such a pattern.

33 Case No. IT-99-36-T (Trial Chamber), September 1, 2004.
34 Case No. IT-99-36-T (Trial Chamber) at 121.
36 Case No. IT-03-66-T (Trial Chamber), November 30, 2005.
37 Case No. IT-03-66-T (Trial Chamber) at 18.
iii. Decisions by national courts in applying Article 1F (a)

In Ramirez v Canada (Minister of Employment and Immigration), (1992)2 FC 306 (CA), the claimant enlisted in the army voluntarily and witnessed the torture and killing of many prisoners. Due to the circumstances of the claimant’s participation in the military, the Canadian Court of Appeal found that he shared the military’s purpose in committing these acts and was an accomplice in committing international crimes. Therefore, for Canadian courts, the mere membership of an asylum seeker in an organisation associated with violence is deemed to be a person excludable under Article 1F (a).

Also, in a decision by the United Kingdom Immigration and Asylum Tribunal (UKIAT) of Gurung, the Tribunal in applying Article 1F (a) excluded the applicant from refugee status by virtue of his voluntary membership of an organisation whose aims, methods and activities were deemed to be predominantly terrorist in character.

Additionally, in the infamous case of the Afghan military intelligence service; Khadamat-e Aetla’at-e Dawlati (KHAD/WAD), the Dutch government assumed responsibility of the prohibited crimes in Article 1F for all officers of that organization. Its conclusions were based on a policy brief from the Department of Foreign Affairs, which stated that “all NCOs and officers were personally involved in the arrest, interrogation, torture and even execution of suspects”.

Nonetheless, other courts and commentators have criticized the above decisions. In the case of R (Sri Lanka) v Secretary of State for the Home Department, the Court of Appeal emphasized the need to consider a wide range of determining factors such as a person’s contribution to the commission of an international crime other than mere association/affiliation with an organization. Furthermore, the Canadian courts have held that there is need to determine the existence of a shared common purpose and that liability should be determined subjective-

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38 (1992)2 FC 306 (CA).
39 (1992)2 FC 306 (CA) at 317.
41 Gurung v Secretary of State for the Home Department [2002] at 3 and 118.
Thus, one needs to establish *mens rea*, of the individual implicated. This is in keeping with UNHCR’s note on the exclusion clause, which recommends that liability be determined by reference to the ‘knowledge, intention and moral choice on the part of the individual concerned’.

**III. Child Soldiers in Relation to Article 1F (a) of the 1951 Refugee Convention**

The use of children in military operations is not a new phenomenon. Throughout history, children have been involved in military operations. For instance, in WWI, in Great Britain 250,000 boys below 19 years joined the army. Additionally, in WWII, child soldiers fought in the Warsaw Uprising, and the Jewish resistance. The use of child soldiers is now global in scale.

**i. The legal and regulatory framework of child soldiers**

Since the 1970s, a number of international conventions have been made to limit the participation of children in armed conflicts. There has also been the creation of NGOs to prevent the recruitment and exploitation of children in warfare and ensure their reintegration into larger society by means of research, advocacy and capacity building. The following highlights the international laws that seek to prevent the recruitment of children in armed conflict.

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a. **Additional Protocol I and Additional Protocol II to the Geneva Conventions**

Additional Protocol I provides that the parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the parties to the conflict shall endeavour to give priority to those who are oldest.\(^{55}\) This provision was most likely influenced by the extensive recruitment of children during WWII.\(^{56}\) Article 4 (3) (c) of APII, provides that children who have not attained the age of fifteen years shall neither be recruited in the armed forces nor allowed to take part in hostilities.\(^{57}\)

b. **The Convention on the Rights of the Child**

Article 38 (2) and (3) provides that states parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities. Moreover, states parties are required to refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, states parties are to endeavour to give priority to the oldest.\(^{58}\)

c. **Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict**

The enactment of the Protocol was prompted by the harmful and widespread impact of armed conflict on children and the long-term consequences it has for peace, security and development.\(^{59}\) Articles 1 and 2 provide that states parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.\(^{60}\)

\(^{55}\) Article 77 (2), Protocol I of the four Geneva Conventions of 12 August 1949.

\(^{56}\) Norman, Rising ’44, 603.

\(^{57}\) Articles 4(3) (C), Protocol II to the Geneva Conventions of 12 August 1949.

\(^{58}\) Article 38 (2) and (3), CRC.

\(^{59}\) Paragraph 3 of the Preamble, Optional protocol to the CRC on the involvement of children in armed conflict (adopted and opened for Signature, Ratification And Accession On 25 May 2000) General Assembly Resolution A/RES/54/263.

\(^{60}\) Articles 1 and 2, Optional protocol to the CRC on the involvement of children in armed conflict.
d. The Rome Statute

Article 8 (2) (b) (xxvi) categorizes the conscription of children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities as a war crime.61

e. The Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups

The Principles are read together with the Paris commitments to protect children from unlawful recruitment or use by armed forces or groups. These two documents consolidate global humanitarian knowledge and experience in working to prevent recruitment, protect children, support their release from armed forces and reintegrate them into civilian life.62

The above laws suggest that in all matters concerning child soldiers, they should be treated like victims and not perpetrators. Nonetheless, the lack of a common minimum age of criminal responsibility (hereinafter MACR) remains an issue. For instance, although the Optional Protocol to CRC on the involvement of children in armed conflict defines a child as anyone under the age of 18, it allows for the recruitment of 16 and 17 year olds by national armed forces, not non-state actors, but prohibits them from taking part in active combat.63 Furthermore, countries like the Netherlands still recruit persons under the age of 18 into their armed forces.64

ii. The grant of refugee status to child soldiers

a. Child soldiers as refugees

A child soldier is any person under 18 years who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers and anyone accompanying such groups, other than family members.65 The definition includes girls recruited for sexual

61 Article 8 (2) (b) (xxvi) UNGA, Rome Statute of the ICC (last amended 2010).
63 Felton J, Child soldiers; are more aggressive efforts needed to protect children? CQ Researcher (2008).
65 Principle 2.1, The Paris Principles and Guidelines on Children Associated With Armed Forces or Armed Groups,
purposes and forced marriage.\(^{66}\) After the end of hostilities, child soldiers may seek asylum to escape persecution in their country.

Child soldiers have to prove that they are refugees according to Article 1A (2) of the Refugee Convention. To qualify as a refugee, one has to prove that:

1. They have a well-founded fear of being persecuted;
2. They are persecuted by reasons of race, religion, nationality, membership of a particular social group or political opinion
3. They are outside the country of their nationality and they are unable or, owing to such fear, unwilling to avail themselves of the protection of that country
4. They do not have a nationality and being outside the country of their former habitual residence as a result of such events, unable or, owing to such fear, are unwilling to return.\(^{67}\)

1) Well-founded fear of persecution

The concept of persecution under the Refugee Convention has no universally accepted definition.\(^{68}\) Scholars opine that violating an individual’s fundamental human rights amounts to persecution.\(^{69}\) Going by that definition, the recruitment of children is a serious breach of international law that violates their fundamental human rights.\(^{70}\) Furthermore, the compulsory use of children under the age of eighteen in armed conflict has been categorized as a form of slavery.\(^{71}\)

Additionally, the subsequent treatment of child soldiers after recruitment amounts to persecution. This is because child soldiers face physical maltreatment and sexual assault while in active combat.\(^{72}\)


\(^{67}\) Article1A (2), *Convention Relating to the Status of the Refugees*.


\(^{71}\) Art. 3(a), *ILO, Worst Forms of Child Labour Convention, C182, 17 June 1999, C182*.

\(^{72}\) Hathaway, *The law of refugee status*, 112-113.
2) **Persecution due to race, religion, nationality, membership of a particular social group or political opinion**

Children who are likely recruits of armed groups have a well-founded fear of persecution because of their membership to a particular social group. The social group could be children from a particular country or region who by reason of their age and gender are potential recruits. Courts have required that for the ground of persecution based on membership to a social group, the applicants have to show that they have a common characteristic that cannot be changed voluntarily. For children, their common characteristic is being minors which cannot change voluntarily.

3) **He is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country**

A child soldier would be unable or unwilling to avail themselves to the protection of their country due to the atrocities they committed which make them objects of hatred and suspicion.

If all the above arguments were to fail, child soldiers are first and foremost children, and as such require special attention. This special attention arises from their vulnerability, their dependency on adults and the fact that they are developing.

### iii. Exclusion of child soldiers under Article 1F (a)

Article 1F (a) provides that the Convention shall not apply to any person with respect to whom there are serious reasons for considering that: he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.

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78. Article 1F (a), UNGA *Convention Relating to the Status of Refugees*. 

The use of the word ‘any person’ is indiscriminate and includes children. Therefore, children whom a state has serious reasons to consider have committed the crimes prohibited may be denied refugee status. Child soldiers have committed serious atrocities in conflicts, in the DRC, Liberia and Sierra Leone.\(^7^9\) In Liberia, child soldiers as young as nine years were responsible for killings, maiming, and rape, against members of opposing armed groups and the civilian population.\(^8^0\) They are used to commit such atrocities because they do not understand the risks and are easier to control.\(^8^1\) Even those who appear to commit these crimes voluntarily do so due to social, economic and political pressures that arise from armed conflict.\(^8^2\)

Therefore, it begs the question; is the *mens rea* of a child considered to discharge the standard of proof of ‘serious reasons to consider’? The next part shows how this standard of proof has been applied by courts.

iv. Case law of child soldiers seeking refugee status

There is jurisprudence from courts in Canada, Netherlands and the UK where the exclusion of child soldiers seeking asylum status under Article 1F (a) has been considered.

a. Canada

In the *Ramirez* Case, the applicant was a member of the Salvadoran army who enlisted voluntarily for a period of two years at the age of fifteen to revenge the atrocities committed against members of his family by insurgents.\(^8^3\) After the first term, he re-enlisted for a further term and finally deserted the army after 33 months of service during which time he had been promoted to sergeant. As a member of the army, he participated in over 100 engagements and was present during tortures and killings of many prisoners.\(^8^4\) The Canadian Court of Appeal stated that Ramirez was on all occasions a participating and knowing member of a military force whose common objective was to torture prisoners to extract information, and was therefore responsible for the crimes committed.\(^8^5\)


\(^8^0\) Human Rights Watch, ‘Easy Prey’, 32.

\(^8^1\) Human Rights Watch, ‘Easy Prey’, 23.


\(^8^3\) Ramirez v Minister of Employment and Immigration.

\(^8^4\) Ramirez v Minister of Employment and Immigration, at 182-187.

\(^8^5\) Ramirez v Minister of Employment and Immigration, at 182-187.
In Saridag v Canada (Minister of Employment and Immigration) 86 (hereinafter the Saridag Case), the Court decided in the context of complicity for crimes against humanity, that a person, who was a member of a terrorist organization in Turkey while aged between 11 and 13 years old, could be denied asylum as long as it could be established that they had knowledge of some of the acts of violence. 87

Moreover, in Poshteh v Canada (Minister of Citizenship and Immigration) 88 (hereinafter the Poshteh Case), the mere membership of the applicant between the ages of 16 to 18 in a terrorist organisation that engaged in violent activities was held to be sufficient ground for their exclusion from refugee status. 89

The decision in the Poshteh Case came three years after Canada had ratified the Optional Protocol to the CRC, a treaty that requires signatories to give special consideration to captured enemy fighters under the age of 18. 90 In fact, Canada was the first to ratify the Protocol. 91

b. The Netherlands

Before 2004, the Dutch government excluded many child soldiers from refugee status based on Article 1F (a). 92 The government then changed its policy of excluding former child soldiers under Article 1F if they were below 15 years at the time of the alleged commission of the crime. 93

In 2004, the District Court of Arnhem decided in favour of a former child soldier of National Union for the Total Independence of Angola (UNITA) (AWB 03/26654). 94 The Court judged that the decision of the asylum authorities had not sufficiently taken into consideration the young age of recruitment: 11 years, and the impossibility for him to escape or withdraw from personal participation. According to the Court, it was generally known that UNITA punishes persons who are disloyal without mercy. 95 For these reasons, the asylum authori-

87 Saridag v Canada (Minister of Employment and Immigration), [1994] FCJ No. 1516.
88 [2005] 3 FCR 487.
89 Poshteh v Canada (Minister of Citizenship and Immigration) [2005] 3 FCR 487.
91 Thomas Walkom, ‘Canada and child soldiers’.
93 United States Committee on Refugees and Immigrants, ‘US Committee for Refugees, World Refugee Survey 2004-Netherlands.’
ties had, according to the Court, failed to examine the personal responsibility of the applicant in a careful way.  


c. The United Kingdom

In the seminal case of *R (on the application of JS (Sri Lanka) v Secretary of State for the Home Department)*, the Supreme Court considered the case of a claimant recruited to the Liberation Tigers of Tamil Eelam (LTTE) at the age of ten, who had continued in combat and intelligence roles until he was 24. The Court held that a person would be disqualified under Article 1F (a) if there were serious reasons for considering that he voluntarily contributed to the organisation’s ability to pursue its purpose of committing war crimes and was aware that his assistance would in fact further that purpose. As to *mens rea*, if a person was aware that in the ordinary course of events, a particular consequence would follow from his actions, he would be taken to have acted with both knowledge and intent.

From the above case law, it can be seen that national courts have taken different stands in applying the exclusion clause to child soldiers. This is the case, even though Canada, the UK and Netherlands are amongst 100 member states that have endorsed the Paris commitments, which require children accused of crimes against international law after being unlawfully recruited by armed forces or groups to be considered primarily as victims of violations against international law and not only as alleged perpetrators. Therefore, it is clear that in practice, States face difficulty in dealing with child soldiers who are alleged to have committed international crimes.

IV. The Best Interests Principle of the Child

**CRC** provides that in all actions concerning children the best interests of the child shall be a primary consideration. The principle of the best interests

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100 International Committee of the Red Cross, ‘100 Member states have endorsed the Paris Commitments’ https://www.icrc.org/eng/assets/files/2012/paris-principles-adherents-2011.pdf on 22 March 2016.
101 Commitment 11, The Paris Commitments to protect children from unlawful recruitment or use by armed forces or armed groups.
102 Article 3 (1), CRC.
of the child is one of the guiding principles of CRC. The BIP is also included in the European Convention on the Exercise of Children’s Rights in the preamble and a consideration that judicial authorities have to take into account in making a decision affecting children.

BIP is also included in the African Charter on the Rights and Welfare of the Child (hereinafter ACRWC) in which it is the primary consideration setting a higher standard than CRC. The American Convention on Human Rights (ACHR) stipulates that provision must be made for the protection of children ‘solely on the basis of their own best interests’ when a marriage is dissolved and that equal rights must be recognized by law for children born in and out of wedlock.

The drafters of CRC chose to use the word a primary consideration rather than the primary consideration because they recognised that there are situations in which the competing interests inter alia of justice and of society at large should be at least of equal, if not of greater importance than the interests of the child. On the other hand, the intentions of ACRWC drafters in using the primary consideration instead of a primary consideration is not known as repeated efforts to establish the existence of travaux préparatoires for the Charter have been unsuccessful. This may lead to the conclusion, until proven otherwise, that there is no such document on the ACRWC.

\[i. ~ \text{The origin of the BIP}\]

The BIP was not in itself novel when CRC was being drafted. It was included in a number of other international human rights instruments; the 1959 Declaration on the Rights of the Child and the 1979 Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). Nonethe-

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110 Principle 2, UNGA Declaration of the Rights of the Child 20 November 1959, A/RES/1386(XIV); Article 5 (b), UNGA, Convention on the Elimination of All Forms of Discrimination Against Women, 18
less, the BIP was expanded in scope, extending an obligation on states to ensure that children’s interests are placed at the heart of all decision-making impacting on children.111

**ii. The meaning of the BIP**

According to the traditional meaning, decision makers were obligated to consider the welfare of children when making decisions about their care and placement.112 This was mostly applied in child custody cases.113 The traditional approach only focused on the welfare of the child rather than their rights.114 The modern meaning of the principle borrows from the traditional concept with some significant differences. One difference is that the provision applies to a wide number of decision makers in both the public and private sphere unlike in the past where it was only in the province of the court to make a decision.115

Another difference is that it creates less room for paternalism and discretion.116 Whereas in the past decision-makers would decide for the child on what they thought would be best for them, CRC requires that a child should participate in the decision-making process.117 The framers of CRC regarded the participation of a child to be a critical component in determining the best interests of the child.118

Additionally, the BIP is to be applied in accordance with the other guiding principles of CRC; participation (Article 12),119 non-discrimination (Article 2),120 and the survival and the development of the child (Article 6).121 Hence, it is not subordinate nor of greater importance than other principles.

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111 December 1979, 1249 UNTS 13.
116 Covell and Howe, *Education in the best interests of the child*.
118 Covell and Howe, *Education in the best interests of the child*.
119 Article 12, *CRC*.
120 Article 2, *CRC*.
121 Article 6, *CRC*.
Therefore, the best interests of a child has to do with special protections for children’s rights in laws and policies, justified limitations on their freedom and the responsibility of adults to provide support and a conducive environment for their full development.122

iii. The role of the BIP

a) To aid in interpretation of the CRC

The BIP supports and clarifies a particular approach of issues that may arise from the CRC.123 Alston suggests that it is an aid to construction and an element which needs to be taken into full account in implementing other rights.124

b) Helps to resolve conflicts among rights

The courts may be guided by the BIP in determining which right overrides the other in the event of a conflict between children’s rights.125

c) Basis for evaluating laws, policies and practices

The principle applies when failure to observe it would adversely affect the child’s exercise or enjoyment of their rights.126 Thus, the BIP is used to identify conditions necessary for the enjoyment of the child’s rights.

iv. Application of the BIP

The application of the principle has been a difficult task as the principle remains uncertain for most courts.127 The Chief Justice of the Supreme Court of Canada stated that the principle is incapable of ‘being identified with some precision.’128

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122 International Bureau for Children’s Rights, ‘Children and Armed Conflict; A guide to International Humanitarian and Human Rights law’ (2010), 441.
To clarify the principle, some states have developed in their national laws, factors to guide courts in determining what is in the best interests of a child. For instance, the Children’s Act of South Africa (SA) has provisions on the factors to be considered in determining a child’s best interests. These include: consideration of a child’s age, maturity, stage of development, gender, background, and physical and emotional security.

a. Case Law

This part reviews case law from two European countries concerning immigration where the best interests of the child was considered.

1) Norway Supreme Court

In the case of Hussein Shabazi and family, (hereinafter the Shabazi Case) the Supreme Court upheld the decision of the Norwegian Immigration Appeals Board (hereinafter UNE) to reject the asylum application. The Shabazi family included a seven year old whose best interests were to be determined in the decision making process. The Court upheld the decision of the UNE that the immigration control considerations outweighed the best interests of the child. The Court stated that when two competing legal norms conflict, the argumentative power on the rights of the child might have to give way when upholding the legal norm of immigration control considerations.

In another case of Verona Delic and family, the Court upheld the UNE’s decision to deport the family to Sarajevo. The Delics had two daughters: Verona, who was ten years old at the time of the trial and Aurora, who was ten-months old. The UNE had to determine whether the best interests of the children outweighed immigration considerations. The Court in quoting the Shabazi Case stated that their role in assessing UNE decisions is to control their understanding of the concept of the best interests of the child on the relevant subject matter, and to ensure that considerations are properly considered and weighed against

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129 Children’s Act 38 of 2005 (South Africa).
130 Section 7 (1) (g) and (h), Children’s Act 38 of 2005 (South Africa).
131 688 of 2012, Norway Supreme Court.
132 688 of 2012, Norway Supreme Court.
133 Section 163, 688 of 2012, Norway Supreme Court.
134 Section 163, 688 of 2012, Norway Supreme Court.
135 1042 of 2012, Norway Supreme Court.
potential opposing considerations. In doing so, the Court upheld UNE’s decision to deport the applicants.

2) The UK Supreme Court

In the landmark case of *ZH (Tanzania) (FC) v Secretary of State for the Home Department*, the UKSC overruled the removal of an asylum seeker and upheld the children’s best interests. The leading judgment stated that the ‘best interests of the child’ broadly means the well-being of the child. A consideration of where the best interests lie will involve asking whether it is reasonable to expect the child to live in another country. Another important part of discovering the best interests of the child is to determine the child’s views.

In conclusion, the BIP has gained worldwide acceptance considering that all states apart from the USA have ratified the treaty. Nonetheless, there is difficulty in its application due to varying interpretations amongst States, especially in immigration cases.

V. Article 1F (a) and the BIP

From the above sections, there is a conflict between Article 1F (a) of the Refugee Convention and the BIP. Article 1F (a) excludes anyone whom there are serious reasons to consider that they committed international crimes, this includes minors. BIP on the other hand, requires that a child’s best interests be a primary consideration in all actions concerning children. Conversely, it would be rare, if ever, that the exclusion of a child from refugee protection would be in his or her ‘best interest’. In analysing this conflict, the following are the issues that arise.

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137 Section 146, 6818 of 2012, Norway Supreme Court; Langbach, T, ‘Shall consider whether decisions are valid’ Aftenposten, January 28 2013 http://www.aftenposten.no/meninger/debatt/Skal-vurdere-om-vedtak-er-gyldige-%7104275.html#.UWLmkpN7Ito on 5 December 2015.


i. **Interpretation of the Refugee Convention and the CRC using the Vienna Convention of the Law of Treaties**

To resolve the conflict between CRC and the Refugee Convention, regards may be given to the Vienna Convention on the Law of Treaties (hereinafter VCLT). Article 30 of VCLT provides that successive treaties modify prior treaties.\(^{144}\) Therefore, it would mean that CRC should modify the exclusion provisions of the Refugee Convention, making the exclusion of children on the grounds of Article 1F illegal. Nevertheless, this rule of interpretation only applies where there is significant overlap between the treaties.\(^{145}\) In this case, the overlap between the Refugee Convention and CRC is minimal and unlikely to fall under Article 30.

VCLT calls for interpretation ‘in good faith in accordance with the ordinary meaning to be given to terms of the treaty in their context and in light of its object and purpose’ which could help resolve the conflict.\(^{146}\) Scholars like Happold argue that WWII was fresh in the minds of the drafters of the Refugee Convention who did not see the participation of children in armed conflicts as a problem since children were mostly used as partisans and resisters during hostilities.\(^{147}\) Hence, exempting children from the application of Article 1F (a) would be desirable for purposes of public policy. However, this would constitute a misleading application of the rules of statutory interpretation of international treaties.\(^{148}\)

Consequently, the interpretive instruments and techniques cannot solve the conflict. There is need to revise the exclusion clause of the Refugee Convention to reflect the rights accorded to children in CRC.

**ii. The minimum age of criminal responsibility (MACR)**

One of the issues that arise from the conflict between the Refugee Convention and CRC is that of MACR.\(^{149}\) CRC requires State parties to establish a minimum age below which children shall be presumed not to have the capacity to

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\(^{146}\) Article 31, VCLT.

\(^{147}\) Happold M, ‘Excluding children from refugee status’, 1136.


