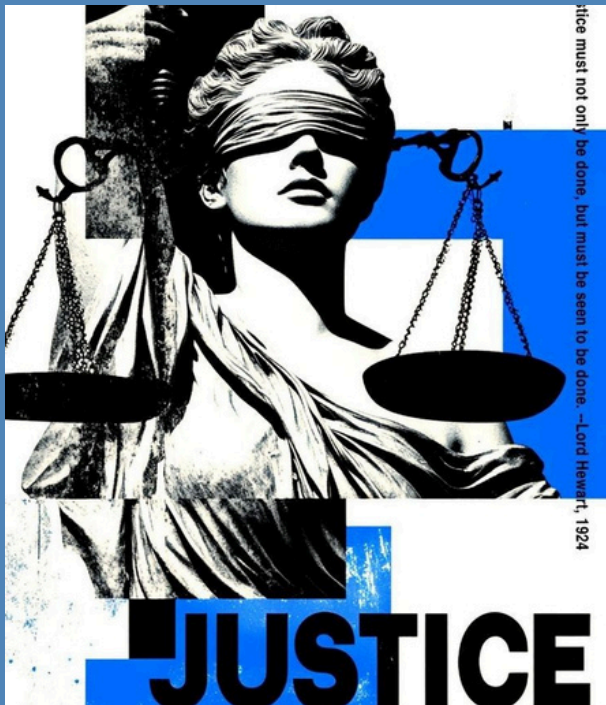




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RESEARCH FAIR 2023: ADVANCING HUMAN RIGHTS AND SOCIAL JUSTICE FOR SUSTAINABLE DEVELOPMENT

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A PROBE INTO THE JUSTIFICATION FOR THE ILLUSIVE PURSUIT OF POSITIVE AND NEGATIVE HUMAN RIGHTS SEPARATELY

BY

JOSEPH MUSASIZI¹

"Civil and political rights are negative rights that can be fulfilled if the state refrains from interfering, while economic, social and cultural rights necessarily require provisions from the state for their fulfilment"

A probe into the justification for the elusive pursuit of the two singularly

ABSTRACT

As Peter Ala Adjetey argues in "Economic and Social Rights and Their Relationship with Political and Civil Rights" (1993-1995) 19 Rev Ghana L 182, civil and political rights are often regarded as negative rights since they impose limitations on governments and non-state actors. Economic, social, and cultural rights on the other hand are positive rights because they confer positive terms for their fulfillment and states must take positive action to the maximum extent possible to ensure their development and enjoyment. The state must not interfere with negative rights but must take all necessary steps to progressively advance positive rights and assist its citizens in realizing them. But are these rights distinguishable? Can one be achieved in the shadow of the other, or is it indeed vain to pursue one divorced from the other as has been argued by some scholars? The mirage of fulfilment of these rights singularly is what this paper endeavours to bring to shore while highlighting the benefits of a unison pursuit. Without the effective realization of civil and political rights; economic, social, and cultural rights may not be fully achieved and vice versa.

This paper particularly looks into the differences between civil and political rights vis a vis

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economic and socio-cultural rights and the reasons behind the negative and positive steps towards their fulfilment, the reasons for their division, the measures that states are required to take to ensure their fulfilment, the challenges faced in the achievement or process of promotion of these rights, and how these rights relate to each other using secondary data compiled from online databases, books, journals, and other secondary sources. The data has been analysed by descriptive analysis among other tools and findings are herein elucidated.

1.0 INTRODUCTION

The foundational document that prescribes the various human rights available to all human beings by virtue of being human is the Universal Declaration of Human Rights (UDHR) adopted in

1948.²It contains various sets of rights considered vital for the existence of all human beings worldwide. These Universal rights are considered inviolable, interdependent, indivisible, absolute, and applicable to every individual regardless of race or nationality.³ They are considered to grant individuals powers that they can hold against others or the state. The State is required to make sure individuals' rights as recognized by law are respected, protected, fulfilled and, when necessary, enforced and at the same time is bound to abide by a series of obligations to ensure, protect and promote these rights.⁴

The UDHR at inception did not make any specific distinction or categorization of these rights as they seemed inter-related.⁵ As time progressed, during the cold war period, historical records state that there were emerging differences between these rights, partly linked to the cold war tensions between Eastern and Western countries.⁶ It is reported that Western countries put more emphasis on civil and political rights, while Eastern countries emphasised on the significance of economic, social, and cultural rights.⁷ This prompted the negotiation and adoption of two separate covenants.⁸ The relevance of this research, therefore, is to assess the impact of this separation in the 21st Century understanding and pursuit of human rights and the place this distinction holds in today's global discourse.

The foregoing split of the rights has watered down the principal purpose of the UDHR over the years having been envisioned as the only international treaty that would prescribe human

² United Nations, 'Universal Declaration of Human Rights' (1948) <<https://www.un.org/en/about-us/universal-declaration-of-human-rights>> accessed 6 April 2021.

³ Berta E. Hernández-Truyol, 'Civil And Political Rights-An Introduction, 28 U. Miami Inter-Am. L. Rev. 223 (1997)' (1997) 28 Miami Inter-Am. L. Rev. 223, 4 <<http://repository.law.miami.edu/Umiar/Vol28/Iss2/4>>.

⁴ UNODC, 'Positive and Negative Obligations of the State' (2019) <<https://www.unodc.org/e4j/en/tip-and-som/module-2/key-issues/positive-and-negative-obligations-of-the-state.html>> accessed 6 April 2021.

⁵ Afsana Supti, 'Civil and Political Rights and Socio-Economic Rights Are Interrelated.'

⁶ OHCHR, 'Key Concepts on ESCRs - Are Economic, Social and Cultural Rights Fundamentally Different from Civil and Political Rights?' <<https://www.ohchr.org/en/issues/escr/pages/areescrfundamentallydifferentfromcivilandpoliticalrights.aspx>> accessed 6 April 2021.

⁷ Eva Brems and Ann Russo, 'Human Rights Handbook' (1996) 25 Columbia Human Rights Law Review. 1993.

⁸ OHCHR (n 6).

rights in the international realm. The tension between western and eastern countries forced the United Nations (UN) to accommodate the political realities of the day,⁹ giving rise to the drafting of two international instruments borrowing from the UDHR.¹⁰ These were; the International Covenant on Civil and Political Rights (ICCPR),¹¹ and the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹² which entered into force in 1976 becoming foundations of International Human Rights Law.¹³ It was argued that the major reason behind the distinction of these rights as described in each of the enabling covenants are the obligations or measures states are mandated to take to insure their fulfilment.

This distinction between the two sets of rights further led to the grouping of human rights into different classes of rights, namely; the first generation of rights made up of civil and political rights, the second generation of rights known as economic and social-cultural rights, and the third generation of human rights that include rights of solidarity.¹⁴ For purposes of this paper, the focus will be limited to the first and second-generation rights, with special focus on the argument that the subdivision into the three categories aimed to protect different kinds of interests, hence requiring different means of protection and implementation.¹⁵

2.0 WHAT ARE CIVIL AND POLITICAL RIGHTS?

Civil and political rights encompass the protection of individuals' freedom from infringement by governments, social organizations, and private individuals, which ensure one's ability to participate in the civil and political life of the society and state without discrimination or

⁹ HJ Steiner and P Alston, 'Steiner H.J. and Alston P. (2000) International Human Rights in Context: Law, Politics, Morals: Text and Material, 2' 1.

¹⁰ Iheoma Adiele, 'Civil And Political Rights Vs Economic Social And Cultural Rights Article.'

¹¹ Authentic English, 'MULTILATERAL International Covenant on Civil and Political Rights. Adopted by the General Assembly of the United Nations on 19 December 1966 Optional Protocol to the abovementioned Covenant. Adopted by the General Assembly of the United Nations on 19 D', vol 999 (1976).

¹² Karin Oellers-Frahm and Andreas Zimmermann, 'International Covenant on Economic, Social and Cultural Rights' [2001] Dispute Settlement in Public International Law 383.

¹³ United Nations, 'The Foundation of International Human Rights Law' <<https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights-law>> accessed 6 April 2021.

¹⁴ Spasimir Domaradzki, Margaryta Khvostova and David Pupovac, 'Karel Vasak's Generations of Rights and the Contemporary Human Rights Discourse' (2019) 20 Human Rights Review 423 <<https://doi.org/10.1007/s12142-019-00565-x>> accessed 7 April 2021.

¹⁵ Law Explorer, 'Human Rights: Three Generations or One?' (*Human Right*, 2016) <<https://lawexplores.com/human-rights-three-generations-or-one/>> accessed 6 April 2021.

repression.¹⁶

Civil and political rights are considered to be negative rights because states are mandated to abstain from interfering with them.¹⁷ Article 2 (2) of the International Covenant on Civil and Political Rights requires a state party to the Covenant to take the necessary steps, following its Constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the Covenant.¹⁸ This provision is considered the central framework for the rights to be respected and protected.¹⁹ The wordings suggest a sense of immediate application or observance of these rights for states that are a party to the ICCPR.²⁰

Some of the substantive rights contained in the document include the right to self-determination;²¹ the right to life;²² freedom from torture and inhumane and degrading treatment and punishment;²³ the right to liberty and security of a person;²⁴ and freedom of movement.²⁵ These are just a few of the prescribed rights in the ICCPR. States are required to ensure that through their constitutional processes, these rights are reflected in their domestic constitution and enforced by the state machinery. Having entered into force on 23rd March 1976 through adoption by the UN General Assembly with resolution 2200A (XXI),²⁶ 173 countries have so far ratified the ICCPR and domesticated its provisions in their constitutions.²⁷

¹⁶ Frontline Defenders, 'Civil and Political Rights' (2021) <<https://www.frontlinedefenders.org/en/right/civil-political-rights>> accessed 16 April 2021.

¹⁷ Elif Gözler Çamur, 'Civil and Political Rights vs. Social and Economic Rights: A Brief Overview' (2017) 6 Bitlis Eren Üniversitesi Sosyal Bilimler Dergisi 205 <<https://dergipark.org.tr/en/pub/bitlissos/issue/28858/321304>> accessed 7 April 2021.

¹⁸ 'International Covenant on Civil and Political Rights.' (1988) 15 Annual review of population law 148.

¹⁹ Sri Subekti, 'HNo Title' (1976) 13 Θεσσαρίσματα 258.

²⁰ John G Merrills, 'The International Covenant on Civil and Political Rights. Cases, Materials, and Commentary. By Sarah Joseph, Jenny Schultz, and Melissa Castan. Xxxvi + 745pp. £75. Cases and Materials on the European Convention on Human Rights. By Alastair Mowbray. Xxxv + 8' (2003) 73 The British Year Book of International Law Oxford, 367.

²¹ International Covenant On Civil And Political Rights (ICCPR), 1966, Article 1.

²² ICCPR, Article 6.

²³ ICCPR, art. 7.

²⁴ ICCPR, art. 9.

²⁵ United Nations General Assembly Resolution 2200A (XXI), 'Article 12 International Covenant On Civil And Political Rights'.

²⁶ Resolution 2200A (XXI) 1976.

²⁷ <<https://www.aclu.org/other/faq-covenant-civil-political-rights-iccpr>> Accessed 16th April 2021.

Negative rights are considered to be cost-free in nature since all that is required of a state is to refrain from acts that would lead to their violation. For that reason, they are believed to be easily achievable.²⁸ For example, the right to be free from torture, freedom of movement, freedom of association, the state only has to desist from interference for citizens' absolute enjoyment of these among others. According to Jorge, these rights are considered to be closely linked to the government and are political and notably being the foundation of constitutions worldwide.²⁹ Additionally, Jorge reaffirms that these rights are important for proper and functional society. He asserts that these rights are fundamental for the attainment of a functional democracy by any state.³⁰

It is however argued that the duty to refrain from interfering with these rights alone does not guarantee the protection of these rights. State parties are additionally required to respect and take appropriate steps to prevent, punish, investigate and redress the harm caused by other individuals or non-state actors who violate these rights such as private entities or corporations to ensure their fulfilment.³¹ This amounts to positive action hence perverting their categorization or barricading as negative rights.

2.1 Comparison to Economic, Social, and Cultural Rights

The International Justice Resource Centre defines economic, social, and cultural rights as the freedoms, privileges, and entitlements that individuals and communities require to live a life of dignity.³² such rights include: the right to work;³³ the right to social security including social

²⁸ Iheoma Adiele (n 12).

²⁹ Jorge Farinacci-Fernós, 'Looking Beyond the Positive-Negative Rights Distinction: Analyzing Constitutional Rights According to Their Nature, Effect, and Reach' (2018) 41 UC Law SF International Law Review 31 <https://repository.uclawsf.edu/hastings_international_comparative_law_review/vol41/iss1/2>. Accessed 7 April 2021

³⁰ *ibid.*

³¹ 'The Covenant on Civil and Political Rights' (2013) 3 Tribuna Juridică 308.

³² International Justice Resource Center, 'Economic Social and Cultural Rights' (2021) <<https://ijrcenter.org/thematic-research-guides/economic-social-and-cultural-rights-2/>> accessed 16 April 2021.

³³ International Covenant On Economic, Social and Cultural Rights (ICESC), 1966, Art. 6.

insurance;³⁴ the right to protection and assistance to family;³⁵ the right to education;³⁶ the right to an adequate standard of living which includes the right to adequate food, clothing, and housing,³⁷ and the right to the highest standard of physical and mental health.³⁸

These rights are deemed to be positive because citizens can compel their governments to take measures that make their implementation a positive duty. This duty may range from the provision of the necessary resources to the creation of conditions necessary for individuals' full enjoyment of these rights.³⁹ Specifically, states are obliged to respect, protect, and fulfil economic, social, and cultural rights. The obligation to respect means States cannot interfere with the enjoyment of the right while the obligation to protect requires the State to reasonably prevent other actors from interfering with the enjoyment of the right.⁴⁰

Article 2(1) of the International Covenant on Economic, Social and Cultural Rights backs this up by requiring that each state party is required to take steps either independently or through international support using the maximum available resources to progressively ensure the full realization of economic and social-cultural rights,⁴¹ including the adoption of legislative measures.⁴²

Because these rights cannot be achieved instantly, states are required to take progressive measures towards the same. This implies that immediate action against abusing states may not be taken since the achievement of these rights involves planning and resource mobilization to ensure their fulfilment.⁴³ Additionally, there is an obligation of International Assistance should a state fail to realize such rights for its citizens despite its positive steps towards the same. For instance, the right

³⁴ ICESCR, Art. 9.

³⁵ ICESCR, Art. 10.

³⁶ ICESCR, art. 13.

³⁷ Trust Territories, 'International Covenant on Economic, Social and Cultural Rights,[1976], Article 11'

³⁸ OHCHR, 'Article 12 International Covenant On Economic, Social, And Cultural Rights' (1966).

³⁹ Eren Üniversitesi Sosyal Bilimler Enstitüsü Dergisi and Gözler Çamur (n 17).

⁴⁰ International Justice Resource Center (n 32)

⁴¹ Trust Territories (n 37).

⁴² Merrills (n 20).

⁴³ ICESCR (n 33)

to adequate housing requires the government to come up with affordable housing schemes, get the necessary resources to help build such houses and make them available for its citizens. These positive steps take several years to reach fruition hence the challenge or enforcement of the adequate housing right.

Consequently, the obligation of the progressive development of these rights allows states to apply flexible measures for their implementation and realization.⁴⁴ However, since states are required to take positive but progressive measures, critics argue that there is a tendency for some states to drag their feet in fulfilling these rights.⁴⁵ The rights nonetheless create an affirmative obligation towards states for their fulfilment.⁴⁶

Progress towards the fulfilment of obligations by states is monitored by the United Nations Committee on Economic, Social and Cultural Rights (UNCESCR) established in 1986 under ECOSOC Resolution 1985/17 of 28 May 1985 with a mandate to carry out monitoring functions assigned to the United Nations Economic and Social Council (ECOSOC) in Part IV of the covenant.⁴⁷ The same covenant places obligations on states to use maximum available resources to realize these rights for their citizens or seek international assistance.

It should be noted the extent to which individuals can claim legal protection of their economic, social, and cultural rights (ESCR) depends on which treaties have been ratified by their governments given that the protections for ESCR vary significantly among the universal and regional human rights instruments.⁴⁸ The state must also reasonably refrain and prevent other actors from interfering with the enjoyment of these rights which is a negative obligation.

⁴⁴ Lillian Chenwi, 'Unpacking "Progressive Realisation", Its Relation to Resources, Minimum Core and Reasonableness, and Some Methodological Considerations for Assessing Compliance' (2013) 46 De Jure 742.

⁴⁵ *ibid.*

⁴⁶ Farinacci-Fernós (n 29)

⁴⁷ OHCHR, 'Committee on Economic, Social and Cultural Rights (CESCR)' (1985) <<https://www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx>> accessed 6 April 2021.

⁴⁸ International Justice Resource Center (n 32)

2.2 Is there any merit in the distinction of these rights?

According to scholarly arguments and discussions, both rights are considered to share a common purpose, which is to mitigate any injustices against human beings under international and domestic law. In this sense, both rights are thus perceived to belong to one generation of rights but apply to different structures and populations under international law.⁴⁹ The world conference on human rights held in 1993 notably declared human rights to be indivisible, interdependent, and interrelated.⁵⁰ States were urged to give importance to every human right irrespective of extrinsic factors that may influence their implementation and enforcement such as governmental, economic, and cultural systems.⁵¹

Consequently, the current societal view of civil and political rights as negative rights and economic and social-cultural rights as positive rights does not hold much weight. This is because it divides and groups these rights, whereas in the real sense they are integrated, intertwined, and

⁴⁹ Law Explorer (n 15).

⁵⁰ Cees Flinterman, 'Vienna Declaration and Programme of Action: 20 Years Later' (2013) 31 Netherlands Quarterly of Human Rights 129 <<https://journals.sagepub.com/doi/10.1177/016934411303100201>> accessed 7 April 2021.

⁵¹ OHCHR, 'Vienna Declaration and Programme of Action' <<https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx>> accessed 7 April 2021.

complementary.⁵²

Whereas Alberto and Klaus indicate that the division is linked to the practical difficulties of their actual implementation, in reality, one cannot deny that negative rights may require positive measures and vice versa. They posit that both rights require resources in the real sense and that therefore the argument of states merely refraining from interference may not hold water in some circumstances.⁵³ This is particularly evident when it comes to the actual implementation of these rights where one easily establishes the inapplicability of negative and positive rights difference.⁵⁴ Resources required to enforce negative rights when violated may at times call for more resources than those required to ensure the realization of positive rights.⁵⁵ Therefore, the urgency that may be required to ensure a positive right is fulfilled may be the same that applies to a negative right and vice versa.⁵⁶

Undoubtedly these arguments hold undeniable truth as reflected by the actualities of today's world, classifying these rights as positive and negative is only practical on paper and their conception as so is limiting and an impediment to their fulfilment especially for civil and political rights that require some action by the state. A good illustration is the right to participate in free and fair elections and the right to a fair trial.⁵⁷

This was affirmed in a Kenyan case *Ibrahim Sangor Osman v. Minister of State for Provincial Administration and Internal Security (2011) eKLR (Kenya)*⁵⁸ where the court stated that treaties or conventions endorsed by Kenya, form part of the laws of Kenya. Furthermore, civil and political rights, as well as social and economic rights, are interdependent hence cannot be separated.⁵⁹

⁵²Flavia Piovesan, 'Social, Economic and Cultural Rights and Civil and Political Rights' (2006) 1 Sur - Revista Internacional de Direitos Humanos 0 <http://socialsciences.scielo.org/scielo.php?script=sci_abstract&pid=S1806-64452006000100003&lng=en&nrm=iso&tlng=en> accessed 7 April 2021.

⁵³ Alberto Quintavalla and Klaus Heine, 'Priorities and Human Rights' (2019) 23 International Journal of Human Rights 679 <<https://doi.org/10.1080/13642987.2018.1562917>> accessed 7 April 2021.

⁵⁴ Stanford Encyclopedia of Philosophy, 'Rights' (2005) <<https://plato.stanford.edu/entries/rights/>> accessed 7 April 2021.

⁵⁵ *ibid.*

⁵⁶ *ibid.*

⁵⁷ Berta E. Hernández-Truyol (n 5).

⁵⁸ [2011] KEHC 4286 (KLR)

⁵⁹ *ibid.*

2.3 Challenges that have arisen from the Categorization of Civil and Political Rights as Negative Rights

Politics is said to have a major influence on how civil and political rights are actualized across the globe.⁶⁰ Most civil movements are closely linked to advocating for these rights, mostly calling upon the state to refrain from acting in a particular manner that limits their enjoyment. Such movements may demand the state to refrain from acts such as limiting freedom of speech or preventing racial discrimination.⁶¹ However, in most cases, such movements are mostly met with a hostile response from the state, especially repressive states where said freedoms of expression and freedom of association are highly restricted. Culpable states mostly include China, Russia, African states including Uganda, Sudan, and Zimbabwe, and surprisingly in some very advanced democracies such as France and the United States of America. It can therefore be adduced that democracy alone does not guarantee the protection of civil and political rights.⁶²

Police in some democratic states have occasionally violated human rights by using excessive force to disperse gatherings, picketing, and peaceful demonstrations in blatant disregard of rights such as freedom of assembly, freedom of expression, and freedom of association as transpired over several decades in Zimbabwe.⁶³ This is not only an example in less civilized states but also at the

⁶⁰Council of Europe, 'The Evolution of Human Rights' (*Compass: Manual for Human Rights Education with Young people*,) <<https://www.coe.int/en/web/compass/the-evolution-of-human-rights>> accessed 7 April 2021

⁶¹ Joseph E Luders, 'Civil Rights Success and the Politics of Racial Violence' (2005) 37 *Polity* 108.

⁶² L Bantekas, I., & Oette, 'Civil and Political Rights. In *International Human Rights Law and Practice*', Chapter 8, (Cambridge University Press 2013).

⁶³Pontsho Mokone and Howard Chitimira, 'Selected Challenges Associated with Civil and Political Rights Violations in Zimbabwe (Part 2)' (2018) 14 *Acta Universitatis Danubius. Juridica* 134.

core of advanced democracies as transpired during the civil rights movements in the United States when activists marched against police brutality and racially motivated violence against African Americans in the 1960s with many ending up in jail or killed. Most recently, similar violent crackdowns and human rights abuse cases were witnessed in the USA and UK over the Black Lives Matter protests of 2020.⁶⁴

In the African context, democratic governments do exist but have been characterized by massive human rights abuse such as arbitrary detentions and inequality before the law especially due to corruption, lack of accountability by the leaders, and dictatorial forms of governance.⁶⁵ These civil and political rights violations have led to some of the worst outbursts by the oppressed resulting in very grave catastrophes like the 1994 genocide in Rwanda and the 2007 post-election violence in Kenya.⁶⁶

The above resulted from the categorization of civil and political rights as negative rights. Had a proactive approach and provision of safe spaces by states, a positive obligation been applied, most of these unfortunate happenings could have been avoided.

On a positive note, however, human rights confrontations have borne democratic governments or improved accountability in states where they occur, for example in Rwanda and Kenya where they resulted in alleviation of generational injustices and bridged societal differences through the adoption of new progressive constitutions and governance tools.

⁶⁴NPR, 'RACE: In 2020, Protests Spread Across The Globe With A Similar Message: Black Lives Matter' (*Morning Edition*, 2020) <<https://www.npr.org/2020/12/30/950053607/in-2020-protests-spread-across-the-globe-with-a-similar-message-black-lives-matt>> accessed 7 April 2021.

⁶⁵Simeon O Ilesanmi, 'Civil-Political Rights or Social Economic Rights for Africa? A Comparative Ethical Critique of a False Dichotomy. Accessed April 7, 2021.' (1997) 17 *The Annual of the Society of Christian Ethics*, 191 <<http://www.jstor.org/stable/23560008>> accessed 7 April 2021.

⁶⁶Beyond Intractability, 'Human Rights Violations' (*Knowledge Base*, 2003) <https://www.beyondintractability.org/essay/human_rights_violations> accessed 7 April 2021.

2.4 Impediments to implementation and utility of social, economic, and cultural rights in light of their positive categorization.

The categorization of economic and social-cultural rights as positive rights with the obligation of progressive implementation has led to some difficulties in practice.⁶⁷ This is partly linked to the extent to which positive measures are taken by the government. Efforts towards their realization even though existent may be difficult to prove and the extent of progression difficult to assess.

