

CONCEPTUALISATION AND OPERATIONALISATION OF THE RIGHT TO A FAIR TRIAL IN CRIMINAL JUSTICE IN KENYA

By

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Abstract

This thesis explores issues concerning the conceptualisation and operationalisation of the right to a fair trial in the Kenyan criminal justice system. In particular, it looks at how and why there have been many difficulties with the implementation of this universal set of values that have been recognised since the adoption of the formal legal system in Kenya, and which have been enshrined in the Constitution since independence.

A number of overarching questions are addressed. First, the factors that hindered the full realisation of the right to a fair trial under the recently repealed Kenyan Constitution are identified. Secondly, enquiry into whether the shortcomings of the repealed Constitution in that regard have been fully addressed by the new Constitution adopted in 2010 is made. And thirdly, the impacts of factors outside the formal law which may have affected the practical operation of certain core elements of the right to a fair trial are identified and explored.

It is argued in the thesis that the problems presented for realisation of core fair trial rights in Kenya are not entirely attributable to shortcomings in the formal law and cannot thus be fully addressed from the formal law perspective alone. Attention is therefore drawn to contextual issues that affect the operation of the right to a fair trial in Kenya. The impacts of factors outside the formal law such as poverty, illiteracy, corruption and cultural perceptions, which may have affected the practical operation of certain core elements of the right to a fair trial, are thus identified and explored.

In light of these contextual factors, a number of approaches that exploit the informal traditional African dispute resolution mechanisms that might be used to address the problems that curtails the full enjoyment of the right to a fair trial so as to achieve at least a better enforcement of fair trial rights in the country are also offered.

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CHAPTER I:

INTRODUCTION AND BACKGROUND TO THE STUDY

1.1. Introduction to the Chapter

This thesis seeks to explore issues concerning the conceptualisation and operationalisation of the right to a fair in the Kenyan criminal justice system. In particular, it explores how and why there have been difficulties with the implementation of this seemingly universally recognised set of values despite the fact that the relevant body of principles have long been formally part of the law in the Kenyan constitutional system. In so doing the thesis addresses a number of overarching questions. First, it seeks to identify the factors that hindered the full realisation of the right to a fair trial. Secondly, it enquires into whether the shortcomings of the recently repealed Constitution in that regard have been fully addressed by the new Constitution adopted in 2010. Thirdly, it also seeks to identify and analyse the impact of factors outside the formal law of a social, cultural, political and historical nature, which may have affected the practical operation of certain core elements of the right to a fair trial. Finally, in light of the above, the thesis seeks to explore a number of approaches that might be useful in addressing the factors constraining the enjoyment of the right to a fair trial so as to help achieve a full, or at least a better, enjoyment of the right in the country.

The purpose of this introductory chapter is to lay the foundations for exploring these questions, and to explain how they will be addressed in the thesis. The first substantive part [part 1.2] introduces briefly the general foundations of the right to a fair trial. It identifies the central values comprising the right; and explains some issues of tension that arise in nearly all legal systems when adjudicating upon disputes over the content and applicability of fair trial principles in individual cases. The second substantive part [1.3] shifts the focus to the right to

a fair trial in the Kenyan context, and seeks to explain the particular themes and concerns of the thesis as well as providing an outline of how the investigation is to be made.

1.2. Foundation of the Right to a Fair Trial

This part will commence by tracing the origin and development of the right to a fair trial within the universal scheme of human rights protection and follows with a general investigation of the values enshrined within its scope. It will distinguish between the protection offered by the right to a fair trial in criminal justice and that available in civil justice. It then proceeds to identify some issues of tension as to how the concept universally operates as a pretext for the investigation of the particular application of the right in Kenya.

1.2.1. Development and Entrenchment of the Values in the Right

In its entirety as a body of human norms, the right to a fair trial has existed in the international arena as an integral part of the general scheme for the protection of human rights that has been recognised since the adoption of the Universal Declaration of Human Rights (UDHR) in 1948 and its codification in the International Covenant on Civil and Political Rights (ICCPR) in 1966.¹

The frameworks for its operation in municipal laws, however, precede the UDHR and have existed in diverse legal systems predating the international order under the United Nations Organisation (UN). From ancient times, traces of individual principles underlying fair trial in criminal processes were outlined in a number of texts including the Code of Hammurabi, the Bible and the Quran, among other documents.²

¹ GA Res 2200A (XXI), 21 UN GAOR Supp (No 16) at 52, UN Doc A/6316(1966) 999 UNTS.

² Eg, in the Code of Hammurabi, inasmuch as it is castigated for its cruelty, it made provisions to guarantee independent court and impartial tribunals; the book of Exodus 23:3 in the Bible commands against 'perverse testimony in a dispute in favour of the mighty ... and show[ing] deference to a poor man in his dispute'; and in Islam, Muslim scholars have argued that human rights and fair trial are tenets of both Quran and Sunna and have even come up with Universal Islamic Declaration of Human Rights (<http://www.al-bab.com/arab/docs/international/hr1981.htm>).

Even in the formative years of most current legal systems, principles within the general body of fair trial norms were variously articulated.³ Procedural rights have, for example, been discussed under the American constitutional doctrine of due process and the common law doctrine of natural justice.⁴

The principles of fair trial in international adjudication also predate the UN-centred human rights movement. A notable international decision is the *Chattin Case* in 1927 by the US-Mexico Claims Commission,⁵ where Chattin, a US citizen had been arrested for embezzlement while serving as a railroad conductor and sentenced to two years imprisonment. On a claim brought by the US, it was contended that he had not been duly notified of the charges against him and was not confronted by his accusers. The Commission concurred that ‘It [was] not shown that the confrontation between Chattin and his accusers amounted to anything like an effort on the judge’s part to find out the truth,’ and held Mexico liable for miscarriage of justice.

Nonetheless, a full recognition of the right to a fair trial as a distinct value enshrining the diverse norms with which the right is usually associated, is articulated in the UN system of international protection of human rights. Article 10 of the UDHR provides that: ‘Everyone is entitled in full equality to a fair and public hearing by an independent and impartial

³ However, Franz Matscher notes that it is only through article 6 of the ECHR that the notion of fair trial entered the legal procedural heritage of states in mainland Europe (Franz Matscher, ‘The Right to a Fair Trial in the Case-law of the Organs of the European Convention of Human Rights’ in European Commission for Democracy through Law (ed), *The right to a Fair Trial* [Science and Technique of Democracy, No 28, Strasbourg: Council of Europe 2000] 10, 10). Pierre Garrone further notes that before ECHR, procedural law was regarded in continental Europe as distinct from the ‘true’ objective and subjective law despite the glorious past of the Roman law which linked procedure and rights (Pierre Garrone, ‘Opening Address’ in European Commission for Democracy through Law (ed), *The right to a Fair Trial* [Science and Technique of Democracy, No 28, Strasbourg: Council of Europe 2000] 6, 7).