\(^{149}\) The acronym was coined by the Committee of the Rights of the Child in General Comment No. 10 of 2007.
infringe penal law.\textsuperscript{150} This discretion left to States further complicates the conflict between the exclusion clause and the BIP.

a. MACR in individual states

States currently have set different standards for the MACR. For instance, for Kenya, which is party to CRC, eight is the MACR.\textsuperscript{151} In contrast, in South Sudan, which ratified the CRC recently,\textsuperscript{152} the MACR is 12.\textsuperscript{153} In Canada, the MACR is also 12.\textsuperscript{154} These differences in the MACR present a problem in the application of Article 1F (a) of the Refugee Convention. A child asylum seeker who committed crimes between the ages of 8 to 12 may be held criminally responsible in Kenya but in Canada and South Sudan they will be considered incapable of having committed the crimes.

b. MACR of the international criminal courts

1) The ICC

The issue of MACR has been a topic of discussion in ICC which is the Court of last resort with jurisdiction over international crimes. ICC is an ideal model that should serve as a guide to state parties. The Rome Statute provides that war crimes include the conscription or enlisting of children under the age of 15 years or using them to participate actively in hostilities.\textsuperscript{155} Article 26 of the Rome Statute prohibits the prosecutor from investigating and prosecuting individuals who commit crimes when they are under the age of 18.\textsuperscript{156} These two provisions if read together create a legal vacuum for children between the age of 15 to 18. In the case of child soldiers, they are considered victims until they reach the age of 15, then from the age of 15 through to 17, they have no status as child soldier victims or as potential perpetrators, nor can they be considered the subject of child soldier crimes.\textsuperscript{157}

\textsuperscript{150} Article 40 (3) (a), CRC.
\textsuperscript{151} Section 14 (1) and (2), The Penal Code of Kenya, Chapter 63, Revised Edition 2009.
\textsuperscript{153} Section 30, The Penal Code Act 9 of 2009 of South Sudan.
\textsuperscript{154} Section 13, Criminal Code, RSC of 1985, c. C-46.
\textsuperscript{155} Article 8 (2) (b) (xxvi), Rome Statute of the ICC (last amended 2010).
\textsuperscript{156} Article 26, Rome Statute of the ICC (last amended 2010).
One can then deduce that for ICC the applicable MACR is persons under the age of 18. However, the culpability of child soldiers between the ages of 15 to 18, who have committed atrocities, before ICC is unknown. It may be argued that domestic courts may prosecute such persons but the ICC is considered an ideal model thus, the three year gap makes ICC ill-equipped to fully address child soldier crimes and failing to provide a comprehensive legislative model on the issue for States parties.158

2) The Special Court for Sierra Leone (SCSL), the ICTY and the ICTR

The SCSL Statute grants the Court jurisdiction over people of 15 years of age.159 Therefore, the MACR for SCSL is 15 years. The ICTY Statute and the ICTR Statute are silent on the issue.160 The Serious Crimes Panels in East Timor, on the other hand, have jurisdiction over minors over twelve years of age.161

c. International trend in MACR

There has been a trend internationally to set MACR at 18 years. The API,162 APII and the CRC,163 prohibit the recruitment of children below the age of 15 years to take part in direct hostilities. Thereafter came Optional Protocol to the CRC on the involvement of children in armed conflict that stipulates that states parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.164 Additionally, the Paris Principles note that a majority of child protection actors will continue advocating for States to strive to raise the minimum age of recruitment to 18.165

163 Articles 4(3) (C), Protocol II of the Geneva Conventions of 12 August 1949 and Article 38 (2) and (3), CRC.
164 Articles 1 & 2, Optional Protocol to the CRC on the Involvement of Children in Armed Conflict.
Even though some of the States that have been discussed above; Kenya and Canada are party to the protocol and the principles, there is hesitation in raising the MACR. This may be because the atrocities that children are accused of are so grave that it would be absurd to apply less stringent measures on them.

The discussion above reveals that there is no universally accepted MACR, and this presents another complexity to the conflict between the Refugee Convention and the CRC. It would definitely be in the best interests of the child if the MACR is set at a standard age of 18.

**iii. The standard of proof of Article 1F(a)**

The introductory line of Article 1F of the Refugee Convention provides that; ‘The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that…’ The interpretation of the legal threshold of ‘serious reasons for considering’ varies from one state to another. For instance, for the Canadian courts, mere membership in an organisation linked to acts of violence is sufficient to show that there are serious reasons for considering that the asylum seeker committed the prohibited crimes.\(^{166}\)

Thereafter, the Court moved away from ‘mere membership’ and held that an asylum seeker’s knowledge of acts of violence could amount to serious reasons for considering that they committed the prohibited crimes.\(^{167}\)

In the UK, courts have held that the burden of proof is discharged when it is proven that a person voluntarily contributed to an organisation’s ability to pursue its purpose of committing war crimes and was aware that their assistance would in fact further that purpose.\(^{168}\) The Dutch courts, on the other hand, have taken a different approach in requiring that an asylum seeker’s personal responsibility for the commission of the crimes alleged must be assessed.\(^{169}\)

In conclusion, the lack of a uniform interpretation of the legal threshold is not in the best interests of the child. There is a need to reach a common ground as to its interpretation.

\(^{166}\) Ramirez v Minister of Employment and Immigration.

\(^{167}\) Saridak v Canada (Minister of Employment and Immigration), [1995] 1 F.C.

\(^{168}\) [2010] UKSC 15, 123.

VI. Recommendations and Conclusion

i. Recommendations

These recommendations are based on the finding that the current application of the exclusion clause by states to child soldiers seeking asylum is against the best interests of the child. The following are the recommendations for the exclusion clause to uphold the best interests of child soldiers.

a. Universally accepted MACR

The CRC is the most ratified human rights treaty.\(^\text{170}\) If the members agree on a common MACR, it could be termed as universally accepted and would apply to all except the USA, which is the only non-state party. This will encourage a uniform application of Article1F (a) that will be endorse the BIP. A uniform MACR would help in achieving the purpose of article 1F (a) of ensuring that persons who have committed the crimes are held legally accountable for their acts.

b. Need for higher standard of proof

The standard of proof set by Article 1F (a) is higher than a balance of probabilities but lower than beyond reasonable doubt.\(^\text{171}\) UNHCR stated that reliable, credible and convincing evidence going beyond mere suspicion is required to demonstrate that there are ‘serious reasons for considering’ that individual responsibility exists.\(^\text{172}\) They further add that it is not necessary for an applicant to have been convicted of the criminal offence, nor does the criminal standard of proof need to be met.\(^\text{173}\)

The above requirements are uncertain and leave a lot of room for discretion of a court. This would not be in the best interests of a child soldier as they are more of subjective than objective and there would be little or no room for their participation in the litigation process that is complex. Furthermore, most child soldiers would arrive at host countries unaccompanied as they have been separated from their parents or their legal/customary caregivers, thus, they have no guidance during the review of their asylum application. There is need to raise


\(^{171}\) UNHCR Statement on Article 1F of the 1951 Convention, 9-10.

\(^{172}\) UNHCR Statement on Article 1F of the 1951 Convention, 9-10.

\(^{173}\) UNHCR, Criminal Justice and Immigration Bill, Briefing of the House of Commons at Second Reading, July 2007, 5.
the legal threshold of Article 1F(a) to reflect the current standards in international criminal law. Nonetheless, this acknowledges that a higher burden of proof will discourage states from taking up such cases.

ii. Conclusion

In conclusion, Article 1F(a) of the Refugee Convention has been used by States to exclude child soldiers, who are alleged to have committed atrocious crimes, from the benefits of refugee status. Different courts of law have interpreted and applied the exclusion clause differently to child soldiers. The issue of the application of the exclusion clause has been compounded by the uncertainty of what the BIP entails. It has emerged that the current application of the exclusion clause to child soldiers seeking asylum is against the BIP. In order for the BIP to be upheld, it is necessary that states agree on a uniform MACR and to revise the legal threshold of the exclusion clause to reflect the legal threshold in international criminal law.
The Implications of Stripping Immunities of Heads of States on State Cooperation and the Effectiveness of Trial

*Patrick Kimani*

Abstract

The development of international criminal law in the last seven decades has seen a gradual erosion of the integrity of immunities for heads of states. The journey from Nuremberg to The Hague has resulted in a permanent international criminal court. Article 27(2) of the Rome Statute of the International Criminal Court (the Rome Statute) disregards immunities as an effective bar to the jurisdiction of the International Criminal Court (ICC). Heads of states have been stripped of their ‘invisibility cloak’ from international criminal prosecutions. The Rome Statute places its reliance on the situation state’s authorities to cooperate with the ICC in its investigation and prosecution of crimes. A special tension is noticeable in circumstances where an incumbent head of state is accused at ICC while his or her state is placed under the general cooperation obligation. This tension is clearly manifest in the two criminal processes against Uhuru Kenyatta and Al Bashir. Bearing in mind the significant political muscle a sitting head of state wields in their state, it is quite likely that their state’s authorities will be very reluctant to discharge their cooperation obligations. The prosecution of sitting heads of states remains a challenge. Is it time to rethink the structure of the ICC or the implementation of the Statute?

I. Introduction

International criminal law is founded upon a common ‘international morality’¹ which abhors particular crimes of such nature as contained in the Rome

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¹ This term was first used in the Treaty of Versailles to found the basis of the bringing to justice of Kaiser Wilhelm II.
Statute of the International Criminal Court\(^2\) (hereinafter the Rome Statute). As the former International Criminal Tribunal for Rwanda (hereinafter ICTY) Prosecutor, Richard Goldstone aptly puts it:

‘…some crimes were so horrendous that they were crimes not only against the immediate victims or solely the people who lived in the country in which they were committed; they were truly crimes against all mankind.’\(^3\)

Certain crimes concern the entire international community and are consequently subject to universal jurisdiction. There is a normative requirement on states and the international community to put an end to impunity for the perpetrators of these crimes.\(^4\) By this acknowledgement and determination, the international community seeks to address a threat that may peril its existence. Indeed, the fight against impunity may be regarded as the central norm, or the *Kelsenian grundnorm*, of the international criminal regime as it stands. One of the more significant efforts by the international community towards curbing impunity was the establishment of a permanent international criminal court in 1998.

Since the inception of the International Criminal Court (hereinafter ICC) in 1998, only two sitting heads of states have been subject to charges for international crimes under the Rome Statute.\(^5\) The two heads of states are Omar Hassan Ahmad Al Bashir and Uhuru Muigai Kenyatta. Uhuru Kenyatta became Kenya’s Head of State while still an indictee of ICC.\(^6\) Omar Al Bashir was already a Head of State at the time the arrest warrant was issued by ICC.\(^7\) As matters stand,
Omar Al Bashir is yet to honour the arrest warrant\(^8\) while the criminal charges against Uhuru Kenyatta were withdrawn in December of 2014.\(^9\) The fact that only one of the two attempts at prosecuting incumbent heads of states has proceeded to trial, a fact blamable on the relevant state’s unwillingness to cooperate with ICC; raises an alarm regarding the structure of ICC under the Rome Statute.

The prosecution has variously alleged non co-operation of the concerned state party or other state parties with ICC as a major cause for the stalling of proceedings.\(^10\) Since, cooperation is an essential element in successful trial proceedings at ICC,\(^11\) and taking into account the significant influence an accused head of state might exert on this process,\(^12\) the expeditiousness of an international criminal trial process is likely to be prejudiced whether or not the accused sitting head of state is ‘ultimately responsible’ for the non-cooperation. Suffice it to say that a sitting head of state may exert considerable influence in one form or another on the concerned state’s general obligation of cooperation.\(^13\) National authorities which in most cases, fall under the power of the sitting head of state would be reluctant to live up to the cooperation obligations commitment when it comes to that state’s incumbent head. Indeed, the allegation has been raised at ICC that an accused’s position as head of state is particularly detrimental to the fulfillment of cooperation obligations.

This paper is an attempt to investigate the seemingly defective relationship between the stripping of immunities available to a head of state, general obligation of state cooperation with ICC and the denial of immunity to a sitting head of state. The paper is broadly themed into two elements of international law: the

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\(^8\) A Pre-Trial Chamber of the ICC has ruled that Malawi and Chad failed to exercise their obligation to arrest and surrender Mr Bashir under Article 86 of the Rome Statute when he visited these countries.

\(^9\) See Notice of withdrawal of charges against Uhuru Muigai Kenyatta, ICC-01/09 – 02/11-983.

\(^10\) See ICC-01/09-02/11-982, ICC-01/09-02/11-940, and ICC-01/09-02/11-943 in the Kenyatta case. The Pre-Trial Chamber has taken the South African authorities regarding their failure to arrest and surrender Omar Al Bashir following his presence in South Africa from the 13-15 June 2015. At the time of writing this dissertation, proceedings under Article 87(7) had been started against South Africa with regards to its failure to cooperate with the Court.

\(^11\) The Preamble to the Rome Statute affirms ‘[t]hat the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation…’ (Emphasis added).

\(^12\) The Prosecution has argued in the Kenyatta case that the fact that the accused person was the Head of State of Kenya and thus ‘constitutionally responsible’ for ensuring Kenya’s compliance with its international obligations made the accused ‘ultimately responsible’ for the Kenya Government’s failure to cooperate with the ICC. See ICC-01/09-02/11-981 para 22.

\(^13\) ICC-01/09-02/11-981, para 22.
immunity of heads of states, and state cooperation with ICC which is a determining factor in assessing the efficiency of ICC.

II. Stripping of Heads of States’ Immunities

i. Immunities for heads of state

Immunities are necessary for the smooth conduct of the international relations between states and contribute to the development of friendly relations among nations. The International Court of Justice has made the observation that:

‘There is no more fundamental prerequisite for the conduct of relations between states than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose. The institution of diplomacy has proved to be an instrument essential for effective co-operation in the international community, and for enabling states, irrespective of their differing constitutional and social systems, to achieve mutual understanding and to resolve their differences by peaceful means.’

Two general types of immunities are recognized under international law: functional (immunity *ratione materiae*) and personal immunities (immunity *ratione personae*). The development of international criminal law has seen a gradual erosion of these types of immunities. Functional immunities apply only to acts performed by persons in their official capacity. They may be relied on not only by serving state officials, but also by former officials with respect to official acts performed while in office. In this category of immunities, reference is made ‘to the nature of the acts in question rather than the particular office of the person who performed them.’ Personal immunities, on the other hand, ‘attach to a particular office and are possessed only as long as the official is in office.’ They are limited to a small group of senior state officials, especially heads of state, heads

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16 United States Diplomatic and Consular Staff in Tehran case (United States of America v. Iran).
of government, and foreign ministers. Akande notes that, due to their role; personal immunities, where applicable, are commonly regarded as prohibiting absolutely the exercise of criminal jurisdiction by states.

Head of state immunity, which is a special category of personal immunity, is regarded as being ‘more comprehensive than diplomatic immunity or ordinary functional immunities. The expansive nature of the immunity recognizes the functions of heads of states, which include high-level diplomacy, negotiations, and the pacific settlement of disputes.

Immunities, where proved, act as a complete bar to any actions or prosecutions preferred against the person who successfully proves them.

ii. The suppression, subversion and excommunication of head of state immunity in international criminal law

As explained below, the robust development of international criminal law in the past century has greatly weakened the application of immunity as a defence in criminal prosecutions at the international level. Specifically, functional and personal immunities appear to be no longer relevant to international criminal trials and prosecutions.

The suppression of immunity for head of states is a principle that was first enshrined in the Treaty of Versailles signed during the Paris Peace Conference in 1919. The Allied and Associated Powers included a punitive clause under which they would arraign the German Kaiser William II of Hohenzollern ‘for a

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20 Akande D and Shah S, ‘Immunities of state officials, international crimes, and foreign domestic courts’ 21 The European Journal of International Law, 4 (2011) 815-852, 819; Lord Browne-Wilkinson in Re Pinochet [Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet; R v. Evans and Another and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet, R v. (1999) UKHL 17 (24 March, 1999)] stated that ‘[I]mmunity enjoyed by a head of state in power and an ambassador in post is a complete immunity attached to the person of the head of state or ambassador and rendering him immune from all actions or prosecutions whether or not they relate to matters done for the benefit of the state. Such immunity is said to be granted ratione personae.’
22 Lord Browne-Wilkinson in Re Pinochet Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet; R v. Evans and Another and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet, R v. (1999).
23 Treaty of Versailles, 28 June 1919, 225 Parry 188.
supreme offence against international morality and the sanctity of treaties'. Under this clause, a tribunal was to be constituted to guarantee the right of defence of the would-be defendant. The Kaiser was never put to trial, partly because of the refusal by the Dutch authorities to extradite the Kaiser for prosecution.

The Pre-Trial Chamber 1 of ICC made reference to the following recommendation by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties:

‘In these circumstances, the Commission desire to state expressly that in the hierarchy of persons in authority, there is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. This extends even to the case of heads of States. An argument has been raised to the contrary based upon the alleged immunity, and in particular the alleged inviolability, of a sovereign of a State. But this privilege, where it is recognized, is one of practical expedience in municipal law, and is not fundamental. However, even if, in some countries, a sovereign is exempt from being prosecuted in a national court of his own country the position from an international point of view is quite different.

Immunity for heads of states and other officials was later and more clearly denounced in the Post World War II period. Article 7 of the Charter of the International Military Tribunal (hereinafter the Nuremberg Charter), presented the thesis that neither a head of state nor a person acting under an official capacity could claim, validly, exemption from responsibility or punishment by the mere fact of their official position. The Tribunal, basing its decision on the above cited Article, held thus:

‘The principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.

In similar terms, Article 6 of the International Military Tribunal for the Far East Charter derecognized the applicability of official position as a valid defence

24 Article 227, Treaty of Versailles, 28 June 1919, 225 Parry 188.
26 82 UNTS 279.
to criminal responsibility. The Nuremberg and Tokyo tribunals, therefore, saw the declaration of an essential principle of international criminal law. The International Law Commission would include this principle as its third principle in the codification of what are popularly referred to as the Nuremberg Principles. The Commission recalled this principle in its Draft Code of Crimes Against the Peace and Security of Mankind of 1996. Article 7 of the Draft Code provides that:

“The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.”

The third Nuremberg Principle was incorporated in the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) as Article 7(2). In the Blaski case, the ICTY Appeals Chamber held that an identical provision is to be found under Article 6(2) of the Statute of the International Criminal Tribunal for Rwanda.’

The prosecutions of various heads of states including Slobodan Milosevi, Charles Taylor, and Laurent Gbagbo saw yet other encroachments at the concept of personal immunity. In a sense, the proceedings of Omar Al Bashir and Uhuru Kenyatta, constitute the final nail on the coffin of immunity ratione personae, at least in the context of international criminal law. Sitting heads of states are no longer protected from criminal jurisdiction.

iii. Article 27 of the Rome Statute

The heading of this Article (irrelevance of official capacity) indicates a continuation of the thesis expounded in the post-World War II tribunals, and indeed, marks the epitome of the history of suppression of heads of states’ immunities expounded in section III (ii) above. The Rome Statute, however, goes beyond just a mere denunciation of official capacity. It provides, specifically, that

‘official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility…”

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31 See Prosecutor v Charles Ghankay Taylor also known as Charles Ghankay Macarthur Dapkpama Taylor (Indictment) SCSL-2003-01-I.
32 See Prosecutor v Laurent Koudou Gbagbo (Initial Appearance) ICC-02/11-01/11-T-1-ENG ET.
34 Article 27(1), Rome Statute.
Its sub-article 2 is to the effect that ‘immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar ICC from exercising its jurisdiction over such a person.’

This Article abolishes any immunity before ICC that incumbent heads of states have hitherto enjoyed. The ICC Pre-trial Chamber 1 considered that a state which becomes a party to the Rome Statute accepts ‘having any immunity they had under international law stripped from their top officials…All of these states have renounced any claim to immunity by ratifying the language of article 27(2)’. The Chamber found that

‘the principle in international law is that immunity of either former or sitting Heads of State cannot be invoked to oppose a prosecution by an international court. This is equally applicable to former or sitting heads of states not parties to the Rome Statute whenever ICC may exercise jurisdiction’.

It emphasized further that ‘immunity for Heads of State before international courts has been rejected time and time again dating all the way back to World War 1.’ Finally, it made reference to the increased number of criminal prosecution of heads of states (Slobodan Milosevic, Charles Taylor, Muammar Gaddafi, Laurent Gbagbo and Al Bashir) as evidence that ‘initiating international prosecutions against Heads of State have gained widespread recognition as accepted practice.’

The Pre-Trial Chamber 1 concluded as follows:

‘For the above reasons and the jurisprudence cited earlier in this decision, the Chamber finds that customary international law creates an exception to Head of State immunity when international courts seek a Head of State’s arrest for the commission of international crimes.’

Article 27(2) of the Rome Statute is quite new and explicit – it states in no uncertain terms that immunities attaching to official positions may not bar ICC from exercising its jurisdiction over such persons. Akande notes that this provision ‘conclusively establishes that state officials are subject to prosecution by ICC

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36 Malawi Decision, para 36.

37 Malawi Decision, para 38.

38 Malawi Decision, para 39.

39 Malawi Decision, para 42.
and that provision constitutes a waiver by states parties of any immunity that their officials would otherwise possess vis-à-vis ICC.\(^{40}\)

Heads of states, incumbent or otherwise, whose states are parties to the Rome Statute cannot claim immunity from criminal responsibility or punishment before ICC. Their states have, by ratifying the Rome Statute, renounced any immunities that their officials may have previously enjoyed.\(^{41}\) This waiver of immunity, however, is limited to the context of ICC.

### III. The Role of State Co-Operation in the International Criminal Court

#### i. The ICC: A creature of consent

ICC has been described as a creature of consent,\(^{42}\) and rightly so. It is established under the Rome Statute of 1998 which entered into force on the 1 July 2002. As of January 2016, 123 states had ratified the Rome Statute although with a number of notable absentees including three members of the United Nations Security Council.\(^{43}\) Membership to the Rome Statute is open to all States. The Secretary-General of the United Nations remains the depositary of instruments of ratification, acceptance, approval or accession. State parties have the option of withdrawing from the Rome Statute by way of a written notification addressed to the Secretary-General of the United Nations.

Some scholars opine that Treaty-based institutions have the advantage of high ‘buy-in’ by participating states.\(^{44}\) At the same time, their major weakness lies in the not-surprising fact that important states may choose not to participate thus ‘weakening the strength and legitimacy’ of those institutions. Further, the treaty-making process entails protracted negotiations between states which may result in significant structural limitations based on political compromises.\(^{45}\)

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41 Kiyani A, ‘Al-Bashir & the ICC’, 484; see also Schabas W, *An Introduction to the International Criminal Court*, 232. Schabas considers that the exception to the definitive nature of Article 27(2) in denouncing immunities, is in the case of non-State Parties to the Statute.
43 These include: The United States of America signed the Statute in 2000 but unsigned it in May 2002 before it became effective; Russian Federation is a signatory but has not ratified the Statute while China is a non-signatory.
Running counter to the position that ICC is a purely consensual\textsuperscript{46} court is the argument that the intervention of the Security Council by way of referrals and deferrals introduces an element of coercion into the framework. This ‘coercion’, it is to be noted, is introduced at the level of operation of ICC. Many would agree that coercion at the point of creation is far different from coercion at the operational level. Indeed, at the operational level, there exists a consensual approach – state cooperation and judicial assistance – which is the primary focus of this section. I note that even in cases where the coercion model may be used at the operational level, there has been a tendency of incorporating the consensual approach in light of the general consensual nature of ICC.

Thus understood, I proceed to show that this consensual model of ICC is its major weakness when it is a question of international criminal proceedings against a sitting head of state. How will a state conscious and proud of its sovereignty consent to the stripping of the garments of its visible head and representative?\textsuperscript{ii}

\textit{ii. The duty to cooperate}

State parties to ICC have a duty to cooperate fully with it in its investigatory and prosecutorial duties.\textsuperscript{47} This is an obligation assumed at the moment of ratification of the Rome Statute. The Rome Statute establishes a permanent court based on interstate consensus hence this Court must be contradistinguished by nature with the coercive tribunals and mixed or hybrid courts.

Part 9 of the Rome Statute is dedicated to ‘international cooperation and judicial assistance’. After the statement of the general obligation to cooperate, the Rome Statute goes on to elaborate particular instances and elements of that cooperation including the following:

i) Availability of procedures under national law to facilitate cooperation with the Court;

ii) Compliance with requests for arrest and surrender of persons to the Court;

iii) Treatment of competing requests with the Court taking priority over non-State

\textsuperscript{46} The consensual and coercion models are used to describe the manner of creation of the international criminal tribunals. As Schaak and Slye explain, a coercion model best exemplified by the ICC, entails negotiations and agreement to establish a treaty-based institution. This would include even the creation of a hybrid tribunal from a bilateral treaty. The coercion model entails the exercise of a sovereign power – either international (usually the United Nations Security Council) or domestic (the nation-state itself).