It should be noted that some of these rights are not wholly appreciated by some states as obligatory state provisions but realizations that individual citizens must strive to achieve on their own, for example the right to an adequate standard of living. This lack of interest in pursuing these rights as a matter of obligation has been fronted by the Overseas Development Institute in addition to accountability as the core challenges in assessing compliance by states in their briefing paper No.46 of 2008.⁶⁸

When it comes to judicial enforcement of these rights, certain complexities accompany their interpretation. Judges lack relevant information and precedent on which to base their decisions. Expert opinion may be required and the need for a comprehensive set of procedures for the judiciary to give solutions to their enforcement. These are either absent or insufficient in several states.⁶⁹ Further to this, these rights are connected to the necessities of life, which require economic goods or services for their fulfilment, a realization that must be strived for to be achieved.⁷⁰

Failure by a state to ensure that economic, social, and cultural rights are enjoyed without discrimination amounts to a breach of International Human Rights Law.⁷¹ The UN gives a few examples of what would constitute the breach of these rights, such as forced evictions of people from their homes, hence deprivation of the right to right to adequate housing, and the failure to

⁶⁷ Overseas Development Institute, 'Achieving Economic And Social Rights: The Challenge In Assessing Compliance, Briefing Paper No 46,2008' (2008) <<https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications/opinion-files/2340.pdf>>

⁶⁸ *ibid.*

⁶⁹ Ellen Wiles, 'Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law' (2006) 22 American University International Law Review, 35.

⁷⁰ Council of Europe (n 60)

⁷¹ OHCHR (n 8).

guarantee a minimum wage adequate for a decent living.⁷²

Another challenge facing the implementation is where a state has an insufficient legal framework that affects its constitutional provisions.⁷³ The right to adequate housing can be used as the best example, where its enforcement has been brought before courts due to the vagueness or uncertainty in character.⁷⁴ It is often said that the right to adequate housing has no precise meaning and offers no clear standard which can be used to determine how its violation conforms to or deviates from it.⁷⁵

Nonetheless, there has been progress in the justifiability of these rights. Using the earlier mentioned example of the right to adequate housing, in South Africa, the famous *Irene Grootboom* case lays the foundation on the justifiability of the right.⁷⁶ The case, according to Bonolo, proposed that progressive measures involve comprehensive, clear, and harmonized measures, which are capable of facilitating the realization of the right; Secondly the measures ought to be flexible enough to meet short-term and medium goals. Moreover, they should clarify what responsibilities and tasks are assigned to the different sectors of the government to facilitate the planning or procurement of resources.⁷⁷ These standards can therefore be generally applicable in the pursuit and fulfillment of other economic and social-cultural rights in other jurisdictions.

All things considered, economic, social, and cultural rights cannot be achieved where civil and political rights are being violated but more so, they require negative steps including refraining from interference in people's social or private lives, refraining from interfering in market economies, and avoiding interference in cultures and their established practices.

⁷² OHCHR, 'Key Concepts on ESCRs -What Are Examples of Violations of Economic, Social and Cultural Rights?' <<https://www.ohchr.org/en/issues/escr/pages/whatareexamplesofviolationsofescr.aspx>> accessed 7 April 2021.

⁷³ Bonolo Ramadi Dinokopila, 'The Justiciability of Socio-Economic Rights in Botswana' (2013) 57 *Journal of African Law*, 108.

⁷⁴ International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights. Comparative Experiences of Justiciability*, vol 2 (2008).

⁷⁵ *ibid.*

⁷⁶ *Government of the Republic of South Africa and Others vs Grootboom* (2010) 2001 1.

⁷⁷ Dinokopila (n 73).

3.0 CONCLUSION

The distinction of rights as negative and positive aims to demonstrate what kind of efforts ought to be taken by the state to ensure their fulfilment. The fact however remains that for positive rights, states will always be required to ensure a hands-on approach is done to guarantee their fulfilment, whereas for the negative rights the state may not be required to do as much but rather desist from certain actions.⁷⁸ It may however be required to strike down an action that would probably cause the violation of a negative right.⁷⁹ The negative and positive aspect of these rights is not significant since all human rights are interdependent and require states to apply both positive and negative steps interchangeably to ensure their fulfilment.⁸⁰

Additionally, both positive and negative rights have been incorporated in most state constitutions and other domestic legislation in addition to state soft laws with their interdependence resulting in expensive enforcement where they have been approached separately due to their overlap.⁸¹

Lessons from this were lived in South Africa where economic, social, and cultural rights borne of apartheid inequalities led to civil and political rights-related struggles with their final cure having been a mixed approach of negative and positive steps towards the attainment of both rights as a whole.

So, is there any justification for the elusive pursuit of the two singularly? This essay finds it futile to separate or approach the promotion and fulfilment of positive rights in absence of negative rights and the emphasis on negative rights without providing for the positive rights in vain. The terms used to distinguish the rights have been found to at times create unnecessary conflict in their interpretation.⁸² More so, according to Seth's problem of negative rights in a positive state; when it applies to the role of the state in terms of performing an action or inaction which seems to be the

⁷⁸ Kirah Addes, 'The Fate of Affordable Housing Legislation in New Jersey : How Governor Christie S Proposed S1 Legislation Threatens To Undo the New Jersey Supreme Court Decisions In' (2011) 821 82.

⁷⁹ Farinacci-Fernós (n 29)

⁸⁰ OHCHR (n 8)

⁸¹ Eren Üniversitesi Sosyal Bilimler Enstitüsü Dergisi and Gözler Çamur (n 17).

⁸² Stanford Encyclopedia of Philosophy, 'Positive and Negative Liberty' (2003) <<https://plato.stanford.edu/entries/liberty-positive-negative/>> accessed 7 April 2021.

basis of distinguishing the two sets of rights, the distinction finds itself no longer useful.⁸³

Several third world states aspire to address economic, social, and political rights while several others especially dictatorial regimes believe that the poor are easier to govern than the wealthy and therefore deliberately strangle or drag down efforts for their realization, further research, therefore, needs to be done on the measure of indicators of relative progression by states towards promotion and fulfilment of these rights within their civil and political spaces.

⁸³ Seth F Kreimer, 'Allocational Sanctions: The Problem of Negative Rights in a Positive State' (1984) 132 University of Pennsylvania Law Review 1293.

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Legal Challenges Facing Algorithmic Decision-Making in Kenya

BY

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Abstract

This paper evaluates the existing non-discriminatory legal framework in Kenya to assess its limitations concerning the increasing use of computer algorithms in decision-making. It argues that the legal tools available may not be adequate to address the challenges of automated decisions. The detection of algorithmic discrimination is a huge challenge that the law does not anticipate. This is because evidence of discrimination is not apparent due to the technical and opaque nature of Artificial Intelligence (AI) and Machine Learning (ML) processes. Furthermore, when evidence is obtained, interpreting it requires highly skilled technical expertise which may not be available. The paper further argues that while the concept of indirect discrimination may be useful in addressing algorithmic discrimination, it may not be enough: additional actions may be required such as the imposition of a requirement for interpretability of algorithmic systems by law. At the same time, whereas the Data Protection Act, 2019 (DPA) contains some progressive provisions in relation to automated decisions, it has its challenges such as compliance and enforcement, and the fact that the DPA only applies to personal data. This paper shall then conclude by calling for the enactment of a comprehensive non-discriminatory statute that addresses, inter alia, the unique challenges of algorithmic discrimination.

1.0 INTRODUCTION

The proliferation of the internet has led to the emergence of revolutionary computer technologies. One such technology is Artificial Intelligence (AI) and Machine Learning (ML). AI has in turn led to a new way of making decisions by use of powerful computer algorithms. This phenomenon has been referred to as algorithmic or automated decision-making. There is no consensus on the definition of algorithmic decision-making and AI. However, some descriptions may be helpful. An algorithm has been defined as 'an abstract, formalized description of a computational

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procedure.”¹ The output of this procedure is what we refer to as a “decision.” Algorithmic decision-making is therefore the process by which an algorithm produces an output.² An algorithm may make decisions in a fully automated fashion or partly automated.³ When partly automated, humans make decisions assisted by algorithms. For example, a bank employee may decide whether a customer can borrow money from the bank after an algorithmic system assessed the customer's creditworthiness.⁴

This technology has been deployed in various sectors with tremendous benefits to society.⁵ Besides their application in credit profiling, Algorithms have been used by a wide range of web publishers, online retailers, and social media companies to determine the kinds of stories that are featured to online readers, the advertisements that are targeted to online shoppers, and the search results they see.⁶ Algorithms have also been used to make decisions about insurance premiums, healthcare, education, housing, and employment screening.⁷ Within the Kenyan context, it was reported that in 2020 *Safaricom* disbursed digital loans amounting to 245 billion shillings through its mobile lending service *Fuliza* which is an automated system of credit profiling.⁸ Aside from *Fuliza*, other digital credit players that rely on automated credit scoring models to advance loans within the Kenyan market include *Tala*, *Branch*, *Musoni*, *Afrikaloan*, *Kopa Leo*, *KCB-MPESA*.⁹

Despite the documented benefits of AI technologies, there are concerns about the potential negative effects of algorithmic agents. One such concern is the potential of algorithms to facilitate discriminatory decision-making.¹⁰ In addition, data protection and privacy concerns have been

¹ See P Dourish, ‘Algorithms and Their Others: Algorithmic Culture in Context’ (2016) *Big Data & Society* 3 no. 2, 3, cited in Frederik J. Zuiderveen Borgesius, ‘Strengthening Legal Protection Against Discrimination by Algorithms and Artificial Intelligence’ *The International Journal of Human Rights* (2020) 1573.

² Frederik J Zuiderveen Borgesius, ‘Strengthening Legal Protection Against Discrimination by Algorithms and Artificial Intelligence’ *The International Journal of Human Rights* (2020) 1573.

³ *ibid.*

⁴ *ibid.*

⁵ See, e.g., US EXECUTIVE OFFICE OF THE PRESIDENT, *Big Data: A Report on Algorithmic Systems, Opportunity, and Civil Rights* (May 2016) 4 < https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/2016_0504_data_discrimination.pdf > accessed June 23, 2021.

⁶ See Philip N Yannella, ‘The Differing US and EU Regulatory Responses to Rise in Algorithmic Profiling’ (2018) 33 *Comm Law* 1.

⁷ *ibid.*

⁸ Franklin Sunday, ‘21 million broke Kenyans take a record Sh 245b Fuliza loans’ *The Standard* (October 15, 2020) < <https://www.standardmedia.co.ke/amp/business-news/article/2001390132/21-million-broke-kenyans-take-a-record-sh245b-fuliza-loans> > accessed June 23, 2021.

⁹ See MicroSave Consulting, ‘Making Digital Credit Truly Responsible: Insights from Analysis of Digital Credit in Kenya’ (September 2019) 13.

¹⁰ Yannella, *supra* note 6 at 1.

raised.¹¹ Many may think that algorithms are harmless tools that rely on objective criteria to render fact-based predictions about consumer likes and behavior. On the contrary, it has been established that algorithmic decisions may result in discriminatory outcomes.¹² There have been reports of algorithmic discrimination based on gender¹³, race¹⁴ and disability.¹⁵

The increasing adoption of AI and ML in Kenya (for instance in the digital credit sector) calls for a corresponding increase in scrutiny of the associated technologies in order to avert the potential undesirable effects of such technologies on society. This paper seeks to evaluate the existing law on discrimination in Kenya to assess its limitations concerning the increasing use of computer algorithms in decision-making. The paper is divided into four parts. Following this introduction, part two gives a brief history of AI and associated technologies like ML. Part three sheds light on the legal challenges that surround automated decision-making. Algorithmic discrimination has been identified as a major issue that requires the attention of policy makers. Finally, part four concludes and suggests some recommendations.

¹¹ See Borgesius, supra note 2.

¹² Yannella, supra note 6.

¹³ Byron Spice, 'Questioning the Fairness of Targeting Ads Online' *CMU* (July 7, 2015) < <https://www.cmu.edu/news/stories/archives/2015/july/online-ads-research.html> > accessed June 23, 2021. A study by Carnegie Mellon University showed that significantly fewer women than men were shown Google ads promising them to help get jobs paying more than \$200,000, raising questions about the fairness of targeting ads online.

¹⁴ BBC, 'Google searches expose racial bias, says study of names' *BBC* (February 4, 2013) < <https://www.bbc.com/news/technology-21322183> > accessed June 23, 2021. Harvard professor Latanya Sweeney says that names typically associated with black people were more likely to produce ads related to criminal activity. See also, *THE EAST AFRICAN*, 'Facebook mistakenly labels black men 'primates'' *THE EAST AFRICAN* (September 4, 2021) < <https://www.theeastafrican.co.ke/tea/news/east-africa/facebook-mistakenly-labels-black-men-primates-3537746> > accessed September 8, 2021.

¹⁵ See Alex Engler, 'For some employment algorithms, disability discrimination by default' (*Brookings*, October 31, 2019) < <https://www.brookings.edu/blog/techtank/2019/10/31/for-some-employment-algorithms-disability-discrimination-by-default/amp/> > accessed September 1, 2021.

2.0 ARTIFICIAL INTELLIGENCE, MACHINE LEARNING AND ALGORITHMIC DECISION-MAKING: A BRIEF HISTORY

2.1 Defining the Concepts

Artificial Intelligence (AI) has been defined as “the study of the design of intelligent agents.”¹⁶ An agent is “something that acts”, such as a computer.¹⁷ Machine Learning (ML) is a good example of AI. ML refers to “an automated process of discovering correlations between variables in a dataset, often to make predictions or estimates of some outcome”.¹⁸ The availability of enormous amounts of data in the digital/internet age has fueled the increasing use and development of AI and ML technologies in the past one decade. Algorithmic decision-making refers to the process by which a computer algorithm produces an output.¹⁹ An algorithm is “an abstract, formalized description of a computational procedure.”²⁰ The output of that procedure is what this paper refers to as the “decision.”

The emergence of AI and ML technologies has been made possible by the availability of big data in the internet era. The term “big data” refers to a confluence of factors, such as the widespread collection of consumer data from a variety of sources, the plummeting cost of data storage, and powerful new capabilities to analyze data to draw connections and make inferences and predictions.²¹

¹⁶ S J Russell and P Norvig, *Artificial Intelligence: A Modern Approach* (3rd ed., Prentice Hall 2016) 2, cited in Frederik J. Zuiderveen Borgesius, ‘Strengthening Legal Protection Against Discrimination by Algorithms and Artificial Intelligence’ *The International Journal of Human Rights* (2020) 1573.

¹⁷ Russel and Norvig, *Artificial Intelligence*, 4.

¹⁸ D Lehr and P Ohm, ‘Playing with the Data: What Legal Scholars Should Learn About Machine Learning’ (2017) *UCDL Review* 51 653, 671.

¹⁹ Dourish, *supra* note 1.

²⁰ *ibid.*

²¹ See Federal Trade Commission, *Big Data: A Tool for Inclusion or Exclusion? Understanding The Issues* (Federal Trade Commission, January 2016) 1 < <https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf> > accessed September 1, 2021.

2.2 A Brief History of Artificial Intelligence

The history of AI is traced to philosophy, fiction, and imagination.²² Early inventions in electronics, engineering, and many other disciplines have influenced AI. But it is only in the last half a century that computer scientists have been able to develop systems that display intelligent behavior.²³ Nonetheless, full-blown AI still remains a future achievement. Philosophers and science fiction writers have always floated the idea of intelligent machines that would display some form of human behavior. Gottfried Wilhelm Leibniz saw the possibility of mechanical reasoning devices using rules of logic to settle disputes.²⁴ Leibniz and Blaise Pascal designed calculators that mechanized arithmetic.²⁵ On the other hand, science fiction writers such as Jules Verne and Isaac Asimov have used the possibility of intelligent machines to advance the fantasy of intelligent non-humans.²⁶

The early twentieth-century developments in electronics and the post–World War II rise of modern computers have made AI a practical possibility. In the last half a century, there has been an explosion of computational devices and programming languages powerful enough to facilitate the development of experimental intelligent systems.²⁷ The decades that followed have seen increased interest in AI research. With the discovery of the internet and the associated explosion in big data, AI and ML have taken root in the 21st century. Still, AI is very much technology in progress. Today AI enjoys widespread acceptance and use in various sectors, such as education, healthcare, employment, policing, transportation, and credit profiling. This is achieved through the use of ML technologies in automating decision-making processes through computer algorithms.

2.3 How Algorithmic Decisions are made

To fully appreciate the legal issues that may arise from automated decision-making processes, an understanding of the technical functioning of algorithms is important. In this section we use the big-data credit scoring model to illustrate how computer algorithms are used to evaluate credit

²² Bruce G. Buchanan, A (Very) Brief History of Artificial Intelligence, *AI Magazine*, Vol. 26 No. 4: Winter 2005 25th Anniversary Issue, at 1.

²³ *ibid.*

²⁴ *ibid.*

²⁵ *ibid.*

²⁶ Bruce G. Buchanan, A (Very) Brief History of Artificial Intelligence, *AI Magazine*, Vol. 26 No. 4: Winter 2005 25th Anniversary Issue.

²⁷ Buchanan, *supra* note 22, at 56.

risk. The process involves the use of thousands of data points and supervised ML tools to measure creditworthiness.²⁸ There are three major steps in designing a credit scoring tool.

First, the problem to be solved is defined (creditworthiness). This includes specifying a target variable representing the desired outcome.²⁹ The data scientist may segment potential borrowers into classes such as "very creditworthy," "creditworthy," "less creditworthy," and "not creditworthy."³⁰ Another way to segment borrowers is based upon their income levels and credit repayment histories.

The second stage entails gathering data and transforming it into a useable form.³¹ Once the target variable has been identified and classes established, the data scientist gathers information associated with individuals for which the various outcomes are already known.³² This information forms the "training data" that is used throughout the machine learning process to develop a final model.

Finally, the model is developed and refined through exposure to training data and through feature selection.³³ The process of ML can then begin. The output of this process is a credit score that is used to make lending decisions.

3.0 LEGAL ISSUES SURROUNDING ALGORITHMIC DECISION-MAKING

The growing use of ML systems has occasioned several challenges. Harms such as discrimination, unfairness, privacy, and opacity have been pointed out.³⁴ Non-discriminatory and data protection laws are part of the tools that are available to redress some of these challenges. Concepts such as direct and indirect discrimination can be deployed to remedy the discriminatory effects of algorithms. Similarly, the legal "right to an explanation" provided in the data protection laws has emerged as a compelling approach for redress. However, this part reveals that these legal tools may not be adequate to address the challenges of automated decisions.

²⁸ See Mikella Hurley & Julius Adebayo, 'Credit Scoring in The Era of Big Data' (2016) 18 *YALE J L & TECH* 148, 168 < https://openyls.law.yale.edu/bitstream/handle/20.500.13051/7808/Hurley_Mikella.pdf > accessed September 1, 2021.

²⁹ *ibid.*

³⁰ Mikella Hurley & Julius Adebayo, 'Credit Scoring in The Era of Big Data' (2016) 172.

³¹ *supra* note 28.

³² Mikella Hurley & Julius Adebayo, 'Credit Scoring in The Era of Big Data' (2016) 174.

³³ Mikella Hurley & Julius Adebayo, 'Credit Scoring in The Era of Big Data' (2016) 180.

³⁴ See Lilian Edwards & Michael Veale, 'Slave to the algorithm? Why a 'right to an explanation' is probably not the remedy you are looking for' (2017) *Duke Law & Technology Review* vol 16, no 1.

3.1 Discrimination

As described in part two above, the process of making decisions based on computer algorithms is technical and sophisticated. The use of extensive data profiles of individuals without a means for such individuals to influence the outcome of those processes is a matter for concern. One of the most troubling concerns with automated decisions is their potential for discrimination. When computers are fed with data that is already biased in certain aspects, the outcome of such a decision-making process can only be biased as well.³⁵ Barocas and Selbst observe that an algorithm is only as good as the data it works with.³⁶ When data contains inherent prejudices, an algorithm normally inherits such prejudices. Data may also reflect the widespread biases that are prevalent in the society.³⁷ Data that is mined for use in automated decisions may contain preexisting patterns of exclusion and inequality. This means that exclusive reliance on algorithms for decision making may lead to the profiling of individuals based on protected characteristics such as race, sex, pregnancy, marital status, health status, ethnic social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth; personal preferences, interests, behaviour, location or movements. Instances of algorithmic discrimination abound. In the US for instance, an AI system used to predict whether defendants were likely to be repeat offenders was shown to be biased against blacks.³⁸

Algorithms used to make hiring decisions or to select students to join a certain school may perpetuate bias based on the training data used. When such data is already biased against certain categories of people, the eventual outcome of the process will also be biased. For some time now, the Kenya Ministry of Education has been doing form one selection and placement using an automated computer system.³⁹ The ministry argues that its system is premised on the principles of

³⁵ supra note 2, 1576.

³⁶ Solon Barocas & Andrew D Selbst, 'Big Data's Disparate Impact' (2016) 104 *CALIF L REV* 671, 1.

³⁷ *ibid*.

³⁸ Julia Angwin, Jeff Larson, Surya Mattu and Lauren Kirchner, 'Machine Bias: There's Software Used Across the Country to Predict Future Criminals. And It's Biased Against Blacks' (May 23, 2016) *ProPublica* < <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> > accessed July 7, 2021.

³⁹ See Benjamin Muriuki, 'Education CS Magoha unveils 2021 Form 1 selection results' *CITIZENTV* < <https://citizentv.co.ke/news/education-cs-magoha-unveils-2021-form-1-selection-results-11936208/%3famp> > accessed September 1, 2021.

merit, equity, choice, as well as capacity and category of schools.⁴⁰ Hence, to foster merit the schools were categorized into: (i) national schools; (ii) Extra-county schools; (iii) county schools; (iv) sub-county schools. The system also took care of special needs students through the Special Needs Education (SNE) secondary schools. The selection and placement process was a three-step process. First, was a process of data verification and validation? Second, was the computation of quotas? Finally, the actual selection took place. There has been an outcry by private sector schools which allege bias against their students for being denied a chance to join schools of their choice.⁴¹ However, the declared government policy in National schools admissions is not based exclusively on merit but also on equity and fairness.⁴² So far, I have not seen any evidence of reliance on ML and training data in the form one selection process. Once the ministry begins to use ML algorithms in its selection technology, questions of structural and historical bias of training data must be raised.

Algorithmic discrimination is also rampant in online advertising. Incidents where women were shown fewer ads for high-paying jobs than their male counterparts have been reported.⁴³

3.1.1 How Data Mining Discriminates

Barocas and Selbst identify five mechanisms through which machine learning decision-making models may have a disproportionately adverse impact on protected classes.⁴⁴

(a) Defining the “Target Variable” and “Class Labels”

The process of locating statistical relationships in a dataset is largely what data mining entails. It is an automated process through which useful patterns and regularities upon which decision making can rely are discovered and revealed.⁴⁵ The accumulated set of discovered relationships is commonly called a “model”. It is these models that are used to predict future outcomes. Such models are applied in credit scoring, insurance pricing, and fraud detection. The outcome of this

⁴⁰ See Education News Hub, “Education Ministry releases guidelines on how the 2021 form one selection and placement was done”, available at <https://educationnewshub.co.ke/education-ministry-releases-guidelines-on-how-the-2021-form-one-selection-and-placement-was-done/> > accessed September 1, 2021.

⁴¹ Daily Nation, “Parents Cite bias on Form One Selection “available at < <https://nation.africa/kenya/news/parents-cite-bias-in-form-one-selection-796806?view=htmlamp>

⁴² See *John Kabui Mwai & 3 Others v KNEC & 2 Others*, Petition No. 15 of 2011.

⁴³ See supra note 12.

⁴⁴ See supra note 2 at 677.

⁴⁵ *ibid.*

process is what is referred to as “target variables”, while “class labels” divide all possible values of the target variable into mutually exclusive categories.⁴⁶ The process of translating these variables is a technical and subjective process that may unintentionally disadvantage protected classes.

(b) Training Data

In ML, data mining involves learning by example. Therefore, a data model learns by exposure to certain examples of data. The data that function as examples are known as “training data”.⁴⁷ Hence “data training” is the data that train the model to behave in a certain way. When models are fed with training data that is biased, the inevitable output of such a process will be discriminatory.

(c) Feature Selection

It is not usually possible for a dataset to fully encompass the full complexity of the individuals it seeks to represent. Consequently, organizations make choices about what attributes they observe and incorporate the same into their analyses through a process known as feature selection. If those factors that better account for pertinent statistical variation among members of a protected class are not well represented in the set of selected features, there will be serious implications for the treatment of those classes.⁴⁸

(d) Proxies

There are instances where members of protected classes still get less favourable determinations even when the data mining process is free from discriminatory effects. This mainly happens when the criteria that are genuinely relevant in making rational and well-informed decisions also happen to serve as reliable proxies for class membership.⁴⁹ When the model relies on such proxies,

⁴⁶ Ibid.

⁴⁷ supra note 2, 681.

⁴⁸ supra note 2, 688.

⁴⁹ supra note 2, 691.

discrimination is bound to happen. A good example would be the use of a non-protected category e.g. residence or zip code, as a proxy for a protected category e.g. race.⁵⁰

(e) Masking

When decision-makers intentionally preserve known prejudices in a set of data so as to achieve a skewed effect in the data mining process, then data masking has taken place. This intentional bias in the collection of data may occasion discrimination of certain members of protected classes.

3.1.2 Legal challenges Unique to Algorithmic Discrimination

Two challenges unique to algorithmic decision-making have been identified in the literature.⁵¹ First is the problem of detecting discrimination by algorithms. Second is the challenge of accessibility and interpretability of evidence.