⁴ Denis Galligan, ‘The Foundation of Due Process in Socialism’ in *Revolution and Human Rights* (International Association for Philosophy of Law and Social Philosophy, Franz Steiner Verlag 1990) 240, 241; C.J.F. Kidd, ‘Disciplinary Proceedings and the Right to a Fair Criminal Trial under the European Convention of Human Rights’ (1987) 36 ICLQ, 56.

⁵ *USA (B.E. Chattin) v. Mexican States*, United States-Mexican Claims Commission 1927, Opinion of Commissioners under the 1923 Convention Between the US and Mexico 1927, 4 UNRIAA 282, 422.

tribunal, in the determination of his rights and obligations and of any criminal charge against him.’ The provisions of this Declaration are codified and given operative legal force in article 14 the ICCPR.

Comparable provisions are also found in article 6 of the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (commonly referred to as European Convention on Human Rights or ECHR); article 8 of the American Convention on Human Rights (ACHR); and article 7 of the African Charter on Human and Peoples' Rights (also referred to as the African Charter or the Banjul Charter) all which, among other things, seek to safeguard accused persons during trial.

In situations of armed conflict various provisions in the Geneva Conventions stipulate process rights for different classes of persons in specific situations,⁶ and even where those specific provisions might not formally be applicable for one reason or another, Common Article 3 provides minimum safeguards as regards detained persons prohibiting:

[T]he passing of sentences... without previous judgment by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized people.

The right to a fair trial is also usually contained in national constitutions of most States in a Bill of Rights.⁷ In South Africa, for example, it is found in section 34, while in Uganda it is found in article 28. In Kenya, it is articulated in article 50 of the current Constitution enacted on 27 August 2010 titled ‘fair hearing.’ Previously, it was enshrined in section 77 of the repealed Constitution as ‘Provisions to Secure Protection of Law.’

⁶ GC III Arts 84, 96 and 99-107; GC IV Arts 71-73; Additional Protocol II Art 6.

⁷ Eg, Constitution (South Africa) chapter ii; Constitution (India) part iii (articles [12]-[35]); Constitution (Uganda) Chapter iv.

Thus, the protection of fair trial seems to have received a lot of acceptance universally with its values seemingly unquestionable and non-derogable.⁸ It is on this premise that the Human Rights Committee in its General Comment on fair trial declared that certain aspects of the right to a fair trial under Article 14 cannot be the subject of derogation even under emergency situations.⁹ The Committee was of a further opinion that under the principles of legality and the rule of law, the fundamental requirements of fair trial must be respected at all times.

Other concerted moves have also been taken to ensure that the values enshrined in this right are enjoyed ‘under all circumstances’.¹⁰

1.2.2. Scope of the Protection Offered Within the Right

The right to a fair trial as a body of safeguards offered in the universal scheme for the protection of human rights that we have identified above entails various distinct safeguards. For example, most of the instruments require that trials be conducted “fairly”, that the hearing be in public, and adjudicated upon by an independent and impartial tribunal/court established by law. Here, three distinct rights are to be found. Firstly, that there should be procedural fairness in the proceedings; secondly, that the trial be carried out in public, and third, that the

⁸ Thus, there can be no derogation from Common Art 3 to the Geneva Conventions. See *The Right to a Fair Trial: Current Recognition and Measures Necessary for its Strengthening, Final Report*, Geneva: United Nations, UN Doc. E/CN.4/Sub.2/1994/24, 1994 para 33; See generally David S. Weissbrodt, *The Right to a Fair Trial Under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights* (Martinus Nijhoff 2001).

⁹ HRC, *CCPR General Comment No 29: Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, available at: <http://www.unhcr.org/refworld/docid/453883fd1f.html> [accessed 9 August 2012]. See also HRC, *General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, available at: <http://www.unhcr.org/refworld/docid/478b2b2f2.html> [accessed 9 August 2012].

¹⁰ Draft Third Optional Protocol to the ICCPR. See UN Sub-Commission on the Promotion and Protection of Human Rights, *The Right to a Fair Trial: Current Recognition and Measures Necessary for its Strengthening: Final Report/prepared by Stanislav Chernichenko and William Treat*, 3 June 1994, E/CN.4/Sub.2/1994/24, available at: <http://www.unhcr.org/refworld/docid/3b00f3fe4.html> [accessed 9 August 2012], Annex I, 59-62.

responsible tribunals or courts should be those legally established and exercising their mandates independently and impartially.¹¹

Besides these three safeguards, most instruments also further provide for the accused persons to be informed promptly of the charges against them; to be tried without undue delay; to be tried in their presence; to be allowed to defend themselves in person or through legal assistance; to be allowed communicate with counsel; to be allowed to examine, or have examined, the witnesses against them; not to be compelled to testify against themselves or to confess guilt; and to have any conviction and sentence reviewed by a higher tribunal according to law. Indeed, to secure these values, the accused individuals are presumed to be innocent until they are actually convicted.

In a nutshell, the discourse on the right to a fair trial thus revolves around the need for: speedy trials; carried out in public; with notice of accusations made given to the accused; who then have the right to respond – including by confronting their accusers; and with the accused standing on an equal footing with the other party – which may entail the right to representation by a counsel.

1.2.3. Fair Trial and Criminal Processes

As this thesis will concern itself with the operation of the right to a fair trial in criminal justice context, it is worth noting that the general provisions of all instruments supplying this right extend to all kinds of litigation, whether criminal or civil. However, a perusal of these instruments readily reveals that the safeguards provided in criminal cases are normally more comprehensive and the protection offered more prominent than in civil disputes. Whereas in a civil justice context the right to a fair hearing tends to focus on a general notion of “fairness” which is context dependant and therefore the precise requirements may vary; fair trial within a

¹¹ David S Weissbrodt and Connie De La Vega, *International Human Rights Law: An Introduction* (University of Pennsylvania Press 2007) 59.

criminal context generally involves an irreducible minimum of express guarantees, as well as a general requirement that, all things considered, the trial be fair.¹²

Further, there are usually more safeguards offered to accused persons in criminal trials than are provided to parties in civil cases.¹³ This is because in criminal disputes, it is the sanctity of life and liberty that is sought to be protected by the application of fair trial safeguards. In civil cases, on the other hand, the government is usually not involved as a party and there is no deprivation of life, liberty or property *as punishment for crime*. Yarbrough commenting on this regarding the US system notes that:

The Constitution does not place such private disputes on the same high level as it places criminal trial and punishment. There is consequently no necessity, no reason why government should in civil trial be hampered or handicapped by strict and rigid due process rules the constitution has provided to protect people charged with crime.¹⁴

The same holds good in European human rights system where the requirements inherent in a fair hearing in criminal justice are not necessarily the same as those in cases concerning the determination of civil rights and obligations.¹⁵ In *Dombo v. Netherlands*, for example, the European Court Human Rights held that contracting States had greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases.¹⁶

As similar approach is to be found in Kenya whose Common Law system, as we shall see later in this thesis, largely borrows from the developments in her former colonial master Britain and has adopted various international instruments that guarantee these rights.