\textsuperscript{47} Article 86, \textit{Rome Statute}. 
Parties and State Parties in specific circumstances;

iv) Making a provisional arrest pending presentation of the request for surrender and the documents supporting such a request; and

v) Other forms of cooperation listed under Article 93 (1) (a – l)
   a. The identification and whereabouts of persons or the location of items;
   b. The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;
   c. The questioning of any person being investigated or prosecuted;
   d. The service of documents, including judicial documents;
   e. Facilitating the voluntary appearance of persons as witnesses or experts before the Court;
   f. The temporary transfer of persons as provided in paragraph 7;
   g. The examination of places or sites, including the exhumation and examination of grave sites;
   h. The execution of searches and seizures;
   i. The provision of records and documents, including official records and documents;
   j. The protection of victims and witnesses and the preservation of evidence;
   k. The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and
   l. Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.

Chapter 11 of the ICC Rules of Procedure and Evidence elaborate the details of the contents of cooperation and judicial assistance requirements as provided under Part 9 of the Rome Statute. Although a state party has bound itself by way of ratifying the Rome Statute to cooperate with ICC when so required, it is contemplated that the ultimate decision to cooperate lies within the discretion of the state party. Indeed, only then would the sanctions for non-cooperation enforced through the mechanism of the Assembly of Parties be relevant – where the state decides not to cooperate even when under an obligation to do so.

ICC, in its 2013 report on cooperation, adopted the model of the Hague Working Group which focused on the following thematic areas:

i) Arrest strategies;

ii) Voluntary agreements;
iii) Agreement on Privileges and Immunities of the Court (APIC); and

iv) Supporting, protecting and enhancing the Rome Statute system and its intrinsic cooperation needs, at the regional and international levels.

ICC, however, emphasized that the priority given to these areas is without prejudice to the importance of other cooperation issues,

‘including the identification, freezing and seizure of assets, discussed during last year’s cooperation facilitation; and the availability of channels of communication and domestic procedures for dealing with Court cooperation requests.’

The priority areas are nevertheless important for a state faced with obligations of cooperation with ICC. It is expected that such a State will ensure that, at the very least, the priority areas are addressed before tending to the other cooperation issues.

In the same report, ICC observes the following:

‘The impact of lack of strong, timely and consistent cooperation and assistance to the Court is multi-folded: it may lead to delays in the investigations activities and other Court proceedings and operations, thereby affecting the Court’s efficiency and as a consequence increasing the running costs and the budget requirements of the Court. The delays may also affect the integrity of the proceedings.’

Further;

‘From a more systemic perspective, effective cooperation, including in particular the execution of arrest warrants, speak for the legitimacy and credibility of the Court and of the Rome Statute community as a whole. The only way forward to consolidate the foundations of the Rome Statute, as the Court is expanding its activities, is to have an increasing number of States accepting to provide voluntary cooperation to the Court. The Court cannot indefinitely rely on the same States that accepted to enter into voluntary agreements years ago to support the new cases and situations before the Court.’

A state is placed under the obligation to cooperate by way of a cooperation request either by ICC or by virtue of a referral (initiated by the United Security Council or the relevant State) to ICC. The competent authorities of the state

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49 Assembly of State Parties: Report of the Court on cooperation, para. 63.
50 Assembly of State Parties: Report of the Court on cooperation, para. 66.
51 Article 87 of the Rome Statute, Requests for cooperation: General provisions.
52 ICC-02/05-01/09 The Prosecutor v Omar Hassan Ahmad Al Bashir, Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, 13 December 2011 (hereafter ‘Malawi Decision’), para 1.
in question are obliged to address the cooperation request and put it into effect. Where the state identifies problems that may impede or prevent the execution of the request, it is required to consult with ICC with respect to those problems.\(^{53}\) Article 87(7) of the Rome Statute provides the non-cooperation procedures to be activated by ICC upon a state party that has failed to undertake its obligations. ICC makes a finding to the effect of non-cooperation by the state and makes a referral to the Assembly of State Parties or the United Nations Security Council where relevant. Cassese has decried the absence of penal consequences on a finding of non-cooperation against a state as an instance of the inadequacies of the Rome Statute.\(^{54}\)

In the *Malawi Decision*,\(^{55}\) ICC noted that the failure by the competent authorities of Malawi to either respond to a warning from the ICC’s Registrar regarding the contemplated visit by President Al Bashir or to arrest the suspect upon arrival in Malawi; constituted a breach of the general duty of cooperation under Article 86 of the Rome Statute.\(^{56}\) Further, ICC found that Malawi had failed to cooperate with ICC in resolving the issue regarding the immunity and privileges accorded by it to the suspect which issue formed one of the basis for its refusal to arrest the suspect.

The ICC Pre-Trial Chamber has taken the view that

‘when cooperating with [the] Court and therefore acting on its behalf, States Parties are instruments for the enforcement of the *jus puniendi* of the international community whose exercise has been entrusted to [the] Court when States have failed to prosecute those responsible for the crimes within its jurisdiction.’\(^{57}\)

The basis of state cooperation with ICC is the absence, on the part of ICC, of enforcement mechanisms to effect its orders, rulings and judgments.\(^{58}\)

The Assembly of State Parties has, on various occasions, ‘recognized the negative impact that the non-execution of Court requests can have on the ability

\(^{53}\) Article 97, *Rome Statute*.


\(^{55}\) ICC-02/05-01/09 The Prosecutor v Omar Hassan Ahmad Al Bashir, *Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir*, 13 December 2011.

\(^{56}\) Malawi became a State Party under the Statute on the 31st of December 2002.

\(^{57}\) Malawi Decision, paragraph 46.

\(^{58}\) See Malawi Decision, paragraph 46.
of the Court to execute its mandate.\textsuperscript{59} It has stressed that ‘effective cooperation remains essential for the Court to carry out its activities.’\textsuperscript{60} Antonio Cassese while commenting on the structure of ICC opines that:

The decisions, orders and requests of international criminal courts can only be enforced by others, namely national authorities (or international organizations). Unlike domestic criminal courts, international tribunals have no enforcement agencies at their disposal: without the intermediary of national authorities, they cannot execute arrest warrants; they cannot seize evidentiary material, nor compel witnesses to give testimony, nor search the scenes where crimes have allegedly been committed. For all these purposes, international courts must turn to state authorities and request them to take action to assist the courts’ officers and investigators. Without the help of these authorities, international courts cannot operate. Admittedly, this holds true for all international institutions, which need the support of states to be able to operate. However international criminal courts need the support of states more, and more urgently, than any other international institution, because their actions have a direct impact on individuals who live on the territory of sovereign states and are subject to their jurisdiction.\textsuperscript{61}

Cooperation is, therefore, an essential feature of ICC. It is necessary for the effective functioning of ICC and may affect its legitimacy and credibility either positively or negatively.\textsuperscript{62} ICC is comparable, in a limited way, to a hybrid tribunal such as ICTY which found itself, two decades ago, struggling at the cooperation hurdle. As the then President of ICTY, Antonio Cassese, lamented to the United Nations General Assembly:

‘[The] Tribunal is like a giant who has no arms and no legs. To walk and work, he needs artificial limbs. These artificial limbs are the State authorities; without their help the Tribunal cannot operate.’\textsuperscript{63}

Much the same could be said about the role of cooperation in the ICC regime. The difference would be that the artificial limbs, in the context of ICC, are donated not by coercion but by consent. Further, the dimensions, extension and nature of the cooperation would have to be determined in each particular


\textsuperscript{62} Where state parties cooperate fully with the Court, this is likely to enhance the legitimacy or acceptability of the Court as opposed to a contrary position. See Assembly of State Parties: Report of the Court on cooperation, para. 66.

\textsuperscript{63} Address of Antonio Cassese, President of the International Criminal Tribunal for the Former Yugoslavia to the United Nations General Assembly, 7 November 1995.
situation or circumstance. Unfortunately, there are no clearly-spelt consequences of a finding of non-cooperation against a state.\textsuperscript{64} These circumstances appear to significantly weaken the reach of the limbs that are ever so necessary for the effective functioning of ICC.

IV. The Conflict between Cooperation and Immunities Regimes under the Statute

\textit{i. The incumbent head of state}

The conflict between the cooperation and immunities regime under the Rome Statute is noticeable with respect to a sitting head of state alleged to have committed crimes within the jurisdiction of ICC and who is thereby facing a criminal prosecution under the Rome Statute.

We have alluded, in section IV above, to the specific cooperation requirements under the Rome Statute. We noted, there, that state cooperation with ICC is essential to the effectiveness of the Rome Statute. Consequently, states that are parties to the Rome Statute or with whom ICC has entered into special agreements are bound by specific obligations. States that default on these obligations would practically be ‘hijacking’ international criminal justice.

An incumbent head of state has significant powers in meeting the cooperation obligations. While it is acknowledged that the principle of separation of powers is largely upheld in most states in the world, a head of state in a parliamentary democracy who wields significant political power may influence the legislative arm of government.\textsuperscript{65} Although not explicitly recognized under the Rome Statute, there is no denying that the incumbent head of state is a major determinant of the direction of any criminal investigation or prosecution that has an ‘international’ tone to it. For a long period during the development of international law, a state and its rulers were considered as one. This is no longer

\textsuperscript{64} Article 87(7) of the \textit{Rome Statute} only provides that ‘Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.’ It will be noted that there are no penal consequences or measures provided under the Statute for an erring state party.

\textsuperscript{65} In Kenya, the majority of members of Parliament belong to the President’s coalition of parties, Jubilee Party. The Kenyan Parliament has voted to withdraw from the Rome Statute.
the case. The distinction between the state and its head is especially emphasized in the concept of individual criminal responsibility in international criminal law. This distinction, however, is still not crystal clear. Sir Arthur Watts has written that the head of state:

‘Personifies the state, representing its persona to the outside world. As a matter of international law a Head of State possesses the *ius repraesentationis omnimodae*, that is the right to represent the State internationally in all respects, and the competence to act for it internationally, with all his legally relevant acts being attributable to the State.’

Incumbent heads of states permanently represent their state and its unity in foreign relations. According to international law, there is no doubt that every head of state is presumed to be able to act on behalf of the state in its international relations. Undoubtedly, the head of state is the primordial figure through which the state acts in its international relations. The state cooperation obligations under the Rome Statute are primarily fulfilled through the positive act of the sitting head of state as the symbol of the state. This is true not only at a theoretical level but also at the practical level. The ratification of the Rome Statute, and hence the assumption of the state cooperation obligations is a function heavily dependent on the political will of the executive which is normally headed by the incumbent head of state. The very fulfillment of these obligations, similarly, lies at the hands of the executive branch. With few exceptions, the executive branch rides on the political will of the head of state since in most cases, the members of the executive are direct appointees of the sitting head of state. They are pawns at the hands of the leviathan.

Even if it was disputed that the head of state does not have such a significant role in meeting the state obligations, it may be argued that he or she has a significant say in the running of the government. Such a stake may arise from the very appointment of the members who constitute the governing body or the executive branch. It is not uncommon, outside monarchical systems, that a head of state is simultaneously the head of government. This ultimately, gives them

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70 In Kenya for instance, the President appoints the Cabinet Secretaries who form the Executive arm of the government. These must, however, be approved by the Parliament of Kenya.
the prior right or substantial claim to any exercise of power or fulfillment of obligation in their jurisdiction.\textsuperscript{71}

Immunities are granted to heads of states and other state officials in cognizance of ‘independence and equality of states and the resulting view that no state should claim jurisdiction over another.’\textsuperscript{72} As Foakes observes, immunities ‘have developed to enable officials to carry out their public business free from interference by the exercise of jurisdiction by another state, and thereby to secure the effective and peaceful conduct of international relations.’\textsuperscript{73}

The position in customary international law is that ‘when in the territory of a foreign state, the person of the head of state is inviolable.’\textsuperscript{74} This position is reflected in domestic laws where the head of state is shielded from national investigations and prosecutions so that they can perform their constitutional functions more effectively.

\textit{ii. The conflict}

Let us suppose that an indictment is made against an incumbent head of a state party to the Rome Statute. By ratification of the Rome Statute, such a state has voluntarily surrendered the immunities proper to its officials and undertaken the cooperation obligations with ICC. That is as far as the theory goes. Tremendous difficulties are encountered throughout the process of investigation and prosecution of the head of state supposing that he or she remains the legitimate head during these processes.

It is not illogical to observe that if such a head of state has sufficient political hold on the executive branch of government, he or she may frustrate any positive cooperation efforts by that arm of government. The assumption that the head of state has sufficient political might over the executive branch is particularly strong where he or she is democratically elected. It would take a very ‘politically independent’ executive to comply with the cooperation obligations where it is likely that the head of that executive branch maybe subject to proceed-


\textsuperscript{72} Foakes J, ‘Immunity for international crimes?’ 4.

\textsuperscript{73} Foakes J, ‘Immunity for international crimes?’ 4.

\textsuperscript{74} See Fox and Webb, \textit{The law of state immunity}, 545 referring to the 2001 Vancouver Resolution of the Institut de Droit International, Article 1 of Part 1 on Serving Heads of States.
ings under ICC. It is rather difficult for an executive appointed by the head of state to shoot itself in the foot, let alone in the head.

Indeed, the Kenyan situation in ICC has presented the clearest instance of this conflict. The question of Kenya’s cooperation with ICC gained even greater concern with the election of Uhuru Kenyatta and William Samoei Ruto as president and deputy president respectively. During the Status Conference of Uhuru Kenyatta’s case, the Common Legal Representative of the Victims (CLRV) alleged in his submissions that,

‘The Accused is Head of State and Head of Government. He has simultaneously presided over ...a policy of obstruction of access to evidence by the International Criminal Court (ICC) which has impeded the emergence of truth at the international level, the deliberate non-prosecution of post-election violence crimes in Kenya.’

The Prosecution has made the following allegations in Uhuru Kenyatta’s respect,

‘[U]nder the Kenyan Constitution, the Head of State is responsible for compliance with international obligations; Mr Kenyatta is therefore ultimately responsible for the Kenyan Government’s failure to cooperate with the Court.’

In response, the Kenyan Government asserted that it had complied with its obligations under the Rome Statute in good faith and in a practical and effect manner.

The ICC Trial Chamber V(B) made the observation that the political influence of a head of state and their constitutional functions as such may be valid factors ‘worthy of serious consideration in circumstances where it had been established that there is a realistic prospect of sufficient, concrete evidence being secured.’ By this observation, the Trial Chamber acknowledges that a relationship may be established between an accused head of state and the cooperation obligations of their state merely on the nature of the evidence sought.

There is something to be said about the separation of the person from the office of the head of state which is at the basis of the distinction between immunity *ratione personae* and immunity *ratione materiae*. This distinction appears at first glance to offer a solution to the conflict highlighted above with regards to an incumbent head of state. This distinction bears a similar rationale with individual

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76 Prosecutor v Uhuru Muigai Kenyatta (Decision on Prosecution’s application for a further adjournment) ICC-01/09-02/11, 3 December 2014.
criminal responsibility which we have highlighted in section III above. The difficulty, however, arises from a practical point of view. When does this distinction occur? An international criminal trial process as envisaged by the Rome Statute encompasses various stages such as preliminary examination, investigation, prosecution, trial, appeal and post-appeal processes. It is quite difficult to ascertain when the distinction between the person of the head of state and the office of the head of state occurs during the international criminal process? Does it only arise at the time of issuing an indictment to the sitting head of state or does it arise during the investigatory stages?

The denial of immunity under the Rome Statute causes serious tension with the equally important cooperation obligations. This tension is especially manifest with respect to an incumbent head of state, the foremost person upon whom, the obligations of the state (including the cooperation obligations) lies and the same person with the greatest entitlement to the immunities within the state.

Finally, regional and international politics aggravates the perceived conflict. It will be noted that ICC has had its fair share of political mudslinging. Kiyani observes that, ‘Concerns about the neutrality and impartiality of the ICC pre-date and exist independently of the Darfur situation.’ There have been accusations against ICC of bias and impropriety in its functions, with the al-Bashir case offered as a case-in-point. Amnesty International criticized ICC’s decision not to investigate alleged Israeli war crimes referred to it by the Palestinian Authorities and said that this ‘opened the court to accusations of political bias.’ The African Union has contested on a number of occasions the decisions of ICC and stated that its members would not cooperate with ICC. Threats of mass

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80 See Kiyani A, ‘Al-Bashir & the ICC’, 494 text to note 128 making reference to the following decisions:
   • Decision on the Abuse of the Principle of Universal Jurisdiction, Doc. Assembly/AU/Dec.243 (XIII) (3 July 2009) (AU Dec. 243) and
withdrawal from the Rome Statute are not strange at ICC. Such political contests between ICC and states or regional bodies are likely to attenuate the conflict especially when a head of state whose state belongs to the regional body is sought to be indicted. Such conflicts are to be observed with respect to the Al-Bashir and Kenyatta cases as well.

**iii. The effect of the conflict**

The tension highlighted above puts into prejudice the fair trial rights of an accused head of state. One of the fair trial rights guaranteed under Article 63 of the Rome Statute is the right to be tried without undue delay. This right requires, as a corollary, expeditious investigation and presentation of evidence to ICC. It demands a speedy and efficient judicial process.

It cannot be denied that the head of state bears immense political weight both within and usually without their state. Any judicial process that proposes to involve a head of state has to take into consideration the political consequences that may result from such an action. It is almost impossible to distinguish the accused person of the head of state from the central political piece of a state’s political matrix. Not only is a proposed judicial process against a sitting head of state a perceived threat against the political sphere but it may also be perceived as a threat against the state itself.

Amidst these perceived threats, national authorities and responsible government departments are unwilling to cooperate with the requests of ICC. This has an adverse impact to the investigation efforts by the prosecution which means that pending cases may stall until such a time when proper and ‘comprehensive investigations’ are made. Pending cases before a court of such international character as ICC is rather discomforting to the political situation of a sitting head. It may cause anxiety in the state. It may disturb foreign relations or engagements with other states. Even more importantly, and for the purpose of this paper, the expeditious trial rights of the head of state regarded as the subject of protection under the Article 67 of the Rome Statute and the International Covenant on Civil and Political Rights; maybe forgotten or ignored in the tension referred to above.

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Assembly/AU/Dec. 334 (XVI) (31 January 2011) (AU Dec. 334);
V. Conclusion and Recommendations

i. The prior norm

The norms or principles in conflict here, are recognized in international law. Immunities and privileges are instruments at the service of foreign relations and international comity. The cooperation obligations are an essential feature in the configuration of the international criminal justice system. As we have highlighted above, there appears to be a serious tension between these norms with respect to an incumbent head of state who is at the same time an accused person.

In the author’s view, the cooperation norm ranks prior to the immunities regime at least in the context of the international law of the present days (from which we cannot alienate the developing corpus of international criminal law) and must give way to it. The cooperation regime is a recent innovation under international criminal law and which, therefore, can be said to be more attuned to the necessities of this day and age. The immunities regime which has developed extensively under customary international law may not have anticipated such crimes as international crimes being committed by those in the high seats of power. These crimes that are appalling to the conscience of humankind and are a direct threat to humanity and as such, place an obligation on all states to condemn them and effectuate all mechanisms to bring those culpable to justice.

This paper will now make reference to the grundnorm proposed earlier – the fight against impunity as the central norm of the current international criminal regime. It appears that the cooperation regime (cooperation norm) is more directly related to the grundnorm as it ensures the effectiveness of the machine established for the very purpose of curing the disease of impunity. The immunities regime is less so related since its aim is actually contrary to the basic tenets of the grundnorm – the immunities norm exempts the relevant persons to whom it applies from the reach of the mechanism against impunity. This, however, does not take for granted the fundamental importance of the immunities norm in preserving smooth foreign relations and international comity. This argument, however, does not materially alter the relation of the immunities norm to the grundnorm vis-à-vis the cooperation regime. In most cases, it is likely that the cooperation regime, if successfully applied, may be more effective in sustaining peace and international comity by bringing justice to victims and bringing the abusive regime to justice.

81 The cooperation regime was introduced by the hybrid tribunals and the permanent ICC in the 1990s.
The fight against impunity demands that sacrifices be made at the level of the state party to the Rome Statute. State cooperation with ICC is an essential aspect towards this object. In this manner, the Rome Statute proves to be ‘too deferential to the prerogatives of state sovereignty.’ The very attempt, however, to prosecute incumbent heads of states introduces an anticipated tension which not only defeats cooperation efforts with the state in question but seriously prejudices the incumbent head of state’s right to an expeditious trial.

**ii. Recommendations**

To avoid the undesirable situation of stalling cooperation efforts and the resultant delays and uncertainty attending pending investigations and prosecutions at ICC, its structure as it stands must be remodeled to ensure that the *grundnorm* of fighting impunity of international crimes is most effectively achieved. Otherwise, a different prosecution strategy should be adopted as a matter of policy to ensure that comprehensive investigations are undertaken in a situation country without serious political obstacles.

The recommended model is one that radically reduces the role of the situation state in the investigation and prosecution of international crimes. As explained above, the result of the cooperation regime under the Rome Statute is to give the state a significant stake in determining the direction of the international criminal trial process. This should be reversed – the state in question should have minimal, if any, involvement in the process. The following points should be taken into consideration in drafting such a model:

1. To preserve the independence and impartiality of ICC, it is necessary to ensure that adequate resources are channeled to the institution;

2. The Assembly of State Parties should establish an institution within the ICC Registry solely charged with the investigative functions in situation countries. This institution should be funded by donations, grants and contributions from state parties as well as any other states or organizations that identify with the cause of the Rome Statute;

3. The cooperation procedures and obligations under the Rome Statute should be replaced with the provisions regarding the operation of the institution recommended to be established above; and

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4. Every state party should be required, at the time of ratification or later, to establish a liaison office with the institution which is funded through a joint partnership with the state. It will be noted that, at a practical level, what is proposed here is akin to an entirely new international organization with its own ‘arms’ and ‘limbs’. It is rather difficult to imagine an organization that does not depend on states for funding of its operations. Ultimately, states and the entire international community retain the say on how such a structure would be run and organized.

This challenge could be addressed by the practice of issuing sealed indictments by ICC to ensure that the highest level of confidence is maintained. This means that the prosecution would proceed with the investigation into a situation or case without disclosing the details of the indictees to the situation country. After thorough investigations, the indictments can be unsealed at which point the prosecution would be ready for trial. Prosecution strategies may also need to be restructured to ensure that cases are prosecuted from the direct perpetrators to the superiors to ensure that cooperation with the situation state is secured beforehand. The prosecution may, subsequently, link the superiors by using the evidence proving the culpability of the direct and indirect perpetrators – tracing the command structure of the alleged crimes.

It is hoped that these recommendations would have the effect of annulling the state’s role in the international criminal trial process and hence the likelihood of hijacking such a process. By setting up an independent institution within ICC’s structure to undertake investigations for ICC, the role of the state would have been effectively reduced to ratification of the Rome Statute and the establishment of the liaison office. This would avoid any conflict between competing rules in international law and allow for the attainment of the grundnorm of international criminal law.

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83 This practice of issuing sealed indictments was adopted by the ICTY Prosecutor’s office upon realizing that publishing indictments and generating media attention proved to be ineffective, as did the practice of announcing indictments in open proceedings designed to highlight failures to arrest suspects. When accused learned of the existence of warrants for their arrest, it was not uncommon for them to go into hiding, sometimes in territories where they received protection. See ICTY in conjunction with UNICRI, ICTY manual on developed practices, 2009, 41-42.
Walking the Tight Rope: Balancing the Property Rights of Individuals with the Right to Housing of Informal Settlers

Doris Matu*

Abstract

The Constitution of Kenya, 2010 provides for the right to property in Article 40. Further, in Article 43 (1)(b), it provides for the right to accessible and adequate housing. The purpose of this article is to show the conflict that arises between the right to property for owners of land and the right to housing of the informal settlers living on these privately owned lands. The main objective is to investigate the concept of illegal forced evictions and the legal framework that surrounds the practices that render such evictions against the principle of human dignity and the right to accessible and adequate housing in the context of informal settlements. The 2010 Constitution states that every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom. This renders important the concern that arises when persons informally settle onto land that they have no legal title to; what is the balance to be maintained between property rights and housing rights as provided for in the Bill of Rights.