3.1.2.1 Undetected Discrimination and new types of Discrimination

Proving discrimination often relies on circumstantial evidence. This makes it a difficult task compared to other illegal acts where direct evidence could be used. ML decisions complicate this further because of the perceived objectivity of machines.⁵² The technical process through which ML decisions may occasion discrimination has been discussed above. It is an opaque process where evidence of discrimination is not apparent. Hence discrimination is invisible to the victims of such decisions.

Furthermore, algorithms have been shown to have the capacity to invent new types of discrimination and differentiation. While many non-discriminatory laws only apply to certain protected classes such as ethnicity, gender, or sexual orientation, some scholars have observed that if an algorithmic system differentiates on the basis of newly invented classes, it could remain outside the scope of non-discrimination law.⁵³ A good example could be a situation where an

⁵⁰ See Raphaële Xenidis and Linda Senden, 'EU non-discrimination law in the era of artificial intelligence: Mapping the challenges of algorithmic discrimination in Ulf Bernitz et al (ed.), *General Principles of EU law and the EU Digital Order* (Kluwer Law International, 2020) at 5.

⁵¹ See, for instance, 'Discrimination by Machine: An Evaluation of Australia's Regulatory Approach to Machine Learning Discrimination' (Research Thesis, University of Technology Sydney, Autumn 2020) 10.

⁵² *ibid.*

⁵³ See for instance, B Custers, *The Power of Knowledge, Ethical, Legal, and Technological Aspects of Data Mining and Group Profiling in Epidemiology* (Wolf Legal Publishers, 2004); A. Mantelero, 'From Group Privacy to Collective Privacy: Towards a New Dimension of Privacy and Data Protection in the Big Data Era', in *Group Privacy*

algorithmic system finds a correlation between, say, using a certain web browser, and a higher willingness to pay. Shoppers using that browser could be subjects of exaggerated prices. Such practices would remain outside the scope of non-discrimination law, as a browser type is not a protected characteristic.

3.1.2.2 Evidential Challenges

In order to prove an allegation evidence is needed. There are two challenges of evidence in algorithmic discrimination. One is the challenge of access, and the second is that of interpretation.

(i) *Accessing Evidence*

ML evidence, unlike human evidence like verbal comments, can be difficult to access. This is because disclosure of algorithms is often protected by trade secrets laws, contractual obligations or intellectual property claims.⁵⁴ This makes it incredibly difficult for victims of discrimination to obtain sufficient evidence that could sustain a claim in court. While such disclosure can be obtained by court order, the convoluted process of litigation may discourage victims from asserting their legal rights. In addition, penetrating computer algorithms to extract evidence requires highly specialized expertise. In some instances, only the person who designed such systems may be able to penetrate them. There is a need to have Intellectual Property exceptions for researchers, journalists and for other public-benefit use of such information.

(ii) *Interpreting Evidence*

ML systems are opaque systems and few will understand how they arrive at their decisions. Sometimes, even the creators of such systems may never understand how their decisions are made.⁵⁵ This complexity makes the interpretability of evidence a complex exercise on two grounds. First, understanding and interpreting which data is relevant to identifying discrimination is difficult for complainants. Even when the complainant has access to data, this still offers little

(Cham: Springer, 2017) 139–58, cited in Frederik J. Zuiderveen Borgesius, “Strengthening legal protection against discrimination by algorithms and artificial intelligence” , *The International Journal of Human Rights*(2020); S. Wachter, ‘Affinity Profiling and Discrimination by Association in Online Behavioural Advertising’, *Berkeley Technology Law Journal* 35, no. 2 (2020), <https://doi.org/10.2139/ssrn.3388639> > accessed August 22, 2021.

⁵⁴ Supra note 2, 1583.

⁵⁵ Jim Shook, Robyn Smith and Alex Antonio, “Transparency and Fairness in Machine Learning Applications” (2018) 4(5) *Texas A&M Journal of Property Law* 443 at 446.

insight into the weight given to the variables affecting the decision.⁵⁶ Secondly, the evidence available requires specialized knowledge, thereby increasing the burden of pursuing a discrimination claim.⁵⁷ This may even require the production of expert evidence if the claim ends up in court. Still, such evidence may not be adequate to prove the claim because the learning nature of the ML system mean such system may not have develop beyond a point where its creator can understand its processes.⁵⁸

3.2 Non-discriminatory law in Kenya and its efficacy against algorithmic discrimination

Two approaches may be adopted in resolving the challenge of discrimination from automated decisions. First is the technical approach where computer scientists can design ML systems that developed techniques that “formalize fairness in such a way that they can constrain the machine learning process so that learned decision rules have specific well-defined fairness properties.”⁵⁹ Second is the legal approach where non-discrimination and data protection laws can be enforced effectively to fight illegal discrimination by algorithmic systems.⁶⁰ But there are some algorithmic decisions that evade current laws. For example, Frederik Borgesius has observed that many non-discriminatory statutes in Europe only apply to discrimination on the basis of certain protected grounds, such as ethnic origin. When computer systems differentiate based on newly invented classes that have no bearing on the protected grounds, such statutes may not apply.⁶¹ He therefore suggests that additional regulation may be needed to “protect fairness and human rights in the area of algorithmic decision making.”⁶²

This section therefore looks into the technical and legal issues that make algorithmic decision making a unique challenge for policy makers. Accordingly, the provisions of the 2010 constitution and the data protection Act (2019) prohibiting discrimination and their application to discriminatory algorithmic decisions form the core of the discussion.

⁵⁶ Supra note 48 at 13.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Supra note 35 at 683.

⁶⁰ See Supra note 2 at 1586.

⁶¹ Ibid.

⁶² Ibid.

3.2.1 The Constitution of Kenya 2010 and the Data Protection Act, 2019

Article 27 of the constitution prohibits direct and indirect discrimination against any person, based on grounds such as race, sex, pregnancy, marital status, health status, ethnic or social origin, and colour. Thus:

27 (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

*(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4)*⁶³

Clearly, the constitution outlaws both direct and indirect unfair discrimination. Direct discrimination happens when different groups are treated in a different manner while indirect discrimination results when a law appearing to have general application to all has different impacts on different groups.⁶⁴

Discrimination can generally be defined as the differential treatment of an individual or a group of individuals which results into a disadvantage. In other words discrimination means unequal treatment. Examples of discrimination may include harassment at work place based on sex, refusal to hire an employee because of their disability etc. According to Kamari-Mbote, discrimination means making unpermitted distinctions.⁶⁵ There is therefore a substantial connection between the concept of equality and non-discrimination.⁶⁶ Discrimination may manifest in two ways: direct discrimination and indirect discrimination.

Discrimination is direct when different groups are treated in a different manner. For direct discrimination to be established there must be a difference in the treatment of persons in similar

⁶³ Constitution of Kenya, 2010.

⁶⁴ See Patricia Kamari-Mbote, "Fallacies of Equality and Inequality: Multiple Exclusions in Law and Legal Discourses", Inaugural Lecture, University of Nairobi, 24 January 2013 at 20

⁶⁵ Ibid at 9

⁶⁶ Ibid

situations based on an identifiable characteristic.⁶⁷ On the other hand, indirect discrimination (or disparate impact in the U.S) happens when a law appearing to have general application to all has different impacts to different groups.⁶⁸ Whether or not the alleged discriminator intended to discriminate is irrelevant when it comes to indirect discrimination. It is the effect of a practice that counts. Therefore, discriminators cannot evade the prohibition of indirect discrimination by proving that they did not mean to discriminate.

3.2.2 Challenges and Limits of Article 27 on Algorithmic Discrimination

While Article 27 may be applied to offer protection against discrimination by algorithms, it suffers several weaknesses. First is the problem of proving that decisions made by algorithm disproportionately affects a protected class and is thus *prima facie* discriminatory.⁶⁹ As we have already argued, it is technically difficult to establish direct discrimination by algorithms. ML algorithms are often described as “black boxes” in light of the difficulties one may face in understanding whether an algorithmic model is biased against a certain category of protected classes.⁷⁰ This opacity makes it difficult for Lawyers and Judges to understand what is in the box and whether it is discriminatory.⁷¹ This reality might make the enforcement of Article 27 a difficult undertaking.

Secondly, while a number of scholars have acknowledged that indirect discrimination is likely to capture many situations of algorithmic discrimination, it has been argued that the strength of the concept of indirect discrimination is compromised by the possibility for it to be objectively justified within the ambit of a proportionality test.⁷² Article 24 of the 2010 constitution provides the circumstances under which rights and fundamental freedoms may be limited. Hence, a right or fundamental freedom may only be limited by law, to the extent that the limitation is reasonable and justifiable in an open and democratic society.

⁶⁷ See ECtHR, *Biao v. Denmark* (Grand Chamber), No. 38590/10, 24 May 2016, para. 89.

⁶⁸ *Ibid.*

⁶⁹ See *Supra* note 2 at 1577.

⁷⁰ See Xenidis and Senden(n48) 20.

⁷¹ *Ibid.*

⁷² *Ibid* at 21.

Xenidis and Senden have argued that it is easy to show that the discriminatory output of the algorithm at stake does serve a legitimate aim.⁷³ This is because the use of algorithmic models in itself will serve legitimate business purposes such as credit default risk.⁷⁴ The limitation should also be appropriate, necessary and proportionate. Courts are likely to accept that algorithms are effective means of making accurate predictions.⁷⁵ However, some think that the necessity test will not be easy to justify because there are other means of achieving the purpose of algorithms while imposing less interference with the right to non-discrimination.⁷⁶

One might say that section 35 of the Data Protection Act is the limitation to Article 27 with regard to algorithmic discrimination. Section 35 provides as follows:

35. (1) Every data subject has a right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning or significantly affects the data subject.

(2) Sub-section (1) shall not apply where the decision is

(a) necessary for entering into, or performing, a contract between the data subject and a data controller;

(b) authorised by a law to which the data controller is subject and which lays down suitable measures to safeguard the data subject's rights, freedoms and legitimate interests; or

(c) based on the data subject's consent.

(3) Where a data controller or data processor takes a decision, which produces legal effects or significantly affects the data subject based solely on automated processing—

(a) the data controller or data processor must, as soon as reasonably practicable, notify the data subject in writing that a decision has been taken based solely on automated processing; and

(b) the data subject may, after a reasonable period of receipt of the notification, request the data

controller or data processor to —

(i) reconsider the decision; or

(ii) take a new decision that is not based solely on automated processing.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid at 22.

(4) A data controller or data processor, upon receipt of a request under subsection (3), shall within a reasonable period of time —

(a) consider the request, including any information provided by the data subject that is relevant to it;

(b) comply with the request; and

(c) by notice in writing inform the data subject of —

(i) the steps are taken to comply with the request; and

(ii) the outcome of complying with the request.

(5) The Cabinet Secretary may by Regulations make such further provision to provide suitable measures to safeguard a data subject's rights, freedoms and legitimate interests in connection with the taking of decisions based solely on automated processing”⁷⁷

The implications of Section 35 in relation to algorithmic decisions are far-reaching. First, profiling or discrimination by algorithms appears to be outlawed except in certain circumstances, which include; (a) where the decision is necessary for performing a contract; (b) authorized by law; or (c) based on consent.

In addition, where automated decisions are made the consumer must be notified. Further, the consumer may request the organization to reconsider such decision and subject the decision to human intervention. A superficial analysis of section 35 of the Data Protection Act may suggest that the Act provides sufficient legal framework to address the challenges of automated decisions. However, a closer look into the Act reveals substantial limitations. First, there are serious compliance and enforcement challenges. While it is too early to conclusively pass judgment on the level of compliance with and enforcement of the Act since it was enacted just recently (2019) and its implementation is still underway, there are early discouraging signs. It was recently reported in news media how political parties are illegally using personal data of Kenyans to register them as members of such political parties.⁷⁸ This act is against the provisions of the Data Protection Act.⁷⁹ In such situations, the Data Commissioner is supposed to issue enforcement notices and/or impose penalties on violators upon receipt of complaints from the victims of privacy breaches.⁸⁰

⁷⁷ Data Protection Act (2019), Section 35.

⁷⁸ See The Star “Kenyans protest registration as party members without consent” available < <https://www.the-star.co.ke/news/2021-06-19-kenyans-protest-registration-as-party-members-without-consent/> > accessed July 12, 2021.

⁷⁹ See for instance sec 25 of the Data Protection Act.

⁸⁰ See Part VIII of the Data Protection Act.

Instead, the Office of the Data Commissioner released a short statement on twitter saying that they had reached an agreement with the office of the registrar of political parties to deregister the 200 people who had filed a complaint. All indications are that the problem of fraudulent registration of members by political parties is widespread. Accordingly, the Data Commissioner ought to be more proactive and invoke his powers to conduct an assessment of all political parties on his own initiative to ascertain the extent of the problem and issue appropriate directions.⁸¹ This laxity of implementation is not an encouraging sign to potential victims of automated decisions. In any case, the enforcement agency may not have the requisite technical expertise to audit algorithms for evidence of discrimination.

The second challenge relates to the inadequate transparency requirements. While enhancing transparency in algorithmic decision-making has been recognized as the best way of solving the problem of opaqueness of algorithmic systems, evidence shows that the transparency requirements of the Act are inadequate in light of the nature of algorithmic decisions. Section 35(3) of the Act requires the Data Controller to notify the data subject in instances where a decision taken produces legal effects or significantly affects the data subject based solely on automated processing, so that such decision may be reconsidered. This provision is intended to enhance transparency in automated decisions. However, this section needs to be enhanced. Borgesius has, for instance, observed that the law should “require that algorithmic systems used in the public sector are developed in such a way that they enable auditing and explainability.”⁸² He gives the example of the European Union where there exists a legal requirement for interpretability for certain systems for algorithmic trading used by investment firms.⁸³ Furthermore, freedom of information laws could be adopted to facilitate code audits which provide more information about how an algorithm works.⁸⁴ Here, Kenya has made a huge stride by enacting The Access to information Act of 2016 which, *inter alia*, provides for the right of access to information held by both public and private entities.⁸⁵ This provision may indeed be invoked by victims of algorithmic discrimination to access such algorithms for extraction of evidence.

⁸¹ See section 8 of the Data Protection Act.

⁸² See Supra note 2 at 1583.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Access to Information Act, 2016, s 4(1).

Rieke, Bogen, and Robinson note that there is a need to clearly define how a software program operates in regulated space, and particular standards against which to measure a system's behavior or performance.⁸⁶ Lastly, the Data protection Act only applies to Personal Data. Predictive models do not relate to identifiable persons. This means that the Act may not apply to decision making algorithms. Data protection laws only apply when such a predictive model is applied to an individual. Kenya is also bound by the declarations of the African Commission on Human and Peoples' Rights. The declaration of Principles on Freedom of Expression and Access to Information in Africa require states to, *inter alia*, set up a legal framework for the protection of personal information.⁸⁷ The enactment of the Data Protection Act is in line with this continental obligation.

4.0 CONCLUSION

The paper set out to investigate the legal challenges associated with automated decision making in the era of Artificial Intelligence. Discrimination has been identified as the most urgent challenge. It is quite possible for algorithmic systems to perpetuate discrimination against the protected groups in a way that is difficult to detect. The opaqueness associated with algorithmic decisions makes discrimination invisible to victims of such decisions. Furthermore, algorithms have been shown to have capacity to invent new types of discrimination and differentiation. While enhanced fairness and transparency in automated decisions are seen as the most effective solutions to this challenge, they may not be enough. Instead, decision-making algorithms should be designed to align with the objectives of non-discrimination law. For instance, legal rules should require that the operations of AI software should be well defined.

The challenge of access to and interpretation of evidence has also been identified. Computer Algorithms are often protected by trade secrets laws, contractual obligations or intellectual property claims. To enable victims of discrimination to obtain evidence that could sustain a claim in court, there is a need to have Intellectual Property exceptions of AI systems for public-benefit use such as research, journalistic investigation, and for other public policy objectives. Furthermore,

⁸⁶ A. Rieke, M. Bogen, and D.G. Robinson, 'Public Scrutiny of Automated Decisions: Early Lessons and Emerging Methods, Upturn and Omidyar Network' (2018) 19 < http://www.omidyar.com/sites/default/files/file_archive/Public%20Scrutiny%20of%20Automated%20Decisions.pdf > accessed August 22, 2021.

⁸⁷ See Principle 42 of the Declaration.

there is still a need to develop algorithmic systems in such a way that they enable auditing and explainability. The law should impose a requirement for interpretability of algorithmic systems.

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PROBLEMATIZING THE LEGAL RESPONSIBILITY FOR ACTS BY UNITED NATIONS PEACEKEEPERS

BY

JOSEPH MUSASIZI*

Abstract.

Peacekeeping can be traced back to the 1950s when cold war rivalries frequently paralyzed the Security Council. This was limited to maintaining ceasefires and stabilizing situations while providing crucial support for political efforts to resolve conflict by peaceful means. The first two peacekeeping missions were the United Nations (UN) Truce Supervision Organization (UNTSO) whose role was to observe the Middle East and monitor the armistice agreement between Israel and her Arab neighbours and the UN military observer group in India and Pakistan. These were both unarmed with the earliest armed peacekeeping operation being the UN Emergency Force (UNEF I) deployed in 1956 to address the Suez Crisis. However, the UN Operation in the Congo (ONUC) launched in 1960 became a hotspot for the widest documented illegal activities by UN Peacekeepers. This essay shall examine the expanding scope of peacekeeping activities, drawing reference from Paolo Palchetti's "International Responsibility for Conduct of UN Peacekeeping Forces: The Question of Attribution". Further, it seeks to propose mechanisms that would make the UN accountable, while expounding on the legal basis of the missions according to Chapter VI, Chapter VII, and Chapter VIII of the UN charter and debate on the concept of effective control. It shall also discuss possible recourse for affected host countries and victims of wrongful acts and omissions by peacekeepers, discuss their immunity and privileges, limitations of such immunity and point out instances where UN peacekeepers have been held legally responsible for their acts. In summation, the audit shall recommend whether there should be attribution of legal responsibility of acts of the peacekeepers to the UN or troop-contributing state or whether such criminal liability should be the responsibility of the individual UN peacekeepers. Finally, recommendations on accountability shall be forwarded and areas of future research proposed.

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1.0 INTRODUCTION.

I argue that UN (United Nations) peacekeeping is a tool used by the UN (the organization) to help conflicting countries transition to peace. It leverages its unique strengths including; legitimacy, burden sharing, and ability to deploy and sustain troops and police from around the globe.² Peacekeepers mostly constitute unarmed military personnel, a few lightly armed ones, and civilian peacekeepers.³ By the end of the Cold War, there was a rise in civil wars between states, towards civilians which prompted international involvement to settle such disputes and maintain peace. This extended the scope of peacekeeping operations from the Israeli-Arabian peninsula affairs to other parts of the world.⁴ Their roles over the years have evolved from not only maintaining peace and security but also; facilitating the political processes of countries; protecting civilians; demilitarization; helping states manage and conduct their elections peacefully and restoring the rule of law in war tone states.⁵ Other experts and professionals also form part of peacekeeping missions including electoral observers and public information experts.⁶

Article 24 of the UN Charter gives the Security Council the authority to ensure the preservation of international peace and security.⁷ This article authorizes the council to decide on measures to take to restore peace.⁸ These measures include making agreements with states which routinely provide troops for peacekeeping missions since the UN does not have its standing army.⁹

UN Peacekeeping missions operate in collaboration with member states' intelligence services, NGOs, friendly military troops, and, other officials. Due to the decentralization of its operations, wide ranges of responsibilities, powers, and immunities, there have been instances where UN peacekeepers have been accused of breaching their main role of maintaining peace by engaging in

² United Nations, 'What Is Peacekeeping' <<https://peacekeeping.un.org/en/what-is-peacekeeping>> accessed 4 March 2021.

³ United Nations, 'Our History' (n 1).

⁴ Hubertus Juergenliemk, 'History of UN Peacekeeping Factsheet UN Peacekeeping Operations by Year , 1945-2012' 4.

⁵ United Nations, 'What Is Peacekeeping' (n 7).

⁶ United Nations, 'Our History' (n 1).

⁷ Charter of the United Nations, Article 24.

⁸ Charter of the United Nations, Article 24.

⁹ Charter of the United Nations (Referred to as the UN Charter), Article 43(1).

illegal acts, acting ultra vires, negligence, illegal and illicit trade and violation of human rights. As Odello points out, there have been numerous instances of serious human rights violations committed by peacekeepers against the people they are meant to protect.¹⁰ This has led to calls to have perpetrators held accountable and ensure that victims get justice.¹¹

However, ascertaining the legal responsibility of the UN peacekeepers is not an easy process considering challenges in determining attribution to the alleged offences and how to resolve the concept of diplomatic immunity. According to article 104 of the Charter of the United Nations,¹² the UN enjoys the necessary legal capacity in any of its member states to enable it to exercise functions. Article 105 (1) and (2) further state that the organization shall enjoy privileges and immunities to enable it to carry out its functions and that this immunity extends to all its representatives and officials.¹³

Even though the same immunity can be limited in instances where UN agents including peacekeepers act beyond their scope or where they engage in criminal behavior, the practicality of doing so can impede justice. In light of these, there is an ongoing discussion on how the UN itself can be held accountable for legal violations by its agents, and the extent to which it can be held culpable.¹⁴

2.0 CIRCUMSTANCES WHERE UN PEACEKEEPERS HAVE BREACHED THE LAW.

Currently, the UN and its officials, including agents enjoy certain privileges and immunities that enable them to conduct their duties efficiently. This raises the question as to whether and how they can be held responsible for acts or omissions that violate the law. Immunity given to the UN can be categorized in the following ways: immunity to the UN itself as an organization, diplomatic immunity that applies to the diplomats, and functional immunity for its personnel as they go about their official duties which includes personnel of peacekeeping missions.¹⁵

¹⁰ Marco Odello, 'Tackling Criminal Acts in Peacekeeping Operations: The Accountability of Peacekeepers' (2010)

¹⁵ Journal of Conflict and Security Law 347.

¹¹ *ibid.*

¹² Article 104 of the UN charter 1945.

¹³ Article 105 (2) of the charter of the United Nations 1945.

¹⁴ Palchetti (n 2).

¹⁵ The Un, UN Charter and The UN Charter, 'Privileges and Immunities of the United Nations' 1
<<http://www.codebluecampaign.com/primer-privileges-and-immunities-of-the-united-nations>>.

The legal basis of the aforementioned immunities is derived from section 17 of the Convention on the Privileges and Immunities of the United Nations for the UN offices¹⁶ which states that UN officials shall be “... *immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity*”. Section 22 of the same convention further grants immunity to other officials carrying out UN missions such as the peacekeepers during the period of their missions. This immunity shields them from “...*personal arrest, words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations...*”¹⁷

This immunity allows them to carry out their roles smoothly but only applies to official capacity or in the exercise of official duty and can therefore be waived for accountability purposes in instances of abuse. However, this can be very challenging. Bradlow gives an example of one such challenge: he narrates how the immunity of the UN peacekeepers affected the possibility of bringing to account the negligent acts of the Nepalese troops in March 2016.¹⁸ The troops allegedly introduced cholera into Haiti through the negligent disposal of waste from infected soldiers who had not undergone testing or screening before the mission. There was clear evidence that the soldiers were culpable, however, the attempt to lift immunity to allow prosecution of those responsible did not bear much fruit.¹⁹ It is reported that the UN relied on its immunity to protect the said soldiers and itself and did not appear in nor accept any responsibility concerning the matter.²⁰ This case shows the practical difficulty of actually holding the UN, its officials, agents, or troops accountable for any acts or omission that harm the very people they allege to protect.²¹

¹⁶ United Nations, ‘CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS Adopted by the General Assembly of the United Nations on 13 February 1946 CONVENTION ON THE PRIVILEGES AND IMMUNITIES’ [1946] Assembly.

¹⁷ *ibid.*

¹⁸ Danny Bradlow, ‘What Can Be Done to Stop the United Nations Abusing Its Immunity’ (*The Conversation*, 2016) <<https://theconversation.com/what-can-be-done-to-stop-the-united-nations-abusing-its-immunity-61227>> accessed 9 April 2021.

¹⁹ CHANAKA WICKREMASINGHE, ‘The Jurisdictional Immunities of International Organisations and Their Officials’ <<http://etheses.lse.ac.uk/2095/1/U586463.pdf>>.

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24 February 2021.

²¹ Wickremasinghe (n 23).