¹² *Hornal v Neuberger Products Ltd* [1957] 1 QB 247; *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563,586; Jonathan Doak and Claire McGourlay, *Evidence in Context* (3rd edn, Routledge 2012) 37.

¹³ See eg ICCPR art 14(1) compared with art 14(2)–(7), the latter being applicable specifically to criminal trials.

¹⁴ Tinsley E. Yarbrough, *Mr. Justice Black and his critics* (Duke University Press 1988) 62.

¹⁵ This is reflected in the express structure and content of the ECHR wherein article 6(2) and (3), which make express reference to criminal proceedings, offer more substantive safeguards compared with those in article 6(1) that applies to both civil and criminal cases.

¹⁶ ECtHR 37/1992/382/460.

1.2.4. Dilemmas in Fair Trial Discourses

In light of the various instruments on the subject, the seemingly universal principles enshrined in the right to a fair trial in criminal justice which we have highlighted may appear to be well articulated and quite straight forward thus needing very little further exploration. However, this is not the case. In practice, a range of tensions have constantly arisen when seeking to operationalise, or give effect to, the right in individual circumstances.

Firstly, it must be appreciated that the international and universal right to a fair trial involves expressing a set of principles and values which have to be given concrete expression and effect (for the most part) within national systems.¹⁷ The values underlying the right to a fair trial therefore have to fit within the national systems to which they are to be applied.

Municipal jurisdictions, for their part, adopt either inquisitorial or accusatorial legal procedures depending on their preferences and perceived peculiarities.¹⁸ Although, as Professor Jeschack argues, the choice of the procedures to adopt is primarily a psychological determination of how best justice may be served,¹⁹ this ultimately determines how the individual values in the right are operationalised within the State system. In essence, the right to a fair trial only imposes a duty upon States to ensure observance of certain fundamental principles entitling those accused the facilities to make their cases with limited constraints but leaves the choice of the method to adopt to the respective States.

Contention may arise as to the effectiveness of the procedures that any State may have established. For example, from one perspective, it may be argued that the right to a fair

¹⁷ Although there are also international criminal courts/tribunals which are required to safeguard these rights for individuals appearing before them eg the ICC, ICTR, ICTY, Special Tribunal for Sierra Leone etc, but it is the national courts that carry out most of criminal trials warranting these safeguards.

¹⁸ Michail Wladimiroff, 'Rights of Suspects and Accused' in Gabrielle Kirk McDonald and Olivia Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts*, (Commentary Vol 1: Kluwer 2000) 419, 420.

¹⁹ H. Jeschack, 'Principles of German Criminal Procedure in Comparison with American Law', (1970) 56 *Virginia Law Review*, 239.

hearing being so fundamental to the rule of law must be strictly observed and any failure to adhere to the settled principles should automatically result in the proceedings being nullified and the accused person being set free.²⁰ In *Sheela Barse v. Union of India*,²¹ for instance, the Indian Supreme Court held that where the court comes to a conclusion that the right to speedy trial of an accused has been infringed, the charge or conviction, as the case may be, must be quashed.

Some may however, for good reasons, disagree with this view and take the position that certain violations, which only flout technicalities of law, should not invalidate the entire proceeding.²² It may, in this view, be argued that what is required is for the court to look at the process itself to determine whether the violation had prejudiced its fairness and if not, the proceedings and/or conviction would then stand.

In a similar vein, many commentators differ on how to deal with evidence obtained illegally. While one school may feel that it would be inappropriate to admit such evidence in trial, the other may opine that how evidence was obtained is irrelevant in determining its admissibility arguing that the issue ought to be whether or not the evidence is probative of the matter before the court.²³

²⁰ This was suggested by Lord Steyn delivering the Privy Council's judgment in *Allie Mohammed v. The State* in an appeal from the Court of Appeal of Trinidad and Tobago ([1998] 53 WIR 444, 454-5).

²¹ 1986 (3) SCC, 632.

²² Eg Senior Principal Magistrate Kiarie has vehemently opposed the rule that supports the acquittal of accused persons who have been held in police custody for a period longer than stipulated by the law (Waweru Kiarie, 'Robbing Peter To Pay Paul- The Acquittal Of An Accused For Breach Of His Constitutional Rights By The Police' 1 October 2011 available at http://www.kmlaw.co.ke/index.php?option=com_content&view=article&id=111:robbing-peter-to-pay-paul-the-acquittal-of-an-accused-for-breach-of-his-Constitutional-rights-by-the-police&catid=40:newspaper-articles&Itemid=211 accessed 4 July 2012).

²³ This debate has been highlighted for example in Polyviou, 'Illegally Obtained evidence and *R v. Sang*,' in CFH Tapper (ed.) *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (London, Butterworths 1981) 226. See also Debra Osborn, 'Suppressing the Truth: Judicial Exclusion of Illegally Obtained Evidence in the United States, Canada, England and Australia' (2000) 7 *Murdoch University Electronic Journal of Law*, at < <http://www.austlii.edu.au/au/journals/MurUEJL/2000/44.html> > accessed 9 August 2012.

Various grounds may thus be offered to justify any approach to the administration of justice that impact on the enjoyment of values enshrined in the right to a fair trial. For example, in most jurisdictions, law enforcement officials view processes that have limited constraints on prompt investigation which require minimum resources for compliance to be good for the maintenance of law and order. They may thus justify them for assuring prompt and timely trials. Human-rights activists, on the other hand, will usually support maximum constraints to discretionary powers of public officials under the notion that rights are intrinsically good for the society.²⁴

It is in this context that Tribe views two principles as underlying the US constitutional due process requirement. He opines that justification can be made of rules of procedure either instrumentally – because they increase the accuracy of the judgement rendered – or intrinsically, that is to say something which people are entitled to because it is a ‘good’ in and of itself, regardless of outcome.²⁵

Professor Dworkin for his part writes that, ‘People have a right that criminal procedures attach the correct importance to the risk of moral harm.’ This would be violated if, for example, cases are decided on the toss of a coin, or by rules that would not allow the suspect to be present during trial, or that do not allow legal representation of the accused.²⁶ He says that people are ‘entitled to procedures consistent with the community’s own evaluation of moral harm embedded in the law as a whole.’²⁷ While to Matthias Kumm, the claim of fair trial as an inherent component of human rights protection lies in the requirement for the

²⁴ Stefan Trechsel, *Human Rights in Criminal Proceedings* (OUP 2005) 10.

²⁵ Lawrence H Tribe, *American Constitutional Law* (University Textbook Series, Foundation Press 1978) 503.

²⁶ Ronald Dworkin, ‘Principle, Policy, Procedure’ in CHF Tapper (ed), *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (Butterworths 1981) 211.

²⁷ Ibid.

optimisation of their enjoyment. This requires their realisation only to the greatest extent possible, given countervailing concerns.²⁸

Thus, universally a lot of debate may pervade the operation of the ‘nebulous’ concept that is the right to a fair trial which it has been argued, has an open-ended residuary quality.²⁹ In fact, as Trechsel notes, when the European Convention came into force, the right was regarded as being so uncertain that it could not be applied by domestic courts.³⁰ And although a lot of guidance has been given by courts and other human rights organs as to how the principle is to operate in municipal courts since then,³¹ difficulties still abound in enforcing it.