I. Introduction

Those who live in informal settlements have no positive right under current Kenyan law to reside on the land they occupy.¹ In almost all cases, they have no alternative option since informal settlements represent the only means by which

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¹ Informal settlers may acquire the legal title to occupy the land if 12 years pass without any interruption from the owner of the land – doctrine of adverse possession; Section 7 of the Limitation of Actions Act (Chapter 22, Laws of Kenya) bars an action by any person to recover land after the end of twelve years from the date on which the right of action accrued to him.
they can realise their human rights, including work and housing.\(^2\) In *Satrose Ayuma & 11 Others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 Others*\(^3\) (hereinafter the *Satrose Ayuma Case*), the first petitioner and other residents of Muthurwa estate were evicted from the premises they had been informally settling in. The residents of Kibera and Mukuru slums have similarly been forcefully evicted from their homes\(^4\) and so were the residents of Komora settlement within Savannah area.\(^5\)

Any evictions that are carried out without due regard to constitutional requirements are illegal.\(^6\) Those that lack the proper involvement of all the persons to be affected and adequate notice of the evictions are illegal and against the whole substratum of human rights. The Basic Principles and Guidelines on Development Based Evictions and Displacement, however, exclude forced evictions which are carried out in accordance with the law and in conformity with the provisions of international human rights treaties from prohibition.\(^7\)

There is a prevalence of informal settlements due to the failure of state mechanisms to address the core issues that result in the occurrence of these settlements. Hence, the eviction of the informal settlers does no good and only results in the evictees gathering elsewhere and forming more informal settlements.\(^8\)

The Constitution of Kenya, 2010 (hereinafter the *2010 Constitution*), entitles every person, either individually or in association with others, to acquire and own property of any description and in any part of Kenya. In addition to this provision, the 2010 Constitution goes on to prohibit the enactment of legislation that would deprive, limit or restrict in any way the enjoyment of such property.\(^9\) Property, for purposes of this discussion, is limited to the interests in land re-

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\(^3\) The High Court of Kenya at Nairobi, The Constitutional and Human Rights Division (Petition No. 65 of 2010).

\(^4\) *Kepha Omondi Onjuru & Others v Attorney General & 5 Others* (2015) eKLR.


\(^6\) Article 10, *Constitution of Kenya* (2010) calls for the due exercise of the principles of governance. The principles that have a bearing on eviction procedures include: the rule of law, participation of the people, human dignity and human rights, equity and accountability.

\(^7\) Basic Principles and Guidelines on Development Based Evictions and Displacement, Annex 1 of the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living (A/HRC/4/18), 3.


sources as alluded to in the interpretation of the 2010 Constitution. Further, Article 43 (1)(b) provides for the right to accessible and adequate housing.

The right to housing directly conflicts with the right to private property in the case of informal settlements on private land. Therefore, since the right to housing and the right to property are both legitimate rights, it is necessary that there is a balance between these rights especially with regard to their enforcement in relation to lands which have informal settlements. It is imperative that justice is done and the poor are protected from the adversities of homelessness while it is also pertinent that the owners of land are guaranteed protection of the property they own. The problem is that the courts are seemingly unable to balance between the two rights and seem to lean towards the right to property and hence the prevalence of evictions from informal settlements.

This article meets pursues these objectives through the following questions: what is the international and national framework on protection from forceful evictions? What is the international and national framework on the protection of the right to own land, property and protection from deprivation of this right? What is the extent to which a balance between the above two rights can be achieved?

In order to complete the research on the conflict between the rights to private property and the implementation of the right to housing for squatters, the paper adopts the doctrinal research method, which involves the analysis of legal rules and formation of doctrines. The analysis of legal rules in this case is towards the investigation of the framework that regulates forced evictions in Kenya and the right to housing in the informal settlement sector. It also analyses the obligations of states with regard to the right to housing and the protection of property.

The law does not always have the answers to the practical problems in society. Therefore, in this case, it is imperative that the fundamental research method is applied as a supplement to the solution of the problem that arises in the analysis of the black-letter law (where a study of the law and its rules does not provide a solution to a certain social phenomenon). Here, an analysis of the

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law and its application is carried out within a particular social context. The specific context in this case is the evictions from informal settlements.

Section II of this paper discusses the legal theories that support the analysis of the issues identified in the research. Section III encompasses a review of the legal framework that regulates evictions in Kenya. The Section analyses the international framework and enquires whether these measures have been adopted in the municipal jurisdiction and if so, whether or not they have been effective. Section IV consists of an analysis of the justifications for private property. It investigates the framework governing the right to property in Kenya and under international law. Section V seeks to find out whether courts have been able to balance the rights of private land owners with those of possible evictees who settle into land they have no legal title to. Section VI gives a brief conclusion of all the issues arising from the body of this article while Section VII makes recommendations to correct the evictions problem and the resulting situations of homelessness.

II. Theoretical Framework

The idea behind international human rights instruments is that there is something about each and ‘every human being, simply by virtue of being a human being’ that dictates that certain choices should be made while others should be totally abandoned. The concept of every human being having human rights by virtue of being a human being has been alluded to in the Universal Declaration of Human Rights (hereinafter UDHR) to the effect that no discrimination is to be exercised in the acquisition of any of the freedoms and rights therein. The relevant attribute upon which each and every human being possesses human rights is the inherent dignity of each member of the human family.

Economic, social and cultural rights (hereinafter ESCRs), a subset of human rights, are defined as the rights concerned with the material bases of the
well-being of individuals and communities, that is, rights aimed at securing the basic quality of life for the members of a particular society. These rights are aimed at ensuring that human beings have the ability to obtain and maintain a decent standard of living consistent with their human dignity. Their protection is embedded on the principle of dignity which affirms that people who are deprived of these rights are denied of the opportunity to live their lives with dignity.

i. Progressive realisation of economic, social and cultural rights

The 2010 Constitution has prescribed that these rights can only be materialised over the course of time and depending on the resources available for those purposes. Progressive realisation would then require that states strive to fulfil, observe, protect and promote these rights to the fullest extent possible even in the midst of financial challenges, as is often the case in developing nations. Countries with more money therefore have a greater duty to ensure that these rights are realised. The determinant for a country’s success is the collective rights that are actually enjoyed by the people as measured against the resource capabilities of the State in question.

Even though states are given the leeway to progressively achieve their mandate towards ESCRs, this by no means, implies that States are completely exempted from carrying out their duties. This cannot consequently be employed as a tactic for non-compliance with obligations. As noted by Sepúlveda,
progressive realisation entails twin obligations; that of ensuring that there is continuous improvement of the situation that the right seeks to protect and the abstinence from deliberately employing retrogressive measures to the fulfilment of ESCRs.24

In Mitubell Welfare Society v Attorney General and 2 Others,25 Ngugi J stated as follows:

‘The argument that social economic rights cannot be claimed at this point, two years after the promulgation of the Constitution also ignores the fact that no provision of the Constitution is intended to wait until the State feels it is ready to meet its constitutional obligations. Article 21 and 43 require that there should be ‘progressive realisation’ of social economic rights, implying that the State must begin to take steps, and I might add, be seen to take steps, towards realization of these rights.’

Alston has argued that the legal implication of terming ESCRs as rights is that there must arise from them some minimum entitlements whose absence would render that a violation under the International Covenant on Economic, Social and Cultural Rights ICESCR26 (hereinafter ICESCR). These minimum entitlements are to be accorded, as a matter of priority, to the most vulnerable members of the society.27 The United Nations Committee on Economic, Social and Cultural Rights (hereinafter CESCR) noted that if ICESCR were to be read in a manner as not to establish a minimum core obligation, it would be largely deprived of its raison d’être. Consequently, any evaluation as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned.28

The challenge, as identified by Young, is in the application of the concept of minimum core where basic questions have gone unanswered. These questions include the following: whether the minimum core is country or region specific? Is the minimum core of one country the same as that of the other? Is it context specific or does it employ an overall or generalised application mode? More

25 Petition No.164 of 2011 (emphasis added).
28 General Comment No. 3, para. 10.
importantly, who gets to decide what it is?\textsuperscript{29} This notwithstanding, the minimum core approach has been hailed as being able to facilitate the courts’ more stringent evaluation of the state’s defences for non-realisation of minimum obligations of the most vulnerable members of society and the ability of the courts to give a more detailed timeline of compliance.\textsuperscript{30}

\textit{ii. The use of the reasonableness approach to ESCRs}

The issue at hand when the courts apply the reasonableness approach is whether the policies and directives employed by governments are \textit{reasonably capable} of facilitating the realisation of the socioeconomic rights in question. The court’s approach is designed to allow government a margin of discretion to contend that the specific policy choices adopted have given effect to ESCRs: \textsuperscript{31}

‘A Court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.’\textsuperscript{32}

In the same vein, O’Regan J asserted that the purpose of the reasonableness standard was to show that the Court required that the duty holder of the right in question performs their obligations with reasonableness. There was need to balance between ensuring that the State (the duty holder in this case) carried out its constitutional mandate and leaving the State with the freedom to choose the most appropriate form of action to take.\textsuperscript{33}

Alston and Quinn have written that the State must take steps towards ensuring the realisation of ESCRs and this has been espoused as an immediate

\textsuperscript{29} Young KG, ‘The minimum core of economic and social rights: A concept in search of content’ 33 The Yale Journal of International Law (2008), 114-115.
\textsuperscript{32} Government of the RSA v Grootboom 2001 1 SA 46 (CC), 2000 11 BCLR 1169 (CC), para 41.
\textsuperscript{33} Rail Commuters Action Group v Transet Limited t/a Metrotrail 2005 2 SA 359 (CC), 2005 4 BCLR 301 (CC), para 87.
The obligation requires that the State undertake deliberate, concrete and targeted steps aimed at, and capable of fully realising, these rights. The South African Constitutional Court has rendered its opinion on the reasonableness criteria and it has held that the approach encapsulates a set of various criteria that must be evaluated before the measures taken by the state can be deemed to have been reasonable in its quest to fulfil its obligation. These measures must be comprehensive, coherent and coordinated, and must also be properly conceived and implemented; be inclusive, balanced, flexible and make appropriate short, medium and long term provisions for people in desperate need or in crisis situations, whose ability to enjoy all human rights is most in peril; clearly set out responsibilities of the different spheres of government and ensure that financial and human resources are available for their implementation; be tailored to the particular context in which they are to apply and take account of the different economic levels in society; be continuously reviewed to corresponding changes in society; be transparent and have its contents made known appropriately and effectively to the public; and allow for meaningful or reasonable engagement with the public or affected people and communities. The Court noted that these factors were not exhaustive and more had to be considered varying on a case-to-case basis.

### iii. Conceptual framework

Research in this paper shall adopt an integrated approach to analyse the extent to which a balance between the right to property and the right to housing has been carried out by the courts. It shall incorporate the progressive realisation mechanism to analyse whether states have done anything to achieve the obligations set in law for the guaranteeing of the right to housing within the context of the conflict that arises with the right to private property; whether the policies and directives issued by the government to try and protect and promote these rights have been reasonable in the specific context and whether any failure by the State to progressively and reasonably achieve its obligations with regards to housing...
is what has led to the persistent forced evictions and the seeming favour of the land owners.

The importance of the use of the purposive rule of interpretation with regard to the Bill of Rights and especially the ESCRs in the quest to realise the transformative potential of the 2010 Constitution shall be restated. This shall be with immense reflection on Kenya’s historical injustices especially with land resources and reckless allocation that caused many to be left landless and land to belong only to a chosen few. This integrated approach also involves viewing of the Bill of Rights with generosity and with the possibility of the widest possible application. This has been endorsed by the courts in Kenya where the High Court in the *Federation of Women Lawyers (FIDA-K) & 5 Others v Attorney General & Another* held that the Bill of Rights has to be interpreted in such a way that gives the maximum benefit of the rights protected therein considering the social conditions, experiences and perception of the people of this country. The 2010 Constitution, at various instances, indicates this growing need to ensure that the rights are interpreted and enforced in a manner that brings greatest benefit to the benefit holders and that promotes the dignity of individuals and communities.

There is then the right to property that seemingly conflicts with the right to housing in the case of informal settlements; every person has the right to own property of any description and anywhere in the country. Blackstone famously stated that;

‘There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.’

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40 High Court Petition No. 102 of 2011.
41 *Federation of Women Lawyers case, Federation of Women Lawyers (FIDA-K) & 5 Others v Attorney General & Another* High Court Petition No. 102 of 2011, 9, 17.
42 Articles 19 (2); 20 (3)(b), (5)(b); 259 (1), Constitution of Kenya, (2010).
43 Article 40, Constitution of Kenya (2010); Article 260, Constitution of Kenya (2010) describes property to include: (a) land, or permanent fixtures on, or improvements to, land; (b) goods or personal property; these delineations are most paramount as evictions tend to affect the fixed structures on the land and the personal belongings of those being evicted.
Kameri-Mbote contends that to determine the effectiveness of the property system in Kenya, there needs to be an evaluation of various social relationships and how they have been impacted upon by the institution of property and whether social dimensions that greatly affect its efficiency are adequately considered. She employs the use of four criteria to determine this evaluation: stability, predictability, justice and fairness.45

This is important in analysing the effect of proposed evictions on the relationship between the private land owners or the government and the evictees. Further, these four markers may also prove useful in addressing the various competing interests at play – the right to enjoy private property and the right to housing and the freedom from evictions.

### III. The Legal Framework Regulating Forced Evictions

Forced evictions are defined as the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land that they occupy, without the provision of, and access to, appropriate forms of legal or other protection.46 This practice inevitably affects the rights of persons. The rights affected include other rights and not solely restricted to the right to housing, and this is because human rights are interdependent.47 The practice of forced evictions that is contrary to the required laws in conformity with international human rights standards constitutes a gross violation of a broad range of human rights, in particular the right to adequate housing.48

Forced evictions are carried out in both developed and developing countries, in all regions of the world. Often these are large-scale evictions, where entire communities of tens or even hundreds of thousands of people are removed. Most of the victims are usually the indigent living in informal settlements. The effect on the lives of those evicted is devastating, leaving them without homes and subject to deeper poverty, discrimination and social exclusion. Such communities are invariably evicted against their will, and in most cases, without any compensation or alternative housing.49

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46 General Comment No. 7: The right to adequate housing (Article 11.1): forced evictions, para. 3.

47 General Comment No. 7, para 4.


i. International law regulating the practice of evictions

One result of the promulgation and implementation of the 2010 Constitution was the concept of application of the general rules of international law and any treaties and conventions ratified by Kenya, which are now part and parcel of the legal framework of Kenya in the various legal fields.50

The International Covenant on Civil and Political Rights51 (hereinafter ICCPR) prescribes for individual freedom against ‘arbitrary or unlawful interference’ with the home, and also provides that all persons are equal before the law and are entitled, without any discrimination, to the equal protection of the law.52 One of the key things that the State is required to do in the case that persons are facing evictions is to ensure that alternative housing is provided to those who would inevitably end up homeless.53 Additionally, General Comment No. 7 on the right to housing (forced evictions) by CESCR also calls for appropriate measures of protection and due process in the event that evictions are carried out. The procedures recommended are:

i) an opportunity for genuine consultation with those affected;54

ii) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction;

iii) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected especially where groups of people are involved,

iv) government officials or their representatives and neutral parties are to be present during an eviction;


51 The International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

52 Article 17, International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

53 General Comment No. 7, para. 13; Susan Waithera Kariuki v The Town Clerk, Nairobi City Council, High Court of Kenya, Nairobi, Petition No. 66 of 2010 (2011) KLR 1, 9; Chenwi L, ‘Putting flesh on the skeleton: South African judicial enforcement of the right to adequate housing of those subject to evictions’ 8 Human Rights Law Review, 1 (2008), 128.

54 Yacoob J noted the importance of consultations with the affected persons in Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg (2008) ZACC 1 stating that it has the potential to contribute towards the resolution of disputes and to increased understanding and care if both sides are willing to participate in the process.
v) all persons carrying out the eviction to be properly identified;

vi) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise;

vii) provision of legal remedies; and

viii) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.\textsuperscript{55}

Juma notes that stemming from the legal definition of the term forced evictions is a two-pronged objective clause: the prevention of evictions and the protection of evictees.\textsuperscript{56} The prevention of evictions has been identified with the term legal security of tenure which CESCR described as a factor that ought to be taken into consideration when determining whether or not there is adequacy in housing and by implication the regulation of the extent to which evictions could have a bearing on security of tenure and the right to housing.

General Comment No 4 has opined that regardless of whether an individual is occupying any house or piece of land as a rental (public and private) accommodation, or on a lease, as an owner, or as part of emergency housing and informal settlements, every person should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. States parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups.\textsuperscript{57}

With regard to the protection of evictees objective, the Commission on Human Rights stated that the practice of forced evictions violated human rights and particularly the right to housing.\textsuperscript{58} Additionally, the Commission on Human Rights recommended that evictions which are determined to be lawful be carried out in a manner that does not violate any of the human rights of those evicted.\textsuperscript{59}

\textsuperscript{55} General Comment No 7, para. 15 (emphasis added); Basic principles and guidelines on development-based evictions and displacement, Annex 1 of the Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, A/HRC/4/18, paras. 37-59.

\textsuperscript{56} Juma L, ‘Nothing but a mass of debris’, 492.

\textsuperscript{57} General Comment No. 4: The Right to Adequate Housing (Article 11 (1) of the Covenant), para. 8 (a).

\textsuperscript{58} Commission on Human Rights Resolution 1993/77, para 1.

\textsuperscript{59} Preamble to Resolution 2004/28.
As for local legislation, the Eviction and Resettlement Bill\(^{60}\) has provided as mandatory some requirements that are to be met during the procedure of evictions.\(^{61}\) It is worth noting that the regulations contained therein cannot be upheld as the Bill has not been passed in parliament and this has caused increased injustice with regard to the practice of evictions in this country due to the lack of a legislative mechanism to govern the conundrum that has become forced evictions. However, this could be a direction as to possible future action on evictions in Kenya.

The prohibition of forced evictions is a legal measure that can be taken immediately and is not dependent on resources. Lack of title and residency in informal settlements are often used as a justification for forced evictions. However, respect for human rights is independent from a particular status, including ownership. A state unable to fulfil the right to adequate housing for all should consider various solutions, including allowing people to provide some level of housing on their own, even if this is done through the creation of informal settlements. States are also obliged to take immediate measures aimed at conferring legal security of tenure on those persons and households currently lacking such protection, in genuine consultation with them.\(^{62}\)

\(\text{ii. What constitutes the right to housing?}\)

CESCR has held the view that the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one’s head or views shelter exclusively as a commodity. Instead, it should be seen as the right to live somewhere securely, peacefully and with dignity. This approach is appropriate for at least two reasons. In the first place, the right to housing is integrally linked to other human rights and to the fundamental principles upon which ICESCR is premised. The inherent dignity of the human person from which the rights in ICESCR are said to derive requires that ‘housing’ be interpreted so as to be alive to a variety of other considerations, most importantly that the right to housing should be ensured to all persons irrespective of income or access to economic resources. Secondly, the reference in Article 11 (1) of ICESCR must be read as referring to adequate housing and not just to housing.\(^{63}\)

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\(^{60}\) The Evictions and Resettlement Bill, 2014.

\(^{61}\) The Bill requires that there is notice of at least 30 days to those who are to be evicted, adequate consultations with regards to the issue of resettlement, a private land owner cannot evict any persons on his land without a court order.


\(^{63}\) General Comment No. 4, para 7.
The 2010 Constitution prescribes that every person has the right to accessible and adequate housing.\textsuperscript{64} The Court in \textit{Susan Waithera Kariniki v the Town Clerk, Nairobi City Council}\textsuperscript{65} acknowledged that the 2010 Constitution was inadequate to the extent that it lacked a precise definition or description of the concept of ‘adequate housing’.

Several factors have been identified that are required for consideration in order to determine whether housing is adequate or not. These are: legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location and cultural adequacy.\textsuperscript{66} Legal security of tenure embodies the benefits in the bundle of rights that would presumably shield an owner of property from forced eviction. The idea seems to be that all persons should have some form of security that guarantees them legal protection against forced eviction. This means that the right to housing places a positive obligation on states to ensure that informal settlements are secure places of residence and that persons living there are protected.\textsuperscript{67} The lack of secure tenure has been identified by the Government of Kenya as the greatest danger to persons living in informal settlements.\textsuperscript{68}

IV. The Right to Property

i. Property defined/ land as property

Property has a diverse number of meanings that can be ascribed to it. To the ordinary person, property is simply a thing represented in the physical \textit{res}.\textsuperscript{69} It was thus defined as: ‘… any external object over which the right of property is exercised. In this sense it is a very wide term, and includes every class of acquisitions which a man can own or have an interest in.’\textsuperscript{70}

Legally, property is seen as a mental concept, an expectation that the property owner has of being able to enjoy a certain advantage from that which is pos-

\textsuperscript{64} Article 43 (1)(b), Constitution of Kenya, (2010).
\textsuperscript{65} Susan Waithera Kariniki & 4 others v Town Clerk, Nairobi City Council & 2 others (2011) eKLR, Petition Case No 66 of 2010, 5.
\textsuperscript{66} General Comment No. 4, para 8.
\textsuperscript{67} Juma L, ‘Nothing but a debris’, 482.
\textsuperscript{68} Amnesty International, Kenya - The unseen majority: Nairobi’s two million slum dwellers (2009).
\textsuperscript{70} Wilson v Ward Lumber Co (1895) 67 Federal Reporter, 677.
sessed. This expectation can only be strong and permanent by guarantee of the law.\textsuperscript{71} To this end, the owner of private land is only able to enjoy his land if the law can guarantee the protection of this right.

Blackstone wrote that property is that sole and despotic dominion which one man claims and exercises over the external things of the world in total exclusion of the right of any other individual in the universe.\textsuperscript{72} Hohfeld on his part stated that the legal concept of property was not comprised only of rights but also entailed powers and privileges.\textsuperscript{73}

Conversely, property is also conceived as a set of interests or bundle that can be enjoyed by the holder.

‘The term property, although in common parlance frequently applied to a tract of land or a chattel, in its legal signification means only the rights of the owner in relation to it. It denotes a right over a determinate thing. Property is the right of any person to possess, use, enjoy, and dispose of a thing.’\textsuperscript{74}

Property is now, more and more, primarily seen as an amalgamation of various legal relations between persons and only consequentially as relating to certain physical objects. There is no fixed meaning of property.\textsuperscript{75} Honoré posited that the bundle of rights existed as incidents of ownership or property. These incidences include the following: the right to possess, use, manage, to the income of the thing, capital, security, transmissibility and absence of term, prohibition of harmful use and the liability to execution and the incident of residuarity.\textsuperscript{76}

Bell and Parchomovskv have argued that only assets which have the capacity to enhance social welfare through stable ownership should be brought under the ambit of the law.\textsuperscript{77} This is important for the consideration of land as property, particularly in Kenya where it is a key economic and social factor that caters to the needs of many\textsuperscript{78} and has been at the centre of violence that has rocked the country.

\begin{thebibliography}{99}
\bibitem{HohfeldW} Hohfeld W, ‘Fundamental legal conceptions as applied in judicial reasoning’ \textit{Yale Law School Faculty Scholarship Series}, Paper 4378, (1917), 717.
\bibitem{EatonvBCCRCo} Eaton v B C & M R Co, (1872) 51 New Hampshire, 511.
\end{thebibliography}
In light of this noted prominence of land utility in Kenya, it is worth noting the words of the scholar Epstein who stated that the right to property embraced the idea of the right to exclude.\textsuperscript{79} The right to exclude has even been argued to be the \textit{sine qua non} of the property rights legal framework; without it, there is essentially no right to property.\textsuperscript{80} This may be a justification for the prevalence of the need of private land owners to want to evict informal settlers from their lands because they deem this to be a power that comes with the right to property that they hold due to their ownership of the land. Property rights are good against the world\textsuperscript{81} and may hence be employed as a basis to evict any persons from lands that are privately owned.