The above scenario is one of the many examples of the transgressions by some UN peacekeeping troops. Others include; sexual offences, human trafficking, smuggling, and use of violent unjustified force. Thi Hoang for instance reports on crimes such as sexual abuse by some peacekeeping troops and the difficulties in holding them accountable even where immunity is waived.²² She goes on to say that the consequences arising out of such difficulties include, ultimately the lack of trust by states on tin activities of UN peacekeepers and fueling the continuing destabilization of the areas where they carry out their mission.²³

The law on the responsibility of International Organizations including the UN is still under formation. However, the International Law Association, specifically the International Law Commission (ILC) has to date, provisionally adopted the Draft Articles on State Responsibility,²⁴ which partly tackles the issue on the responsibility of the United Nations according to Leck.²⁵ Article 5 of the Draft Articles, as the ILC indicated in its commentary, provides for imputation of the conduct of UN peacekeepers.²⁶

Further to this, article 4 of the Draft Articles, provides that:

*“The conduct of an organ ... of an international organization in the performance of functions of that organ ... shall be considered as an act of that organization under international law whatever position the organ ... holds in respect of the organization ”*²⁷

3.0 WAYS IN WHICH MALPRACTICES ARE HANDLED BY UN PEACEKEEPERS - THE PROBLEM OF ATTRIBUTION.

According to Article 43 (1) of the UN Charter, all Members of the United Nations undertake to make available to the Security Council, on its call a special agreement or agreements: armed forces, assistance, and facilities, including rites of passage, necessary for the purpose international peace

²² Thi Hoang, ‘When the Peacekeepers Are Part of the Problem’ (*The Global Initiative Against Transnational Organized Crime*, 2019) <<https://globalinitiative.net/analysis/when-the-peacekeepers-are-part-of-the-problem/>> accessed 9 April 2021.

²³ *ibid.*

²⁴ Christian Walter and others, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001)’ (2004) II 1465.

²⁵ Christopher Leck, 'International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct' (2009) 10 Melbourne Journal of International Law 346.

²⁶ *ibid.*

²⁷ United Nations and General Assembly, 'Report of the International Law Commission' (2009) 10.

and security,²⁸ since the UN Security Council enters into special agreements with troop providing states to fulfill their peacekeeping mission. Palchetti argues that providing states can be held responsible for the unlawful acts by their peacekeepers.²⁹ This seems to have already solved the problem, but a question is asked as to whether the UN can be liable as the general administrator of such operations, and to what extent.³⁰ This has resulted in instances where the court has been called upon to determine if the conduct in question can be attributed to the United Nations or the respondent state.³¹

To establish this, the concept of attribution comes into play. Attribution in this context can then be defined as the act of linking the unlawful conduct of individuals or entities, through commission or omission of an act, to that of the authorizing body, to establish its legal responsibility for an internationally wrongful act.³²

Attribution of conduct of peacekeepers has been mostly linked to contributing states since these states normally retain some powers over their state contingents giving them more effective and direct control of troops' actions. Leck cites that peacekeepers have been known to mostly seek and heed to instructions from their governments before executing UN orders whenever on the ground hence governments retaining responsibility for enforcing compliance by their troops.³³

Article 5 of the ILC's Draft Articles on the Responsibility of International Organizations³⁴ points to the use of the effective control test to establish the attribution of conduct of peacekeeping forces. According to the texts of the Draft Articles, an international organization will be held responsible when its conduct constitutes an act or omission that can be attributable to that organization, and the act or omission is a breach of international obligations of that organization.³⁵ The practical aspect of this has nonetheless fronted an array of challenges.³⁶

²⁸ Article 43(1) of the United Nations Charter.

²⁹ Palchetti (n 2).

³⁰ *ibid.*

³¹ *ibid.*

³² Marko Milanovic, 'Special Rules of Attribution of Conduct in International Law' (2020) 96 International Law Studies 1 <<https://papers.ssrn.com/abstract=3623309>>.

³³ Leck (n 29).

³⁴ Article 5 of Draft articles on the responsibility of international organizations 2011 Adopted by the International Law

Commission at its sixty-third session, in 2011 2011.

³⁵ CF Amerasinghe, 'Comments on the ILC's Draft Articles on the Responsibility of International Organizations' (2012) 9 International Organizations Law Review 29.

³⁶ WICKREMASINGHE (n 23).

However, the UN has set its mechanisms for dealing with wrongful acts by its personnel and has laid down several procedures in ensuring accountability. The UN Secretariat believes that where the military is involved in a peacekeeping mission under its command, it should be responsible for human rights violations committed by members of that mission.³⁷ It asserts that as a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international responsibility of the Organization and its liability in compensation.³⁸

Durch argues that the military is on most occasions subject to national military codes of justice, and the memoranda of understanding between the UN and troop-contributing countries.³⁹ Unfortunately, where misconduct relates to the non-military personnel, less severe punishments will often be used, such as deportation.⁴⁰ For him, this does not constitute a serious measure to deter unlawful acts by UN peacekeepers or its agents. He contends that to some extent, this exhibits injustice and hypocrisy.⁴¹

4.0 EXAMPLES WHERE ACCOUNTABILITY HAS BEEN SUCCESSFULLY PURSUED.

It should be noted that there have been a few instances where accountability has been successfully realized. In one such example, legal responsibility for human rights violations of the UN peacekeepers was borne by the state that contributed to the troops.⁴² In *Behrami and Saramati, Al-Jedda and HN v The Netherlands*⁴³, the court in the Netherlands examined certain actions by the Dutch Battalion while it was serving in the UN peacekeeping mission in the former Yugoslavia

³⁷ Stephen Mathias, UN Peacekeeping Today: Legal Challenges and Uncertainties' (2017) 18 Melbourne Journal of International Law 138

<http://leeds.summon.serialssolutions.com/2.0.0/link/0/eLvHCXMwtV1JS8NAFB6svQgiWhWXKnPyIpEkM9PJCB5UIB4qQhevIbMoYg3Fxx_vm0zWlqIHL0OZQBPeF-Yt-d73EOqFF763cibY-tqITm_o-ImN6zmQ9d6_Agt7AK1tlP0DuNWfwgb8BohhBZBh_RXMM0sCT5R5M8Z1PlIajE3zR-bFSn-Us1KcFDM4MUcByEruYDnMy>.

³⁸ UN Secretariat, "Responsibility of International Organizations: Comments and Observations" [2004] International Organizations 19.

³⁹ By William J Durch and others, 'Ending Impunity: New Tools for Criminal Accountability in UN Peace Operations' 1.

⁴⁰ *ibid.*

⁴¹ *ibid.*

⁴² Lucius Caflisch, 'Adjudicação, Responsabilidade e Jurisdição No Direito Internacional Dos Direitos Humanos' (2017) 10 ACDI Anuario Colombiano de Derecho Internacional 161.

⁴³ *Behrami and Saramati, Al-Jedda and HN v The Netherlands*.

in the 1990s.⁴⁴ The court had to decide whether the country was liable for the demise of three persons who were killed by the peacekeeping troops from the Netherlands.⁴⁵ The Supreme Court of the Netherlands ruled that the Netherlands had effective control over the troops and the mission, hence liable for the demise of the concerned individuals.⁴⁶ This case illustrated how the concept of attribution can be used to apportion blame on either the troop-contributing state or the UN itself based on effectiveness of control.⁴⁷

The UN acknowledged its international responsibility for the conduct of peacekeepers under the UN Operation in the Congo ('ONUC') and the UN Peacekeeping Force in Cyprus for their unlawful actions and omissions.⁴⁸ The UN took responsibility for the ultra vires acts of ONUC peacekeepers and the UN Emergency Force who opened fire and killed civilians without such orders.⁴⁹

5.0 THE CONCEPT OF EFFECTIVE CONTROL.

According to article 7 of the Draft Articles on the responsibility of international organizations,⁵⁰ the acts of the agent or state under the authority of an international organization *that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.*⁵¹ Effective control may be described as the extent to which the UN or the troop contributes state- controlled led the operation. However, evaluating the level of control and how much support the UN provided to a state or another international organization for it to be held accountable for any act is also challenging.⁵² This has continued to be so despite the proposal that an internationally wrongful act of an international organization entails the international responsibility of that

⁴⁴ Caflisch, 'Attribution, Responsibility and Jurisdiction in International Human Rights Law' (2017) 10 ACDI Anuario Colombiano de Derecho Internacional 161.

⁴⁵ Mathias (n 41).

⁴⁶ Mathias (n 41).

⁴⁷ *ibid.*

⁴⁸ Nations and Assembly (n 31).

⁴⁹ Leck (n 29).

⁵⁰ Amerasinghe (n 39).

⁵¹ Article 7 of Draft articles on the responsibility of international organizations, 2011 2011.

⁵² Stephen Mathias, "UN Peacekeeping Today: Legal Challenges and Uncertainties," *Melbourne Journal of International Law* 18, no. 2 (December 2017): 138-153.

organization.⁵³ However, knowledge of the wrongful acts committed is considered a key factor, and where the UN claims it had no knowledge or did not have any effective control, it may not be held responsible.⁵⁴

Nevertheless, for certain offences like acts of sexual exploitation and abuse or human trafficking, the UN will not acknowledge or be held accountable for these acts, simply because they are illegal and do not form part of the official functions of the UN.⁵⁵ Such conduct cannot be said to be under the official capacity of UN peacekeeping missions.⁵⁶

Cedric gives a list of certain factors that can also be used to determine the accountability of either the UN or troop-contributing states.⁵⁷ According to him, accountability can be ascertained towards the UN or the troop-contributing state for any ultra vires acts done by the authorization and discretion of a commander from the UN or a national force commander which cause any form of harm hence it can be apportioned to either the UN or the member state commander.⁵⁸ Secondly, if the UN instructs the commission of international crimes or in case any omissions that can be directly linked to the UN such as failing to provide sufficient support in terms of resources, resultant wrongful acts can be attributed to it.⁵⁹

However, as observed by Leck, the adoption of the ‘effective control’ test in Article 5 of the Draft Articles does not fully reflect the complexities of current practice, given the possibility of, *inter alia*, multiple attributions of conduct, the long chain of command and nexus of events that take place on grounds where peacekeeping missions operate.

⁵³ Article 3 of Draft articles on the responsibility of international organizations 2011 Adopted by the International Law Commission at its sixty-third session, in 2011.

⁵⁴ Article 5 of Draft articles on the responsibility of international organizations 2011 Adopted by the International Law Commission at its sixty-third session, in 2011.

⁵⁵ Leck (n 29).

⁵⁶ *ibid*.

⁵⁷ Cedric Ryngaert, “Apportioning Responsibility between the UN and Member States in the UN Peace-Support Operations: An Inquiry into the Application of the Effective Control Standard after Behrami” (2012) 45 Israel Law Review 151 [2012] Israel Law Review.

⁵⁸ Cedric Ryngaert, ‘Apportioning Responsibility between the UN and Member States in UN Peace-Support Operations: An Inquiry into the Application of the “Effective Control” Standard after Behrami’ (2012) 45 Israel Law Review 151.

⁵⁹ *ibid*.

6.0 ATTAINING ACCOUNTABILITY DESPITE IMMUNITY.

Although immunity of UN peacekeepers is prescribed in the laws of most states party to the UN treaty, it should however be noted that there are limitations as to how such immunity is applied and to what extent albeit obscure. This is despite the fact that in some instances immunity claims have been made by the UN as shall be exemplified below.⁶⁰ Pundits and activists however argue that any law that upholds the immunity notion is contrary to most Constitutional principles in about rule of law since it inhibits justice and no man or organization is above the law.⁶¹

In light of these, the notion that peacekeepers or UN agents must enjoy full immunity from local, civil, and criminal jurisdiction has never commanded universal support. Only a few courts have embraced the idea of absolute immunity. However, as Sari points out; members of visiting forces enjoy functional immunity in civil and criminal matters arising in connection with the performance of their official duties. Furthermore, where they are deployed in the challenging operational environments that characterize peace, support, and security assistance missions, visiting forces normally enjoy complete immunity from criminal jurisdiction.⁶² At the same time, she concludes; bespoke treaty instruments continue to play an important role in adjusting and complementing these two general principles.⁶³

Nonetheless, it is saddening that in most cases UN peacekeepers rarely face the consequences of the crimes they commit.⁶⁴ This has been mostly because immunity complicates the process of bringing them to account.⁶⁵ The Secretary-General can waive such immunity for very serious offences which allow the aggrieved to conduct investigations and ultimately prosecute and punish the troops concerned, but then again there is scarcely reported precedent on the waiver of such immunity.⁶⁶ The UN is said to always put itself in a position that will protect itself as an institution

⁶⁰ J. K. CHIPPINDALL, 'Visiting Forces Act, Legislation Editor-Fourth Year Student.' [1953] Sydney Law Review, 225 <<http://www.austlii.edu.au/au/journals/SydLawRw/1954/7.pdf>>.

⁶¹ *ibid.*

⁶² Aurel Sari, 'The Immunities of Visiting Forces' [2019] The Cambridge Handbook of Immunities and International Law 559.

⁶³ *ibid.*

⁶⁴ Kathleen Jennings, 'The Immunity Dilemma: Peacekeepers' Crimes and the UN's Response' [2017] E-International UNIVERSITY OF NAIROBI LAW REVIEW, FEBRUARY 2022

Relations (E-IR) 1 <<https://www.e-ir.info/2017/09/18/the-immunity-dilemma-peacekeepers-crimes-and-the-uns-response/>>.

⁶⁵ *ibid.*

⁶⁶ *ibid.*

and its peacekeepers of any kind of treatment they may face if immunity is waived.⁶⁷ The most frequent actions taken to bring accountability for the unlawful acts of the UN peacekeepers is either their suspension from duty to allow investigations if found culpable, perpetrators could be repatriated, demoted from their positions, or fired all of which constitute administrative punishments with hardly any use of criminal sanctions, jail time.⁶⁸

States have however been continuously urged by the UN to ensure that they give periodic updates on how they deal with allegations of acts or omissions of the UN officials, inclusive of peacekeeping troops brought to their attention.⁶⁹ Pursuant to paragraphs 24 and 25 of General Assembly resolution 70/114,⁷⁰ a Report by the UN Secretary-General of 20th July 2016 on Criminal Accountability of United Nations officials and experts on mission highlighted the following sections; Section II which contains information received from governments on the extent to which jurisdiction, in particular over crimes of a serious nature committed by their nationals while serving as United Nations officials or experts on mission is established under their national laws, Section III which provides information received from governments on the handling of credible allegations that reveal that a crime may have been committed by United Nations officials or experts on mission by States against whose nationals such allegations are made, and matters relating thereto and Section IV which provides information on cooperation among States and with the United Nations in the exchange of information and the facilitation of investigations and prosecution of such individuals, as well as the protection of victims and witnesses in this process on which it based to instruct that any measures taken to bring perpetrators of wrongful acts should however not be contrary to the law.⁷¹ Alternative enforcement measures have also been proposed, such as naming and shaming the states that do not take any measures to ensure accountability of their peacekeeping troops.⁷² However, this has been considered by several pundits as a simple pat on the back as it lacks the deterrence and retribution aspects of punishment.

⁶⁷ *ibid.*

⁶⁸ *ibid.*

⁶⁹ United Nations, 'Criminal Accountability of United Nations Officials and Experts on Mission', vol 12585 (2016) <https://www.un.org/en/ga/sixth/71/criminal_accountability.shtml>.

⁷⁰ Paragraphs 24 and 25 of General Assembly resolution 70/114.

UNIVERSITY OF NAIROBI LAW REVIEW, FEBRUARY 2022

⁷¹ United Nations, 'Criminal Accountability of United Nations Officials and Experts on Mission' (n 73).

⁷² Jennings (n 68).

Furthermore, the UN Secretariat in an attempt to minimize cases of misconduct by its personnel carries out mandatory screening of the personnel deployed to carry out any service or mission. This helps in the prevention of deploying persons with criminal records on the ground.⁷³ These background checks apply also to all other UN officials.⁷⁴

There are also codes of conduct that UN peacekeepers are required to adhere to. These include manuals and guidelines which give the standards of behaviour acceptable in the UN and the need to refrain from unacceptable behaviour⁷⁵. Examples include; the Human Rights Due Diligence Policy (2013), the Capstone Doctrine (2008), the Secretary-General's Bulletin on special measures for protection from sexual exploitation and abuse (2003) the UN Code of Personal Conduct for Blue Helmets (1998) and We Are United Nations Peacekeepers (1998).⁷⁶ James and Alex indicate that these documents form part of the internal legal order of the UN policies and indicate a basis for disciplinary action against individual peacekeepers, but have no external obligations for the UN under international law.⁷⁷

7.0 CONCLUSION AND RECOMMENDATIONS.

In conclusion, the concept of holding UN peacekeepers accountable is complicated especially due to the scope of activities and fragmented systems.⁷⁸ It is important to note that the UN and its member states take strong and effective measures to ensure that offences committed by UN officials or experts in missions do not go unpunished.⁷⁹

⁷³ Jerome. W. Cramp, 'Who's Responsible' [1987] October
<<https://ohchr.org/Documents/Publications/AttributingIndividualResponsibility.pdf>>.

⁷⁴ OHCHR, 'Attributing Individual Responsibility For Violations Of International Human Rights And Humanitarian Law In United Nations Commissions Of Inquiry, Fact-Finding Missions And Other Investigations Pg 23'
<<https://ohchr.org/Documents/Publications/AttributingIndividualResponsibility.pdf>>.

⁷⁵ Simone F van den Driest, 'Chaper 10 Tracing the Human Rights Obligations of Un Peacekeeping Operations' [2018] Non-State Actors and International Obligations 179.

⁷⁶ BRILL James Summers, and Alex Gough, 'Non-State Actors and International Obligations: Creation, Evolution and Enforcement, Edited by James Summers, and Alex Gough, BRILL, 2018. ProQuest Ebook Central, Pg. 189
[Http://Ebookcentral.Proquest.Com/Lib/Lancaster/Detail.Action?DocID=5570557.](http://Ebookcentral.Proquest.Com/Lib/Lancaster/Detail.Action?DocID=5570557)
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⁷⁷ *ibid.*

⁷⁸ Michael Fowler and Sumihiro Kuyama, 'Accountability and the United Nations System' [1814] Practice 1.

⁷⁹ Odello (n 14).

Suggestions have been made on implementing a two-step justice system where the UN would act as the principal partner in the administration of criminal justice for mission personnel.⁸⁰ Such a role for the UN would benefit host states in instances where arguments are brought by the UN, therefore, placing the cases beyond the legal reach of the state legal system. If this is adopted, it may improve the criminal accountability of the UN peacekeepers.⁸¹ However, at it currently stands, there is a strong belief that it is very difficult or rather impossible to obtain justice in instances where peacekeeping troops have committed heinous crimes that aggrieved locals in areas where they operate decide not to seek any kind of action against perpetrators for the expense and belief in the vanity of the process by wronged locals.

It is recommended that peacekeeping troops contributing states in conjunction with the United Nations take stronger and exemplary punitive actions to deter these wrongful deeds that mostly violate human rights. They should also rehabilitate and compensate victims. This can best be achieved where the UN and troops contributing states increase cooperation and improve dual or joint control of peacekeeping activities. This would allow for shared responsibility for the peacekeepers' conduct and make appropriation and apportioning of liability more feasible. These dual or multiple attributions of conduct would motivate parties concerned including the UN, troop- contributing state and the Individual perpetrators be more aware of their actions and omissions.

In summation, this study recommends that responsibility be attributed where it lies, to the individual perpetrators of the wrongful acts or omissions. This will invigorate watchfulness and foster personal responsibility in the individual peacekeepers. This should be complemented by robust accountability methods to bring individual wrongdoers to justice and ensure that the convicted ones are punished to deter future misconduct.⁸²

The impact of the call for individual accountability about criminal and civil liability within the diplomatic space calls for further research on how it will impact behavioural psychology and the willingness of peacekeepers to engage in these lifesaving daring missions.

⁸⁰ Madeline L and England Matthew C Wee William J. Durch, Katherine N. Andrews, 'Improving Criminal Accountability In United Nations Peace Operations' 15 <https://www.files.ethz.ch/isn/102719/Improving_Criminal_Accountability_June2009.pdf>.

⁸¹ *ibid*.

⁸² Rosa Freedman, 'Approach to Peacekeepers and Sexual Abuse' (2018) 29 *European Journal of International Law* 961.

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38. Article 104 of the UN charter 1945
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42. Article 43(1) of the United Nations Charter
43. Article 5 of Draft articles on the responsibility of international organizations 2011 Adopted by the International Law Commission at its sixty-third session, in 2011 2011

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REALIZING MENTAL HEALTH INCLUSIVITY WITHIN THE SOCIAL JUSTICE AND HUMAN RIGHTS DISCOURSE IN KENYA

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ABSTRACT

Mental health has long been a relegated topic often marred with societal prejudice, misconceptions, and biases, with more focus being put on physical health. In many African countries, including Kenya, mental health issues have historically been given little or no recognition. This is primarily due to structural inequalities and barriers such as marginalization of vulnerable groups, limited awareness of mental health conditions, stigmatization, and systemic discrimination. This article seeks to ventilate on the intersectionality between mental health, human rights, and social justice and the imperative of promoting inclusivity within the three spheres. Kenya's mental health sector has also had a turbulent past, mainly ailing from systemic discrimination. The mental health sector has historically been significantly starved of resources, with only 0.01% of the national health budget being allocated to mental health care. Mental health greatly influences an individual's overall health and social well-being; therefore the promotion of mental health inclusivity is not only a matter of ethical obligation but also a fundamental element of human rights and social justice. Over the years, mental health has significantly received recognition, with several African countries formulating mental health policies and action plans in line with the objectives set out in the WHO Comprehensive Mental Health Action Plan. This article therefore seeks to probe into the evolving recognition of mental health and its importance in the realization of sustainable development. It further emphasizes the need to elevate mental health to the social justice and human rights spectrum to create a more inclusive society where mental health rights are protected, and people with mental health conditions are empowered to thrive.

1.0 INTRODUCTION

According to the World Health Organization (WHO), mental health is “a state of well-being that empowers individuals to cope with the stresses of life, realize their abilities, learn well, work well,

and contribute meaningfully to their community; and not merely the absence of mental disorders.”¹ Mental health is integral in the realization of sustainable development goals. The promotion of mental health is part of the imperatives of SDG No. 3 which aims to reduce premature mortality by one-third, through prevention, treatment, and promotion of mental health and well-being by 2030.² Sustainable development goals cannot be realized without global action on mental health and well-being.³ According to Jim Yong Kim, the former President of the World Bank Group, mental health is not just a public health issue; - it is a development issue, and we need to act now because the lost productivity is something the global economy simply cannot afford.⁴ Encouraging the promotion of inclusivity of people with mental health conditions in global development interventions reinforces the principle of inclusivity and holistically improves mental health on a global scale.⁵ Nonetheless, mental health continues to be a lingering global concern especially with the onset of the global pandemic, COVID-19, which amplified these conditions.⁶ Despite the strides made to raise awareness of mental health-related matters and streamline mental health care services, mental health is still plagued with various impediments. The challenges persist in terms of discrimination, inequalities in access to mental health care, and poverty which increases the risks of mental health illnesses, limited awareness on mental health-related matters, and high cost of treatment of mental health conditions. In Kenya, the promotion of mental health inclusivity intrinsically aligns with Article 43 of the Constitution of Kenya which echoes the right to the highest attainable standard of health and access to healthcare services which includes mental health.⁷ It shows commitment to the protection of the physical, mental, and social well-being of

¹ World Health Organization, “Mental Health” (2022, June 17) < https://www.who.int/news-room/fact-sheets/detail/mental-health-strengthening-our-response/?gad_source=1&gclid=CjwKCAjwUwBhBnEiwAgwzrUtF_zmaSmGFEhoJaI7bSPFTARITRX2PckjTlPkHj6QoL_ChFXyNQ2BoCQ4MQAvD_BwE > accessed 11/10/23

² Mental Health Innovation Network, ‘Mental health and the 2030 Sustainable Development Agenda,’ (September 2018) < <https://www.mhinnovation.net/sites/default/files/downloads/resource/UNGA%20brief%20final.pdf> > accessed on 11/10/23

³ *ibid.*

⁴ Jim Yong Kim, ‘Making Mental Health a Global Development Priority’ (Speech at the World Bank-World Health Organization Event, Washington D.C., 13–14 April 2016) < <https://www.mhinnovation.net/sites/default/files/downloads/resource/UNGA%20brief%20final.pdf> > accessed 11/10/2023.

⁵ *ibid* (n 1)

⁶ Amir Radfar et al., ‘Emergent Crisis of COVID-19 Pandemic: Mental Health Challenges and Opportunities’ [2021] *Front Psychiatry* July 19;12:631008 < <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8326372/#:~:text=The%20economic%20decline%20due%20to,health%20services%20are%20among%20factors> > accessed on 11/10/2023.