1.3. The Fair Trial Question in Contemporary Kenya

Having identified some of the universal dilemmas in enforcing the right to a fair trial, this part moves on to explore how particular tensions have been exhibited in the criminal justice system Kenya and to identify the research questions that the thesis seeks to answer. Further, this part identifies three selected values (independence and impartiality of adjudicatory tribunals, timely trials and equality of arms) that will be used in this thesis to investigate how the right to a fair trial actually operates in Kenya and offers justifications for the choice of these particular rights. Lastly, it gives an outline of how the investigation will be approached and methodology to be employed in this thesis.

²⁸ Mattias Kumm, ‘Political Liberalism and the Structure of Rights’ in George Pavlakos (ed), *Law, Rights and Discourse* (Hart Publishing 2007) 137.

²⁹ Gomien, Harris and Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter* (Council of Europe publishing, Strasbourg 1996) 157-9; Harris, O’Boyle and Warbrick, *Law of the European Convention on Human Rights* (Butterworths 1995) 202.

³⁰ Stefan Trechsel, *Human Rights in Criminal Proceedings* (OUP 2005) 84-85.

³¹ Eg, the European Court has created a wide case law and the Human Rights Committee too has elaborated on the rights when addressing individual complaints under the ICCPR alongside other international tribunals and national courts creating a vast body of jurisprudence on this issue. For a general discussion on application of human rights in trials as customary international law, Christiana Ochoa, ‘The Individual and Customary International Law Formation’, (2008) 48 *Virginia Journal of International Law* 119; Kathleen M. Kedian, ‘Customary International Law and International Human Rights Litigation in United States Courts: Revitalizing the Legacy of the Paquete Habana,’ (1999) 40 *William and Mary Law Review* 1395; William Fletcher, ‘International Human Rights in American Courts’, (2007) 93 *Virginia Law Review in Brief* 1-14.

1.3.1. Emergent Tensions in the Operation of the Right in Kenya

As a starting point for explaining the focus and motivation of this study of fair trial in Kenya, it is important to note that we will not be concerned here (for the most part) with all of the sorts of conventional debates and tensions over the content and effect of the right as might from time-to-time arise in normally functioning liberal democracies operating under the rule of law. Our concern and focus shall not be, for example, whether Kenyan law does, or should, adopt a strict exclusionary rule regarding illegally obtained evidence, or whether Kenyan jurisprudence on fair trial rights reflects instrumentally or intrinsically based reasoning. Rather, in examining the conceptualisation and operationalisation of the right to a fair trial in Kenya, our focus shall be on issues which might be thought to be more fundamental or foundational in nature and concern the very existence of the right in any meaningful sense in the country.

Our starting point for that examination is a recognition that for some considerable period of time there has been a complete breakdown in public and official confidence in the ability of the courts to administer justice fairly; and a widespread acceptance that there has been an absence of properly functioning mechanisms and structures to ensure the enjoyment of fair trial rights in accordance with universally accepted standards. For this reason, in this section, some time is devoted briefly to providing an account of a number of events and occurrences in recent history which serve to exemplify the breakdown of public and official confidence in the criminal justice system.

Thus, we shall cover issues arising from the aftermath of post-election violence in 2007; controversies surrounding military activities in the Mt. Elgon region; concerns over how to handle activities of criminal gangs (the *Mungiki* menace); and the recent constitutional reform debates which reflect a recognition amongst civil society in Kenya that the post-independence

constitutional structure and practices, and in particular those pertaining to the Judiciary, required radical adjustment.

1.3.1.1. The Post-election Violence and The Hague Process

The first, issue providing a backdrop for this investigation arose at the end of 2007, after closely contested general elections that the opposition party that came second disputed. This led to a civil strife that largely took an ethnic dimension pitting the communities that supported different candidates against each other. At the end of it, more than 1300 people had died and a further 500,000 were displaced from their homes.

This dispute highlighted two dilemmas presented to the enforcement of the right to a fair trial in Kenya. First, the role of the court as an arbiter of social conflict was challenged by the opinion that the system was pro-government and therefore unable to render a fair decision regarding the contested elections. Instead of seeking judicial intervention, the aggrieved parties sought to use mass action to redress their grievances. It was only after the loss of more than a thousand lives and the displacement of over half a million people that a power-sharing arrangement was reached by the protagonists through international mediation.³²

The debate afterwards shifted to the accountability of those most responsible for the conflict that resulted in widespread commission of crimes such as murder, arson and rape. This again led to the question: Was the general performance of the Judiciary a factor which contributed to bringing about this state of affairs? And were the courts capable of delivering justice to the victims of these crimes?

In Parliament, the proposal for the creation of a local *ad hoc* tribunal to try those bearing the greatest responsibility for the crimes committed was defeated. The Members

³² The African Union with the support of the international community led the mediation process in Kenya after the contested election. A panel of eminent persons led by Koffi Annan, the former Secretary General of the United Nations ultimately secured a power sharing deal.

instead preferred the matter to be referred to the International Criminal Court in The Hague or to have a special international tribunal that could not be compromised.³³

The totality of these events brought to the fore the need to rethink how the legal system could be reformed to meet the demand of the society and prevent national catastrophes similar to the post-election violence. Indeed, various post-election Commissions formed after the violence recommended that judicial reforms be undertaken in order to have a credible judiciary capable of resolving the social conflicts and prevent extra-judicial resorts by individuals.³⁴

Secondly, the events highlighted the social fissures that existed within the diverse Kenyan communities that impacted on the legal processes. The post-election violence scenes gave a clear indication that ethnicity and other social factors could not be ignored when considering how legal processes operate in the country.

1.3.1.2. The Military Activities in the Mt. Elgon Region

The second event that took place just before the 2007 general elections related to the activities of the Sabaot Land Defence Forces (SLDF) which also highlighted the relevance of social factors that affected the operation of the country's legal system.

³³ As part of the Peace agreement brokered by the Panel of Eminent African Personalities, several commissions were formed to investigate the underlying problems that led to the chaos. The Commission of Inquiry into the Post Elections Violence (CIPEV)'s terms of reference were published in the Kenya Gazette dated 23 May 2008. The Commission submitted its final report to the President and to the Panel of Eminent African Personalities recommending the establishment of a local tribunal within a stipulated time, to look at the cases of international crimes, failure of which, the Panel of Eminent African Personalities should forward the matter to the ICC.

³⁴ E.g Report of the Commission of Inquiry into the Post-Election Violence (CIPEV), 'the Waki Report'; Report of the UN Special Rapporteur on Extrajudicial, Arbitrary or Summary Executions, Mission to Kenya on 16-25 February (2009) 'The Alston report'; Report of the Independent Review of the (2007) Elections Commission (IREC), the 'Krieglar Report'.