Property exists for many reasons but essentially to govern the conflicts that arise in the set of legal relationships between various persons in relation to things. The property regimes mediate the various conflicting interests by allocating exclusive rights.\textsuperscript{82} A property law system urges decision makers (land owners) to consider not only their self – interests but also the needs and concerns of other individuals.\textsuperscript{83}

\textbf{ii. Protection of the right to property}

\textbf{a. International Law & Regional Human Rights Instruments}

International law instruments that have been ratified by Kenya are part of the law of the country by virtue of Article 2(6) of the 2010 Constitution. Other general principles of international law are also part of the municipal law by virtue of Article 2(5) of the 2010 Constitution.

UDHR proclaimed that, ‘everyone has the right to own property alone as well as in association with others’ and that ‘no one shall be arbitrarily deprived of his property.’\textsuperscript{84} The International Convention on the Elimination of All Forms of Racial Discrimination stipulates a general undertaking of State parties to eliminate racial discrimination and guarantee ‘the right to own property alone as well

\begin{footnotesize}
\textsuperscript{80} Merrill T, ‘Property and the right to exclude’, 730.
\textsuperscript{84} Article 17, \textit{Universal Declaration of Human Rights}.
\end{footnotesize}
as in association with others.\textsuperscript{85} The International Convention on the Elimination of All Forms of Discrimination against Women requires the equal treatment of women and men in respect to ownership of property.\textsuperscript{86} Regionally, the African Charter on Human and Peoples’ Rights (AfCHPR) guarantees the right to property and outlines the public need and general interest of the community as legitimate grounds for limiting the right. The encroachment on the right must also be in ‘accordance with the provisions of appropriate laws’.\textsuperscript{87}

b. Kenyan Law

Under Kenyan law, property is protected under the 2010 Constitution in Article 40 which states that every person has the right, either individually or in association with others, to acquire and own property of any description and in any part of Kenya. Article 260 defines property to include land. Parliament has been barred by the 2010 Constitution from enacting any laws that would allow the State or any other person to arbitrarily deprive a person of property of any description or to limit, or in any way restrict the enjoyment of the right to property. This implicitly means that every person who has acquired land in any part of any country has the right to enjoy his property without the interference of informal settlers who encroach on these lands and subsequently begin to use the land for settlement and housing.

The question, therefore, is to inquire whether the property rights of these individuals are more important than the right to housing of these informal settlers who are usually poor people who have no money to acquire land of their own to prevent evictions from the land.

V. The Balance Between Property Rights and Housing Rights

This section shall meet its objectives by analysis of case law and constitutional provisions with regard to human rights and how courts have attempted to reach a balance between these two rights.


\textsuperscript{86} Articles 15(2) and 16(1)(h), \textit{The International Convention on the Elimination of All Forms of Discrimination against Women}, 18 December 1979, 1249 UNTS 13.

i. Kenyan courts

Prof Ghai submitted in the *Satrose Ayuma Case*\(^{88}\) that the residents of Muthurwa Estate should not have been evicted because it is against human dignity in the context of Kenya’s socio-economic background, and that the 2010 Constitution promotes human dignity and that it was not right for the Respondents to claim property rights since human dignity triumphs over all other rights.\(^{89}\) In this case, the petitioners were evicted from land owned by the respondents. The Court noted that there were competing interests between the petitioners and the respondents as regards the suit premises.\(^{90}\) The Court went on to hold that there had been a violation of the petitioners’ right to housing as the evictions had been carried out inhumanely and against the international minimum standards.\(^{91}\) There had been inadequate notice and insufficient consultation with the affected persons.

In *William Musembi & 13 others v Moi Education Centre Co Ltd & 3 Others*,\(^{92}\) the Court found that the demolition of the petitioners’ houses and their forced eviction by the first, second and third respondents without provision of alternative land or shelter and without the proper sanction of the law was a violation of their fundamental right to inherent human dignity, security of the person, and to accessible and adequate housing. It was stated that evictions just perpetuated a long and never-ending cycle of informal settlements on other peoples’ land. The Court noted thus:

‘Unlike the birds of the air, men, women and children whose dwellings have been demolished will not fly away and perch on a tree, and then begin to rebuild their nests afresh. As most of those evicted from informal settlements are often poor, they become homeless, join the ranks of the dispossessed in the streets, or find another vacant piece of land to put up their shacks and continue with their precarious existence until the next eviction and demolitions.’\(^{93}\)

ii. South African jurisprudence

Although South African cases are not binding precedents in Kenya, they are relied upon in this paper to show the experiences that the courts have had in

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\(^{88}\) *Satrose Ayuma & 11 Others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 Others*, The High Court of Kenya at Nairobi, The Constitutional and Human Rights Division (Petition No. 65 of 2010).

\(^{89}\) *Satrose Ayuma Case*, para 29.

\(^{90}\) *Satrose Ayuma Case*, paras 60-61.

\(^{91}\) UN Basic Principles and Guidelines on Development based Eviction and Displacement (2007).

\(^{92}\) Petition No 264 of 2013, in the High Court of Kenya at Nairobi (2014) eKLR.

\(^{93}\) *Musembi Case*, para 79 (emphasis added).
dealing with the balancing of these rights. Their analysis provides insight of the direction that constitutional courts tend to take when dealing with such matters. The Constitutional Court of South Africa has been instrumental in the development of case law with regard to socio-economic rights such as the right to housing (which is the subject of this discussion).

The content of the Bill of Rights needs to be interpreted in its specific social and historical context within which it is placed. Chaskalson P in Soobramoney v Minister of Health, KwaZulu-Natal (hereinafter the Soobramoney Case) similarly held:

‘We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.’

Based on the above quotation from the judge in the Soobramoney Case, it can be seen that he acknowledges the transformative power of the Constitution to change the situation of the citizens of South Africa living in deplorable conditions and that unless the Constitution realises this potential, it will not have served its purpose of transformation of society as conceived by its makers. As long as society keeps being in a deplorable state, then the Constitution will have failed the test of transformation. It will only be as worth as the paper it is written on and nothing more.

In Modderklip Boerdery (Pty) Ltd v Modder East Squatters and another (hereinafter the Modderklip Case), Modderklip Boerdery (Pty) Limited owned a portion of the farm Modder East, which adjoins Daveyton Township. During the 1990s, due to overcrowding, residents of Daveyton began settling on a strip of land between Daveyton and the farm. This came to be known as the Chris Hani infor-
mal settlement. At the beginning of May 2000, about 400 persons, who had been evicted by the municipality from Chris Hani, moved onto a portion of the farm and erected about 50 shacks. By October 2000, there were about 4,000 residential units inhabited by about 18,000 persons. On 18 October 2000, Modderklip made an application for the eviction of the occupiers under the Prevention of Illegal Eviction and Unlawful Occupation of Land Act. The application, succeeded and Marais J issued an eviction order on 12 April 2001. The occupants were given two months to vacate but they did not heed this notice.

Harms JA agreed with the finding of De Villiers J who had found that the refusal of the occupiers to obey the eviction order amounted to a breach of Modderklip’s right to its property entrenched by section 25(1) of the Bill of Rights, which provides that ‘no one may be deprived of property except in terms of law of general application’. The judge, however, held that the order could not be executed – humanely or otherwise – unless the state provided some alternative land.

The state failed in its constitutional duty to protect the rights of Modderklip: it did not provide the occupiers with land which would have enabled Modderklip (had it been able) to enforce the eviction order. Instead, it allowed the burden of the occupiers’ need for land to fall on an individual.

The judge very aptly held that the problem was two-pronged: First, there was the infringement of the rights of Modderklip. Second, enforcement of Modderklip’s rights would have impinged on the rights of the occupiers. Moving or removing them was no answer and they would have to stay where they were until other measures could be devised. Requiring of Modderklip to bear the constitutional duty of the state with no recompense to provide land for some 40,000 people was also not acceptable. Further, the judge noted that it was up to the courts to provide effective relief to those who had been adversely affected by a

98 19 of 1998.
100 Modderklip Case, para 21.
101 Modderklip Case, para 26.
102 Modderklip Case, para 30; East London Western Districts Farmers’ Association and others v Minister of Education and Development Aid and others 1989 (2) SA 63 (A) 75I-76B:
   ‘In our system of law, however, the bureaucratic solution of problems, however intractable, must be achieved with due regard to the legitimate property rights of ordinary citizens. The situation no doubt called for prompt action by the respondents. Such action, however, required not merely the alleviation of the lot of the refugees but simultaneously the protection of the farming community into whose midst so many distressed persons were being precipitately introduced. The respondents failed to secure the latter.’ (Per Hoexter JA.)
103 Modderklip Case, para 41.
constitutional breach.\textsuperscript{104} It was held in \textit{Fose v Minister of Safety and Security}\textsuperscript{105} that the courts have a particular responsibility in this regard and are obliged to ‘forge new tools’ and shape innovative remedies.\textsuperscript{106}

The final judgment in the \textit{Modderklip Case} is a fine example of the awareness that some judges have to the difficulties that arise between the right to housing of informal settlers and the right to enjoy private property. The finding that the eviction could not be enforced without the state providing for alternative land for settlement by the settlers can be termed as acceptance of the obligation of the state to provide housing, even though this may be done progressively in the face of financial difficulties or inadequacy of land. If finances and unavailability of alternative land prove to be the case, the reasonable thing may indeed be to let the settlers stay on the land they occupy as the states acquires it for a fee or finds alternative means of dealing with the situation. In this case, the judge ordered for the residents to remain on the lands until alternative land was found. This would go a long way to transform society from the perpetual scene that is witnessed where settlers such as these are taken out of land and left with nowhere else to go.

The balance that was reached in this case was appropriate as it served to protect the rights of the informal settlers by letting them have a place to stay and at the same time, finding that the state had not met its obligations to protect the housing rights of the settlers. The judgment also served to protect the right to private property of Modderklip by holding that it was entitled to damages for the occupation and the declaration that the state had been in violation of Modderklip’s rights.

In \textit{Government of the Republic of South Africa and Others v Grootboom and Others}\textsuperscript{107} (hereinafter the \textit{Grootboom Case}), Mrs Irene Grootboom and the other respondents were rendered homeless as a result of their eviction from their informal homes situated on private land earmarked for formal low-cost housing. They applied to the Cape of Good Hope High Court for an order requiring the government to provide them with adequate basic shelter or housing until they obtained permanent accommodation and they were granted certain relief. The appellants were ordered to provide the respondents with shelter.

\textsuperscript{104} \textit{Modderklip Case}, para 42.
\textsuperscript{105} 1997 (3) SA 786 (CC).
\textsuperscript{106} \textit{Fose v Minister of Safety and Security} 1997 (3) SA 786 (CC), para 69 (per Ackermann J).
\textsuperscript{107} \textit{Grootboom Case}, 2001 (1) SA 46 (CC).
Yacoob J noted that the state was obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing.\textsuperscript{108} In light of my proposal in section II to use the progressive realisation approach to the implementation of ESCRs, where the state must be seen to be doing something, the Court similarly noted that the measures must establish a coherent public housing programme directed towards the progressive realisation of the right of access to adequate housing within the state’s available means.\textsuperscript{109} The South African Constitutional Court noted:

‘Progressive realisation’ shows that it was contemplated that the right could not be realised immediately. Nevertheless, the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the state must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses.\textsuperscript{110}

This statement shows that the state must make a concerted effort to provide for housing. The steps must be reasonable, they may take time but the state must begin to take those steps so desperately needed to accord justice to those who need it the most in society.

The Court also noted that the State has a negative obligation in terms of the right to housing that is, not to interfere with the enjoyment of the right. This obligation had been violated when the municipality funded the eviction of the respondents earlier than the notice had indicated, without giving the victims a chance to salvage their belongings.\textsuperscript{111} To conclude, the Court held that the State must foster conditions to enable citizens to gain access to land on an equitable basis.\textsuperscript{112}

De Vos notes that in the Constitutional Court’s approach to social and economic rights in \textit{Grootboom Case}, lies the understanding of the role of the Bill of Rights (particularly the equality provisions and the provisions guaranteeing social and economic rights) as a transformative document aimed at addressing the deeply entrenched social and economic inequality in society.\textsuperscript{113}

\textsuperscript{108} \textit{Grootboom Case}, para 24.
\textsuperscript{109} \textit{Grootboom Case}, para 41.
\textsuperscript{110} \textit{Grootboom Case}, para 45.
\textsuperscript{111} \textit{Grootboom Case}, para 88.
\textsuperscript{112} \textit{Grootboom Case}, para 93.
\textsuperscript{113} De Vos P, ‘Grootboom, ‘The right of access to housing and substantive equality as contextual
Ultimately, when there is a clash between property rights and the genuine despair of people in dire need of accommodation,

‘the judicial function is not to establish a hierarchical arrangement between the different interests involved. It is not the task of the judiciary to automatically privilege, in an abstract and mechanical way, property rights over the housing rights of those affected.’

In such instances, the function of the court is ‘to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each case’. Therefore, the state must show equal accountability to occupiers and landowners. It must show that it adequately considered the interests of both the land owners and the occupiers.

VI. Conclusion

It can be said from the various cases above that the balance to be reached between the right to housing of occupiers and the right to property of the individual land owners is a delicate one. The courts seem to be most interested in enforcing justice for both parties. The courts have been keen to interpret the constitution in a transformative way that changes society for the better by attempting to reduce the inequalities that exist with regard specifically to the right to housing. This transformative approach to interpretation contextualises the various legal texts and interprets them against the backdrop of the problem facing the most vulnerable groups in society affected by a specific human rights issue with the intention to transform the lives of those aggrieved by giving them effective solutions. The State is mandated to provide alternative lands for resettlement in the case that evictions are to take place from lands it owns or from land owned privately by citizens. Ultimately, the balance can only be reached appropriately on a case to case basis. It is important for the various stakeholders to deal with the problem of informal settlements before the matters ultimately appear in court – most importantly at the point of policy formulation, law making and budget allocations.

114 Port Elizabeth Municipality v Various Occupiers 2004(12) BCLR 1268 (CC), para 23.
115 Modderklip Case, para 22.
VII. Recommendations

The enactment of the Evictions and Resettlement Bill, 2014 is important in order to have legislation in place that will govern the process of evictions. Court judges should also be more alive to the difficulties culminating from the balance to be carried out in the case that there is a conflict between housing and property rights. They should not be quick to issue eviction orders as was done by Marais J in the initial Modderklip Case (as noted above).

Furthermore, the minimum and maximum acreage should be considered in order to avail more land for the settlement, by the government, of those who are unable to acquire their own pieces of land. This will deal with the situation where a single individual owns a lot of land that is left unutilised whilst many other persons suffer from the lack of it. Additionally, Kenyan lawyers, NGOs and civil society groups should do more to participate in the bringing of such actions before our courts in order to build our local jurisprudence. These groups should be more proactive in pushing for the improvement of the utilisation of land resources and for the promotion and protection of the right to housing.
Occupational Safety and Health of Coal Mine Workers in Kenya: Filling the Lacuna in the Law

Ikoha Muhindi*

Abstract

Mining is essential in the economic development of any country endowed with mineral resources. In Kenya, for instance, one block of coal in the Mui Basin has enough coal to bring in KES. 3.4 trillion into the economy. However, disasters such as the Monongah disaster in a coal mine in the United States have resulted in the loss of lives of numerous workers. It is therefore important to ensure the enactment of legislation safeguarding these workers. This article seeks to assess the extent to which the Occupation Safety and Health Act safeguards these concerns in Kenya. It also undertakes a brief comparative study of the best practices employed in Australia and South Africa in safeguarding the safety and health of workers in coal mines. Finally, the article makes recommendations on how Kenya can follow suit and adopt various aspects of the legislations from these jurisdictions.

I. Introduction

Mining is defined as the process of extracting precious or valuable metals from the earth, and this extraction can either be in its native state or in their ores.¹ In many developing countries, such as Kenya, mining is a contributor to revenue in the economy and provides employment to the locals in the area.² In 2012, the Kenyan Government discovered coal deposits in Mui Basin, Kitui County. According to the information provided by the Ministry of Energy (as it then

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¹ Re Rollins Gold Mineral Co. (D.C.) 102 Fed. 985.

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was), block C alone has an estimated 400,000 metric tons of coal deposits.\(^3\) This is enough to earn KES. 3.4 trillion, at current market rates.\(^4\)

However, by its nature, coal mining is intrinsically one of the most dangerous lines of occupation. This is because of the following reasons:\(^5\) First, coal is readily inflammable and explosive especially in its finest form and frequently, coal mines contain highly flammable and explosive gases. In some cases, non-flammable gases may be present in the coal mines which can kill a coal worker inhaling the gases through suffocation. Second, the sinking and tumbling of roofs in coal mines frequently occur and approximately cause four times as many fatalities as explosions. Third, the coal mining process, regardless of whichever method is employed, involves the use explosives on the coal deposits.\(^6\) These, coupled with untold amounts of dust, are ready ingredients for sicknesses such as lung diseases, skin rashes and eye infections.\(^7\)

Disasters in coal mines often tend to be of a high magnitude and have led to countries and international organizations making legislations safeguarding the safety and health of coal workers in their various jurisdictions. For instance, the Monongah Mining Disaster, which resulted in the death of 362 workers as a result of an underground explosion led to creation of an institution known as the United States Bureau of Mines in 1910 whose sole purpose was to improve the safety in mines and was followed by the Federal Coal Mine Health and Safety Acts enacted in 1969 and 1977 respectively.\(^8\)

Kenya’s legal framework recognises the importance of the safety and health of workers. The Constitution of Kenya, 2010 (hereinafter the 2010 Constitution) accentuates that every worker has the right to fair labour practices which include the right to reasonable working conditions.\(^9\) This article highlights that reasonable working conditions include all conditions necessary to ensure that the safety and health of workers are safeguarded.\(^10\) The Occupational

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\(^3\) Mutemi A, ‘Mui coal mines: A blessing or a curse? Socio-economic and environmental intricacies’ University of Nairobi (2013), 3.


\(^6\) Jahnig A ‘Coal deposits of Colombia’ Freiberg University of Mining and Technology (2007), 9.


\(^10\) Article 41(2) b, Constitution of Kenya (2010).
Occupational Safety and Health of Coal Mine Workers in Kenya

Safety and Health Act\textsuperscript{11} and the Work Injury Benefit Act,\textsuperscript{12} have tried to regulate the manner in which employees are treated and the various penalties employers face for negligence on their part in ensuring that employees are working in good conditions. However, as is later demonstrated in this article, the existing laws are still insufficient to adequately cater for the safety and health of workers in coal mines. Further, the article shows the need for our country to follow the examples set by other countries in protecting the safety of coal workers in the mining industry.

II. The Legal Framework on the Occupational Safety and Health of Coal Workers in Kenya and its Shortcomings

In Kenya, the legal framework governing coal workers is enshrined in the 2010 Constitution, Acts of Parliament and legal policies.

i. The Constitution of Kenya, 2010

The 2010 Constitution\textsuperscript{13} is the grundnorm\textsuperscript{14} of the state and as such, ranks highest in relation to other sources of municipal law in the state.\textsuperscript{15} In its preamble, the 2010 Constitution accentuates the significance of all persons’ well-being as all citizens ought to be committed to nurturing and protecting the well-being of the individual, the family, communities and the nation.\textsuperscript{16} It highlights that all workers have the right to reasonable working conditions.\textsuperscript{17} Further, each individual has the right to the highest attainable standard of health.\textsuperscript{18} This shows the high value the 2010 Constitution places on the safety and health of workers including those in coal mines.

Additionally, Article 66(1) of the 2010 Constitution stipulates that the State has the authority to regulate land and any interests arising over land in safeguarding public safety and health. This can be interpreted to mean that the State has

\textsuperscript{11} Act No. 15 of 2007.
\textsuperscript{12} Act No. 13 of 2007.
\textsuperscript{13} Constitution of Kenya (2010).
\textsuperscript{14} The ultimate norm from which every legal norm deduces its validity.
\textsuperscript{15} Section 3(1), Judicature Act Kenya (Chapter 8, Laws of Kenya).
\textsuperscript{16} Preamble, Constitution of Kenya (2010).
\textsuperscript{17} Article 41(2) b, Constitution of Kenya (2010).
\textsuperscript{18} Article 43(1) a, Constitution of Kenya (2010).
the power to stop the operation of a mine if it poses a risk to the health of the workers or it can compulsorily acquire the mine.

The 2010 Constitution has provided for a recourse mechanism a person may turn to if their right to a clean and safe working environment has been infringed or violated. It states:

‘If a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.’

The Industrial Court has jurisdiction to hear matters pertaining to enforcement of occupational safety and health rights. This is pursuant to Article 162(2) of the 2010 Constitution which gives Parliament the power to establish courts to hear and determine disputes relating to employment and labour relations. These courts have the same status as the High Court. The Court has exclusive original and appellate jurisdiction to hear and determine all disputes relating to employment and labour relations.

### ii. Acts of Parliament

#### a. The Occupational Safety and Health Act

The Occupational Safety and Health Act is a statute whose aim is, *inter alia*, to provide for the safety and health of workers in their workplaces and to provide for the establishment of the National Council to cater for issues pertaining to occupational safety and health. It outlines the duties of an employer in ensuring the safety and health of all persons working or present in their workplace. These duties include the provision and maintenance of safe systems, facilities and procedures of work, providing any information, training or supervision that may be required in ensuring the safety and health of all the employees, availing information on any risks that may be associated with new technologies and finally, employers have to make sure employees participate in the application and review of safety and health measures in relation to the workplace.

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20 Section 12, *Industrial Court Act* (Act No. 20 of 2011).
21 *Occupational Safety and Health Act* (Act No. 15 of 2007).
23 Section 6(1), *Occupational Safety and Health Act* (Act No. 15 of 2007).
24 Section 6(2), *Occupational Safety and Health Act* (Act No. 15 of 2007).
Further, as a precautionary measure, the Act stipulates that risk assessments on the safety and health of employees have to be carried out by the employer, and after the results are examined, the employer has to come up with measures that will ensure that all equipment and tools used in the workplace are safe and do not pose any risks to the safety and health of employees. The duties provided for by the Act are twofold as employees also have a duty to ensure that their personal safety and health, as outlined in Section 13, is protected. In doing so, they have to ensure the following: That they have worn protective clothing on their person as they work, they have to fully comply with safety and health procedures and instructions provided to them and they have to report promptly to their supervisor any situation that they have sufficient reason to believe will pose a danger to their safety and health.

In spite of the express provisions provided for by the law on the obligation employees have in safeguarding their own safety and health, it has proved difficult for employees in mines, especially those in developing countries such as Kenya to adhere to these obligations. This is because, despite having the express right to remove themselves from any situations that may pose a risk to them, employees face another risk; that of losing their jobs as a result of doing so. For instance, on 5 May 2007, a Company dismissed 28 workers as a result of striking because of poor working conditions. Fortunately, the Kenya Plantation Union with the backing of the Minister of Labour at the time, fought for the reinstatement of the workers. Similarly, coal mine workers may not be inclined to leave the mines even if the working conditions do pose a danger to their welfare as they would not want to lose their source of income. Another example was seen in Kenya Quarry and Mines Union v Kenya Calcium Products Ltd, where legal counsel for these mining corporations took advantage of the ignorance of the employees in the mines. In this case, the grievants incited the other employees to go on strike. However, failure to follow the set out grievance mechanism in their collective bargaining agreement led to their summary dismissal.