⁷ Constitution of Kenya 2010, Article 43.

the citizens. Kenya has also put in place the Kenya Mental Health Policy 2015-2030, which seeks to address the systemic challenges, emerging trends, and to mitigate the burden of mental health problems and disorders in order to achieve the highest standard of mental health.⁸ Section 5 (Part1A) of the Mental Health (Amendment) Act (2022) clearly demarcates the roles of the National and County governments, reinforcing the Kenya Mental Health Policy 2015-2030 recommendations on the augmentation of mental health leadership and governance structures in the country.⁹ The Act clearly delineates the roles with an emphasis on provision of mental health resources, adoption of national strategies and action plans and policies to realize the right to mental health as provided for under Article 43 of the Constitution, community and family-based care and support systems, and county-specific care and rehabilitation programmes.¹⁰ Bodies like the Kenya National Commission on Human Rights have also taken up the role to continue raising awareness, driving actions, and implementing interventions that prioritize, promote, and protect every person's mental health as a universal human right.¹¹ Demystifying the promotion of mental health inclusivity within the human rights and social justice sphere is paramount because it greatly helps in tackling issues of discrimination, promoting equitable access to mental health care services, and fostering a supportive environment for people with mental health illnesses.

2.0 CONTEXTUALIZING MENTAL HEALTH AS A HUMAN RIGHT

Mental health is inseparable from physical health. Therefore because the right to health is a fundamental human right, mental health is equally so. According to the report by the World Health Organization made on World Mental Health Day, the focus of human rights has predominantly

⁸ The Ministry of Health, *Kenya Mental Health Policy 2015-2030* (2020) < <https://publications.universalhealth2030.org/uploads/Kenya-Mental-Health-Policy.pdf> > accessed on 11/10/2023.

⁹ Mental Health (Amendment) Act, No 27 of 2022, Section 5 (1A).

¹⁰ Clement Kemboi, 'Kenya National Commission on Human Rights: An Analysis of the Mental Health (Amendment) Act 2022' [11th October 2022] < <https://www.knchr.org/Portals/0/AN%20ANALYSIS%20OF%20THE%20MENTAL%20HEALTH%20%28AMENDMENT%29%20ACT%2C%20%202022.pdf> > accessed 11/10/23.

¹¹ Dominic Kabiru, "KNCHR Press Release: The World Mental Health Day; "Mental Health Is a Universal Human Right" (10, October 2023) < <https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1171/Press-Release-The-World-Mental-Health-Day-%E2%80%9CMental-Health-Is-a-Universal-Human-Right%E2%80%9D#:~:text=The%20expenditure%20is%20much%20higher,250%20per%20capita.> > accessed on 11/10/23.

been on needs such as food, shelter, and healthcare.¹² Central to this notion, is the fact that mental health stands as a critical pillar for human well-being, and therefore recognizing it as a universal human right is acknowledging the relationship between mental health and the overall quality of life.¹³

In Kenya, the right to mental health is enshrined in Article 43(1) (a) of the Constitution of Kenya 2010, which guarantees every person the right to the highest attainable standard of health, including the right to healthcare services.¹⁴ This right is similarly articulated in various international human rights instruments ratified by Kenya by virtue of Article 2(5) of the Constitution of Kenya 2010.¹⁵ They include Article 16 of the African Charter on Human and Peoples' Rights (ACHPR) and Article 12 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR).¹⁶

The United Nations Convention on the Rights of Persons with Disabilities also affirms the need for promotion and protection of the human rights of all persons with disabilities, including mental disabilities.¹⁷ Similarly, the Kenya Mental Health Policy 2015-2030 asserts that mental health is a human right that should be respected and upheld regardless of religion, gender, culture, and socio-economic status.¹⁸

The right to health, which includes mental health, is closely interlinked with the concept of human dignity which is a foundational principle that serves as a precept to all human rights.¹⁹ Article 28 of the Constitution of Kenya 2010 underscores that every person has the right to his or her human

¹² Dr. P.K. Singh, "World Mental Health Day: Mental Health is a Universal Human Right," (2023) <<https://www.who.int/southeastasia/news/detail/10-10-2023-world-mental-health-day-mental-health-is-a-universal-human-right#:~:text=The%20focus%20of%20human%20rights,the%20overall%20quality%20of%20life.>> accessed on 11/10/23.

¹³ *ibid.*

¹⁴ Constitution of Kenya 2010, Article 43(1) (a).

¹⁵ Kenya National Commission on Human Rights, "Silenced Minds: The Systemic Neglect of the Mental Health System in Kenya," (2011) <https://www.knchr.org/Portals/0/EcosocReports/THE_%20MENTAL_HEALTH_REPORT.pdf> accessed on 11/10/23.

¹⁶ *ibid.*

¹⁷ UN Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) UNGA Res 61/106 (2006).

¹⁸ Ministry of Health, Kenya Mental Health Policy 2015-2030, 'Towards attaining the highest standard of mental health' (2015) <<https://publications.universalhealth2030.org/uploads/Kenya-Mental-Health-Policy.pdf>> accessed 11/10/23.

¹⁹ *ibid.*

dignity respected and protected.²⁰ Guaranteeing individuals the right to health and access to healthcare services, including both curative and rehabilitative care, accords them the opportunity to live dignified lives.²¹ It is also important to note that the right to health is one of the social-economic rights that act as building blocks enabling people to live dignified lives free from coercion and dependence.²² It empowers them with the autonomy to make informed decisions about their healthcare, whether independently or through supported decision making where necessary.²³

At the core of the right to mental health, is the right to freedom from discrimination. Article 27(4) of the Constitution of Kenya 2010 prohibits the state from discriminating against individuals directly or indirectly grounds of health status which includes mental health status.²⁴ The right to freedom from discrimination is similarly codified in various international human rights instruments, which include Article 7 of the Universal Declaration of Human Rights²⁵, Article 2(2) of the International Covenant on Economic, Social, and Cultural Rights²⁶, and Article 26 of the International Covenant on Civil and Political Rights.²⁷

People with mental health conditions encounter a multitude of human rights violations and discrimination even in mental health care facilities.²⁸ A human rights assessment report on Mathari National Teaching and Referral Hospital, one of the largest mental health hospitals in Kenya, exposed significant human rights violations in the facility.²⁹ The service users at the hospital were subjected to unsanitary conditions, neglect, physical and verbal abuse, violations that infringed

²⁰ *ibid*

²¹ Alicia Ely Yamin et al., 'Advancing the right to health: from exhortation to action' [2023] The World Health Organization Council on the Economics of Health for All; Insight No. 5 < https://cdn.who.int/media/docs/default-source/council-on-the-economics-of-health-for-all/whocouncileconomicsh4all_insight_no5.pdf?sfvrsn=e894c52b_1&download=true > accessed 11/10/23.

²² *ibid*.

²³ *ibid*.

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

²⁵ UN General Assembly, *Universal Declaration of Human Rights* (adopted 10 December 1948) UNGA Res 217 A (III), art 7.

²⁶ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights* (Adopted 16 December 1966, entered into force 03 January 1976), 2200 A (XXI), art 2(2).

²⁷ UN General Assembly, *International Covenant on Civil and Political Rights* (Adopted 16 December 1966, entered into force 23 March 1976), 2200A (XXI), art 26.

²⁸ WHO/OHCHR, 'Guidance on Mental Health, Human Rights, and Legislation' (2022) <https://www.ohchr.org/sites/default/files/documents/issues/health/draftguidance/2022-06-30/WHO_OHCHR_mental_health_human_rights_and_the_law.docx> accessed 11/10/23

²⁹ Joy Muhia et al., 'A human rights assessment on a large mental health hospital in Kenya' (2021) 40 Pan African Medical Journal 199 < <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8760291/> > accessed 11/10/23

their fundamental right to health.³⁰ Moreover, the report highlighted the absence measures and safeguards to prevent detention and treatment without free and informed consent, infringing on the patients' rights to legal capacity and autonomy to make healthcare decisions.³¹

In 2022, the Kenya National Commission on Human Rights conducted an assessment on the mental health facilities in Kenya pursuant to the World Health Organization Quality Rights Initiative.³² The initiative accentuates the transformation of mental health services towards a person-centered, rights-based recovery approach.³³ The assessment report launched in 2023 uncovered the poor standard of living for service users in mental health services.³⁴ It further pointed out the violation of their right to exercise legal capacity and their right to personal liberty and security of their person.³⁵

The findings of the assessment report are reflective of the Mental Health (Amendment) Act, which, while acknowledging the right to exercise legal capacity for persons with mental illnesses under Section 6(3K)³⁶, it imposes limitations under Section 26(3) (a) (ii).³⁷ Section 26(3) (a) (ii) stipulates that in the absence of a supporter duly appointed to facilitate the individual with mental illness with decision-making, a representative is appointed in that regard to make decisions on their involuntary admission and treatment without the patient's involvement.³⁸ The Act further allows for involuntary admission and detention of individuals with mental illnesses under Section 22.³⁹

Embracing a human rights-based approach to mental health is crucial because it confers entitlements that give rise to legal obligations to the government to protect mental health and adopt

³⁰ *ibid*

³¹ *ibid*

³² Dominic Kabiru, 'KNCHR Press Release: The World Mental Health Day: "Mental Health is a Universal Human Right," (10, October 2023), < <https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1171/Press-Release-The-World-Mental-Health-Day-%E2%80%9CMental-Health-Is-a-Universal-Human-Right%E2%80%9D#:~:text=The%20expenditure%20is%20much%20higher,250%20per%20capita> > accessed on 12/10/23

³³ *ibid*

³⁴ *ibid*

³⁵ *ibid*

³⁶ Mental Health (Amendment) Act, No 27 of 2022, Section 6(3K).

³⁷ Mental Health (Amendment) Act, No 27 of 2022, Section 26(3) (a) (ii).

³⁸ *ibid*

³⁹ Mental Health (Amendment) Act, No 27 of 2022, Section 22.

legislation that upholds human rights.⁴⁰ By placing people at the center of an issue, a rights perspective empowers individuals to take more control over decisions concerning their mental health and their treatment thereto.⁴¹ It also prohibits non-discrimination and prioritizes the needs of poor and vulnerable people.⁴²

2.1 Steps that Kenya has taken to promote mental health inclusivity within the human rights sphere

Kenya, like many other African countries such as Nigeria, Ghana, South Africa, Uganda, and Zambia, has established a robust legal framework to bolster mental health inclusivity and safeguard the rights of persons with mental health conditions.⁴³ Kenya has gradually been refining the mental health system. The enactment of the 1989 Mental Health Act was a watershed moment for the mental healthcare system in Kenya. It marked a step towards the progressive realization of mental health inclusivity in the country, as envisaged under Section 2A of the Act.⁴⁴ A number of policies and legislations have since then been crafted towards the realization of this noble cause.

The 1989 Mental Health Act has since undergone amendments with the most recent being the 2022 Mental Health (Amendment) Act, which has been lauded for its efforts in recognizing and guaranteeing the rights of persons suffering from any form of mental disorder.⁴⁵ The Act outlines the guidelines for the reception of voluntary and involuntary patients in mental hospitals and delineates the procedures for the establishment of mental hospitals.⁴⁶ The Act has also established

⁴⁰ *ibid.*

⁴¹ *ibid.*

⁴² *ibid.*

⁴³ Abdul Rahman A Saied, 'Nigeria's National Mental Health Act 2021: Any Challenges Ahead?' (2023) 401 *The Lancet* 997 < [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(23\)00345-8/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(23)00345-8/fulltext) > accessed 11/10/23.

⁴⁴ Mental Health Act, Cap 248 Laws of Kenya, Section 2A.

⁴⁵ 'An Analysis of Kenya's Legal Framework on Mental Health,' (01, June 2023),

<<https://theplatform.co.ke/an-analysis-of-kenyas-legal-framework-on-mental-health/#:~:text=The%20Act%20provides%20guidelines%20on,subsidiary%20at%20the%20district%20level.>> accessed on 11/10/23

⁴⁶ *ibid.*

the Kenya Board of Mental Health which is tasked with overseeing mental health activities across the country, reporting to the government the status of the same and recommending reforms.⁴⁷

The 2022 Mental Health (Amendment) Act now recognizes persons with mental health illness to include a person diagnosed with alcohol or substance use disorder and a person with suicidal ideation or behavior.⁴⁸ While the Mental Health (Amendment) Act 2022 has made efforts to recognize suicidal ideation as a mental disorder under Section 3, Section 226 of the Penal Code still underpins attempted suicide as a criminally punishable offense.⁴⁹ It stipulates that any person who attempts to kill himself is guilty of a misdemeanor, and therefore liable to imprisonment of up to two years, a fine, or both.⁵⁰

The 2021-2026 Suicide Prevention Strategy proposes the decriminalization of attempted suicide by repealing Section 226 of the Penal Code. The provision is discriminative and ultimately has a negative impact on the steps that the country is taking to recognize people with mental health conditions within legal instruments.⁵¹ It is an area that calls for urgent reforms since it deters the progress of realizing mental health inclusivity for sustainable development.

Kenya has also formulated the Kenya Mental Health Policy Plan 2021- 2025 whose was main aim is to operationalize the four main objectives of the Kenya Mental Health Policy (2015-2030) and to provide a framework for both National and County Governments and stakeholders to implement the Mental Health Policy through strategic objectives with specified priority targets and indicators.⁵² It advocates for the breaking of barriers to the improvement of mental health such as stigma and discrimination, which contribute to the human rights violations of people with mental health conditions.⁵³

⁴⁷ *ibid.*

⁴⁸ Mental Health (Amendment) Act, No 27 of 2022, Section 3.

⁴⁹ Penal Code Cap 63, Laws of Kenya.

⁵⁰ *ibid.*

⁵¹ Ministry of Health, Suicide Prevention Strategy 2021-2026, 'National Strategy for implementation by all stakeholders to prevent suicide and promote mental well-being,' < <http://guidelines.health.go.ke:8000/media/SUICIDE-PREVENTION-STRATEGY-2021-2026.pdf> > accessed 12/10/23.

⁵² Ministry of Health, 'Kenya Mental Health Action Plan (2021-2025): Towards attainment of the highest standards of mental health' < https://www.aku.edu/bmi/Documents/kenya_mental_health_action_plan_2021-2025_.pdf > accessed 12/10/23.

⁵³ *ibid.*

The National Guidelines on Workplace Mental Wellness 2023 is another initiative tailored towards the promotion of mental health at the workplace. It envisions that work is a social determinant of mental health and therefore meaningful work contributes to the protection and promotion of mental health.⁵⁴ The objectives of the Guidelines is to provide recommendations for interventions to safeguard the mental well-being of employees, managers/supervisors and organizations through the promotion of mental wellness at work, prevention of work-related mental health conditions and supporting workers with mental health conditions to access quality care.⁵⁵

The Kenya Mental Health Investment Case 2021 is a document that posits the importance of investing in mental health. Investment in mental health is an imperative to the prevention of human rights violations mainly because people suffering from mental illnesses often face human rights abuses.⁵⁶ Investment in mental health in line with human rights, may involve the enforcement and implementation of international human rights instruments such as Convention on the Rights of People with Disabilities which are committed to the protection of the rights of persons with mental health disorders.⁵⁷

The court has also played a vital role in the promotion of mental health within the human rights discourse. The High Court in **Kimaru & 17 others v Attorney General & another; Kenya National Human Rights and Equality Commission (Interested Party) (Petition 226 of 2020) [2022] KEHC 114 (KLR)**, declared the provisions of sections 162(4) and (5), 166 (2), (3), (4), (5), (6) and (7) and 167(1)(a), (b), (2), (3) and (4) of the **Criminal Procedure Code** and any other law providing for the detainment of any person with mental challenges who faces a criminal trial or has been tried and a special finding made that such a person was ‘guilty but insane’ at the President’s pleasure unconstitutional, for subjecting persons with disabilities to inhuman and degrading treatment and being in contravention of articles 25(a), 27(1), (2), (4), 28, 29(d) and (f), 50, 51(1) and (2), 159(2)(a), (b) and (d) and 160(1) of the Constitution of Kenya 2010.⁵⁸ The

⁵⁴ The Ministry of Health, ‘National Guidelines on Workplace Mental Wellness,’ (2023) < http://guidelines.health.go.ke:8000/media/Workplace_Mental_Wellness_Guideline-2023-308-With_Sign.pdf > accessed 12/10/23.

⁵⁵ *ibid*.

⁵⁶ Enableme Kenya, ‘3 Reasons Why Kenyan Government Should Invest in Mental Health,’ < <https://www.enableme.ke/en/article/3-reasons-why-kenyan-government-should-invest-in-mental-health-9221> > accessed on 12/10/23

⁵⁷ *ibid*

⁵⁸ [2022] eKLR.

subject provisions negatively impacted the promotion of mental health and mirror some of the human rights violations that people suffering from mental health conditions are faced with.

According to the Kenya National Commission on Human Rights, human rights violations negatively impact people's mental health.⁵⁹ Therefore, it calls for stakeholders and mental health facilities to create a conducive physical and social environment that will help eradicate inhumane and degrading practices that result in such violations.⁶⁰

3.0 MENTAL HEALTH WITHIN THE SOCIAL JUSTICE DISCOURSE

Social justice is a core principle underlying the human rights concept of non-discrimination and is closely linked to the idea of equality before the law, as underscored in various international human rights instruments, including the United Nations Convention on the Rights of Persons with Disabilities. It embodies the ideal that everyone should be accorded equal access to wealth, health, well-being, privileges, and opportunity.⁶¹

It envisages fair and equitable division of resources, opportunities, and privileges in society.⁶² The concept is premised on the idea that everyone should be treated equally.⁶³ It is informed by principles such as equality, equity, inclusiveness, and fairness.⁶⁴ Social justice propels the promotion of health equity and speaks to all the social determinants of health.⁶⁵ To provide sustainable mental health care on a global scale, there is need to integrate it with social justice.

In Kenya, social justice is envisioned in the preamble of the 2010 Constitution of Kenya as one of the essential values informing the constitution.⁶⁶ The principles of social justice are also enshrined

⁵⁹ *ibid* (n 6).

⁶⁰ *ibid* (n 6).

⁶¹ Daniel Thomas Mollen Kamp, 'Social Justice Meaning and Main Principles Explained,' (Investopedia, July 08 2022) < <https://www.investopedia.com/terms/s/social-justice.asp> > accessed 13/10/23

⁶² *Ibid*.

⁶³ Kariuki Muigua, 'Sustainable Development Goals and Social Justice in Kenya, ' (2021) < <http://kmco.co.ke/wp-content/uploads/2021/02/Sustainable-Development-Goals-SDGs-and-Social-Justice-in-Kenya-Kariuki-Muigua-February-2021.pdf> > accessed on 13/10/23

⁶⁴ *Ibid*.

⁶⁵ Regine King, 'How Social Justice and Mental Health Interconnect,' (University of Calgary, 18 Jan 2021) < <https://ucalgary.ca/news/how-social-justice-and-mental-health-interconnect#:~:text=In%20the%20domain%20of%20health,and%20their%20overall%20well%2Dbeing.> > accessed on 13/10/23.

⁶⁶ Constitution of Kenya, 2010.

in Article 27 of the Constitution of Kenya 2010 which guarantees every person equality before the law, and equal protection and benefit of the law.⁶⁷ People with mental health conditions must enjoy their legally protected rights in equal measure as the rest of the society. They are also entitled to protection from negative laws that exacerbate social exclusion and discriminative institutional service and treatment practices.

The principles of social justice are also embedded within various international legal instruments. By virtue of Article 2 (5) of the Constitution, which provides that general rules of international law shall form part of the laws of the country, Kenya has ratified them into law.⁶⁸ Article 1 of the Universal Declaration of Human Rights provides that all human beings are born free and equal in dignity and rights.⁶⁹ Article 5 of the Convention on the Rights of Persons with Disabilities also obligates state parties to ensure equal recognition of all persons before the law and it entitles them to equal protection and benefit of the law without discrimination.⁷⁰

The World Health Organization has also structured a global action agenda to continue this course. It has put in place the 2013-2030 Comprehensive Mental Health Action Plan which proposes policies and actions for adoption and implementation to facilitate the promotion of mental health and well-being, to prevent mental health conditions for those at risk, and to achieve universal coverage for mental health services.⁷¹

The concept of social justice within the mental health domain has progressively evolved over time. There are several factors that have hampered the advancement of equal access to mental health care and the protection of the rights of people suffering from mental illnesses within this sphere. They include low budgetary allocation for mental health, shortage of human resource for mental health, inadequate integration of mental health services within primary healthcare facilities, among others.⁷²

⁶⁷ Constitution of Kenya, 2010.

⁶⁸ Constitution of Kenya, 2010.

⁶⁹ *ibid* (n 25), Article 1.

⁷⁰ *ibid* (n 17), Article 5.

⁷¹ WHO, 'Comprehensive Mental Health Action Plan 2013-2030,' <

<https://iris.who.int/bitstream/handle/10665/345301/9789240031029-eng.pdf?sequence=1> > accessed on 13/10/23

⁷² Obinna O Oleribe et al., 'Identifying Key Challenges Facing Healthcare Systems in Africa and Potential Solutions' (2019) 12 International Journal of General Medicine 395.< <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6844097/> > accessed on 13/10/23.

According to the World Health Organization, promotion and prevention interventions in mental health work by identifying the individual, social, and structural determinants of mental health and then intervening to reduce risks, build resilience, and establish supportive environments for people with mental health conditions.⁷³ Structural inequalities majorly stem from the social, environmental, economic, and cultural determinants of health.⁷⁴

The World Health Organization defines health inequalities as measurable differences in health across population subgroups.⁷⁵ Health inequity refers to the unfair and unjust inequalities in health.⁷⁶ Inequities in mental health exist in the access to mental health care, use and outcomes of mental health care, geographical demographics, socio-economic status, racial or ethnic background, and sexual orientation.⁷⁷ These inequities result in stigmatization and discrimination of people suffering from mental illnesses hence deterring the promotion of mental health inclusivity.

3.1 Factors Affecting Mental Health Inclusivity within the Social Justice Discourse

Factors affecting mental health inclusivity within the social justice discourse are closely linked to those affecting the human rights discourse, since both frameworks seek to advance equality, dignity, and justice to all individuals, including those with mental health conditions. They include;

a) Cultural Factors

Culture and ethnic backgrounds have an impact on an individual's mental wellbeing and mental health related experiences. Cultures differ in their understanding of mental health, which affects

⁷³ World Health Organization, "World Mental Health Report: Transforming Mental Health For All" (2022) < <https://iris.who.int/bitstream/handle/10665/356119/9789240049338-eng.pdf?sequence=1> > accessed on 14/10/23

⁷⁴ National Academies of Sciences, Engineering, and Medicine, *Communities in Action: Pathways to Health Equity* (National Academies Press 2017) ch 3 'The Root Causes of Health Inequity' < <https://www.ncbi.nlm.nih.gov/books/NBK425845/> > accessed 14/10/23.

⁷⁵ World Health Organization, 'Identifying Health Inequalities and their drivers for achieving health equity' (2022) < <https://www.who.int/data/inequality-monitor/about#:~:text=Health%20inequalities%20are%20measurable%20differences%20in%20health%20across%20population%20subgroups> > accessed 14/10/23.

⁷⁶ EM Ngui, L Khasakhala, D Ndeti and LW Roberts, 'Mental Disorders, Health Inequalities, and Ethics: A Global Perspective' (2010) *International Review of Psychiatry*, < <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2935265/> > accessed 14/10/23.

⁷⁷ *ibid.*

the level of importance and attention given to mental health matters.⁷⁸ This, may in some circumstances, result in cultural stigma because in some cultures, mental health illnesses are considered weaknesses which should be hidden.⁷⁹ People from such cultural backgrounds often find it hard to seek help and openly share their experiences because of the stigma surrounding mental health.⁸⁰

Culture also affects the manner in which patients describe their symptoms to their clinicians.⁸¹ It influences patients to selectively talk about their symptoms in “culturally acceptable” ways, to avoid any negative consequences.⁸² For instance, reports have shown that Asian patients often tend to talk more about their somatic symptoms, such as dizziness, first and may only disclose their emotional symptoms when questioned further about them.⁸³ Cultural influences also affect the manner in which people suffering from mental illnesses choose seek treatment and how they cope with the conditions.⁸⁴

People suffering from mental illnesses are also faced with cultural stigmatization, where they are treated differently from the rest of the community members. They are often not treated as full citizens and are excluded from mainstream society.⁸⁵ Families of people with mental health conditions also suffer the same fate because they are often marginalized due to the stigma associated with these conditions.⁸⁶ Cultural factors sometimes determine how much support one gets from one’s family and community.⁸⁷

According to Temitope Ogundare in the text “Culture and Mental Health: Towards Cultural Competence in Mental Health Delivery,” we can only improve health outcomes by recognizing

⁷⁸ Sofia Andrade, ‘Cultural Influences on Mental Health,’ (16, April 2017) < <https://pha.berkeley.edu/2017/04/16/cultural-influences-on-mental-health/> > accessed 14/10/23

⁷⁹ Mental Health First Aid, ‘Four Ways Culture Impacts Mental Health’ (11 July 2019) < <https://www.mentalhealthfirstaid.org/2019/07/four-ways-culture-impacts-mental-health/> > accessed 14/10/23

⁸⁰ *ibid.*

⁸¹ U.S. Department of Health and Human Services, “ Mental Health: Culture, Race, and Ethnicity—A Supplement to Mental Health: A Report of the Surgeon General ” (2001) < https://www.ncbi.nlm.nih.gov/books/NBK44243/pdf/Bookshelf_NBK44243.pdf > accessed 14/10/23

⁸² *ibid.*

⁸³ *ibid.*

⁸⁴ *ibid* (n 46).