Due to the prevalent land conflicts, compounded by ethnic strife, the SLDF, a militant outfit, began to wreck havoc in the Mt. Elgon area in western Kenya.³⁵ The militant gang committed many atrocities against persons from other ethnic communities who had bought land and settled in that area and also those from the *Sabaot* community itself who were perceived to be traitors. Reports of ‘*kangaroo court*’ trials leading to killings and maiming by the outfit were widespread.

In the official circles, it was perceived that there was a breakdown of discipline within the population and as pressure mounted on the government, military officers were deployed to assist the police to quell the insurgency. In the operation that ensued, all suspected SLDF members and their sympathisers were forcefully rounded up and assaulted by the police and military officers. To them, these ‘lying’ villagers could not be prosecuted as the courts were perceived to have progressively gotten pro-rights of accused persons and could therefore not convict the suspects on the available evidence.³⁶ It was thus decided that these people had to be ‘disciplined’ out of court. It is alleged that the uniformed forces stripped, whipped and tortured the villagers as a means of bringing back law and order in the area.³⁷

This indicated that it was also possible that the State itself could subvert the laws it made by resorting to extra-judicial measures when it perceived that the legal processes in place was ineffective to ensure proper administration of justice.

³⁵ This group had taken up arms to fight for land rights of the *Sabaot* ethnic community; a population indigenous to that area, which lies at the foot of Mt. Elgon in the Western part of Kenya; at the country’s border with Uganda.

³⁶ As we shall see in the body of this thesis, for a long time, the courts in Kenya were never seen as being keen to protect individual’s rights. However, with agitation for legal reforms, courts progressively became responsive to protection of human rights.

³⁷ Kenya National Commission on Human Rights, *‘The Mountain of Terror’: A Report on the Investigations of Torture by the Military at Mt. Elgon*, May 2008, 13.

1.3.1.3. The *Mungiki* Menace

Another important occurrence that necessitated this investigation was events surrounding the *Mungiki* operations in the country. For some time, *Mungiki*, a criminal gang, has been terrorising people in urban centres, and areas around Central and Rift Valley Provinces, causing chaos to city slums, demanding ‘protection money’ from transport operators, slum-dwellers and business men in these areas as well as murdering those who defy its orders.³⁸

From time to time, pressure would mount on the State which would then deploy lethal force to quell the menace. At one point a ‘shoot to kill’ order was issued against suspected *Mungiki* adherents in order to eliminate them as most of those arrested and taken to court were released for lack of concrete evidence.³⁹ When human rights activists became vocal against the State-sanctioned violence, they were painted as only being interested in protecting ‘criminals’.⁴⁰ The *Mungiki* mayhem also elicited heated debates on the role of judicial process in the fight against crime especially when accused individuals were acquitted by the courts which were now becoming more proactive in upholding human rights.⁴¹

1.3.1.4. The Constitutional Reform Debate

Discussions on the events surrounding the post-election violence, the SLDF and the *Mungiki* menace may give a wrong impression that courts have been at the forefront in upholding the values of fair trial thereby leading to extrajudicial recourses by complainants who feel that the courts will favour accused persons. However, as we shall see in chapters IV and V, the most damning criticisms have in fact been directed against the perceived lack of independence and

³⁸ Margaret Gathoni Gecaga, ‘Religious Movement and Democratisation in Kenya: Between the Sacred and the Profane’ in Godwin Murunga and Shadrack Nasong'o (eds), *Kenya: The Struggle for Democracy* (Zed Books, CODESRIA 2007) 58 esp at 70 *et seq.*

³⁹ See, *US Congress Country Reports on Human Rights Practices for 2007* (US Congress Vol 1, August 2008) 283, 284.

⁴⁰ ‘Police Officers Condemned Unfairly’, *Standard*, Nairobi, 19 June 2012.

⁴¹ Theresa Kaleja, ‘An Institutional Analysis of Corruption in Kenya’ in Birger P. Priddat and Michael Schmid (eds), *Korruption ALS Ordnung Zweiter Art* (VS Verlag 2011) 191, 217.

impartiality in the institutions of administration of justice in most of the conflicts in the country, which has in turn led to several attempts to restructure the Judiciary.

For instance, a number of official reports have given damning accounts of the Judiciary; condemning the institution for being corrupt, unprofessional and incapable of ensuring that justice is done.⁴² Thus, when the National Alliance Rainbow Coalition (NARC) government came into power in 2003, it unsuccessfully attempted a ‘radical surgery’ on the Judiciary leading to the removal of many judges who were perceived to be corrupt and/or unsuitable to hold office in order to restore public confidence in the institution.

It is also against a similar backdrop that a member of the reconstituted Judicial Service Commission Ahmednasir Abdullahi opined after the 2007 post-election violence that the Judiciary was the ‘the biggest single actor’ in the resultant mayhem stating that, ‘When the aggrieved parties could not find a decent judge to arbitrate their complaints, they resorted to the pre-law remedies of butchering one another.’⁴³ The same sentiments were also expressed in the report of two important post-election commissions – the Commission of Inquiry into Post-Election Violence (CIPEV) chaired by Justice Philip Waki (popularly referred to as the Waki Commission) and the Independent Review Commission on the General Elections held in Kenya on 27th December, 2007 (commonly referred to as the Kriegler Commission) – which preceded the final push towards the enactment of the 2010 Constitution.⁴⁴

⁴² The most prominent of these reports being *The Report of the Committee on the Administration of Justice* (the Justice Kwach Report) 1998, *The Report of the Integrity and Anticorruption Committee of the Judiciary* (the Justice Ringera Report) 2003, *The Report of the Sub-Committee on the Ethics and Governance of the Judiciary* (the Justice Onyango Otieno Report) 2006, and *The Report of the Committee on Ethics and Governance of the Judiciary* (the Justice Kihara Kariuki Report) 2008.

⁴³ Emeka-Mayaka Gekara, ‘Judges Restless ahead of Vetting,’ *Sunday Nation*, Nairobi, 18 December 2011, 10.

⁴⁴ This was under the Four Agendas set by the Panel of Eminent Personalities led by the former UN Secretary General Kofi Annan appointed by the AU with the support of the UN in an effort to resolve the largely publicised post-election conflict in Kenya.

Thus, as we shall see in chapter IV and V, some of the major constitutional changes in the 2010 Constitution were targeted at the Judiciary which has highlighted the importance of the value of independence and impartiality of the Judiciary, not just to the right to a fair trial, but also to the general process of administration of justice.⁴⁵

1.3.1.5. Conclusion

The post election violence indicated the perils of a non-functional judicial system; one that in the eyes of the public cannot deliver, and led aggrieved parties to resort to other means of self-help. On the other hand, the issue of alleged torture by the military and security personnel in Mt. Elgon area and the *Mungiki* saga indicates that the impact of a perceived non-functional system is not limited to the public opinion alone. Other organs of government and machinery of law enforcement also do get embroiled in the conflict when there is a tension between various social ideals such as when it is perceived that there is a conflict between public security and the ideals of due process.