The Act has faced a major problem in its implementation. Kenya has a population of 38.6 million people. Of these, 2 million work in the

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25 Section 6(2), Occupational Safety and Health Act (Act No. 15 of 2007).
26 Section 6(2), Occupational Safety and Health Act (Act No. 15 of 2007).
30 Kenya population data sheet, 2011 (These are the figures tabulated after the 2009 census).
formal sector and 8.8 million work in the informal sector.\textsuperscript{31} There are about 140,000 workstations situated throughout the country and the Directorate of Occupational Safety and Health Services (hereinafter the Directorate), with 71 professional occupational safety and health officers, is not capable of effectively inspecting the workstations leaving many workers exposed to occupational safety and health hazards without intervention.\textsuperscript{32} Further, the representation of the Directorate in 29 counties leaves the remaining 18 counties without any officers.\textsuperscript{33}

Additionally, in rural areas, literacy levels are very low and as seen, are insufficiently covered by the Directorate. This leaves most, if not all, of these workers ignorant of the minimum requirements of safety and health set by the government. Most therefore end up working in unsafe conditions and are left exposed to occupational safety and health hazards.\textsuperscript{34} From the above, it can clearly be seen that the Directorate is unable to effectively cater for workers in coal mines as it lacks the necessary capacity to do so.

Therefore, there is need for the office of the Directorate to introduce new specialised institutions which will cut across all ministries and carry out the work of inspection of various workplaces that fall within the ministries.

b. The Work Injury Benefits Act

The Work Injury Benefits Act is an Act of Parliament enacted with the purpose of compensating employees who are injured at work and contract diseases connected with their employment.\textsuperscript{35}

It defines an employee as a person working under a contract of service.\textsuperscript{36} Workers in coal mines fall under this definition and therefore fall under the Act. It entitles an employee to compensation as a result of an accident which has led to the disablement or death.\textsuperscript{37}

\begin{enumerate}
\item International Labour Organization ‘National profile on occupational safety and health – Kenya’ (2013).
\item International Labour Organization ‘National profile on occupational safety and health – Kenya’ (2013).
\item International Labour Organization ‘National profile on occupational safety and health – Kenya’ (2013).
\item International Labour Organization ‘National profile on occupational safety and health – Kenya’ (2013).
\item Section 10(1), \textit{Work Injury Benefits Act} (Act No. 13 of 2007).
\end{enumerate}
The Act makes it illegal for an employer to solicit contributions from employees towards the cost of medical aid. It is considered an offence and the Director of Occupational Safety and Health Services has the authority to issue orders compelling the employer to pay back any amounts that may have been taken. 

The Act, however, fails to provide adequate compensation for persons, such as coal workers who may be injured permanently as a result of explosions and other accidents that may paralyse them; leaving them unable to work again. This issue shall be further expounded.

c. The Explosives Act

This Act governs the use of explosives within Kenya and is applicable in this sector since coal mining requires the use of explosives. These explosives, however, can result in the caving in of the mine killing those inside or trapping them. The Act therefore makes it mandatory for mine operators to acquire a permit in order to access blasting materials.

It is a crime for a coal mine operator to use blasting materials without a permit and is punishable by either a three thousand shillings fine or a one-year prison sentence, or both. Considering the dangers that are associated with blasting materials, the fine stipulated by the Act is too little and may not be adequate to deter coal mine operators from using explosives without a permit. Its punitive aspect is wanting.

iii. Legal policies

a. The National Minerals and Mining Policy (Final Draft)

The Policy was developed with the goal of coming up with an all-encompassing framework for managing Kenya’s mineral resources. Strategies to be employed in the Policy include ensuring a socially acceptable balance between the impacts, both positive and negative of mining on the physical and human environment; ensuring that compliance of activities in the mineral sector are in line with the relevant health and safety legislation; promoting best mining practices

40 Section 9, Explosives Act (Chapter115, Laws of Kenya).
41 Section 12, Explosives Act (Chapter 115, Laws of Kenya).
to ensure that mine closure plans and post-mining phases form integral part of the planning stage; develop in liaison with relevant institutions specific regulation for mining operations in environmentally sensitive areas such as forests reserves, nature reserves and national parks.\footnote{Section 2, \textit{National Minerals and Mining Policy (Final Draft)} (2010).}

In as much as there are quite a number of laws governing mining in Kenya, very little has been done, or proposed to be done to ensure that the safety and health of coal workers is protected. This leaves those working in mines susceptible to health hazards and other unsafe practices associated with mining. The laws have proved to be inadequate in ensuring the health and safety of those in mines. This is why the legislature needs to go back to the drawing board and come up with a policy and legal framework that addresses the health and safety of coal workers. This will help seal the loopholes in the mining laws and avert future tragedies in the sector.

\section*{III. Salient Features of the Legal Framework Governing the Occupational Safety and Health of Coal Workers in Other Jurisdictions}

The right to safe and healthy working conditions is part of the broader right of everyone to the enjoyment of just and favourable conditions of work, enshrined in article 23 of the \textit{Universal Declaration of Human Rights}\footnote{\textit{Universal Declaration of Human Rights}, 10 December 1948, 217 A (III).} (hereinafter UDHR), and article 7 of the \textit{International Covenant on Economic, Social and Cultural Rights}\footnote{\textit{The International Covenant on Economic, Social and Cultural Rights}, 16 December 1966, 993 UNTS 3; Sensi S, “The adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights.” A paper presented at a high level expert meeting on the new future of human rights and environment: Moving the global agenda forward, held at Nairobi, November 30 - December 1, 2009.} (hereinafter ICESCR). UDHR provides that everyone is entitled to the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.\footnote{Article 23, \textit{Universal Declaration of Human Rights}, 10 December 1948.} ICESCR\footnote{\textit{International Covenant on Economic, Social and Cultural Rights}, 16 December 1966.} further reiterates the right to safe and healthy working conditions. It stipulates that all state parties will recognise the right of everyone to the enjoyment of just and favourable conditions of work which will ensure safe and healthy working...
conditions. In the preamble to the International Covenant on Civil and Political Rights (hereinafter ICCPR), the parties outline the obligation of all states to recognise in accordance with UDHR, that the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy their civil and political rights, as well as their economic, social and cultural rights.

The above international instruments show the importance the international community has accorded to the right of all persons to safe and healthy working conditions. With that in mind, this section of the article looks into the best practices employed by other states in grappling with the issue of occupation health and safety of coal workers. The article examines two jurisdictions namely; Australia and South Africa.

1. Australia

Australia has one of the most progressive occupation health and safety legislation in the world. Its legislation is based on the principles of risk management, worker participation and the duty of care and places the onus of providing safe workplaces on the operator of the mine site. Government inspectors act as both enforcers of regulations and mentors who encourage good health and safety performance. Further, enforcement protocols are generally risk-based, with action being defined by both the level and immediacy of the risk.

In Australia, each state has come up with its own legal framework which incorporates different regulations that promote the development of management systems. However, there has been harmonisation of mining laws between the Australian states. These laws have been developed so as to be in line with the occupational health and safety laws in the country. This article examines the New South Wales mining legislations namely; the Work Health and Safety (Mines) Act and the Work Health and Safety (Mines) Regulations. These pieces of leg-

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48 The International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

The main objective of the Act is the promotion of the health and safety of persons at work in mines or related places, by ensuring that measures are in place to eliminate risks and emergencies in the various workplaces in the mines.\(^{54}\)

Part 5 of the Act touches on the safety and health representatives for coal mines.\(^{55}\) These representatives have the obligation of reviewing and implementing safety management systems which are required to be present in mines, to investigate any incidents or occurrences in the mines and to help train site and electrical safety and health representatives.\(^{56}\) Further, the representative can give directions to the operator of the mine to suspend operations if they are of the opinion that the mine has failed to comply with the occupational health and safety standards thus posing danger to the employees.\(^{57}\) Failure by the operator to comply with the directions of the representative results in a fine of AUD 10,000 payable if the operator is an individual and AUD 50,000 payable if the operator is a body corporate.\(^{58}\)

Further, the Act provides for the appointment of mine safety and health representatives.\(^{59}\) These, in contrast to the industry safety and health representatives, have a more specific role as they are experts in a specific line of work. For instance, where electrical installations are required in the coal mine, an electrical safety and health representative would be the one to carry out the task and not a health safety and health representative.\(^{60}\)

The Act establishes the Mine Safety Advisory Council.\(^{61}\) This council has the duty of advising the Minister on any policies that may be required in relation to the health and safety of workers in mines.\(^{62}\) Further, the Act establishes a Competence Board which oversees the development of standards of competence for persons working in mines in relation to their health and safety.\(^{63}\) The Competence Board also carries out due diligence on the competence of persons.

exercising functions in a mine⁶⁴ and where it deems fit, it has the duty to advise the Minister on matters related to the competence required of persons to exercise any function in a mine.⁶⁵

In order to exercise its functions effectively, the Competence Board may develop competence standards or cause them to be developed where there is need to do so.⁶⁶ Finally, it is mandatory that the Competence Board provides an annual report to the minister, highlighting its activities during the preceding year.⁶⁷

In order to ensure that the objectives of the Act are met, the Act also establishes the position of a regulator who advises the Minister and makes recommendations pertaining to the effectiveness of the work health and safety laws.⁶⁸ The New South Wales Department of Industry acts as the regulator. The Department takes advice from the Competence Board on how to carry out its functions under the Act. In coal mines, their function is important as they determine the requirements for certificates of competence and conduction of examinations, and the issuing of certificates of competence and practicing certificates.⁶⁹

Under the regulations, mine operators must develop and implement a safety management system as a means of ensuring that the safety and health of workers and that of others present in the mines is not jeopardised as a result of mining operations.⁷⁰ A safety management system for a mine is the principal means of ensuring that a mine operates smoothly and safely.⁷¹ It harnesses various policies and procedures which provide a systematic approach to be followed by the mine operator in order to achieve and monitor effective levels of health and safety. This system has to be documented, should be clear and comprehensible and be made accessible to all persons who may want to access it.⁷²

In most cases the safety management system will include specific strategies for hazards and risks at the mine such as mining hazard management strategies and controls strategies for emergencies, electricity, health, explosives, plant and other mechanical risks. The purpose of the safety management system is to set

⁶⁹ NSW Department of Industry, Skills and regional development, mining competence board strategic plan to 2020, 14 December 2015.
⁷² NSW Code of Practice, ‘Safety management systems in mines’.
out in a structured and organised manner, various aspects of operations in the mines that affect the safety of workers and any other persons in the mine.\textsuperscript{73} Usually, a safety management system will document the following: a safety policy outlining how the operator intends to manage safety outcomes, how they will implement safe work procedures in the mines, how the mine will be managed and how resources will be allocated to handle safety matters, any consultation arrangements with workers and the coordination of activities of other persons who may be in the mine and finally, it outlines procedural issues such as the monitoring of health, incidents reporting, filing of records and maintenance procedures for the system.\textsuperscript{74} If a mine operator fails to come up with the system, they are liable to pay penalties. Where the operator is an individual, they are liable to pay a fine amounting to AUD 6,000 and where the operator is a company, it is liable to a fine of AUD 30,000.\textsuperscript{75}

The regulations also require mine operators to come up with emergency plans to cater for the mines. Failure to do so attracts penalties worth AUD 6,000 for individuals and AUD 30,000 in the case of body corporates.\textsuperscript{76} Normally, an emergency plan addresses the various response mechanisms in the case of an emergency and outlines probable triggers of the emergency plan.\textsuperscript{77} In coming up with the emergency plan, operators take special account of the nature of the operations, how complex the operations are and the possible risks that may arise as a result of the operations.\textsuperscript{78}

The Act has yielded positive results in the state. Between 1 July 2013 and 30 June 2014, 16 mine workers died at work in mines in Australia. Out of this, only 3 of the fatalities occurred in coal mines in New South Wales. This is evidence of the efficiency of the legislation in place as compared to other countries with over hundreds of deaths in their mines.\textsuperscript{79}

Further, the District Court of New South Wales now has jurisdiction to hear and determine all claims pertaining to the compensation of coal workers. In respect of compensation purposes, coal workers are treated differently as they retain certain rights to compensation which other workers do not. These, \textit{inter alia}, include the entitlement to redeem lump sum payments as compensation

\textsuperscript{73} Work Health and Safety Regulations (2012) (South Africa), ‘A guide to Chapter 10 – Mines’.
\textsuperscript{74} Work Health and Safety Regulations (2012) (South Africa), ‘A guide to Chapter 10 – Mines’.
\textsuperscript{75} Clause 13, Work Health and Safety (Mines) Regulations (2014) (New South Wales).
\textsuperscript{76} Clause 88, Work Health and Safety (Mines) Regulations (2014) (New South Wales).
\textsuperscript{78} Clause 88(3), Work Health and Safety (Mines) Regulations (2014) (New South Wales).
and the entitlement to the deemed total incapacity provision under the Workers Compensation Act.  


to determine the deemed total incapacity provision under the Workers Compensation Act.  

ii. South Africa

South Africa has suffered numerous fatalities in its mining sector. This is in spite of mining being one of the cardinal economic activities. In 2009, mining contributed about 18.8% of the gross domestic product and created about one million jobs in the country. In the late 19th Century, miners were exposed to multiple health and safety risks as mining had just increased to a more industrial scale. The safety of mines has since improved in the country. The South African Commission of Inquiry into Mine Safety and Health, in 1995, after carrying out studies concluded that dust exposure in mines had stagnated for 50 years.

The International Labour Organisation undertook a survey of the number of fatalities related to work in South Africa. From the survey, they found that in 2001, close to 2,000 workers died as a result of work related accidents. From these, 288 died in mines. Given that miners account for less than 4% of the total workforce in the country, approximately 15% of work-related fatalities are associated with mining.

In response to fatalities in mines, the mining legislation in South Africa had to be developed. In 1972, the report of the Roben’s Committee, a commission of inquiry into health and safety at work in Britain, chaired by Lord Roben, laid the foundation of more comprehensive and systematic health and safety approaches. Lord Roben criticised the bias in the law in regard to safety and health as the law lacked provisions to address the same.

He called for expansion of occupation health and safety to take into account human factors associated with work, the interactions between employers and employees in matters of health and safety and the employer’s duty in the management of occupational health and safety in his workplace. Further, he proposed that prescriptive legal provisions be replaced by performance or outcomes

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requirements, which were to be supported by a general duty of care placed on employers.86

As a result of this, in 1995, the South African Commission of Inquiry into Safety and Health in the Mining Industry, came up with a report recommending the promulgation of legislation to address occupational health and safety in mines, and to ensure that operators in mines take immediate steps in improving the standards of practice in the workplace and controlling health hazards.87

The Mine Health and Safety Act and its regulations of 1996, from the commission’s findings, had the aim of ensuring that the health and safety of employees and other persons at mines was protected.88 These two pieces of legislations govern the occupational safety and health of workers in coal mines in South Africa. The Act stipulates that employers bear primary responsibility to ensure that there is a safe work environment. This means that they have to ensure that mines are designed and constructed in a manner that will provide a safe and healthy working environment.89 Further, employers are required to ensure they keep and maintain an annual health report, for which, if the employer is a body corporate with at least 50 employees then they shall publish and distribute it to their shareholders.90

Employers are also obligated to provide safety and health equipment to the employees.91 They should also ensure that the facilities are upheld in hygienic conditions. The employer should also provide sufficient protective equipment for the employees and make sure that the employees are aware of the proper use and maintenance of the equipment.92 Additionally, pursuant to section 8,93 the employer is mandated to establish a policy pertaining to health and safety which outlines the organisation of work, the protection of both employees and non-employees who may be affected by the mining operations. Under clause 3,94 the employer has an obligation to publicly display the copy of the policy and must also generate copies for the representatives in the mines. This helps in ensuring the employees are informed of their rights relating to their health and safety.

The Act stipulates that workers have the right to participate in health and safety training. The onus to provide for this training is placed on the employer.\textsuperscript{95} Training provides employees with any information that may be required to undertake their duties without endangering themselves. This makes employees become familiar with occupational hazards posed by the mining environment and steps they can individually take to curb such risks. This training is free and therefore no employee is required to pay any sum for it.\textsuperscript{96} Training is carried out on different occasions. These include: Before employees commence the work, on intervals that may seem fit to the employer, before making substantial changes to mining equipment and before changes are made in relation to the employees’ work.\textsuperscript{97} Further, records of all trainings must be kept by the employer.

The employer is further required to acquire the services, whether part time or full time, of an expert in the field of occupational hygiene techniques whose duty is taking an account of the hazards present in the mine and filing records of the same.\textsuperscript{98} Subsequently the employer is required to come up with a medical surveillance system of employees exposed to health hazards on requirement by law to do so or in response to an assessment conducted by him.\textsuperscript{99} The surveillance is appropriate considering the hazards. Further, the employer must acquire the services of a medical practitioner where necessary.\textsuperscript{100} This ensures that all possible health risks are countered appropriately and in a timely manner.

The Act also stipulates the necessity of approaches on risk management in addressing health and safety hazards. This is made possible by identifying the risks and hazards employees are exposed to while at work, assessing the risks, making a record of significant hazards and availing the records to the employees.\textsuperscript{101} A periodic review of records has to be undertaken by the employer in order to determine whether further control or elimination of risk is possible in future.\textsuperscript{102} The Principal Inspector of Mines has to be informed on any incident or occurrence resulting in injury or death of a person in a mine in order for them to instruct an inspector to carry out a parallel investigation of the incident with the employer.\textsuperscript{103}

The Act establishes the Mine Health and Safety Council. It is a tripartite entity comprising of the state, the employer and labour members under the direction of the chief inspector of mines. The council has the task of advising the Minister on any legislations and research outcomes which are targeted at promoting the health and safety in the mines. Moreover, it oversees all the activities of its sub committees, holds a summit after every two years in which a review of the state of occupational health and safety in mines is undertaken.

The number of injuries and deaths in coal mines has significantly dropped in South Africa. For instance, in 2014, the number of fatalities in all mines was 84 being the lowest number ever recorded in the country. Of these, seven of the fatalities occurred in coal mines. This was a 93% improvement in the safety of coal mines between 1993 and 2013, as fatalities have reduced from 90 to 7 fatalities. Cases of noise induced hearing loss have reduced from about 6,000 case recorded in 2003 to about 1, 200 cases which were recorded at the end of 2013.

At the 2014 Mine Health and Safety Summit, the Mine Health and Safety Council said it would launch a Centre of Excellence in April 2015. This centre is aimed at spearheading the promotion of innovation by means of training and research carried out by mine workers. ‘We need to reclaim our space as a country that leads in mining innovation and excellence’, stated Mike Teke, President of the Chamber of Mines.

As has been discussed, in the late 19th Century when mining increased to a larger scale in South Africa, mine workers faced very high levels of risk both to their safety and health. However, with the introduction of laws such as the Mine Health and Safety Act and regulations; the safety performance of mines has shown great improvements and is definitely a step in the right direction.

From the two case studies - Australia and South Africa - the positive impacts mining legislations specific to the health and safety of workers in mines have had in those states is evident. Kenya ought to use this as a learning opportunity and come up with similar coal mining legislation that will adequately cater

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for the persons who will be working in the coal mines in Mui basin.

iii. Comparative study of the legal frameworks in Australia and South Africa

The first aspect that is worthy of address is that of safety representatives in mines and their training. In accordance with the Mine Health and Safety Act (South Africa), mine safety representatives have to undergo some form of training. This is similar to the Occupational Safety and Health Act which stipulates the same.\(^{108}\) The training provided by the Mine Health and Safety Act (South Africa) is threefold. Firstly, workers should be trained to execute particular operations in means that not only ensure the protection of the worker alone but also preventing risks that may affect others in the mines.\(^{109}\) Secondly, training on commencement of the project and periodic trainings should be designed for all ranks of mine officials, taking into account the various risks to the health and safety of the persons posed in the mine.\(^{110}\) Thirdly, adult basic education training (ABET) which is a primary contributor to the intervention and minimization of health and safety risks in mines.\(^{111}\) Studies, however, have shown that neither the representatives themselves, nor the workers themselves, are fully aware of all these roles, functions and responsibilities.\(^{112}\)

More so, in spite of legislation expressly providing for the requirement of undertaking training, there aren’t any regulations or institutions in place to ensure that they are indeed carried out. The only thing made available is literature, which is of a technical nature discussing the use of specific equipment for health and safety, but there is very little, if any, information about training approaches and techniques. After various studies were carried out on the development of mining, some researchers came to the conclusion that historically, a fallacy existed claiming that lack of training did not in itself cause accidents or fatalities in mines.\(^{113}\)

\(^{108}\) Section 9, *Occupational Safety and Health Act* (Act No. 15 2007).


\(^{110}\) Tuchten G, ‘Concept development for facilitating the health and safety efficacy of South African mine workers’, 124.

\(^{111}\) Tuchten G, ‘Concept development for facilitating the health and safety efficacy of South African mine workers’, 124.


Further, mining companies are considered reluctant to share information that can impact on their place in the market. This reason, *inter alia*, alludes to why mining companies over the years have been reluctant in training the representatives. According to Walters and Frick,

‘The features promoting effectiveness of occupational health and safety in workplaces included, adequate training of persons in the workplace, interaction opportunities between employers and workers and mechanisms of channelling problems in the workplace and changes being made on the same.’

They maintain that the more this criterion is met in workplaces, the better the rates of detection and reduction of work hazards therein. However, this cannot be realised without the commitment of the management. Management commitment in improving the health and safety is important because it supports participative arrangements for health and safety and ensures efficiency and quality of production. Walters and Gourlay stated,

‘[w]hatever the level of development of trade union organisation and worker representation on health and safety, it can never be a substitute for management organisation for health and safety. Without effective management systems for health and safety and a commitment to its continued prioritization, the role of worker involvement is severely constrained.’

Representatives therefore ought to enjoy the following rights so as to effectively carry out their duties: protection from any discrimination as a result of their representative role, paid time off to enable them to carry out their functions, paid time off in order to receive training; the right to information made available by the employer on current and future hazards to the health and safety of workers at the workplace, the right to inspect the workplace and any complaints from workers on issues of health and safety; the right to be consulted by the employer on all issues pertaining to his role and finally, the right to accompany health and safety authority inspectors when they inspect the workplace and to make complaints to them when necessary.

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116 See Walters and Frick, *Worker participation and the management of occupational health and safety*.
The second aspect is that of the tripartite Mine Health and Safety Council which is also established by the Mine Health and Safety Act, and consists of members representing the State, employees and employers in the mining industry. This is also the case in New South Wales which has a Mine Safety Advisory Council. The Council has the task of advising the Minister on any legislations and research outcomes which are targeted at promoting the health and safety in the mines. The Chief Inspector of Mines is the chairperson of both the Mine Health and Safety Council and the Mining Qualifications Authority. The authority handles matters pertaining to the education and training needs in the mining sector.

In Kenya, the Occupational Safety and Health Act establishes the National Council for Occupational Safety and Health. The duties of this Council include advising the Minister on occupational safety and health policies to be adopted, formulating statutory proposals specific to occupational safety and health and promoting best practices regarding occupational safety and health. The interpretation section of the Act, however, defines the term ‘Minister’ as the Minister of Labour or now referred to as the Cabinet Secretary in charge of the Ministry of Labour, Social Security and Services. It is inconceivable that the Cabinet Secretary is able to sufficiently cater for all industries that require labour force in the country. Therefore, it would be prudent to follow South Africa and New South Wales and come up with a council specifically in charge of the safety and health in mines. This council, should be answerable to the Cabinet Secretary in charge of mining who is competent to handle the matter as it falls within their docket. It will also ensure that actual training of representatives is undertaken.

As was also evident in the mining legislations of New South Wales, the mining council will also ensure that safety management systems are present in mines. These systems are vital as they are the primary means of ensuring the safe operation of a mine. They will also ensure that the system is documented. Further, the council through its representatives will ensure that the system is understandable and easily accessible to those who might want to read it. According to Mwangi Rwenji, a mining engineer in Kenya,
‘Safety management systems are important as they introduce a standardized way of handling safety that eliminates the aspect of having to train, re-train and train again employees as the whole system becomes like a continuous training approach while at the same time meeting the objective of safety management. From this, we can see the vital role safety management systems will play in coal mines in Kenya.’