⁸⁵ D Bhugra, R Tribe and D Poulter, ‘Social Justice, Health Equity and Mental Health’ (2022) 52(1) South African Journal of Psychology 3. < <https://journals.sagepub.com/doi/pdf/10.1177/00812463211070921> > accessed 14/10/23

⁸⁶ International Mental Health Collaborating Network, ‘Human Rights and Social Justice’ < <https://imhcn.org/bibliography/discrimination/> > accessed 14/10/23

⁸⁷ *ibid* (n 47).

how cultural value systems affect health and healthcare delivery.⁸⁸ He makes reference to Asia and Africa, where the utilization of healthcare services among pregnant women was determined by the impact of culture on the meaning of care and informed choice.⁸⁹ In as much as culture is neither bad nor good, we need to be aware of its influences on health and well-being, and how we can work on reshaping the negative influences.⁹⁰

People with mental health conditions should be allowed to live fulfilling lives free from discrimination, and be valued for the diversity and richness they bring to society.⁹¹ According to the World Health Organization, everyone in the community and the care system needs to support the social inclusion of people with mental health conditions.⁹² It further proposes the equipment of primary care staff and community care providers with new skills to detect mental health conditions, provide basic interventions and support to people with mental health conditions.⁹³

b) Economic Factors

Employment is one of the ways in which individuals can actualize their economic and personal goals.⁹⁴ People with mental health conditions are often unfairly labelled as “incapable.” They are therefore not allowed to have equal opportunities in access to employment and participation in society, which ultimately undermines civic society.⁹⁵ Mental illnesses not only lead to difficulties at an individual level but also cause damage to the economy and hence, every country needs to take urgent responsibility and action to defend the rights of individuals living with mental health conditions.⁹⁶

.<<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7681163/#:~:text=Abstract%20employment%20is%20critically%20important,the%20most%20serious%20mental%20illnesses> > accessed 15/10/23.

⁸⁸ T Ogundare, ‘Culture and Mental Health: Towards Cultural Competence in Mental Health Delivery’ (2020) 5(1) Journal of Health and Social Sciences 23. < <file:///C:/Users/hp/Downloads/FInalPrintArticle.pdf> > accessed 15/10/23

⁸⁹ *ibid.*

⁹⁰ *ibid.*

⁹¹ *ibid* (n 52).

⁹² World Health Organization, “World Mental Health Report: Transforming Mental Health For All’ (2022) < <https://iris.who.int/bitstream/handle/10665/356119/9789240049338-eng.pdf?sequence=1> > accessed 15/10/23

⁹³ *Ibid*

⁹⁴ RE Drake and MA Wallach, ‘Employment Is a Critical Mental Health Intervention’ (2020) 29 Epidemiology and Psychiatric Sciences e178.

<<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7681163/#:~:text=Abstract%20employment%20is%20critically%20important,the%20most%20serious%20mental%20illnesses> > accessed 15/10/23

⁹⁵ *ibid* (n 53).

⁹⁶ *ibid* (n 53).

The World Health Organization envisages the complementation of health interventions with vital social services, including child protection and access to education, employment and social protection as one of the ways we can enable people with mental health conditions achieve their recovery goals and live a more satisfying and meaningful life.⁹⁷ It also points out the fact that employment especially amongst people with schizophrenia or bipolar disorder can be an enormous source of stress.⁹⁸ However, it can also promote recovery and is associated with improved self-esteem, better social functioning and a higher quality of life.⁹⁹

c) Discrimination on the grounds of Sexual Orientation

Socially marginalized groups such as sexual minorities tend to have higher rates of mental health conditions than the general population.¹⁰⁰ This mainly stems from the stigma and discrimination that arises from their sexual identities. Despite all these factors, they still have difficulties in accessing mental health services.¹⁰¹ They face discrimination even within health systems, where hospital registration forms have columns that only provide for males and females.¹⁰² They also find it hard to seek help because of the hostility they encounter from the society.

The World Health Organization encourages member states to promote the inclusion of sexual minorities within society and prevent their discrimination in the access to mental health services.¹⁰³ The Comprehensive Mental Health Action Plan 2013- 2030 lists out one of the implementation options for addressing the barriers to access to mental health treatment, care and support amongst sexual minorities as identifying and assessing the mental health needs of different sociodemographic groups in the community.¹⁰⁴

⁹⁷ *ibid* (n 62).

⁹⁸ *ibid* (n 62).

⁹⁹ *ibid* (n 62).

¹⁰⁰ *ibid* (n 62).

¹⁰¹ *ibid* (n 62).

¹⁰² N Nakkeeran and B Nakkeeran, 'Disability, Mental Health, Sexual Orientation, and Gender Identity: Understanding Health Inequity through Experience and Difference' (2018) 16(Suppl 1) Health Research Policy and Systems 97 < <file:///C:/Users/hp/Downloads/s12961-018-0366-1.pdf> > accessed 16/10/23

¹⁰³ *Ibid* (n 62).

¹⁰⁴ World Health Organization, Comprehensive Mental Health Action Plan 2013- 2030, < <https://iris.who.int/bitstream/handle/10665/345301/9789240031029-eng.pdf?sequence=1> > accessed 16/10/23

d) Racial Discrimination

Racial discrimination against a particular group of people in the society increases the risk of social exclusion which undermines mental health.¹⁰⁵ Reports have documented racial discrimination in the administration of medical care, which is manifested in fewer diagnostic treatments and diagnostic procedures for African-Americans versus whites in the United States.¹⁰⁶ Surveys like the General Social Survey in 1990, have revealed that African-Americans and Hispanic Americans reported experiencing higher levels of financial stress and stress from racial bias than whites.¹⁰⁷

The case study on racial minorities in the United States alludes to the probability that minorities are likely to delay or fail to seek mental health treatment because of the oppression and hostility they face.¹⁰⁸ Racial discrimination adversely affects mental health and may expose racial minorities to risk for mental conditions such as depression and anxiety.¹⁰⁹ To achieve social inclusion, it is crucial to recognize racial diversity and the impact it has on access to mental health treatment in order to foster more inclusive societies. Mental healthcare systems should be structured in an equitable manner in order to address barriers to access to mental health treatment in a more inclusive and sustainable way.

e) Resource Allocation

One of the ways countries can foster inclusivity and meet the mental health needs of their people is by ensuring adequate funding and resource allocation towards the implementation of mental health policies. Adequate finance and resource allocation is the basis for establishing administration and governance mechanisms, developing and deploying a trained workforce, and installing relevant infrastructure and technology to scale up the delivery of sustainable mental health services.¹¹⁰

¹⁰⁵ *ibid* (n 62).

¹⁰⁶ *ibid* (n 50).

¹⁰⁷ *ibid* (n 50).

¹⁰⁸ *ibid* (n 50).

¹⁰⁹ *ibid* (n 50).

¹¹⁰ World Health Organization, “World Mental Health Report: Transforming Mental Health For All’ (2022) < <https://iris.who.int/bitstream/handle/10665/356119/9789240049338-eng.pdf?sequence=1> > accessed 16/10/23

The Kenya Mental Health Action Plan 2021- 2025 reveals that there has been mental health care financing disparity and inequality in the country which has led to unavailability or poor and inaccessible mental health services.¹¹¹ It further pointed out that only 0.01% of the national health budget is allocated to mental health and that Kenyans have been forced into poverty due to out-of-pocket payments for mental health care.¹¹² According to the Action Plan, the only way we can achieve sustainable, comprehensive mental health care services as envisaged in the Kenya Mental Health Policy 2015- 2030 is by lobbying for adequate financing and sustained flow of resources in mental health care systems.¹¹³ It proposes the enrollment of people with mental health conditions in the National Hospital Insurance Fund (NHIF), establishment of conditional grants for community health programmes to support users' recovery plans and bridge mental health disparities, and investment in public private partnerships and voluntary private sector participation in provision of mental health services and financing.¹¹⁴

Social justice is imperative for the realization of mental health inclusivity. Promoting social justice ensures that no one is left behind and that the needs of people with mental health conditions are equitably met. It is also an essential tool for breaking barriers in access to mental health and addressing biases like stigma and discrimination, all while upholding the human rights of people with mental health conditions.

4.0RESHAPING MENTAL HEALTH CARE

The World Health Organization calls upon nations to embrace community-based mental health services to improve coverage for mental health services.¹¹⁵ It encourages countries to supplement institutional care with community-based mental healthcare which is more accessible and acceptable.¹¹⁶ Achieving this goal necessitates raising awareness of mental health conditions within communities where people with mental illnesses reside, thereby addressing stigma-related challenges efficiently. Providing people with mental health conditions with mental health care and

¹¹¹ Ministry of Health, 'Kenya Mental Health Action Plan 2021- 2025' < https://www.aku.edu/bmi/Documents/kenya_mental_health_action_plan_2021-2025_.pdf > accessed 16/10/23

¹¹² *ibid.*

¹¹³ *ibid.*

¹¹⁴ *ibid.*

¹¹⁵ World Health Organization, "World Mental Health Report: Transforming Mental Health For All' (2022) < <https://iris.who.int/bitstream/handle/10665/356119/9789240049338-eng.pdf?sequence=1> > accessed 16/10/23

¹¹⁶ *ibid.*

support within their communities fosters inclusivity and enables them to live more fulfilling lives in the society.

The World Health Organization proposes people-centered, recovery-oriented, and human rights-based care.¹¹⁷ The Kenya Mental Health Policy also gives policy direction on religious and community leaders being oriented to participate in the care, support, and referral of persons with mental health conditions.¹¹⁸ According to the Kenya Mental Health Policy, Kenya has adopted the WHO model of service organization pyramid for an optimal mix of mental health services, which requires mental health services to be integrated with general health care.¹¹⁹ It states that single-service setting cannot meet all population's mental health needs.¹²⁰ Restructuring mental health care services is crucial for the reduction of the mental health treatment gap and mitigating resulting inequalities.

5.0 CONCLUSION

Mental health is one of the prevalent global health problems that call for urgent action and reforms. This article sheds light on some of the human rights violations that people with mental health conditions are faced with, the inequalities in the access to mental health care and how the current mental health laws and policies are shaping the mental health space. It also gives the imperatives of considering mental health and fostering mental health inclusivity within the human rights and social justice discourse. It is, however, important to bear in mind that while there are policies and actions put in place to advocate for mental health and mental health inclusivity, countries must ensure that the policies and action plans are not just merely words on paper but are effectively being implemented. To achieve mental health inclusivity, we must acknowledge the diversity in our society and work towards breaking barriers to the access to mental health care.

¹¹⁷ *ibid.*

¹¹⁸ Ministry of Health, 'Kenya Mental Health Policy 2015- 2030: Towards Attaining the Highest Standard of Mental Health' < <https://publications.universalhealth2030.org/uploads/Kenya-Mental-Health-Policy.pdf> > accessed 16/10/23

¹¹⁹ *ibid.*

¹²⁰ *ibid.*

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<https://www.who.int/southeastasia/news/detail/10-10-2023-world-mental-health-day-mental-health-is-a-universal-human-right#:~:text=The%20focus%20of%20human%20rights,the%20overall%20quality%20of%20life>. > Accessed on 11/10/23

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Good for the Goose but not the Gander: The International Law of Losers and Developing Nations

BY

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Abstract

The body of existing international law including international humanitarian law was intended to bind all state parties in their relations with other state and non-state actors. In practice however, it has become apparent that these laws have become increasingly difficult to equally enforce with developed countries or parties on the winning side getting special treatment in how and when they enforce the laws. Their counterparts, being less developed countries and parties on the losing side of the armed conflicts, are dealt an unfair hand as these laws are strictly enforced against them. This article seeks to highlight the manner in which international humanitarian law has been selectively enforced to the detriment of losers of armed conflict as well as developing countries.

1.0 INTRODUCTION

1.1 Definition

Jus ad bellum constitutes of a body of international laws and rules that outline the criteria under which actors can declare war or undertake to participate in an armed conflict.¹ They include principles such as the probability of success,² a just cause,³ proportionality, and the last resort principles, established to guide actors in weighing whether there is need to go to war and consider

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¹ Martin J. Rochester, *The New Warfare: Rethinking Rules for an Unruly World*. (Taylor & Francis 2016).

² Taylor B. Sebolt, *Humanitarian Military Intervention: The Conditions for Success and Failure*. (Oxford University Press 2007)

³ Marthas Finnemore, *Rules of war and wars of rules: The international red cross and the restraint of state violence*. In John Boli and George M. Thomas (ed.). *Constructing World Culture: International Nongovernmental Organizations Since 1875*. (Stanford University Press, 1999) pp. 149–165.

the best means to employ.⁴ *Jus in bello*, on the other hand, refers to the recognized body and principles of international laws and rules used to regulate the management of armed conflicts. They include rules that relate to, inter alia, limiting fighting with enemy combatants, attacking only military installments, caring for the sick and treating enemies who surrender.⁵ These laws and principles guide the conduct of parties prior to and during war to minimize suffering. International Humanitarian Law hence refers to the body of law ascribing rights and responsibilities that aim to protect individuals and mitigate the effects of armed conflict.⁶

1.2 Background

The purported grund norm of international law that regulates armed conflict is the Charter of the United Nations (1945). An instrument ironically adopted and passed by the winners of one of the bloodiest conflicts of history, a war won after the war was brought to an end following the bombing of Hiroshima and Nagasaki that caused hundreds of thousands of civilian deaths.⁷ The Charter outlines that all state parties must settle their international dispute in a peaceful way and all use of force shall be restricted.⁸ The treaty itself was passed in the absence of freely and democratically elected African governments. Similarly, the Convention relating to the status of refugees was passed with few former colonies of western states having achieved their independence and represented by democratically elected regimes.⁹ The Rome Statute was passed amidst some opposition, but sailed through regardless.¹⁰ Two decades later, it has emerged that these laws were strictly applied only to the losing side in armed conflicts. Furthermore, it has become clear that less developed countries are expected to adhere to international humanitarian laws, receiving harsh criticism and backlash and sanctions for any deviation or non-compliance, while their developed counterparts have different standards applicable to them with regards to the violation of the same laws.

⁴ Eamon Aloyo, *Just War Theory and the Last of Last Resort - Ethics & International Affairs*". Ethics & International Affairs.

⁵ Andrew J. Carswell, *Classifying the conflict: a soldier's dilemma*. (International Review of the Red Cross 2009)

⁶ ICRC *What is international humanitarian law?*

⁷ Robert Pape, *Bombing to Win: Airpower and Coercion in War*. (Cornell University Press 1996) p. 129.

⁸ Charter of the United Nations 1945, Art 2(3) (4).

⁹ International Convention on the Status of Refugees 1951.

¹⁰ Michael P. Scharf, *Results of the Rome Conference for an International Criminal Court*. (American Society of International Law 1998).

This article sought to highlight the instances in which the law and usages of war have been skewed to the disadvantage of losers and weaker parties, and cast light on the bias in ensuring compliance with refugee and asylum laws.

2.0 THE STRONGEST AND WINNERS TAKE ALL

2.1 Introduction

The winners of a war have always been the people who have decided the fate of the losing combatants. In the international sphere, the First World War saw the allied forces make punitive decisions that were detrimental to Germany and her allies with regards to their territory and finances. The Treaty of Versailles resulted in loss of territory by Germany and her allies and punitive financial sanctions in the name of ‘making reparations for the victims of the war’.¹¹ This occurred despite the fact that both sides were guilty of violating ordinances of war.¹²

2.1 International conflicts

The United States of America, which oversaw the illegal involuntary internment of Japanese Americans into concentration camps under President Franklin Roosevelt, is yet to be held to account.¹³ The program, an allied version of the Nazi concentration camps, exposed Japanese Americans to squalor conditions in the camps that often led to deaths.¹⁴ It also resulted in the destruction of their property and livelihoods and exposed them to racist policies.¹⁵ In the Nuremberg trials, parties like Ilse Koch were charged on the basis of the inhumane treatment given to detainees at various Nazi concentration camps like Buchenwald.¹⁶ There was no mention, indictment for arrests made for the deaths and inhumane treatment in the Japanese isolation camps.

2.3 Non-international conflicts

¹¹ Andrew Wiest, *The Western Front 1917–1918: From Vimy Ridge to Amiens and the Armistice*. (2012).

¹² Alan Kramer, *Combatants and Noncombatants: Atrocities, Massacres, and War Crimes*, in: Horne, John (ed.): *A Companion to World War I*, Malden et al. (2012) pp. 188-201.

¹³ Commission on Wartime Relocation of Civilians, *Personal Justice Denied*. Washington, D.C.: (Civil Liberties Public Education Fund 1997). p. 459.

¹⁴ Tetsuden Kashima, *Homicide in Camp*. Densho Encyclopedia.

¹⁵ Bradford Pearson. For Japanese-Americans, Housing Injustices Outlived Internment. (The New York Times 2020).

¹⁶ Alexandra Przyrembel, *Transfixed by an Image: Ilse Koch, the 'Kommandeuse of Buchenwald'*. *German History*. (Blackwell Publishing Ltd. 2001) 19 (3): 369–99.

With regards to local conflicts, the African continent is no stranger to local insurrections and armed military groups. The post-independence decades of the 1960s to 1990s saw numerous coups, counter coups, separatists and armed insurgents termed as liberation fighters.¹⁷ In instances where the ruling regime retained power, these groups were termed as terrorists, rebels and separatists and their leaders made to stand trial for violation of laws of war. In Uganda for instance, Kony and his LRA operatives like Vincent Otti, and Dominic Ongwen were indicted by the ICC for crimes in which the Ugandan People's Defense Forces were similarly implicated. Subsequently, the International Criminal Court vindicated the Uganda People's Defense Forces (UPDF) of any wrongdoing much to the chagrin of their victims and human rights groups.¹⁸ The same applied for the South Africa apartheid regime that was guilty for committing numerous human rights violations in its operations against the military wing of the African National Congress, *Umkhonto We Sizwe*¹⁹ initially declared a terrorist organization. In Kenya, after the fall of colonialism, the *Mau Mau* which was initially termed as a terrorist group²⁰ would be vindicated after independence as an independence movement.

2.4 Analysis

The Charter of the United Nations obligates all state parties to pursue all peaceful means available in the resolution of conflicts and abstain from the use of force.²¹ This provision is applicable to all states. The only exceptions under international law are when a country employs force for purposes of self-defense²² and collective military action under the express authorization of the Security Council.²³ In addition, the Geneva Conventions assign both individual and collective state responsibility to oversee compliance with their provisions. The Third and Fourth Geneva Conventions, outlaw willful killing, unlawful killing, confinement or inhumane treatment and torture if committed against protected persons or property.²⁴ The Allied parties that perpetrated

¹⁷ Patrick McGowan, *African Military coups d'état 1956-2001: Frequency, Trends and Distribution*. (The Journal of Modern African Studies 2003) Vol. 41, No. 3 pp. 339-370.

¹⁸ Lina Owor Ogora, *Civil Society in Uganda Outraged by Controversial Newspaper Article Clearing Ugandan Army of committing war crimes*.

¹⁹ Hovey Gail, *Human Rights Violations in Apartheid South Africa*. Africa Fund.

²⁰ A.E Norman, *The Crime of Mau Mau*. (The Australian Quarterly, 1954) JSTOR.

²¹ UN Charter 1945, Art 2(4) (5).

²² UN Charter 1945, Art 51.

²³ Ibid, Art 24, 25.

²⁴ Third Geneva Convention 1929, Art 130 see also Fourth Geneva Convention 1949, ART 147.

atrocities against the populace of the Central powers as well as their perceived sympathizers ought to have similarly been held to account as a result of the aforesaid violations. Like the senior Nazi officials, I argue that the Allied Generals and senior officials should have stood trial. Instead, because they won the war, the responsibility of reparations was based squarely on the losing parties and the atrocities of the Allied like the American internment camps and the bombings of Hiroshima and Nagasaki justified as ‘necessary evils’.

The Rome Statute also assigns individual criminal liability to all persons who violate international humanitarian laws through the commission of international crimes.²⁵ For non-international conflicts that have precipitated humanitarian crises like the Uganda People’s Defence Force’s (UPDF) long drawn war with the Lord’s Resistance Army (LRA), only the LRA combatants have been indicted, charged and convicted both locally and internationally. This is the case in spite of both sides being implicated in the commission of atrocities such as murders, rapes and destruction of property.

2.5 Conclusion

This demonstrates that the winners of the wars often tend to be judge and jury over the application of the laws of war and decides who to hold accountable for violations. The winner and his allies are often absolved of any wrongdoing. This is contrary to the existing body of international law that provides that, where parties partake in armed conflict using means that are inconsistent with international humanitarian laws, both parties have to be held accountable regardless of the outcome.²⁶

3.0 THE CONTRA AFFAIR AND TAYLOR’S CIVIL WAR

The highly popularized Iran-contra affair was an operation in the 1980s that involved a conspiracy where the United States illegally sold weapons to Ayatollah Khomeini’s Iran regime and irregularly diverting the funds to assist anti-government Contra rebels in Nicaragua.²⁷ The anti-Sandinista terrorist incursion that led to numerous deaths and human rights abuses ranging from

²⁵ Rome Statute of the International Criminal Court, Art 25.

²⁶ Rome Statute of the International Criminal Court.

²⁷ Seymour M. Hersh, *U.S. Said to Have Allowed Israel to Sell Arms to Iran*. (The New York Times 1991).

the targeting of non-military targets to daylight executions of civilians.²⁸ The United States, under President Ronald Reagan backed the deployment training and funding of contra troops in an attempt to oust President Augusto Sandino whose only crime was his communist leanings that controverted USA's capitalistic leanings, and had no bearing on his legitimacy to rule.²⁹ An inquisition by the American Congress that vindicated president Reagan on the grounds that he was not aware of the extent of the operations taking place.³⁰ Only local indictments were made with a large number of the participants in the plot being pardoned or handed light sentences.³¹ What exacerbated the situation was that, despite successfully litigating the issue at international court of justice,³² the Nicaraguan government failed to get reprieve as the United States used its position in the Security Council to veto all resolutions intended to make it comply with the findings of the International Court of Justice.³³ I argue that an irony therefore occurs where despite finding of fault by official within the Reagan administration to rule in favor of Nicaragua, no formal criminal sanctions were brought against the same individuals on an international criminal tribunal.

In stark contrast, Charles Taylor the former Liberian warlord and president, who similarly bankrolled parties of the Sierra Leone Civil War, is languishing in jail after being indicted, charged and convicted by the Special Court for Sierra Leone, unlike his counterpart who spent his retirement in peace and relative comfort, much of which was bankrolled by the American exchequer.³⁴

3.1 Analysis

The international criminal regime assigns individual criminal responsibility to both civilian and non-civilian leaders for conduct and intent or knowledge that culminates in the commission of

²⁸ John A. Booth, Christine J. Wade and Thomas W. Walker. *Understanding Central America: Global Forces, Rebellion, and Change*. (Avalon Publishing 2014) p. 107.

²⁹ John A. Booth, Christine J. Wade and Thomas W. Walker. *Understanding Central America: Global Forces, Rebellion, and Change*. (Avalon Publishing 2014).

³⁰ Ibid.

³¹ Anonymous, *Iran-Contra Pardons*. *Bangor Daily News*. Bangor, Maine. (Associated Press.1992). p. 2; see also David Johnston, *Bush Pardons 6 in Iran Affair, Averting a Weinberger Trial; Prosecutor Assails 'Cover-Up*. (The New York Times 1992) national ed sec. A. p. 1.

³² *The Republic of Nicaragua v The United States of America* [1986] ICJ 1.

³³ Noam Chomsky, "4". *Necessary Illusions, Adjuncts of Government*. (Oxford University Press 1989) see also United Nations General Assembly Session 41 *Resolution 31. A/RES/41/31* ; United Nations Security Council *Verbatim Report 2718. S/PV.2718*.

³⁴ Leo Cendrowicz, *Warlord Convicted: Liberia's Charles Taylor Found Guilty of War Crimes*. (Times 2012)

international crimes outlined under the Rome Statute.³⁵ Investigations uncovered that senior US officials, including President Reagan, had adequate knowledge of the contra affair and were implicated in the commission of the crime of aggression and use of force against an independent country. Unlike Charles Taylor who was implicated in crimes, some of which he had no direct involvement in by virtue of his senior position;³⁶ the Americans were not indicted for war crimes by any international or local tribunals and enjoy their retirement, celebrated as heroes.

4.0 CONCLUSION

The uneven legal treatment accorded to Charles Ghankay Taylor, a president of a then third-world country was nothing short of biased compared to that accorded to Ronald Reagan, a US president implicated in similar conduct. The further abuse of power by the United States, contrary to the ICJ ruling and multiple UN General Assembly Resolutions, through use of veto to prevent the enforcement of the judgment against it further highlights the impossibility of successfully effecting equality in the strict compliance with international obligations by state parties.