1.3.2. The Research Questions and Scope of the Study

In light of the diverse factors highlighted that influence the enjoyment of the right to a fair trial and the intricacies it entails in its application in the criminal justice system in Kenya, this thesis seeks to address the following questions, namely:

- (1) How has the right to a fair trial fared in the Kenyan Criminal Justice System?
- (2) Why have many difficulties been experience in the operationalisation of the principles forming part of the right to a fair trial in Kenya? and
- (3) How can we work towards achieving greater enjoyment of the right to a fair trial in the country's criminal justice system?

⁴⁵ William Wallis and Katrina Manson, 'Overview: A Fragile State is Put to the Test,' *Financial Times*, London, 27 October 2011.

To that end, it will explore the scope of the protections offered to the right to a fair trial in Kenya by various instruments, identify the factors that have hindered the full realisation of the right to a fair trial and investigate how legal reforms in the country are addressing the emergent questions. Other factors outside the formal law that may have affected the operation of the right to a fair trial will be explored and suggestions offered as to the approaches that may be used to optimise the enjoyment of the right.

1.3.3. Delimitation of the Study

Any investigation into the scope of the right to a fair trial invariably leads one to the conclusion that this right is not a single value, but consists of numerous norms, each of which may be independently explored. For instance, it may be possible to explore the aspect of independence and impartiality of courts alone, which would certainly lead to some important conclusions being drawn about a legal system's approach to the entrenchment of the right to a fair trial. But even then, this will not mean that the right to a fair trial is optimally enjoyed. If under the procedures adopted, accused persons cannot get ample opportunity to make their defences, or if trials end up taking very long to be concluded, there will clearly be a failure by the law to fully uphold the right to a fair trial.

Thus, Lord Steyn sitting at the Privy Council in *Darmalingum v. State* considered the aspect of the right to a fair hearing and found that the right contained three separate guarantees, namely, (1) a right to fair hearing; (2) within a reasonable time; (3) by an independent and impartial court established by law. As he put it, 'if a defendant is convicted after a fair hearing by a proper court, this is no answer to a complaint that there was a breach of the guarantee of disposal within a reasonable time'.⁴⁶

⁴⁶*Darmalingum v. State* [2000] 5 LRC 522. In *Porter v. Magill* [2002] 1 All ER 465, para 87, Lord Hope held that although the rights are closely related and the overriding question is whether or not there was a fair trial,

It may therefore be necessary to explore a whole range of the values enshrined in the right to a fair trial to fully appreciate its intricacies. However, as noted above, this thesis is concerned with exploring how and why there have been particular difficulties in effectively protecting the right in Kenya, and we shall therefore concentrate on a number of key elements of the right which have had a particularly important impact on the failure to properly operationalise the right in Kenya, as well as being especially significant in influencing the way in which the criminal justice system in Kenya is perceived. We shall thus concentrate our examination in this thesis on (i) the right to independent and impartial institutions for the administration of justice including the courts and prosecution services; (ii) the requirement of a trial within a reasonable time; and (iii) the broader principle of equality of arms.

Whilst all aspects of the right to a fair trial are universally important, we will see that the selected rights have been of central importance in the difficulties which Kenya has experienced. For instance, the lack of independence and impartiality of the Judiciary combined with the protracted processes that was employed by the courts during litigation contributed significantly to the absence of confidence in the institutions of justice and the collapse of law and order discussed in part 1.3.1.

A second reason for choosing to concentrate on some of these aspects of fair trial is because they are broad overarching values whose effective protection goes right to the heart of the notion of a fair trial. This is especially true of the notions of judicial independence and equality of arms. Indeed, independence and impartiality of institutions of criminal justice will usually determine whether it is actually possible to achieve fairness in the first place. In the same vein, the principle of equality of arms underpins many other values entailed in the right to a fair trial including the right to legal representation, the need for legal aid, and the

the rights are separate and distinct and should be considered separately. See also *R v. Lord Advocate* [2003] 2 LRC 51.

presumption of innocence among other values contained in most human rights instruments.

Although the notion of timely trial may be thought to be narrower than the other two sets of values, as will be explained below, it may have an impact on a whole range of evidential matters which are central to the notion of fairness in a criminal justice context. Furthermore, it is a matter of particular importance to consider within the context of an examination of Kenyan attempts to operationalise fair trial rights. This is because, as we will see, social factors such as poverty and illiteracy (which will be exemplified in addressing the issue of timely trials) have contributed significantly to difficulties in ensuring the enjoyment of many other values within the right to a fair trial.⁴⁷

A general introduction to each of these aspects of the right to a fair trial is offered below.

1.3.3.1. Institutional Independence and Impartiality

It will be shown in this thesis that the value of independence and impartiality of criminal justice institutions is an important cornerstone of the right to a fair trial. Its relevance is enhanced by the fact it is an overarching value upon which the efficacy of criminal justice system largely rests.⁴⁸ Moreover, institutional independence and impartiality have featured in most of the recent controversies in the country and has indeed been made the focal point of the institutional reforms thus requiring a special consideration in this thesis.⁴⁹

The importance of having an independent and impartial Judiciary is underscored by the fact that all the material sources of the right to a fair trial (including all the major international

⁴⁷ E.g. poverty affects the right to access adequate legal representation by an advocate of one's choice while illiteracy enhances the need for translation of proceedings etc.

⁴⁸ Donna Gomien, David John Harris and Leo Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter* (Council of Europe publishing 1996) 157.

⁴⁹ A lot of the changes in institutional structures under the new Constitution focused on the Judiciary with it being the only institution where all serving members were to be vetted before they could continue in office (under art 23 of the 6th schedule to Constitution (2010)).

treaties covering civil and political rights) tend to begin with the requirement that all trials should be carried out by an independent and impartial court or tribunal. In Kenya, even prior to the enactment of the current Constitution, section 77(1) of the Lancaster House Constitution expressly provided that all persons charged with criminal offences had the right to be tried ‘*by an independent and impartial court established by law*’. This is now found in article 50 the current Constitution.

Similarly, although the aspect of prosecutorial independence is normally never given the same prominence as the independence of the Judiciary, it is a notion that is inherent in the safeguards offered to accused individuals since the right to a fair trial necessarily entails independence of the prosecution to safeguard individuals from malicious charges motivated by other considerations such as the desire to suppress political dissent. Towards that end, some legal consideration is usually given to the independence of prosecutors. For example, the repealed Constitution gave the principal office in charge of prosecution constitutional autonomy for initiating criminal charges against individuals.⁵⁰ The same autonomy has been retained in the office of the Director of Public Prosecutions under the new Constitution.⁵¹

In general, it is notable that while the notion of independence rests on the collective institutional independence from other entities, particularly the Executive arm of the State, impartiality is defined by the ability of an individual official to conduct him/herself without bias or allowing external factors to cloud his/her decision. Whereas impartiality rests in the ‘ability of the individual officer to possess a state of mind or attitude that will make him/her impartial while exercising [his/her] functions [... and] is an issue of personal integrity,’ institutional independence, on the other hand, ‘is premised on the principle of separation of

⁵⁰ The Repealed Constitution, s 26(8).