The final aspect to be discussed is that of compensation. The Work Injury Benefits Act provides that an employee is entitled to periodical payments equivalent to their earnings for suffering temporary total disablement due to an accident incapacitating them for three days or more.\(^\text{124}\) This compensation, however, is limited to a period not exceeding twelve months.\(^\text{125}\) On average, workers in Kenyan mines (inclusive of coal workers) earn about KES 81,030 per annum.\(^\text{126}\) Assuming the worker is temporarily disabled, they are only entitled to KES. 81,030 which will be paid through the course of the following year. From then, they are not entitled to any other payments from then. In New South Wales, there are two methods of paying compensation. The first is periodic payments to the worker at the rate of their current weekly wage for the first 26 weeks, and after 26 weeks, weekly payments up to a maximum payment of KES 42,697 per week, depending on the extent of the disability. The second involves indexed weekly payments made to a surviving dependent spouse, payable at KES 24,918 per week, which continues until re-marriage or the commencement of a de facto relationship or until the death of the spouse.\(^\text{127}\)

IV. Conclusion

Considering the delicate situation of the coal mining environment, a lot needs to be done to ensure the health and safety of the workers in Kenya. There is need to establish strong institutional, legal and policy frameworks as has been done in Australia and South Africa. This article therefore makes the following recommendations.

First, Kenya should enact an Act to deal exclusively and extensively with occupational health and safety of coal mine workers. Second, there should be a revision of the compensation amounts provided for by the Work Injury Benefits


Act. Third, Kenya should also establish resilient institutions whose mandate is the regulation of the health and safety of mine workers. Fourth, there should be guidelines and directions encompassing duties of employers and employees in mining. Fifth, there should be a mining policy guiding on the protection of mine workers from possible health and safety hazards in their work area. Lastly, it should also be expressly provided in law for the provision of medical services in coal mines and even better a clinic to cater for the workers.
The Rejected Stone May Be the Cornerstone: A Case for the Retention of Traditional Justice Systems as the Best Fora for Community Land Disputes in Kenya

Raphael Ng’etich*

Abstract

The resolution of community land disputes is not catered for adequately in Kenyan policy, law and practice. The Traditional Justice Systems (hereinafter TJS) initially used by communities were phased out with the introduction of laws based on western models of ownership. They were and are still viewed as regressive and backward. However, the formal systems introduced do not afford access to justice for all due to the complex procedures and high costs. This is the case even while TJS remain the most appropriate forum for resolving community land disputes. Their informal and community inclusive nature as well as resolution of disputes in the pursuit of restorative justice provide the best forum for resolution of community land disputes. This is owing to the fact that community land ownership is characterized by a web of interests and relationships where land rights are held by different individuals and groups with diverse interests. These relationships, therefore, need to be preserved for the communities to live harmoniously. TJS practices in Ghana and South Sudan are briefly examined in seeking to establish these aspects.

I. Introduction

The communal ownership of land in pre-colonial Africa was not to last for long as the colonialists introduced individual ownership based on English land ownership systems. The Swynnerton Plan,¹ for example, recommended in-

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dividual land holding and intended to convert community land to private land to be held in accordance with English laws.\(^2\) The result was a dualist system of law where customary law was subjugated to English law.

After independence, the subjugation continued: statutory law determined the validity and applicability of customary law.\(^3\) However, the individualistic approach to dispute resolution, the pursuit of retributive ends, high costs, complex procedures and inaccessibility in all parts of the country do not allow the formal system to facilitate access to justice for all. It has a preference for rule-oriented disputes.\(^4\) Community land disputes do not always fit in this group.\(^5\) The Njonjo Commission, in pointing out the dissatisfaction with the formal process, stated that,

“The public has lost faith and confidence in the existing land dispute settlement mechanisms and institutions...they are characterised by delays...and unnecessary bureaucracy especially when there is a low participation of the local people...”\(^6\)

This contributes to the continued existence of customary law despite the earlier deliberate efforts to eliminate it. It is in this regard that Okoth-Ogendo compares customary law to a dangerous weed that goes underground and continues to grow despite the overlay of statutory law designed to replace it.\(^7\) The traditional justice systems (hereinafter TJS) ‘have remained resilient despite the onslaught by the formal legal system.’\(^8\) Community land tenure is neglected due to the overemphasis on private ownership of land.\(^9\) This is a perverse incentive to move away from community land rights to private land rights\(^10\) and is partly as a result of the misconception characterising the pre-2010 approach to com-

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\(^3\) See, for example, Section 3(2), *Judicature Act* (Chapter 8, Laws of Kenya).
\(^8\) Kariuki F, ‘Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya’, 203.
community land viewing community land as *res nullis*\(^\text{11}\) yet it is *res communis*.\(^\text{12}\) However, community land tenure continues to survive: ‘...the more policy and law sidelined customary tenure systems, the more resilient these systems became.’\(^\text{13}\)

The National Land Policy\(^\text{14}\) (hereinafter the Policy) and the Constitution of Kenya, 2010 (hereinafter the 2010 Constitution) ushered in a new dawn for community land and TJS. They are now expressly recognised and there are efforts to enact a law on community land.\(^\text{15}\) However, the emphasis on the formal justice systems continues to date. Parliament is mandated to enact a statute to establish a court with the status of the High Court to entertain disputes relating to environment and land.\(^\text{16}\) In fulfilment of this duty, it has enacted the Environment and Land Court Act, 2011.\(^\text{17}\) This continued emphasis on formal mechanisms fails to realize that, ‘every society...has its own methods, procedures, or mechanisms for dealing with or resolving disputes’.\(^\text{18}\) Traditional African communities have their own unique cultures which have since been central in resolving disputes. The constitutional recognition of TJS has not solved the problem as they have not been adopted in the dispute resolution policy and practice.\(^\text{19}\) They are portrayed as backward and retrogressive.

### II. Theoretical Underpinnings for Using TJS to Resolve Community Land Disputes

The structural functionalism theory provides a basis for the appropriateness of TJS in resolving community land disputes. The theory has its origins in the works of Emile Durkheim and Herbert Spencer, who set out to investigate

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\(^\text{11}\) *Res nullis* literally means ‘nobody’s property’. It is used to describe things which do not have an owner.

\(^\text{12}\) Okoth-Ogendo HW, ‘The tragic African commons’, 4. *Res communis* literally means ‘thing of the (entire) community’. It is used to describe things that belong to an entire community or mankind as a whole.


\(^\text{15}\) Articles 61, 63(5) and 159(2) (c), *Constitution of Kenya* (2010).


\(^\text{17}\) Chapter 12A, Laws of Kenya.


order and stability in society.\textsuperscript{20} According to the theory, the way a society is structured determines the way in which various societal functions are ordered.\textsuperscript{21} The patterns of social ordering determine the forms of dispute resolutions applicable.\textsuperscript{22} For example, conflict resolution mechanisms in a communal society are determined by the shared communal values. This implies that disputes arising from communally held land can best be resolved using communal mechanisms. The suitability of TJS in resolving community land disputes can, therefore, be premised on this theory since the communal nature of African societies necessitates mechanisms which are community inclusive and aim at restoring the relationship between the disputants.

The African commons theory advanced by Okoth-Ogendo explains the communal ownership of land in traditional African societies. He posited that the African commons are organised and managed by a social hierarchy in the form of an inverted pyramid with the family at the tip, the clan at the middle, and the community at the base. Decision making in each of these levels is done in reference to the internalised communal values and principles.\textsuperscript{23} This communal aspect, therefore, has implications on land dispute resolution. Furthermore, land in traditional African communities is not merely an economic or political resource: it is a medium binding together the intra and inter-generational social and spiritual relations\textsuperscript{24} and belongs to the living, the dead and the unborn.\textsuperscript{25} It is in this regard that ‘[i]ssues about its ownership and control are therefore as much about the structure of social and cultural relations as they are about access to material livelihoods.’\textsuperscript{26} It is, therefore, necessary to develop ‘socially reconstructive dispute processing mechanisms...’\textsuperscript{27} TJS can best fulfil this role since they are anchored on communal values and seek to preserve the relationships between the disputants.

III. The State of Community Land and TJS

This part undertakes a thematic review of existing literature on community land and TJS in establishing the state of community land and TJS. It seeks to counter the notion in the existing literature that community land ownership and TJS are backward and inferior. The themes covered are:

i. Community land

Land was communally owned in pre-colonial Africa but the setting in of colonization saw a focus by policy and law on private ownership and perception of the African form of land ownership as being inferior. In examining land policies and laws in colonial Kenya, Ghai and McAuslan state that:

‘For the greater part of the colonial period, agrarian policy was concerned to create and maintain two separate and unequal systems of administration, the African system existing to serve in a subordinate capacity the European one...the settlers were in a position to ensure that they played a major part in administering the law applying to them and that the administration of the law applying to Africans should reflect their assumptions about the place of Africans in Kenya...the law and its administration had no inherent values, but derived both values and form from the predilections of the dominant political and economic groups in society.’

The intention of introducing private land ownership was manifested in the commissioning and implementation of the Swynnerton Plan which advocated for land consolidation, adjudication and registration. Parcels of land were registered to individuals with the aim of giving incentives for development. This, however, resulted in land crisis and conflicts: a large portion of communally owned land was converted to individual land through questionable processes.

After independence, land tenure was classified into three categories: customary; government; and private tenure. Customary land was held and managed according to the customary laws and practices of various traditional com-

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29 See Swynnerton, The Swynnerton report.
munities.\textsuperscript{33} It was held in form of group ranches and trust lands where individuals were registered as the holders in place of the community. However, they were prone to abuse and in many instances there was illegal and irregular conversion to private land.\textsuperscript{34}

The 2010 Constitution has had positive implications on community land. The constitutional recognition of community land is a feature unique to the 2010 Constitution. It states that the people of Kenya can own land as communities\textsuperscript{35} and further provides that the classification of land in Kenya includes community land which is to be vested in and be held by communities.\textsuperscript{36} It does not provide a definition but only mentions what constitutes community land, for example, ancestral land and land lawfully held, managed or used by communities.\textsuperscript{37} It also requires that a law be enacted to cater for community land interests.\textsuperscript{38}

\textit{ii. TJS and customary law}

TJS are founded on the customary practices of various tribal communities. Their functioning and viability is, therefore, greatly determined by the legal status and application of customary law.\textsuperscript{39} Kariuki observes that, ‘...they are embedded in African customary laws. They are anchored on traditional norms and values of Africans.’\textsuperscript{40}

Customary laws have been greatly side-lined in the legal process in Kenya. The colonial government set the stage for their relegation by imposing English laws on traditional African communities which had their own systems of law and governance.\textsuperscript{41} This led to the emergence of a weak pluralist system of law ‘which persists even today under which customary law is seen as being inferior 'law'’.\textsuperscript{42}

\begin{itemize}
\item \textsuperscript{33} Republic of Kenya, Final report of the truth, justice and reconciliation Commission of Kenya, 250.
\item \textsuperscript{34} Hornsby C, Kenya: A history since independence, IB Tauris, London, 2012, 314.
\item \textsuperscript{35} Article 61, Constitution of Kenya (2010).
\item \textsuperscript{36} Article 63(1), Constitution of Kenya (2010).
\item \textsuperscript{37} Article 63(2), Constitution of Kenya (2010).
\item \textsuperscript{38} Article 63(5), Constitution of Kenya (2010).
\item \textsuperscript{39} International Commission of Jurists Kenya, Interface between formal and informal justice systems in Kenya, 2011, 32.
\item \textsuperscript{40} Kariuki F, ‘Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya’, 203.
\item \textsuperscript{41} Republic of Kenya, Report of the Commission of inquiry into the land law system of Kenya, 89.
\item \textsuperscript{42} Kariuki F, ‘Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya’, 206.
\end{itemize}
Case law, before and after independence, depicts that this results in relegation of customary law in the legal system. In *R v Amkeyo*, for example, a woman married under customary law was held not to be a legal wife or spouse and was consequently compelled to testify against her husband. This contravened the common law rule of spousal privilege which protects the confidentiality of communications within marriage and prevents a spouse from being forced to testify against the other in criminal or civil cases.

Apart from viewing customary law as inferior, the colonial Judiciary also failed to adapt English laws to the circumstances of the communities living in the colony as required under the proviso to the East Africa Order in Council. They ignored the call by Lord Denning in *Nyali Ltd v Attorney General*, where he stated that:

‘The next proviso says, however, that the common law is to apply ‘subject to such qualification as local circumstances render necessary’. This wise provision...is a recognition that the common law cannot be applied in a foreign land without considerable qualification...In these far-off lands the people must have a law which they understand and which they will respect. The common law cannot fulfil this role except with considerable qualifications.’

After independence, the country inherited the formal laws and continued the subjugation of customary law to the formal systems. The Judicature Act provides the evidentiary basis of this claim. It requires that customary law be applied as long as it is not repugnant to justice and morality. The application of this provision occasions grave consequences on customary law. The content of the repugnancy clause is not defined but left open for the courts to interpret. Customary law also has to be proven in order to be regarded as law. The result is that ‘...African customary law has suffered tremendous usurpations on the ju-

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43 See also *Lolkilite ole Ndinoni v Netwala ole Nebele* [1952] 19 EACA, Kamanza s/o Chiwaya v Manza w/o Tsuma Unreported High Court Civil Appeal No. 6 of 1970 and *Maria Gisege Angoi v Macella Nyomenda* Civil Appeal No. 1 of 1981.
44 [1917] 7 EALR 14.
47 [1955] 1 AER 646.
50 Chapter 8, Laws of Kenya.
51 Section 3(2), *Judicature Act* (Chapter 8, Laws of Kenya).
53 Ernest Kinyanjui Kimani v Mairu Gikanga and Another [1965] EA 735.
This has led to the undermining of TJS as they derive their basis from customary law.

However, the promulgation of the 2010 Constitution saw customary law expressly recognised as a source of law. The first implication of this provision on customary law is that the express mention of customary law by the supreme law means that it is a legitimate source of law and now has a position in the country’s legal system. Secondly, the requirement that customary law be applied in a manner consistent with the 2010 Constitution provides a safeguard against any customary law and practice that does not adhere to the constitutional and human rights principles. The 2010 Constitution further recognises the crucial role of culture ‘as the foundation of the nation’. On the principles of land policy, it provides that there should be ‘encouragement of communities to settle land disputes through recognised local community initiatives’. Furthermore, the exercise of judicial authority is to be guided by principles including the use of alternative forms of dispute resolution and traditional dispute resolution mechanisms. It can, therefore, be reasonably stated that the legal status of customary law and TJS has been elevated.

iii. TJS and access to justice

The 2010 Constitution requires the state to guarantee access to justice for all. Access to justice may refer to: a situation where individuals are able to obtain affordable, accessible, comprehensible, just, efficient and expeditious solutions from the legal system; the removal of the barriers hindering access to the formal systems and structures so that every member of society can access legal services; or the use of informal dispute resolution mechanisms to ensure access to justice. The last reference is the perspective taken in this paper.

57 Article 60(1), Constitution of Kenya (2010).
The Rejected Stone May Be the Cornerstone

TJS can better guarantee access to justice in Kenya since they do not bar individuals and communities through webs of procedural rules, legal principles and justice professionals. It instead allows them to have a direct contact with the dispute resolution system.\(^{63}\) And as noted by the Njonjo Commission, it is necessary to develop an efficient and cost effective land dispute resolution mechanism devoid of delays.\(^ {64}\)

IV. Legal and Policy Manifestations of TJS in Kenya

This part examines the manifestations of TJS in Kenya. It seeks to interrogate whether the policies, laws and practices, both past and present, promote TJS.

i. Past manifestations

a. Native Courts Regulations

The Regulations\(^ {65}\) established a court system for native Africans and recognised the existing power of councils of elders and local chiefs to adjudicate disputes in the native communities.\(^ {66}\) They applied customary law in resolving disputes relating to natives.\(^ {67}\)

b. East African Native Courts (Amendment) Ordinance

The Ordinance\(^ {68}\) introduced special courts with full civil and criminal jurisdiction over natives in districts. The courts applied laws prevailing in the Protectorate including customary law. Section 20 of the Ordinance contained the repugnancy clause and became one of the major steps in subjecting the validity and application of customary law to statutory provisions.\(^ {69}\) The substance of this provision was later reproduced in Article 7 of the Kenya Colony Order in Council of 1921 and continues to be part of Kenyan law as reflected in Section 3(2) of the Judicature Act.\(^ {70}\)

\(^{63}\) Christie N, ‘Conflicts as property’ 17 British Journal of Criminology, 1 (1977).


\(^{65}\) No. 15 of 1897.

\(^{66}\) Article 2(b), Native Courts Regulations (No. 15 of 1897).

\(^{67}\) Kariuki F, ‘Customary law jurisprudence from Kenyan courts’, 2.

\(^{68}\) No. 31 of 1902.


\(^{70}\) Chapter 8, Laws of Kenya.
c. Native Lands Registration Ordinance

During the 1950s, more attention was directed towards customary laws on land. The aim of the Ordinance was to effect registration of individual ownership of land previously held under customary tenure. It established a committee to hear and determine land claims in line with customary law. The provision was framed as recognition of customary land rights but the true intention was to mount ‘...another form of assault on customary law as it sought to transform customary land rights into an entirely different crop of rights, namely modern land tenure based on principles of English property ownership.'

ii. Present manifestations


The promulgation of the 2010 Constitution appears to have ushered in a new dawn for TJS in Kenya. The repealed Constitution did not deal with TJS. The recognition, therefore, by the supreme law seems to assert the place of customary law in the legal system and, consequently, that of TJS in dispute resolution. Article 2(4) provides for the supremacy of the 2010 Constitution over all other laws. The 2010 Constitution is the most important part of the basic law of a state. This Article goes ahead to recognise customary law as a source of law. However, the recognition is in a negative perspective. The Article only mentions it in an exclusionary manner in that where it is inconsistent with the 2010 Constitution, it is rendered void to the extent of the inconsistency. This therefore does not significantly uplift the place of customary law in the juridical system.

There has been an attempt in the constitution making process to ensure respect for ethnic and regional diversity and the right of communities to manifest their cultural identities. This was realized in the inclusion of Article 11 which ‘recognises culture as the foundation of the nation...’ This approach seeks to encourage cultural diversity and to protect and promote culture. The repealed Constitution did not have specific provisions dedicated to culture. Article 11 is

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72 No. 2 of 1959.
an attempt to depart from the notion, originating in the colonial period, which views traditional African cultures as backward, primitive and immoral. It imposes a positive duty on the state to promote all forms of national and cultural expressions and requires enactment of a law to ensure that communities are compensated for the use of their cultures. The promotion, therefore, of the traditional cultural practices has a positive impact on TJS since they are embedded in the customs, norms and values of traditional African cultures.\(^78\)

Access to justice is provided for under Article 48 and TJS can be used to realize it by ensuring that communities especially in rural areas are able to get an affordable, easily available and comprehensible forum for dispute resolution. TJS apply the customs and traditions of various communities and it is, therefore, not alien to the communities. Furthermore, TJS processes are conducted in the local languages. This makes it very easy for the parties to easily comprehend the proceedings, respond appropriately and not require legal representation.

The principles on land policy guide the manner in which land administration and management is conducted.\(^79\) These principles can best be realized using TJS. TJS provide an easily available, cost effective and easily comprehensible forum for resolution of community land disputes. The transparent administration of land is realized as communities are given the opportunity to settle disputes over land using their own customs, traditions and local community initiatives in line with the 2010 Constitution. This is also in line with the objects of devolution of giving powers of self-governance to communities and recognising and promoting their right to manage their own affairs and to further their own development.\(^80\)

The National Land Commission (hereinafter NLC) is established in order to prevent abuses of the land management and administration processes. One of the mandates of NLC is to encourage the application of traditional dispute resolution mechanisms in land conflicts.\(^81\) NLC is, therefore, one of the bodies charged, by the 2010 Constitution, with ensuring that TJS are applied in the land dispute resolution process.

Judicial authority has previously been exercised by the courts and tribunals but no law had alluded to the fact that it is derived from the people. The 2010

\(^78\) Kariuki F, ‘Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya’, 203.

\(^79\) Article 60, Constitution of Kenya (2010).

\(^80\) Article 174 (c) and (d), Constitution of Kenya (2010).

\(^81\) Article 67(2) (f), Constitution of Kenya (2010).
Constitution mentions this in order to emphasize the important point that all sovereign power comes from the people of Kenya and that the 2010 Constitution is the medium through which this power is transmitted to those charged with governance.\textsuperscript{82} The use of traditional dispute resolution mechanisms is one of the principles guiding the exercise of judicial authority.\textsuperscript{83} This goes a long way in bolstering the overall objective of recognising that sovereign power comes from the people. It also contributes to the realization of the other principles, for example, that justice shall not be delayed and shall be administered without undue regard to procedural technicalities.

However, traditional dispute resolution mechanisms may not be applied in a manner that contravenes the Bill of Rights, is repugnant to justice and morality or inconsistent with the 2010 Constitution or any written law.\textsuperscript{84} The restriction as to repugnancy to justice and morality is vague. This is because neither the 2010 Constitution nor statutes define what constitutes ‘repugnant to justice and morality’. This is left for the courts to determine and, as shown above, provides room for undue restriction of traditional dispute resolution mechanisms.

Furthermore, the mandate of promoting traditional dispute resolution mechanisms is placed on the judiciary.\textsuperscript{85} This reduces their viability in guaranteeing access to justice.\textsuperscript{86} The 2010 Constitution requires the state to ensure that fee requirements do not impede access to justice.\textsuperscript{87} The courts are slow, expensive, do not go into the root cause of the conflict and the parties have no control. The judiciary is, therefore, not in a position to ensure an effective implementation and promotion of traditional dispute resolution mechanisms in guaranteeing access to justice.

b. National Land Commission Act

The 2010 Constitution establishes NLC in order to prevent abuses of land administration powers. The National Land Commission Act\textsuperscript{88} seeks to further the provisions of Article 67(2). It provides for additional functions of NLC as stipulated in the 2010 Constitution.\textsuperscript{89} One of the functions is the encouragement
of the application of traditional dispute resolution mechanisms in resolving land conflicts. NLC should, therefore, take up this mandate and ensure that TJS is promoted.

c. Environment and Land Court Act

The creation of the specialized courts, for example the Environment and Land Court (hereinafter the Court), is a feature unique to the 2010 Constitution. The Environment and Land Court Act\(^90\) has been enacted pursuant to Article 162(2)(b). It empowers the Court to apply traditional dispute resolution mechanisms on its own motion, with the agreement or at the request of the parties.\(^91\) Where the application of TJS is a condition precedent to any proceedings, the Court must stay proceedings until the condition is met.\(^92\) The objective of the Act is to enable the Court to facilitate just, expeditious, proportionate and accessible resolution of disputes.\(^93\) This objective will not be realized if TJS are placed under the Court. TJS will end up like the litigation process which has, in an attempt to guarantee access to justice, led to delay and even denial of justice.\(^94\)

d. Land Act

The Act outlines the land management and administration values and principles.\(^95\) The values bind all state organs and officers, public officers and all persons engaged in the enactment, application or interpretation of the provisions of the Act or making or implementing public policy decisions. One of the principles is that communities are to be encouraged to settle land disputes through local community initiatives. The proper implementation of this principle by applying TJS will help realize the other principles, for example, security of land rights, transparent and cost effective administration of land, democracy, inclusiveness and participation of the people. Any disputes under the Act may be referred to the Court.\(^96\)

\(^90\) Chapter 12A, Laws of Kenya.
\(^95\) Section 4, \textit{Land Act} (Chapter 280, Laws of Kenya).
\(^96\) Section 128, \textit{Land Act} (Chapter 280, Laws of Kenya).
e. Judicature Act

The Act states that customary law is to be applied as long as it ‘is not repugnant to justice and morality…’ This provision is what has long hindered the application of customary law and TJS. The Act does not define what constitutes repugnancy to justice and morality. The vagueness must have been intended to weaken the position of customary law, and consequently TJS, in the legal system due to their perception of TJS as backward and retrogressive.

f. Magistrates’ Court Act

The Act vests jurisdiction on magistrates to entertain claims under customary law. It defines a ‘claim under customary law’ to include those concerning land held under customary tenure.

g. Commission on Administrative Justice Act

The Act mandates the Commission to work with different public institutions to promote alternative dispute resolution in handling complaints on public administration. This empowers the Commission to employ TJS in resolving disputes relating to the administration of community land.

h. National Land Policy

The National Land Policy recognises the need to ensure that there is access to timely, efficient, affordable dispute resolution mechanisms in order to facilitate efficient land markets, tenure security and investment stability in land. On community land, the Policy states that one of the effects of individualization of tenure was to undermine traditional resource management institutions. The Policy recognizes that TJS has a role to play in guaranteeing access to justice in the land sector.