³⁵ Rome Statute of the International Criminal Court 1998, Art 30.

³⁶ *The Prosecution v Charles Ghankay Taylor* [2013] SCSL-0-01-A.

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BRIDGING THE EDUCATIONAL DIVIDE IN KENYA: SOCIAL JUSTICE IN EDUCATION FOR SUSTAINABLE DEVELOPMENT

ADI and KJW

ABSTRACT

Sustainable development is a developmental approach that involves meeting the needs of the present generation without compromising the chances of future generations to meet their own. The idea of sustainable development has often been criticized for being nondescript, yet it is a hallmark of various discussions on social justice. Social justice, on the other hand, is a state of equity in relation to resources, participation, diversity, and enjoyment of human rights. Consequently, the mutual dependence between the right to education and social justice creates significant groundwork for sustainable development and unveiling an equitable and thriving society. This is because education is both a means and an end to sustainable development. Achieving social justice within the right to education thus requires addressing disparities in education most of which are occasioned by corruption. This paper will analyse the notion of sustainable development and the nexus between sustainable development and education. It will then shed light on the embezzlement of resources as a manifestation of corruption in education and substantiate recommendations to promote social justice. Ultimately, this work seeks to prove that social justice in education is not only an objective of sustainable development but also a key component of achieving it. The methodology employed in this paper involves a comprehensive review of existing literature to substantiate the analysis and recommendations. This review will provide a robust foundation for understanding the interplay between education, social justice, and sustainable development, and offer evidence-based insights into addressing corruption and promoting equity in education.

1.0 INTRODUCTION

Echoing Nelson Mandela's insight on education, "Education is the most powerful weapon you can use to change the world."¹ Education is fondly hailed as the cornerstone of both progress and development, connecting the present to a prospective future. It is equally a prerequisite for enjoying other rights, including economic opportunities, health, political participation, and social inclusion.² Education empowers individuals, enabling access to better employment opportunities, fostering informed citizens, promoting healthy practices, and eliminating discrimination.³ This aligns with Sustainable Development Goal 4 (SDG 4), which aims to ensure inclusive and equitable quality education and promote lifelong learning opportunities for all, recognizing education's fundamental role in achieving broader development outcomes.⁴

However, at the global level, disparities in education remain a significant barrier to achieving a just and sustainable society, as many communities struggle to access quality education.⁵ In Kenya, several disparities in education have persistently obstructed the path to a just and sustainable society as part of the nation's populace continuously struggles to access quality education.⁶ The focal point of this paper will be to first, analyze the dual role of education in the notion of sustainable development, second, to show how corruption in the Kenyan education system brings about disparities that impede social justice, and lastly, to substantiate the role of social justice in education as both an objective and a core component of sustainable development.

To comprehensively understand this paper's focus on social justice in education, we need to outline the meaning of corruption, and further demonstrate how it undermines social justice. Corruption can broadly be understood as the abuse of entrusted power for personal benefit.⁷ In this context, it

¹ Nelson Mandela 'Keynote Address' (Speech at Madison Park High School, Boston 23 June 1990) < [Nelson Mandela: 'Education is the most powerful weapon which you can use to change the world.' — The Socratic Method \(socratic-method.com\)](#)> accessed 20 November 2023.

² United Nations Educational, Scientific and Cultural Organization (UNESCO), 'Sustainable Development Goals Begin with Education: How Education Can Contribute to The Proposed Post-2015 Goals,' (2015) 3-10. < [Sustainable development begins with education: how education can contribute to the proposed post-2015 goals | Global Education Monitoring Report \(unesco.org\)](#)> accessed 20 November 2023.

³ *ibid.*

⁴ *ibid* (n2)

⁵ Sylvia Schmelkes, 'Recognizing and Overcoming Inequality in Education,' (United Nations, 22 January 2022) < [Recognizing and Overcoming Inequity in Education | United Nations](#)> accessed 20 November 2023.

⁶ Joyce Kanyiri, Alice Kibui, and Tom Omtondo, 'Reorienting Education to Achieve Vision 2030: Challenges and Barriers,' (Moi University Press 2015) 160.

⁷ James Chen, 'Corruption: Its Meaning, Type, and Real-World Example' (*Investopedia* 13 May 2023) <https://www.investopedia.com/terms/c/corruption.asp> accessed 20 November 2023

extends beyond financial misconduct as it encompasses a spectrum of unethical practices.⁸ When corruption is rampant in a society, it undermines the entire education system in terms of access and quality, in that it undermines social justice by perpetuating inequality and impeding access to quality learning, thereby hindering sustainable development efforts aimed at achieving equitable growth and sustainability.⁹ This has far-reaching negative impacts on society ranging from poor quality education, mismanagement of resources, unqualified teaching staff, and excessive bureaucratic burdens that give rise to disparities.¹⁰

Disparities essentially refer to notable differences or dissimilarities;¹¹ and are evidenced by gender inequality, a skewed budget allocation, and cultural inequalities, which result in outcomes that perpetuate inequality.¹² This underscores the importance of remedies and preventive measures aimed at increasing transparency and accountability for transformative change. By dismantling these barriers, Kenya can harness the full capabilities of its citizens, thus paving the way for a more equitable future. This promotes social justice, which is tantamount to the view that every individual is entitled to uniform political, economic, and social rights and opportunities.¹³

Social justice can be generically defined as the state of just distribution of rights, opportunities, and resources, which lessens existing disparities.¹⁴ The link between eradicating corruption and achieving social justice becomes more apparent mainly because at the heart of social justice is a minimum semblance of equality often disrupted by corrupt practices.¹⁵ Social justice thus

⁸ United Nations Office on Drugs and Crime (UNODC), 'Module 9: Corruption in Education,' in *Knowledge Tools for Academics and Professionals; Module Series on Anti-Corruption* (2022) 9 <[Anti-Corruption Module 9 Corruption in Education.pdf \(unodc.org\)](#)> accessed 20 November 2023

⁹ Monica Kirya, 'Education Sector Corruption: How to Assess it and Ways to Address it' (Anti-Corruption Resource Center, 2019) 3. <[u4.no/publications/education-sector-corruption-how-to-assess-it-and-ways-to-address-it.pdf](#)> accessed 20 November 2023.

¹⁰ Anthony Ansong, 'Negative Impacts of Corruption in Education,' (Light Magazine Africa, 1 March 2016) <[Negative Impact of Corruption on Education \(linkedin.com\)](#)> accessed 20 November 2023.

¹¹ Merriam-Webster, 'Disparity: Definition and Meaning,' <[https://www.merriam-webster.com/dictionary/disparity](#)> accessed 20 November 2023.

¹² Alwiya Alwy and Sussane Schech, 'Explaining Education Inequalities in Kenya,' in William T Pink and George W Noblit (eds), *International Handbook of Urban Education*, Vol 9 (2007) 129.

¹³ Mona Khechen, 'Social Justice: Concepts, Principles, Tools and Challenges,' Economic and Social Commission for Western Asia, Technical Paper 9 (2013) 8.

¹⁴ Thilo Ketschau, 'Social Sustainable Development or Sustainable Social Development - Two Sides of the Same Coin? The Structure of Social Justice as a Normative Basis for the Social Dimension of Sustainability,' *International Journal of Design & Nature and Ecodynamics*, Vol 12 Issue 3 (2017) 338, 341.

¹⁵ *ibid* 341; See Olaf Cramme, 'Social Justice in the Global Age,' Polity: Cambridge (2009) 276.

understood, serves as a normative framework for sustainable development and in later stages of this work appears as a reference framework that allows for individuals' self-fulfilment.¹⁶

Ultimately, this paper endeavours to examine education's dual role in sustainable development, demonstrating how corruption in Kenya's education system creates disparities hindering social justice. Additionally, it substantiates the role of social justice in education as both an objective and core component of sustainable development. In pursuit of this outcome, chapter two of this paper elucidates the central position occupied by education within the spectrum of sustainable development as both a means and an end, owing to the incorporation of innovative approaches such as the proposition of environmental education. Chapter three then examines corruption, particularly the embezzlement of resources, and how it undermines the education system in terms of access and quality leading to undesirable outcomes. Chapter four focuses on social justice in education for sustainable development incorporating theories of social justice. This is meant to show the key role social justice in education would play in realizing sustainable development goals. Finally, the article provides recommendations for curbing the embezzlement of resources in the education system.

¹⁶ *ibid* 342.

2.0 EDUCATION AND SUSTAINABLE DEVELOPMENT

2.1 The Notion of Sustainable Development

Sustainable Development has been the subject of immense discourse by various scholars, in a bid to ascertain its components and its objectives. It can be classified into ecological, economic, and social sustainability.¹⁷ Ecologically, sustainable development encompasses long-term safeguarding of natural bases of living, including, energy supply, transport, and trade, among others.¹⁸ Economically, this reflects on the quality of living and aims at creating an economic system that, in the long run, is geared towards improving the use of natural resources, infrastructure, and so on.¹⁹ Quality of living in this context should be understood to transcend its material base and include the possibility of self-development for an individual and society;²⁰ which is also a common feature in social justice.²¹

In the social sphere, sustainable development correlates with the other spheres discussed above. This implies not only internal but also external solidarization; a readiness to collaborate with other communities and areas, as well as the adoption of responsibility for global development in which disadvantaged regions (e.g., the Third World), can participate.²² At this point, there is an apparent divergence on what such a 'definition' of sustainable development constitutes. On one hand, there is an apprehension that the consensus on sustainability is based on abstract aims, which may be stalled in the non-committal sphere where it is neither one thing nor another.²³ On the other hand, there is a position that this nondescript nature and lack of precision depicts what sustainable development stands for; creativity and dynamism.²⁴

¹⁷ Franz Rauch, 'The Potential of Education for Sustainable Development for Reform in Schools,' *Environmental Education Research* Vol 8 Issue 1 (2002) 43.

¹⁸ *ibid* 47.

¹⁹ *ibid* 47.

²⁰ *ibid* 47-48.

²¹ See The Introduction Section of This Work.

²² Franz Rauch 'The Potential of Education for Sustainable Development for Reform in Schools' (n 17) 48.

²³ *ibid* 46-47; see also John Elliott, 'Sustainable Society and Environmental Education: Future Perspectives and Demands for the Educational System,' *Cambridge Journal of Education*, Vol 29 Issue 3 (1999) 325.

²⁴ *ibid* 48.

2.2 Education as a Means and an End of Sustainable Development

Despite this divergence, development must at its core encompass three main objectives. Firstly, to increase the availability and widen the distribution of basic survival needs such as food, shelter, health, and protection.²⁵ Second, to elevate living standards by providing more jobs, better education, and greater emphasis on cultural and humanistic values, all of which will contribute not just to improving material well-being but also to boosting individual and national self-esteem.²⁶ Thirdly, to broaden individuals' and nations' economic and social options by liberating them from reliance not only on other people and nation-states but also on forces of ignorance and human misery.²⁷ Even at this nascent stage, it is increasingly becoming evident that education serves a twofold purpose; it is both a metric with which to gauge sustainable development and a driving force to actualize it.

The term "sustainable development" has also evolved in recent years to characterize patterns of growth that minimize the adverse effects of human activity on the physical environment.²⁸ According to some researchers, the primary reason for seeking to minimize environmental deterioration is to demonstrate respect for the intrinsic value of non-human components of the natural environment.²⁹ Objections to this argument in developed countries have concentrated on the topic of whether things other than humans, such as the environment have inherent value. Meanwhile, experts from developing countries have voiced concern that prioritizing environmental protection may have disproportionately negative consequences for members of already disadvantaged groups in developing countries.³⁰ Key innovations in this regard include the proposition of environmental education, which is argued to enable the application of knowledge to important spheres of social interaction in the environment, and social action for the

²⁵ Kevin Davis and Michael J Trebilcock, 'What Role Do Legal Institutions Play in Development?' (University of Toronto, 1999) 25.

²⁶ *ibid* 25.

²⁷ *ibid* 25.

²⁸ Davis and Trebilcock, 'What Role Do Legal Institutions Play in Development?' (n25) 28.

²⁹ *ibid* 28.

³⁰ Ramachandra Guha 'Radical American Environmentalism and Wilderness Preservation: A Third World Critique,' (1989). See also Davis and Michael, 'What Role Do Legal Institutions Play in Development?' 29.

environment.³¹ This consequently shapes the environment as a sphere of socially important action and interaction.³²

According to de Haan and Harenberg, environmental education has been conceptualized as education for sustainability after the 1992 Rio Summit.³³ Aside from ecological issues, environmental education is influenced by the concept of fair and equitable worldwide distribution.³⁴ There is an emerging new configuration of ecological, economic, and social components where education for sustainability might serve as a model for broader educational change.

This creates a tug-of-war between anthropocentric and ecocentric approaches to sustainable development. However, the latter poses feasibility challenges seeing as its primary focus is the intrinsic value of the environment rather than its consequent impact on humans.³⁵ This overlooks the fact that humanity is an essential element of not only the environment itself but also the implementation of sustainability.³⁶ Thus, a certain amount of anthropocentrism is necessary to establish the delicate balance between humanity and environmental conservation.

The notion of anthropocentrism, at least in some aspects, has seeped into other dimensions of development. For example, the United Nations Development Program initiated the Human Development Index (HDI) in 1990 and has proceeded to publish reports annually.³⁷ The HDI is based on three key indicators namely: life expectancy at birth, knowledge as measured by a weighted average of adult literacy (two-thirds) and mean years of schooling (one-third), and lastly, income as measured by adjusted real per capita income.³⁸ This elucidates further, the central position that education occupies within the spectrum of sustainable development as both means and end. However, the pervasive scourge of corruption has significantly hindered achieving our sustainable goals through education in Kenya.

³¹ Franz Rauch 'The Potential of Education for Sustainable Development for Reform in Schools' (n 17) 45.

³² *ibid* 45.

³³ *ibid* 38.

³⁴ *ibid* 38.

³⁵ Timonah Chore, 'Reconceptualising the Right to a Clean and Healthy Environment in Kenya: The Need to Move from an Anthropocentric View to a Bicentric View,' *Strathmore Law Review* (2019) 71.

³⁶ *ibid* 74.

³⁷ Davis and Trebilock, 'What Role Do Legal Institutions Play in Development?' 24; See also Martha Nussbaum, Amartya Sen 'The Quality of Life' (New York: Oxford University press 1993).

³⁸ *ibid* 24-25.

3.0 CORRUPTION IN THE EDUCATION SECTOR

3.1 A Brief Account on The Post-Colonial Education System in Kenya

The historical evolution of the Kenyan education system is a testament to the complex journey towards development, self-determination, and inclusivity, and can be divided into several phases.³⁹ In pre-colonial times, education was primarily informal, involving a lifelong process of acquisition of knowledge and skills relevant to societal affairs being conveyed through apprenticeship by local leaders and elders of the community.⁴⁰ This was before Western education stratified along racial lines- European education, African education, and Asian education- was introduced.⁴¹ Education for Africans was elementary and was intended to perpetuate colonial interests with a curriculum tailored to produce a limited workforce that could assist the colonial administration.⁴²

Following the independence of Kenya in 1963, there was a push to advance education as the government sought to expand access while also promoting local cultures and languages. In 1967 Kenya formed the East African Community (EAC) with Uganda and Tanzania and adopted the 7-4-2-3 system consisting of seven years of primary school education, four years of secondary education after primary school, two years of high school education, and three to five years of university education.⁴³

Following the EAC's collapse in 1977, Kenya continued with the same system until 1985 when the 8-4-4 system was introduced in line with the 1982 Mackay Report. One of the objectives of reference of this report was to review the existing education system in relation to Kenya's development goals. This saw the transition to eight years of primary school, four years of secondary school, and finally four years of university education.⁴⁴ This system aimed at promoting

³⁹ Anthony M Wanjohi, 'Development of Kenyan Education System Since Independence,' (2019) 1-10 < [Development of Education System in Kenya since Independence | Anthony M. Wanjohi - Academia.edu](#) > accessed 29 November 2023.

⁴⁰ Benson Okello, 'Revisiting the Role of Traditional Apprenticeship in Traditional Africa Vocational Pedagogy,' (2015) 4.

⁴¹ Kenneth King, 'Pan Africanism and Education in the Southern States of America and East Africa,' (Oxford University Press, 1971) 104.

⁴² J C Ssekamwa, S M E Lugumba, 'A History of Education in East Africa,' (Kampala Uganda Fountain Publishers, 2001) 28.

⁴³ Jonathan, 'Curriculum Changes in Kenya since Independence and Their Implications on Curriculum Development' (School for Africa, 27 January 2023) < [Curriculum changes in Kenya since independence and their implications on curriculum developments | SchoolForAfrica.org — Giving Children a Fighting Chance](#) > accessed 29 November 2023.

⁴⁴ Boniface Ngala, 'The 8-4-4 System of Education in Kenya,' (The Medium, 1 March 2022) < [THE 8-4-4 SYSTEM OF EDUCATION IN KENYA ===== | by Bonface Nyangla | Medium](#) > accessed 29 November 2023.

vocational training and producing a skilled workforce for different fields, unlike the 7-4-2-3 system.⁴⁵ This was then replaced by the competency-based curriculum (CBC) in 2018 whose focal point is the development of skills and competencies over exam scores.⁴⁶

3.2 The Manifestation of Corruption in Kenya's Education System

However, Kenya has encountered challenges in reforming its education system due to the manifestation of corrupt practices from the central government to schools. These manifestations continue to hinder equitable access to education, obstructing the path toward a just and sustainable society.⁴⁷ This can be depicted by the Ethics and Anti-Corruption Commission 2021 statistics, portraying that education has a likelihood of 0.40% to be associated with corruption and the chances of embezzlement and misappropriation of funds are 8.9% and 4.8% respectively.⁴⁸

Furthermore, a forensic audit from the Ministry of Finance in June 2022, shows that a total of 54.9 million dollars intended to build schools in underserved areas was misappropriated which discourages donors.⁴⁹ For example, the emergence of details from massive fraudulent practices led to the end of the Department for International Development's direct funding to Kenya's government for Kenya's education support sector program.⁵⁰ From the post-independence era, factors such as inadequate oversight and political interference have contributed to the growth of corruption.⁵¹ Therefore, the embezzlement of resources in education serves as a stark manifestation of corruption within the educational landscape, impacting the quality and equity of the system.⁵²

⁴⁵ Parliament of Kenya 'Report of the National Committee on Educational Objectives and Policies' *Gachathi Report* (1976) 33-34.

⁴⁶ Callen Nyamwange, 'Competence Based Curriculum Implementation Since 2018 to 2020 in Kenya: A Review of Current Status,' *African Journal of Educational and Social Science Research*, Vol 8, Issue 4 (2020) 2.

⁴⁷ Molly Cunningham, 'Colonial Echoes in Kenyan Education: A First-person Account,' (2012) 39.

⁴⁸ Ethics and Anti-Corruption Commission, 'National Ethics and Corruption Survey 2021,' (Research Report No 13, 2022) 13-18.

⁴⁹ Voice of Africa, 'Millions of Education Money Stolen in Kenya,' 22 February 2012 < <https://www.voanews.com/a/millions-of-dollars-of-education-money-stolen-in-kenya/> > accessed 29 November 2023.

⁵⁰ UK Parliament 'Information from interviews with Department for International Development Kenya,' November 2013 < [HSS0059 - Evidence on Strengthening Health Systems in Developing Countries \(parliament.uk\)](https://www.parliament.uk/publications/59404/1/HSS0059-Evidence-on-Strengthening-Health-Systems-in-Developing-Countries) > accessed 29 November 2023.

⁵¹ UNODC, 'Module 9: Corruption in Education,' (n 8) 12.

⁵² Monica Kirya, 'Education Sector Corruption: How to Assess it and Ways to Address it,' (n 9) 3.

Embezzlement of resources materializes in the misappropriation of funds, materials, and assets designated for educational activities.⁵³ It occurs at the administrative and institutional levels, with the motives ranging from personal gain to the desire to acquire influence within the educational institutions.⁵⁴ However, regardless of the motivation, the consequences are far-reaching and detrimental to the education system. Embezzlement results from individuals exploiting their positions within the institutions to redirect funds from government donations, tuition fees, and donations for personal use.⁵⁵ The diversion thereby compromises the quality of education provided to students as essential resources are depleted leading to inadequate infrastructure and the use of outdated learning materials.⁵⁶

Furthermore, it extends to the mismanagement of physical assets within educational institutions. This includes theft or unauthorized use of equipment supplies and facilities. For instance, university libraries may suffer from inadequate procurement of reference materials, limiting the academic resources available to scholars.⁵⁷ Pilfering physical assets only worsens the situation, impeding the ability of schools to provide a well-rounded and comprehensive learning environment. Additionally, it also derails the morale of educators, following the siphoning of funds intended for salary increments, benefits, and professional development.⁵⁸ This creates an atmosphere of distrust and dissatisfaction affecting the overall dedication and commitment of the teachers ultimately affecting the learning experience of students.

3.3 Corruption; The scourge of Social Justice

Consequently, corruption perpetuates the cycle of inequality, which hinders social justice. This can be depicted by schools in affluent neighbourhoods being equipped with better facilities and resources while the ones in underserved areas continue to suffer from a lack of essential funds and

⁵³ *ibid* 11-12.

⁵⁴ Jacques Hallak, Muriel Poisson, 'Corrupt Schools, Corrupt Universities: What Can Be Done?' (United Nations Economic Social and Cultural Organization, 2007) 57-58.

⁵⁵ Voice Of Africa, 'Millions of Education Money Stolen in Kenya,' 22 February 2012 <<https://www.voanews.com/a/millions-of-dollars-of-education-money-stolen-in-kenya>> accessed 29 November 2023.

⁵⁶ UNODC, 'Module 9: orruption in Education,' (n 8) 9.

⁵⁷ U4 Anti-Corruption Resource Centre Issue 4:2006 'Corruption in the Education Sector,' (Anti-Corruption Resource Center, 2006) 8.

⁵⁸ *ibid* 11.

materials.⁵⁹ Therefore, it results in a two-tiered system where a part of the citizenry thrives while others are trapped in limited opportunities and reduced life chances as they bear the brunt of diminished public services.⁶⁰ Embezzlement thus widens the gap between the privileged and the disadvantaged, reinforcing social inequalities.

Moreover, the effects of education extend beyond the classroom, influencing society's social fabric.⁶¹ As education opportunities diminish, so does the potential for both economic empowerment and upward mobility, thus exacerbating poverty levels in society. It also reinforces systemic inequalities as individuals from poor backgrounds encounter challenges in accessing higher education and securing well-paying jobs, further entrenching the divisions within the society.⁶² This diminishes the perceived value of education.⁶³ Therefore, only through a concerted effort to weed out corrupt practices can societies nurture an education system that serves as a foundation for both individual and societal development.

4.0 SOCIAL JUSTICE IN EDUCATION FOR SUSTAINABLE DEVELOPMENT

It has been evident thus far that education is both a means and an end to sustainable development and that pervasive corruption within the education sector impedes the full realization of sustainable development goals. Therefore, we have argued that social justice in education, achieved partially through eradicating corruption, is key to sustainable development. In this chapter, we will understand how social justice in education manifests by analyzing various approaches to social justice backed by predominant theories of social justice.

The goal of a social justice model, which serves as a normative foundation for the concept of social sustainability, is to create a reference framework that allows the distribution of resources in an

⁵⁹Jeniffer Candipan, 'Neighbourhood change and the neighbourhood school gap,' *Urban Studies* Vol 56 Issue 15 (2019) 5.

⁶⁰ UNODC, 'Module 9: Corruption in Education,' (n 8) 9

⁶¹ Hallak, Poisson, 'Ethics and Corruption in Education,' (n 54) 76.

⁶² UNODC (n 8) 12 <[Anti-Corruption Module 9 Corruption in Education.pdf \(unodc.org\)](https://www.unodc.org/documents/anti-corruption/Module_9_Corruption_in_Education.pdf)>

⁶³ Mihaly Fazekas, Isabelle Adam and Olena Nikulina 'Cost and Extent of Corruption in the Education Sector in Uganda,' (2021) 8-9.

objective, reasonable, rational, and moral manner.⁶⁴ Furthermore, considering that sustainable development is a process that will most likely transcend several generations, intergenerational fairness is brought into further scrutiny.⁶⁵ By establishing the situation of future generations as a reference for sustainable action, a time-related feature for a social justice model has already been proposed.⁶⁶ Having advanced an anthropocentric view of sustainability, the need for differentiation in the needs of an individual and society looms large in the context of social justice for sustainable development.⁶⁷

This is even more so in handling the issue of embezzlement of resources. Due to a lack of adequate financial resources, underprivileged individuals may have relatively little participation in economic transactions and may thus be left out of the scope of economic considerations.⁶⁸ On the other hand, over-privileged individuals are benefactors, enablers and supporters of the mechanisms that cause these socioeconomic disadvantages.⁶⁹ This antagonism has been highlighted and analyzed in particular by works of critical theory and is manifested by the growing gap between rich and poor.⁷⁰

4.1 Using Social Justice as a Normative Framework for Sustainable Development

In exploring the dynamics behind social justice and sustainable development, this paper picks out three dominant theories that apply to understanding social justice as a normative framework for sustainable development. These are distributive justice, Rawls' theory of justice, and the capabilities approach (Amartya Sen).