⁵¹ The Constitution (2010) art 157(10).

powers, where the three arms of government operate without interference from the other branches.’⁵²

The two concepts are however closely related and are usually viewed together. For example, in *Thaddeaus Martin Nyaingiri Omomanyi v. Republic*,⁵³ where a trial magistrate had reacted to external factors that had not been adduced in evidence when giving his judgement, the High Court found that the perceived lack of impartiality had actually compromised judicial independence. It held that, ‘The independence of the Judiciary required that ... no external information should be given to the trial magistrate to affect his or her judgment.’

1.3.3.2. The Right to a Timely Trial

The right to have trials being concluded within reasonable time, which is the second safeguard that we shall examine, is usually affected by a broad range of factors that are core to whether the enjoyment of the right to a fair trial in general is possible. For example, a legal system wrought with legal technicalities may lead to time wasting. Delays in concluding trials may also be caused by inept judicial officers and the courts manned by incompetent personnel who may even cause delays as a means to solicit bribes (as we shall see in chapter IV, the Kenyan Judiciary has been variously accused). Moreover, inadequate physical infrastructure and manpower may lead to fewer cases being concluded at any one time, while litigants themselves may cause delays for whatever reasons. An investigation into these issues will thus address a broad range of factors that may generally be seen to be affecting a good number of other related values or even the enjoyment of the right to a fair trial as a whole.

⁵²‘The State of Judiciary in the NARC Era: Independence, Interference or Both’ in Winnie Mitullah, Morris Odhiambo and Osogo Ambani, *Kenya’s Democratisation: Gains or Loses? Appraising the Post-KANU State of Affairs* (Claripress, Nairobi 2005) 34, 35.

⁵³High Court, Kericho, Criminal Miscellaneous Application No 10 of 2008, [2008] eKLR.

That this right is quite important to the scheme of protection of the right to a fair trial in most instruments is evidenced by it being one of the basic/minimum guarantees that every accused person must enjoy. Under the old Constitution, for example, section 77(1) ‘afforded a fair hearing *within a reasonable time*,’ to accused persons. The newly enacted constitution had retained this approach.⁵⁴ At international and regional levels also, all human rights instruments that accord accused individuals the right to a fair trial contain provisions requiring timely trials as a core guarantee. For instance, both the International Covenant on Civil and Political Rights and the Rome Statute provide among the minimum guarantees for each individual facing trial the right to be tried without undue delay.⁵⁵ The African Charter and the European Convention on Human Rights (ECHR) also contain similar provisions.⁵⁶

There are a number of reasons why the value of trials being conducted within a reasonable time is essential. First, delays reduce the chance of the court arriving at proper decision thus compromising fairness. Protracted proceedings that take a long time normally make it difficult to ascertain the guilt or innocence of the accused persons. With the passage of time, witnesses tend to forget the exact details of the events leading to charges being instituted against individuals thereby prejudicing the trial.

Secondly, delays make it harder for accused persons to effectively make their defences. Witnesses may have moved away to other places making it costly for the accused to trace them and have them summoned to give evidence. Where there are inordinate delays, witnesses may even die before being called to the stand to give evidence thereby completely foreclosing the possibility of their evidence ever being given. Under the law of evidence, if witnesses are dead or cannot be found after the police have conducted their investigations and

⁵⁴ The Constitution (2010), art 50.

⁵⁵ ICCPR art 14(3)(c); the Rome Statute art 67(1)(c).

⁵⁶ African Charter art 7(1)(d); and ECHR art 6 talk about trial within ‘reasonable time.’

taken written statements, their statements will be admitted in evidence by the court but the accused individuals in that case will not have the benefit of impeaching the evidence by cross-examining the witnesses.

Thirdly, if individuals are incarcerated because they cannot afford bail or are deemed to pose a risk to the society or there are fears that they may escape from the court's jurisdiction and are, therefore, denied bail, undue delays will mean that their right to personal liberty is violated and the presumption of innocence in their favour is denied.

To the community, even if the accused are finally convicted after years of trial, justice will never be seen to have really been done when the public loses interest in the case. In that case, the efficacy of criminal justice will have been lost in spite of correct decisions being made to convict those who are indeed guilty. Thus, there is a truism that justice delayed is justice denied.

1.3.3.3. Equality of Arms and Issues of Legal Representation

Lastly, the investigation in this thesis will also focus on the more generic notion of equality of arms which arises from the fact that the ability of accused persons to offer an effective defence is predicated upon the accuser and the accused being treated equally before the law. This is because the notion entails within itself a broad range of values that are aimed at ensuring that the defence and the prosecution must have equal access to the court as well as procedural equality during trial.

Traditionally, human rights law has addressed the issue of equality of arms by focusing on the aspect of procedural inequality, as distinct from a holistic view of the substantive inequality.⁵⁷ Nonetheless, when addressing the question of the right to a fair trial in the

⁵⁷ Eg the Reply of the Government of the United States to the *Juan Raul Garza* case of 27 January 2000 at the Inter-American Commission on Human Rights Petition, Case No 12.243 where it is argued that 'Equality of arms requires procedural equality, not substantive equality.'

Kenyan context, the aspect of inequality in financial and legal resources cannot be downplayed since in most cases, accused individuals fail to effectively contend against the State on account of limitation in resources.

Thus, the principle of equality of arms has broad connotations in respect to the enjoyment of the right to a fair trial. It affects such values as the right to legal representation, to have access to the material in the hand of the prosecutor, to be given ample time to make one's defence etc. At the International Criminal Tribunal for the former Yugoslavia (ICTY) in *the Prosecutor v. Tadic*,⁵⁸ it was stated that equality of arms implies that each party must have a reasonable opportunity to defend his interests under conditions which do not place him at a substantial disadvantage *vis-à-vis* his opponent. The Appeals Chamber went further to explain that the principle meant that the prosecution and the defence sides must be equal before the court which was duty-bound to provide every practical facility it was capable of granting when requested by a party.

In this thesis, more prominence will be given to the aspect of legal representation since, similar to the value of timely trials that we highlighted above, it tends to be affected by a broad range of issues such as poverty, illiteracy and even customs. These issues have long been of particular concern to the country since at the onset the State has more resources at its command to lodge a formidable challenge, which may call into question the fairness of the trial. For example, when an illiterate accused person comes from incarceration to court unrepresented to face a well trained prosecutor, he will definitely be unable to content equally

⁵⁸Appeals Chamber 15 July 1999, para 43, 44, 48, 52. See generally Magorzata Wasek-wiaderek, *The Principle Of 'Equality Of Arms' in Criminal Procedure Under Article 6 of the European Convention on Human Rights and its Functions in Criminal Justice of Selected European Courtiers: A Comparative View* (Leuven University Press, 2000).

with the prosecutor. Lord Denning succinctly expressed the plight of such accused individuals in the case of *Pett v. Greyhound Racing Association*:⁵⁹

It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man: 'you can ask any questions you like;' whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task?⁶⁰

As we shall see in chapter VI, poverty and illiteracy which permeates the social structures in Kenya, present a worse scenario of inequality that even with the courts' assistance, accused person may still not be able to lodge effective defences.