97 Section 3(2), Judicature Act (Chapter 8, Laws of Kenya).
98 Section 9, Magistrates’ Court Act (Chapter 10, Law of Kenya).
99 Section 2, Magistrates’ Court Act (Chapter 10, Law of Kenya).
100 Section 8, Commission on Administrative Justice Act (No. 23 of 2011).
103 Republic of Kenya, Sessional paper No. 3 of 2009 on National Land Policy, section 64.
iii. Challenges faced in resolving community land disputes

The resolution of community land disputes using the formal justice system has posed various challenges. Community land is held and managed according to the cultures of traditional African communities. However, it must be noted that cultures vary across communities and, therefore, the phrase ‘African customary law’ does not imply the existence of a single custom applicable to all the communities.\(^\text{104}\) Each community ‘...has its own methods, procedures, or mechanisms for dealing with or resolving disputes.’\(^\text{105}\) Applying a form of justice system that does not recognise the diversity in culture fails to appropriately resolve the dispute in question. Diversity in culture necessitates diversity in dispute resolution,\(^\text{106}\) a principle the drafters of the 2010 Constitution realized in drafting Article 159(2) (c).\(^\text{107}\)

The resolution of community land disputes using the formal justice system has not borne fruit since it represents powers of self-governance taken from communities. The communities are not able to decide on matters affecting them. The 2010 Constitution recognizes this and provides that some of the objects of devolution of government are to give powers of self-governance to the people and ‘to recognise the right of communities to manage their own affairs and to further their development’.\(^\text{108}\)

Another challenge derives from the lack of community land legislation. Community land is held according to the customs of the various communities. Customary law is not documented and this has the effect that the rights and obligations over land are not documented as well.\(^\text{109}\) The formal justice system is, unable to appropriately resolve disputes relating to such land since courts require proof of ownership of land and yet communities do not possess title deeds.\(^\text{110}\) The communities can, therefore, be disposed due to their inability to obtain the documents required in the process.

\(^{105}\) Dzivenu S, ‘The politics of inclusion and exclusion of traditional authorities in Africa’, 2.
\(^{107}\) Kinama E, ‘Traditional justice systems as alternative dispute resolution under Article 159(2) (c) of the Constitution of Kenya, 2010’, 23.
\(^{108}\) Article 174(d), Constitution of Kenya (2010).
TJS terminology also poses a challenge. The law deals with community, customary and traditional justice systems as if they are similar.\textsuperscript{111} Community justice systems refer to those practices adopted by a group of people who live together by virtue of their ethnicity, culture or interest.\textsuperscript{112} Customary justice systems are those mechanisms that have developed based on the customs of a group of people.\textsuperscript{113} Traditional dispute resolution mechanisms are those that have been used by communities over a long period of time.\textsuperscript{114} The legal framework uses these terms interchangeably.\textsuperscript{115} Furthermore, there are overlaps, differences and similarities between these terminologies.\textsuperscript{116} The implementation of TJS laws is, therefore, bound to face terminological difficulties since the use of different terms implies that the mechanisms are different.

The past manifestations of TJS in policy and law show that the applicability of customary law in juridical system has been subjugated to statutory provisions. This has not, however, been resolved in the present manifestations as the application of customary law is still subjected to the repugnancy clause. One can only take comfort in the fact that the place of culture, customary law and TJS in the nation has been constitutionally acknowledged.

V. Comparative Study on TJS Practices

TJS practices in other jurisdictions are examined with the aim of determining the lessons that Kenya can draw in harnessing TJS to resolve community land disputes. Ghana and South Sudan are examined. They have been picked due to the approach they have taken in implementing TJS. They recognise TJS institutions without interfering with their function. This is due to the fact that merging traditional and formal systems lead to dilution or undermining of the traditional ones.\textsuperscript{117}

\begin{footnotesize}
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i. Ghana

The land tenure system in Ghana is dualistic in nature – consisting of customary and state tenure systems.\textsuperscript{118} The social and religious beliefs characterising traditional ownership have profound implications on land tenure norms and practices. For example, the Akan tribe regard land as a supernatural feminine spirit.\textsuperscript{119} Land is treated as a heritage given to the community to use and preserve for future generations.\textsuperscript{120} It is held in trust by the head of the community.\textsuperscript{121} This is because land belongs to the entire family, village or community and not to the individual.\textsuperscript{122} The Constitution of Ghana has recognized this fiduciary duty which is performed in line with customary law and usage.\textsuperscript{123}

Land is classified into public and customary land. Customary land falls under the ‘stool,’ ‘skin,’ ‘clan’ and ‘family’ heads, all characterized by communal ownership.\textsuperscript{124} Communally held land in Ghana is about 80 percent.\textsuperscript{125} Below is the dispute resolution channel.

![Figure 1: Channels of Traditional Dispute Resolution](image)

\begin{enumerate}
\item \textbf{Level 1}
\begin{itemize}
\item Farm owners/land users try to sort out their differences
\end{itemize}
\item \textbf{Level 2}
\begin{itemize}
\item Family Heads, Friends and Relatives
\end{itemize}
\item \textbf{Level 3}
\begin{itemize}
\item Stool/Village Chief and Elders/Council of Advisors
\end{itemize}
\item \textbf{Level 4}
\begin{itemize}
\item Paramount Chief
\end{itemize}
\end{enumerate}

\textsuperscript{120} See Danso E, ‘Peri-urban land tenure in Ghana (Accra)’.
\textsuperscript{126} Alhassan O and Manuh T, ‘Land registration in eastern and western regions, Ghana’ International
The various levels of land holding, as shown in Figure 1, also serve as dispute resolution structures. Dispute resolution begins from the land owners/users through the community, to the paramount chief. Level 2 to level 4 also serve an appellate function. The disputes that cannot be resolved in level 1 are dealt with in the next level, all through to level 4. The institutions at the various levels serve a dispute resolution function. The disputing parties come together to negotiate or voluntarily submit the dispute to the heads of the family, the village chief or the paramount chief.127

The head of the family, the village chiefs and paramount chiefs employ mechanisms such as rituals, negotiation, reconciliation and mediation in resolving the matter.128 The rituals used vary from community to community but have the same significations due to the belief that land is a spiritual entity and, therefore, the Earthgod is the ultimate decider of land disputes.129 Negotiations are used by the disputants themselves and at other times under the recommendation of those in charge of dispute resolution.130 Reconciliation and mediation are employed where the parties are not able to resolve the dispute themselves or when rituals are not used.131

II. South Sudan

Traditional African communities in South Sudan hold land in common. Individuals have the right to use – usufruct,132 passed down generations and chiefs regulate land use for the common good.133 Land disputes are resolved by customary courts.134 Disputes are resolved at the different levels: those at the

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132 Usufruct is an interest that permits one to use a thing and at the same time pay respect to the substance of the property as they have no right to dispose of it. See Bermann GA and Picard E, Introduction to French law, Kluwer Law International, Alphen aan den Rijn, 2008, 162.
134 Mennen T, ‘Customary law and land rights in South Sudan’, 11.
meta-family level are handled by elders; those at the *boma* by sub-chiefs; those at the *payam* by executive chiefs; and those at the county by paramount chiefs. Disputes not resolved at one level are taken to the next. The resolution of disputes by customary courts is a practice that thrives in rural areas where the state mechanisms are not present.

The operation of customary courts is recognised under the Local Government Act. Each county has a Customary Law Council as the highest customary law authority charged with the protection, promotion and preservation of the traditions, customs, cultures, values and norms of the communities within that county. It also has the responsibility of administering customary law and training the customary court staff in the county. It derives its authority from the customs and traditions of the people.

There are four levels of customary courts: “C” Courts; “B” Courts or Regional Courts; “A” Courts or Executive Chief’s Courts; and Town Bench Courts. These courts have the competence to entertain customary disputes, including customary land disputes, in accordance with traditions, customs and norms of the communities. The levels also serve an appellate function.

### iii. Lessons from the comparative study

The case studies reveal that indigenous TJS institutions are able to deliver justice and are accessible, affordable and comprehensible especially in rural areas. Land is also more than an economic asset to traditional African communities so other aspects, for example, social and religious implications inform the land holding and consequently dispute resolution. It is also evident that the state can recognise TJS without interfering with them. This enables the indigenous TJS institutions to work and remain true to their objectives, for example, the pursuit of restorative justice.

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135 An administrative unit in South Sudan under Payam administration.
136 An administrative unit in South Sudan under County administration.
137 Mennen T, ‘Customary law and land rights in South Sudan’, 10.
140 Section 12, *Local Government Act* (South Sudan).
141 Chapter X, *Local Government Act* (South Sudan).
142 Section 97, *Local Government Act* (South Sudan).
143 Section 100, *Local Government Act* (South Sudan).
144 Section 98, *Local Government Act* (South Sudan).
145 Sections 99, 100, 101 and 102, *Local Government Act* (South Sudan).
VI. Suitability of TJS in Resolving Community Land Disputes

Communal property rights, for example, community land rights, are likened to a ‘web of interests’ as they incorporate different parties with various rights. Various rights attach to community land, for instance, the right to graze, right to fetch water, right to harvest forest resources like honey or right to regulate or manage the resources. The resolution of disputes relating to the ownership and use of such resources, therefore, requires mechanisms that take into account and preserve these relationships. This role is best fulfilled by TJS due to the following attributes:

i. Communitarian nature

TJS are community inclusive as they involve the disputants as well as the community at large in resolving the dispute at hand. They are not solely concerned with the offender and the victim as does the formal dispute resolution process. This is because in African traditional communities, the members are tied in varying degrees to the disputants and, therefore, each member of the community feels wronged or responsible depending on the extent of the ties with the disputants. A dispute is ‘...not merely... a matter of curiosity regarding the affairs of one’s neighbour, but in a very real sense a conflict that belongs to the community itself.’ This is founded on the traditional African principle that rights and duties primarily attach to a community or group rather than to an individual and, therefore ‘...a disputing individual transforms his group into a disputing group...’ It is in this regard that a dispute afflicts the entire community and, therefore, the disputants as well as the community at large must be involved, in the process and outcomes, in order for harmony to be restored. In addition

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149 Penal Reform International, Access to justice in sub-Saharan Africa: The role of traditional and informal justice systems, 2000, 22.
The Rejected Stone May Be the Cornerstone

to the fact that the processes and outcomes of TJS are community oriented,\textsuperscript{153} public consensus is a necessary ingredient since social pressure is required to enforce the decisions.\textsuperscript{154}

TJS processes afford the community members the opportunity to tender evidence and voice their opinions\textsuperscript{155} in order ‘...to settle the disputes once and for all so that the society [can] thereafter continue to function harmoniously.’\textsuperscript{156} This feature is further depicted in the observation of the late Nelson Mandela in outlining the democratic aspects in the traditional decision making in his ethnic group in South Africa. He stated that, ‘Democracy meant all men were to be heard, and a decision was taken together as a people.’\textsuperscript{157}

This makes TJS suitable for resolving community land disputes since community land is held and managed communally.\textsuperscript{158} All the concerned individuals and groups are involved and catered for in the resolution of disputes with the main aim being preservation of the relationships between the community members.

The formal system takes away self-governance from the hands of communities and vests them in state machinery which seeks different ends from those of communities, for example, the state pursues retributive justice while communities seek restorative justice.\textsuperscript{159} The formal system also marginalizes and intimidates communities. Communities have, therefore, opted to maintain TJS in order to ‘...retain control over dispute resolution within their own cultural, familial and sometimes religious norms.’\textsuperscript{160}

Apart from being an economic and political resource, land, to traditional African communities, is also a cultural and spiritual asset. It is a medium that defines and binds social relations in both an intra-generational and inter-genera-

\begin{itemize}
  \item \textsuperscript{154} Penal Reform International, \textit{Access to justice in sub-Saharan Africa}, 26.
  \item \textsuperscript{156} Chimango L, ‘Tradition and the traditional courts of Malawi’ 10 \textit{Comparative and International Law Journal of Southern Africa} (1977), 40.
  \item \textsuperscript{158} Okoth-Ogendo HW, ‘The tragic African commons’, 2.
  \item \textsuperscript{159} The differences are examined later in the paper.
  \item \textsuperscript{160} Macfarlane J, ‘Working towards restorative justice in Ethiopia: Integrating traditional conflict resolution systems with formal legal system’ \textit{Cardozo Journal of Conflict Resolution} (2006-2007), 495.
\end{itemize}
ternal aspect.\textsuperscript{161} TJS are, therefore, appropriate as they are able to fully take into account the varied aspects of land in traditional African communities. The fact that they are anchored on communal values allows communities to perform their religious obligations and retain and enhance their cultural identity.\textsuperscript{162}

\textit{ii. Resolution of disputes as opposed to settlement}

On the one hand, resolution identifies and addresses the underlying issues in a dispute.\textsuperscript{163} It goes beyond the positions held by the parties and looks into the underlying values and feelings. Settlement, on the other hand, is centered on the assertion by the parties of upholding established social norms of right and wrong without delving into the core issues underlying the dispute between the parties.\textsuperscript{164} The focus is on the allocation of legal rights and duties with the objective being to end the dispute as quickly and amicably as possible.\textsuperscript{165} It therefore has the implication that a related or similar dispute may arise since the core issues have not been fully addressed.\textsuperscript{166}

In resolution, the disputants are not compromising or bargaining away their interests. On the contrary, ‘...they engage in a process of information-sharing, relationship-building, joint analysis and cooperation.’\textsuperscript{167} This is due to the understanding that ‘the roots of conflict lie in the subjective relationships between the disputants.’\textsuperscript{168} A settlement process, however, approaches disputes from an objective or realistic perspective and does not take into account the underlying values and feelings of the parties. Settlement of disputes is superficial: the core issues are not addressed and ‘remain to flare up again, either when strength of feeling produces new issues or renewed dissatisfactions over old ones, or when the third party’s guarantee runs out.’\textsuperscript{169} Such an approach is not permanent as it is premised on ‘a temporary settlement or control of a crisis, without tackling the

\begin{thebibliography}{99}
\bibitem{162} Macfarlane J, ‘Working towards restorative justice in Ethiopia’, 495.
\bibitem{164} Burton and Dukes, \textit{Conflict}, 83-87.
\bibitem{168} Bloomfield D, ‘Towards complementarity in conflict management’, 152.
\bibitem{169} Bloomfield D, ‘Towards complementarity in conflict management’, 152.
\end{thebibliography}
deeper structural roots underlying the crisis.... There are no ‘quick fix’ solutions to these problems.\textsuperscript{170}

TJS handle disputes with the underlying theme being the resolution of the issues at the core of the dispute with the aim of restoration of relationships, peace-building and parties’ interests. They are not concerned with the allocation of rights between disputants\textsuperscript{171} and in this regard therefore seek to promote restorative justice as opposed to retributive justice.\textsuperscript{172} This is reinforced by the fact that TJS are premised on ‘the notion of reconciliation or the restoration of harmony’.\textsuperscript{173} TJS make use of restorative and transformative principles in dispute resolution due to the involvement of the community at large in the search for a solution to the problem at hand. It is not solely about the individual offender and the individual victim.\textsuperscript{174} The outcomes ‘are community oriented with little damage and nobody is excluded’.\textsuperscript{175}

\textbf{iii. Informality}

Formal justice mechanisms are established and endorsed by the state while informal mechanisms run outside the ambit of the state.\textsuperscript{176} Formalisation is the act of legally recognising informal activities, those involved and the respective institutions.\textsuperscript{177} This has focused mainly on land for close to a century.\textsuperscript{178} The conception underlying this process has been that property rights means private rights and that private land rights are superior to communal land rights.\textsuperscript{179} This is one of the reasons as to why indigenous property systems are viewed as being retrogressive. It has informed the move from informal to the formal in East Africa up to date.\textsuperscript{180}

\textsuperscript{171} International Commission of Jurists Kenya, \textit{Interface between formal and informal justice systems in Kenya}, 32.
\textsuperscript{172} Kariuki F, ‘Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya’ 204.
\textsuperscript{174} See Elechi O, ‘Human rights and the African indigenous justice system’.
\textsuperscript{175} See Zehr, \textit{The little book of restorative justice}.
\textsuperscript{177} Okoth-Ogendo HW, ‘Formalising informal property rights: The problem of informal land rights reform in Africa’ Background paper prepared for the Commission for the Legal Empowerment of the Poor, Nairobi, 2006, 5.
\textsuperscript{178} Okoth-Ogendo HW, ‘Formalising informal property rights’, 6.
Informal justice systems guarantee access to justice especially in rural areas and informal settlements because the people in such areas are not able to afford the formal systems and live in remote areas. In Ethiopia, for example, informal justice systems are more influential and affect the lives of the individuals and groups living in areas far from regional centres.\(^{181}\)

TJS in Kenya have been under the informal mechanisms as they have not been adequately recognised and protected.\(^ {182}\) Today, they are recognised by the 2010 Constitution.\(^ {183}\) This is due to the realisation that they can dispense justice better in resolving conflicts\(^ {184}\) since they are affordable and not alien to the traditional communities\(^ {185}\) and have inclusive processes.\(^ {186}\) One question that arises is whether TJS can now be referred to as formal mechanisms due to the constitutional recognition. The answer to this can be found in clearly establishing the position of TJS in relation to traditional state mechanisms. It has to be determined whether they are still subjugated to statutory mechanisms or whether they are actually promoted by the state.\(^ {187}\) The state must actively participate as they do not become formal systems due to mere recognition.\(^ {188}\)

Can the formal and the informal justice systems work together? Can the informal be incorporated into the formal? There have been various attempts to address these issues. Those advocating for the informal justice systems due to their ability to achieve restorative justice have argued that merging the informal and formal will dilute or undermine informal systems.\(^ {189}\) According to them, merging the two means restorative justice is undermined.\(^ {190}\)

iv. The Pursuit of restorative as opposed to retributive justice

Restorative justice is ‘...a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.’\(^ {191}\) Retributive justice has been used in describing the conventional criminal justice sys-

\(^{183}\) Article 159(2), Constitution of Kenya (2010).
\(^{184}\) Forsyth M, ‘A typology of relationships between state and non-state justice systems’, 69.
\(^{185}\) Pimentel D, ‘Can indigenous justice survive? Legal pluralism and the rule of law’, 32-36.
\(^{189}\) Zehr, Changes lenses, 97-105.
\(^{190}\) Zehr, Changes lenses, 97-105.
\(^{191}\) Zehr, The little book of restorative justice, 37.
tem with special regard to offenders being punished. The two forms of justice share the desire to vindicate a wrongful act through reciprocal action but differ in the manner of realizing their objectives. Retributive justice imposes pain in order to vindicate while restorative justice is of the opinion that acknowledging the victims and encouraging offenders to take responsibility addresses the root cause of the problem.

To restorative justice, the primary stakeholders in a dispute are individual victims, their families, victimized communities, offenders and their families. The state also has an interest but is seen as more removed since it has not suffered a direct impact.

TJS seek restorative ends due to their basis in reconciliation and restoration of harmony:

“At the heart of [traditional] African adjudication lies the notion of reconciliation or the restoration of harmony. The job of a court or an arbitrator is...to set right a wrong in such a way as to restore harmony within the disturbed community.”

They seek to restore relationships, build peace and protect the interests of parties without allocating formal rights between them. Their involvement of the whole community in resolving the dispute at hand also contributes to restoration and transformation. The outcomes are also community oriented and little damage is involved as nobody is excluded. Archbishop Desmond Tutu describes the concept of ‘Ubuntu’ – which roughly translates to ‘restoring a balance that has been lost’, as being at the centre of traditional concepts of African justice. He states that, ‘Retributive justice is largely Western. The African understanding is far more restorative - not so much to punish as to restore a balance that has been knocked askew. The justice we hope for is restorative of the dignity of the people.”

196 Kariuki F, ‘Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya’ 204.
201 See Zehr, *The little book of restorative justice*.
TJS place a higher premium on reconciliation due to the realization that in most disputes,

‘...no party is totally at fault or completely blameless. As such, a high value is placed on reconciliation and everything is done to avoid the severance of social relationships. Where men must live together in a communalistic environment, they must be prepared for give and take relationships and the zero-sum, winner-take-all model of justice is inappropriate in their circumstances.’

Furthermore, TJS avoids adversarial approaches in order to preserve the web of relationships in the multiplex societies. Adversarial approaches raise the tension and estrangement between the disputants and their supporters and, therefore, threaten the moral cohesion of the community or group.

The sanctions imposed in TJS also reflect the underlying principle of restoration of social harmony and reconciliation of the disputants and the community. Compensation and restitution are emphasized in order to restore the status quo rather than imposing punishment. Traditional African societies do not need to employ the punitive measures used by the formal systems since for them, ‘enforcement lies within the complex of relationships...’ The social pressure founded on the web of relationships play a powerful role in securing compliance. Failure to comply with a finding arrived through a highly public participatory process is commensurate with disobeying the entire community and attracts social ostracism. The members of the community withdraw social contact and economic cooperation leading to separation of the individual from the community, a condition likened to a ‘living death’. In some instances, restitution of more than the damage occasioned is ordered ‘especially when the offender has been caught in flagrante delicto.’

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207 Igbokwe V, ‘Socio-cultural dimensions of dispute resolution’, 449-450, 469.
209 Roberts, Order and dispute, 27, 39, 65.
VII. Conclusion and the Way Forward

Community land is recognised by the 2010 Constitution but is not well protected and a community land law is yet to be enacted. This poses a challenge since the individualisation of land ownership destroys the web of interests that TJS practices are greatly reliant on. Customary law is also viewed as being inferior law. This treatment originates from the colonial administration and has continued in independent Kenya.

The community inclusive approach inherent in TJS is able to cater for the different parties exercising the various rights over community land. TJS are also able to preserve the diversity in the lives of traditional communities since each community has its own mechanisms. The informal nature of TJS enables them to reach every community even those in remote areas in an accessible, comprehensible and affordable manner. The pursuit of restorative justice preserves and strengthens the webs of relationships by the various right holders in community land. The resolution of disputes as opposed to settlement facilitates reconciliation by tackling the underlying issues in order to restore harmony among the various users of community land and related resources.

In light of the above, this paper recommends that policies and laws need to ensure better protection of community land. The absence of community land legislation increases the tenure insecurity. The communities are likely to lose their land to private individuals through questionable processes as there is no law governing the holding and conversion of land from community to private tenure. There is also a need to ensure that the policy and legal barriers hindering the application of customary law are removed.

The indigenous TJS institutions need to be recognised and encouraged as they are the custodians of the customs and values of the various traditional communities. Side-lining them results in the decline of cultural activity and consequently the demise of TJS. The formal justice systems should not interfere with TJS mechanisms. Combining the two justice systems undermines the objectives of informal justice systems, for example, the pursuit of restorative justice. It is also necessary to formulate a TJS Policy to guide the relationship between the formal and the informal justice systems, address the human rights and terminology concerns.