⁶⁴ Ketschau 'Social Sustainable Development or Sustainable Social Development - Two Sides of the Same Coin? The Structure of Social Justice as a Normative Basis for the Social Dimension of Sustainability,' (n 14) 342.

⁶⁵ *ibid* 342.

⁶⁶ *ibid* 342.

⁶⁷ Thilo Ketschau, 'Social Justice as a Link between Sustainability and Educational Sciences,' *Sustainability* 7(11) (2015) 15754 <<https://doi.org/10.3390/su71115754>> accessed 5 December 2023.

⁶⁸ Monika Winn, Manfred Kirchgeorg, 'Sustainability Marketing for the Poorest of the Poor,' *Business Strategy and the Environment Journal*, Vol 15 Issues 3 (2006) 171 <<https://doi.org/10.1002/bse.523>> accessed 5 December 2023.

⁶⁹ *ibid* 171.

⁷⁰ Ketschau (n 14) 343; See also Spannagel and Trotz Aufschwung 'Einkommensungleichheit geht nicht zurück. WSI Verteilungsbericht' (2015) 68 WSI-Mitteilungen Band 622; See also, Oxfam International 'An Economy for the 1% How privilege and power in the economy drive extreme inequality and how this can be stopped' (2016) <https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bp210-economy-one-percent-taxhavens-180116-en_0.pdf> accessed 5 December 2023.

Distributive justice, as elucidated by Kersting, seeks to address the challenge of justice by defining what resources need distribution, by whom, towards whom, and in what manner. It involves the distribution of these resources based on need rather than equality. Implementing this would also require a needs-basis approach to counter existing inequalities and ensure equality is served by bridging the gap between the underprivileged and over-privileged. In this approach, those who have benefited or stand to benefit from having a seat at the decision-making table bear the costs of reparations. Therefore, distributive justice would assert that the government has a duty to develop a funding model that channels additional resources to underserved schools, ensuring equitable access to quality education.⁷¹

This can be depicted by Kenya's education funding model which targets to achieve greater equity by providing full scholarships to vulnerable students, shifting the financial burden to the able ones, and increasing budgetary allocations to universities to enhance access and affordability.⁷² However, it places financial strain on the less needy households, since they are not considered as necessitous as the underprivileged and therefore are not given first priority when financial assistance is granted. This leads to increased dropout rates and financial challenges inhibiting social justice.⁷³ Nonetheless, this theory forms the basis of our first recommendation on oversight mechanisms in education to allow for more equitable distribution and management of resources allocated to the education sector.

Second, Rawls' theory of justice delves into the structure of just societal order, emphasizing the importance of the most comprehensive system of fundamental freedoms without jeopardizing others.⁷⁴ It takes a more communitarian approach considering mainly intra-social distribution. Applying this theory necessitates the government to ensure equal distribution of educational resources and opportunities across all schools regardless of their location. This can be portrayed by the free primary and secondary education in Kenya, initiated between 2003 and 2008

⁷¹ Lamont, Julian, Christi Favor, 'Distributive Justice,' Edward N. Zalta (ed.), Winter Edn, *The Stanford Encyclopaedia of Philosophy*, (2017) < <https://plato.stanford.edu/archives/win2017/entries/justice-distributive/> > accessed 2 December 2023.

⁷² Wachira Kigotho, 'New Funding Model Places Greater Burden on The Financially Able,' (University World News Africa Edition, 4 May 2023) <[New funding model places greater burden on the financially able \(universityworldnews.com\)](https://www.universityworldnews.com/newstory.php?sid=436444)> accessed 2 December 2023.

⁷³ *ibid.*

⁷⁴ Claudio D' Amato, *Virginia Tech*, 'Rawls and Capabilities: The Current Debate' (2014) 2.

respectively, aiming to ensure equitable access to quality education.⁷⁵ It increased access and enrollment in learning institutions. However, the system does not come without its weaknesses.⁷⁶ This includes regional disparities and inadequate financial muscle to fund it. This has become a pressing issue considering the revelations in the preceding chapter.

Lastly, the capabilities approach, connected closely to personal freedom, explores the capabilities a person needs for a successful life, emphasizing an individualistic perspective.⁷⁷ Despite the term ‘capabilities’ lacking a clear definition, it has been broadly defined as enabling personal choice; the ability to pursue paths, in education for example, because they want to. It focuses on expanding students’ freedom to choose the educational path that is right for them, empowering students as agents of their development. This approach manifests in the introduction of the Competency-Based Curriculum in Kenya. As compared to the previous curriculums, CBC shifts focus from content mastery to developing learners’ competencies and real-world skills.⁷⁸ Additionally, it enhances individual abilities and well-being through personalized learning and skill development. CBC also aims to achieve social justice through the capabilities approach by developing learners’ competencies to thrive in society.⁷⁹ Furthermore, it develops learners’ capabilities to lead fulfilling lives and contribute to society.

5.0 RECOMMENDATIONS

As discussed in previous sections of this paper, developing countries (like Kenya) often lack such capacity to implement their laws effectively. This is further heightened by factors such as corruption. It would then be puzzling as to how a developing country would acquire the necessary state capacity to develop. A partial answer arguably lies in the Confucian traditions of East Asian

⁷⁵ Fredrick Wawire Otike, ‘Free Primary Education in Kenya and its Challenges in Fighting Illiteracy,’ *Journal of Education and Practice* (2011) 147 < [A Strategic Study on Foreign Fund Utilization in Chinese Insurance Industry \(dkut.ac.ke\)](http://www.dkut.ac.ke) > accessed on 2 December 2023.

⁷⁶ Emmanuel Manyasa, Mercy Karogo, ‘Free Primary and Secondary Education Policies and their Contributions to Learning at the Bottom of the Pyramid. (Open Book Publishers, 2022) < [Learning, Marginalization, and Improving the Quality of Education in Low-income Countries - 15. Kenya \(openbookpublishers.com\)](http://openbookpublishers.com) > accessed on 2 December 2023.

⁷⁷ Stephen Przybylinski, Roman Sidortsov, ‘ The Capabilities Approach,’ in *Theorizing Justice; A Primer for Social Scientists* 1st edn (Bristol University Press, 2023) 124.

⁷⁸ Maurice N. Amutabi, ‘Competency Based Curriculum and The End of an Era in Kenya's Education Sector and Implications for Development: Some Empirical Reflection,’ *Journal of Popular Education in Africa* (2019) 45-66.

⁷⁹ Beatrice M’mboga Akala, ‘Revisiting Education Reform in Kenya: A Case of Competency Based Curriculum’ *Social Science and Humanities Open* 3. 100107 (2021) 3.

countries like South Korea. This is a meritocratic approach that holds education in high regard. Well-educated public officials and effective government agencies provided significant state capability. Despite financial constraints, these states were able to recruit elite public officials because Confucianism encouraged educated individuals to seek government jobs with the belief that serving the state as a government official was an honour. As a result, these countries were able to hire and deploy highly disciplined and dedicated officers to draft and enforce the legislation. This is a method that has spread and it has been evidenced in developing European countries (e.g. Germany under Otto von Bismarck). This approach would simultaneously weed out corruption and promote the education system in Kenya. It also falls under the non-economic parameters of development meaning it would require little financial resources.

To effectively curb the issue of embezzlement of resources, implementing oversight mechanisms and fostering transparency and accountability is paramount.⁸⁰ Educational institutions ought to establish stringent financial controls for budgeting and resource management coupled with conducting regular audits to monitor the allocation and usage of funds. This involves hiring external auditors to ensure an impartial assessment of institutional financial practices.⁸¹ By creating a system of checks and balances, educational institutions can deter potential embezzlers and promptly identify any irregularities.

Additionally, promoting transparency and accountability is also essential. This entails making financial information accessible to the relevant stakeholders such as teachers, parents, and the community at large.⁸² Therefore, the development of clear and concise financial reporting mechanisms by focusing on key data, accuracy, and clarity fosters accountability and encourages collective vigilance.

The creation of channels for whistle-blowers to report suspicions of embezzlement anonymously will provide an additional protective layer against corruption.⁸³ Training programs on ethical conduct ought to be mandatory for all staff to create awareness about the detrimental impacts of

⁸⁰ Monica Kirya, (n 9) 29.

⁸¹ Mihaly Fazekas, Isabelle Adam and Olena Nikulina 'Cost and Extent of Corruption in the Education Sector in Uganda' (2021) 12.

⁸²U4 Anti-Corruption Resource Centre Issue 4:2006 (n 57) 40.

⁸³ United Nations Office on Drugs and Crime, ' Module 6: Detecting and Investigating Corruption,' in *Knowledge tools for academics and professionals; Module Series on Anti-Corruption*, (2022) 15 < [Anti-Corruption Module 6 Key Issues: Investigation of Corruption \(unodc.org\)](#)> accessed on 5 December 2023.

embezzlement on the quality of education. These programs will aid in emphasizing the importance of upholding ethical standards and the penalties associated with corrupt practices. Collaboration with external entities is also pivotal.⁸⁴ Government agencies and anti-corruption organizations helping with investigations on embezzlement allegations strengthen the overall response to corruption in education.⁸⁵ By implementing these measures collectively, educational institutions can build a resilient defence against corruption, ensuring that resources intended for education are used judiciously and equitably.

6.0 CONCLUSION

Goal 4 of the 17 Sustainable Development Goals (SDGs) adopted in 2015, calls for inclusive and equitable education for all. However, the 2018 progress report on SDG 4 revealed that only 41% of children in Sub-Saharan Africa and 52% in North Africa attend school and many of them do not acquire the minimum proficiency in reading and mathematics.⁸⁶ This has partially been attributed to lack of state capacity and corruption through embezzlement.⁸⁷ State capacity includes the financial, technological, and administrative capabilities (including controls against corruption) of a government.⁸⁸ These two impediments adversely affect the implementation of laws including those that are geared at realizing human rights such as education.⁸⁹

Ultimately, the inadequacy of restricting social justice to one theory becomes evident, highlighting the challenges of prioritizing conflicting interests within a multidimensional model. Social justice in education promotes equality; this means that regardless of circumstance, every child will get the chance to develop their full potential.⁹⁰ It breaks barriers of inequality that have been entrenched by corruption and fosters economic growth on two fronts. One, people are more skilled and informed hence they can pursue things they consider valuable to them currently, and second, people are more knowledgeable about taking care of their needs and those of their environment

⁸⁴ U4 Anti-Corruption Resource Centre Issue 4:2006 (n 57) 45.

⁸⁵ United Nations Office on Drugs and Crime, (n 83) 23.

⁸⁶ U4 Anti-Corruption Resource Centre Issue 4:2006 (n 57) 1.

⁸⁷ Lee Yong-Shik, 'General Theory of Law and Development,' *Cornell International Law Journal*, Vol 50 Issue 3 (2017) 416.

⁸⁸ *ibid* 452.

⁸⁹ *ibid* 451-454.

⁹⁰ United Nations Educational, Scientific and Cultural Organization (UNESCO), 'Global Education Monitoring Report,' (2020) 4

through innovations and some futuristic such as education reforms, that can be passed through generations. This is true sustainable development!

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The Pandemic, a Curfew and the Law: Kenya's Need for a Regulatory Framework during the Enforcement of a Curfew in a Pandemic

BY

DANIEL MURAKARU

1.0 INTRODUCTION

The declaration that COVID-19 is a pandemic by Tedros Adhanom, the Director-General for the World Health Organization, sent anxiety and panic waves to the whole world.¹ States needed to respond to the great pressure to secure lives and ensure that the right to the highest attainable standard of health is realized. In addition to the above pressure, states also needed to ensure that fundamental rights and freedoms are respected during the pandemic. Kenya was not left out in this catastrophe and in a bid to curb the spread of the disease it took various measures such as imposing the dusk to dawn curfew.²

Despite the urgency and pressure to act, it is of paramount importance that states respect the rule of law. State officials must justify their actions on the premises of codified and clear legislation or else they will be acting on impulse and whims that can't be legally justified especially when it comes to the limitation of human rights and fundamental freedoms.

From this end, this article will seek to expound on the significance of the rule of law when it comes to the limitation of fundamental rights and freedoms giving a key perspective on Kenya. It will then proceed to show that the curfew orders issued during the pandemic in Kenya were not founded on clear legislation and thus failed the constitutional threshold of legitimacy in the limitation of human rights. Moreover, the article will show to what extent the lack of clear legislation and regulatory framework on enforcement of curfew led to a misapprehension of its objective by the police thus making them violate human rights and fundamental freedoms. The article will then conclude by assessing the parliamentary role of lawmaking by asking the question of whether we are ready for another curfew in a pandemic having in mind that there is a lacuna on the same.

¹World Health Organization, 'WHO Director-Generals Opening Remarks at the Media Briefing on COVID-19' 11th March 2020. < <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19> > accessed on 9th November @ 2247 hrs.

² Legal Notice No.36 of 2020.

2.0 LIMITATION OF RIGHTS AND THE RULE OF LAW

The rule of law has been enshrined in our transformative constitution as a value that binds all persons inclusive of state organs.³ The rule of law has been established as the influencing authority of the law; in essence ‘no one is above the law’.⁴ It emphasizes the need of the state to be subject to clear prescribed laws.⁵ Plato in his great writings on the rule of law points out that where the government is a slave to the authority of the law other than some authority, then there is a promising future for the state.⁶

It is however important to note that in as much as the rule of law can be used to transform society in a better way, it can also be used to ruin the same society. This is especially where rulers of a state use the rule of law to subject citizens to evil laws. For example, in Kenya, the Independence Constitution was amended by the introduction of section 2A which made Kenya a one-party state.⁷ This was an unjust law as it limited most of the civil and political rights such as the freedom of expression and the right to join a political party of choice. Those who objected such as Raila Odinga and Kenneth Matiba were subjected to torture, cruelty, and inhumane treatment.⁸

It is in that vein that Hans Kelsen in his works expounded on the need for the law to be subjected to a grund norm that gives enacted laws legitimacy.⁹ The naturalists such as Lon Fuller came up with the principles of legality known as the eight desiderata whose foundation was on the promotion of social justice and the need to have a law that shuns away from evil.¹⁰ The desiderata aimed to give a grund norm on which laws would find their legitimacy. The desiderata provided

³ The Constitution of Kenya 2010, art. 10(2)(a).

⁴ The Rule of law < <https://www.lexisnexis.com/en-us/rule-of-law/default.page> > accessed on 10th November 2021

⁵ Hobson Charles, *The Great Chief Justice: John Marshall and the Rule of Law* (1996).

⁶ Cooper, John Madison, Hutchinson D.S., *Complete Works by Plato* (1997).

⁷ Reuters, ‘Kenyan Parliament Approves Measure for One-Party State’ (10th June 1982) < <https://www.nytimes.com/1982/06/10/world/kenyan-parliament-approves-measure-for-one-party-state.html> > accessed on 10th November @ 2314 hrs.

⁸ Amnesty International, ‘Kenya: Silencing Opposition to One-Party Rule’ (1990). In addition to Raila Odinga and Kenneth Matiba, the others who were detained for multi-partism in Kenya include Charles Rubia, George Anyona, Edward Oyugi, Ngogho Kariuki, Augustus Kathangu, Gerald Chirabika, Elijah Rukose, Caleb Ooro Odero among others.

⁹ Kelsen Hans, *General Theory of Law and State* (1949).

¹⁰ Emanuel Raul Tucsá, ‘Legal Ethics as a Moral Idea: A Theory of Philosophical Legal Ethics Based on the Works of Lon Fuller’ (2014) LLM *Theses*.6 p.80-85 < <http://digitalcommons.osgoode.yorku.ca/llm/6> > Accessed on 14th February 2020

that good law should include a law that is general, prospective, clear, consistent, and avoids contradiction, is capable of being obeyed by all, durable and congruent in terms of official action and declared rules.¹¹ Thus if a law doesn't meet the above criteria, then it can't be said to be capable of being obeyed and thus not subject to the rule of law.

The people of Kenya having in mind the rotten history of the unjust limitation of human rights and fundamental freedoms in Kenya, promulgated the 2010 constitution which provided vide article 24 that human rights are to be only limited by the constitution and clear elaborated law¹² to the extent that the limitation is justifiable in an open and democratic society. This thus means that rights cannot be limited without being provided for by the constitution or written law. The limit must also be reasonable, necessary, and proportionate to the objective to be achieved so that it can be justifiable in an open and democratic state.¹³

Having espoused the link between the rule of law and the limitation of rights, this article will then proceed to evaluate whether there was indeed clear and sufficient law to guide the government in imposing the dusk to dawn curfew.

3.0 LEGAL BASIS FOR THE CURFEW

On 27th March 2020, President Uhuru Muigai Kenyatta, together with the Cabinet Secretary for Health and Interior vide Legal Notice No.36 declared nationwide dusk to dawn curfew to curb the spread of COVID-19.¹⁴ The curfew was subject to various extensions through the whole of 2020 and it was not until after 20th March 2021, as the country commemorated and celebrated their heroes, that the President called off the curfew.¹⁵ This was after much pressure from the public to call off the curfew since the infections had reduced and politicians were hosting rallies without paying heed to COVID-19 protocols.¹⁶ The fundamental issue this part of the article will be seeking

¹¹ Emmanuel Raul Tusca, 'Legal Ethics as a Moral Idea: A Theory of Philosophical Legal Ethics Based on the Works of Lon Fuller' (2014) LLM Theses, 6 P80-85 < <http://digitalcommons.osgoode.yorku.ca/llm/6> > Accessed on 14th February 2010

¹²Constitutional Review of Decision No. 01/15 of the Government of the Republic of Kosovo [2020] p.47 Para. 191

¹³ Ibid [n.11] p. 49 -50 para197 -198, The judge in the case described the test for limitation of rights and fundamental freedoms should be: (a) provided for by law (b) has a legitimate aim (c) is necessary (d) is proportionate.

¹⁴ Ibid [n.2]

¹⁵ Aljazeera Network, 'Kenya Lifts Longstanding COVID Curfew as Infections Ease' (20th October 2021). < <https://www.google.com/amp/s/www.aljazeera.com/amp/news/2021/10/20/kenya-lifts-longstanding-covid-curfew-as-infections-ease> > accessed on 12th November 2021 @ 0800hrs.

¹⁶ Bonface Otieno, 'Uhuru Under Pressure Over WHO Curfew Rule' (2021) < www.businessdailyafrica.com/bd/economy/uhuru-under-pressure-over-who-curfew-rule > accessed 13th Nov 2021

to interrogate is whether the curfew imposed during the pandemic was premised on clear legislation.

Under section 8(1) of the Public Order Act, the Minister for Interior can give curfew orders where he or she deems it fit after the advice of the Inspector General and Provincial Commissioner of a certain area that needs order and restoration of security. Justice Chitembwe in the Lamu Curfew case stated that the primary purpose of the curfew provided in section 8(1) of the Public Order Act is to allow the police to infiltrate a particular area that has insecurity as a result of crime or war and restore peace in that particular area.¹⁷ This legislation is clear as to who, when, and how a curfew may be put in place with regards to the objective of restoring order in an area that has insecurity. This then begs the question of whether, the above legislation was sufficient to guide the government towards imposing, extending, and calling off the curfew?

The answer to the above question would be in the negative. To begin with, the objective of the curfew in the Public Order Act is to fight crime rather than prevent the spread of an infectious disease. The Act further places the mandate on the Ministry of Interior to issue the curfew orders with advice from the Inspector General or Provincial Commissioner¹⁸ of a certain area. These are persons who are not experts in public health and thus not correlate issuing or even extending a curfew. Moreover, the Act does not give the criteria that can be used to extend a curfew more so one that is issued based on public health emergency. This leaves room for unnecessary extensions which are founded on the opinions of certain experts thus defeating democracy and public participation.

It is interesting nevertheless to note that, in *Law Society of Kenya v The Inspector General of the Police*, the presiding judge found the legislation in place to be sufficient. He noted that section 16 of the Public Health Act allowed the application of other Acts such as the Public Order Act to compliment it and thus the curfew was justified in law.¹⁹ He further pointed out that the uncertainty and need to act in urgency necessitated the imposition of the curfew as a precautionary measure.²⁰

¹⁷ *Law Society of Kenya v Inspector General Kenya National Police Service & 3 Others* [2015] eKLR (The Lamu Curfew Case).

¹⁸ Provincial Commissioners before the promulgation of the 2010 constitution were the heads of provinces. However, they are no longer provided for in the constitution since Kenya is now divided into counties which are headed by County Governors.

¹⁹ *Law Society of Kenya v Hillary Mutyambai Inspector General Police Service & 4 others; Kenya National Commission on Human Rights & 3 Others (Interested Parties)* [2020] eKLR para 113 -114.

²⁰ *Ibid* [n.19] para 126 -135.

These justifications are vague as they do not give clarity on how curfews during a pandemic should be enforced. This raises many questions as to what would guide the nation in terms of enforcement of curfews during a pandemic. What criteria would be used to assess the effect of the curfew during the pandemic? What is the place of democracy and public participation in terms of extension and calling off a curfew during a pandemic? How would the government be brought to book concerning the measures undertaken?

The answers to the questions above can be effectively answered by clear legislation as will be discussed later in this article.

4.0 MISAPPREHENSION OF THE CURFEW IN A PANDEMIC

The lack of clear legislation on matters concerning the enforcement of the curfew brought a lot of uncertainty concerning the objective of the curfew. As aforementioned, the primary purpose of imposing the curfew during the pandemic was meant to curb the spread of covid-19 in the country. However, its reception especially by the law enforcers was as if it was meant for fighting war or crime. This is because of the gross violation of human rights that was seen across the country.

Human Rights Watch reported that in the enforceability of the curfew, nearly six people had been killed.²¹ Yassin Hussen Moyo, a 13-year-old boy, was one of the victims who was shot dead by the police as he was standing on their home's balcony. The police shot him as they tried to disperse a crowd which was violating the curfew order. The Human Rights Watch further reported that there were counts of gross injury, especially to persons in Mombasa, Likoni Ferry, who were forced to lie on the ground, slapped, and even kicked for flouting the curfew. Moreover, the police were seen across the country beating and torturing persons who flouted the curfew. Recently, in August 2021, it was reported that the police had shot two Kianjakoma brothers as they tried to evade arrest for flouting the dusk to dawn curfew.²²

This then would beg the question of why would the police use such unnecessary force in curbing a curfew that was not meant to fight crime but rather a disease. To start with, the police may have

²¹ Human Rights Watch, 'Kenya: Police Brutality During Curfew (2020)' < <https://www.hrw.org/news/2020/04/22/kenya-police-brutality-during-curfew> > accessed on 14th November 2021 @ 0824hrs.

²² Citizen Digital < <https://citizen.digital/news/witnesses-says-he-saw-cops-assault-embu-brothers-before-they-were-found-dead-13096195/> > accessed on 14th November 2021 @ 0827hrs.

misapprehended the objective of the curfew to be for fighting crime due to a lack of clear legislation on the enforcement of a curfew in a pandemic. This then made them treat everyone who had been found to flout the curfew as a criminal who deserves a beating, kicking, and even more bullets. Moreover, the curfew may have just revealed the ignorant nature of our police to the rule of law and respect for human rights as the National Police Service Act clearly outlines when reasonable force should be used.²³

5.0 CLEAR LEGISLATION AS THE WAY FORWARD

COVID-19 indeed created a lot of panic in the whole world. It created a situation of uncertainty and almost two years down the pandemic, there seems to be no legislation enacted by parliament on pandemic response management, especially on the enforcement of the curfew. This then begs the question of whether we are ready for another pandemic. Do we still expect the same legislation that is the Public Order Act to govern the enforcement of a curfew? Do we have regulated criteria of how a curfew may be extended and called off or do we expect to leave this mandate to a few experts?

The above questions just prove the need for clear legislation on curfews during a pandemic. The legislation will aid by giving clarity on the procedure of enforcement of curfews and more so on which institutions are to be held to account concerning pandemic response management.²⁴ This paper thus recommends that the legislature should come up with clear legislation on the enforcement of curfews.

4.0 CONCLUSION

In conclusion, this article has established that the curfew imposed in Kenya during COVID-19 though necessary was not imposed on clear legislation thus failing the constitutional threshold of a right being limited by law. Furthermore, the lack of clear legislation and ignorance from the police led to the misapprehension of the objective of the curfew. This led to death and subjection to violence to persons who had flouted the curfew. The paper recommends that the legislature

²³ National Police Service Act 2012, sch.6.

²⁴ Joelle Grogan, 'Power, Law and the COVID-19 Pandemic – Part II: Preparing for Future Emergencies' (2021) Verfassung Blog < <https://verfassungblog.de/power-law-and-the-covid-19-pandemic-part-ii/> > accessed on 14th November 2021

should come up with clear legislation on how curfews should be imposed, enforced, and controlled in case of another pandemic.

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