Some level of equality may be attained where accused individuals are represented by a legal counsel. For the poor, this can only be facilitated by having a functional legal aid system. Thus, it may be argued that a lack of legal aid does not only disentitle the poor from effectively contenting with the prosecution, it also latently subjects them to discrimination by subjecting them and the rich to criminal processes on equal basis.⁶¹ However, ever the State tends to use poverty as an excuse for not having a robust legal aid programme.

1.3.4. Approaches to the Research and Methodology Adopted in the Investigation

The investigation in this thesis will take three approaches. First we shall use existing legal frameworks found in the written laws and established practices as a basis for assessing how individuals' rights are enforced. Secondly we shall explore how legal reforms are incorporating internationally accepted standards of best practices as a means of ensuring that rights are enjoyed. Thirdly, we shall seek to move beyond the provisions of the black letter laws to also explore the socio-cultural environment that affect the enjoyment of the right to a

⁵⁹(1968) 2 All.ER 545.

⁶⁰*Pett v. Greyhound Racing Association* (1968) 2 All.ER 545, 549.

⁶¹ 'The Bazelon-Katzenbach letters' (1965) 56 *Journal of Criminal Law* (C & PS) 498.

fair trial in light of the particular concerns based on the historical, socio-economic and cultural factors in operation in the country. Thus, besides looking at purely academic materials including textbooks, statutes and relevant case law, this thesis (especially in chapter VI, which explores the impact of poverty and illiteracy on the enjoyment of the right to a fair trial) will also be based on empirical information obtained from personal observation of court proceedings during visits to the Makadara, Kibera Butali and Kitale Law Courts undertaken between March and May 2010 and discussions with legal practitioners and other stakeholders in administration of justice (including members of civil society organizations interested in the criminal justice and individuals who are the end users of criminal justice institutions) over the same period.

Indeed, the stated purpose of this thesis is the ‘conceptualisation’ and ‘operationalisation’ of the right to a fair trial. The term ‘conceptualisation’ here refers to the investigation of what the right is and how it is reflected in the formal documents and general practice. We shall for example be asking, ‘Is the right to an independent and impartial Judiciary found in the constitution?’ In operationalisation, on the other hand, we shall be dwelling on how the values enshrined in the right are put to effect. With regard to the value of independence and impartiality for example, we shall be inquiring whether there are structures in place to ensure that the Judiciary is truly independent and impartial. We shall also consider how other issues such as peoples’ perceptions of the Judiciary impact on the effectiveness of the courts in the enforcement this right.

1.3.5. Outline of the Study

Including this introductory chapter, this thesis contains nine chapters, the last one being a summary and conclusion chapter. In chapter II, we explore the formal legal sources of the right to a fair trial as found in the Kenyan criminal justice framework. The chapter dwells

entirely on the foundation of this right in formal law since it is that view that finds expression in documented laws that the courts apply and indeed usually is the predominant view in any investigation into such matters.

Chapter III unpacks the structure of law against the backdrop of legal pluralism emanating from the country's historical as well as statutory contexts on the premise that the formalist view of how the right to a fair trial operates is incomplete and does not give a full reflection of the practice of enforcing the right in Kenya. It is contended here that the legal system introduced in Kenya (dating as far back as the period when formal laws were first introduced to the country by the colonial establishment) has had a great practical impact on the right to a fair trial in Kenya. The consequent plural legal system that resulted did not sit well with the expression of the right to a fair trial which was supposed to be sourced only from the formal laws.

Chapter IV reviews the overarching question of the independence and impartiality of the Judiciary as a cornerstone of the protection of the right to fair trial. It suggests that an important historical and political context of right to a fair trial must be seen in the effective subordination of the Judiciary to the Executive from as early as the colonial period. Reflecting on the changes brought by the new Constitution to ensure judicial independence and impartiality, it is conceded in chapter IV that this goes a long way in enhancing independence and impartiality of the Judiciary. However, it is still contended that the full realisation of the right will require that other considerations beyond mere reforms to the formal law be taken on board. Similarly, chapter V, which investigates the impact of the political aspects of the institutional arrangements for making prosecution decisions on the enjoyment of fair trial rights in Kenya, concludes that there are other factors beyond the formal law that continue to affect the process of criminal prosecution.

In chapter VI, a social context is given to the enjoyment of the right in Kenya by reflecting on the influences of poverty and illiteracy on the Fair trial values forming the focus of the study. It is concluded from this investigation that the formalist provisions of the right are actually subjected to some social influences that are reflected on the practical operation of the right which must therefore be given due consideration. Building upon this perspective, chapters VII and VIII concentrate on cultural influences to the enjoyment of the right by addressing the existence of informal customary dispute resolution modes which are utilised to settle criminal disputes despite the lack of a legal basis in the formal law.

At the end, it is suggested that in light of the historical, political, social and cultural factors in play, even under the current Constitution, informal customary systems may have a role to play in enhancing the protection of the right to a fair trial in the criminal justice system in Kenya.

CHAPTER II:

FORMALISTIC CONCEPTION OF THE RIGHT

This chapter makes an analysis of the formal legal sources of the right to a fair trial in Kenya revealing a set of values framed in a similar fashion as it is elsewhere in the democratised world. Noting however, that there were glaring violations of the right in the country, it is suggested that it may take more than a mere look at formal provisions of law to fully understand how the right actually operates.

2.1. Introduction

The notion of fair trial has been part of the criminal justice framework in Kenya since even before the commencement of the formal State system.¹ In the pre-colonial period, the various communities that occupied the territory of Kenya had, for example, adopted the value of open trials for those considered to have infringed social values. Among other safeguards in these trials, an accused individual was given the chance to defend himself either in person or through witnesses before any judgement was rendered.² During the colonial times, on the other hand, a criminal justice process akin to that in England was adopted for the benefit of the settler population but which, to some extent, was also applied to the native population. In that system, notions such as natural justice were used to safeguard those threatened with punitive measures for infractions of the law.³

However neither the pre-colonial, nor colonial frameworks could correctly be described as a uniform body of rules, and the formal recognition of the right to a fair trial in that sense was only fully recognised at independence by the adoption of the Bill of Rights within the

¹ A British protectorate was established over the territory that now constitute Kenya after the 1885 Anglo-German agreement that delineated the Africa and divided it between the world's major powers at the time.

² Makau Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press 2002)76.

³ A detailed analysis of the historical development of the right to a fair trial is made in chapter III of this thesis.

Kenyan Constitution in which a section was dedicated entirely to the right to a fair trial.⁴ The constitutional scheme was implemented through various pieces of legislation containing particular safeguards for accused persons aimed at ensuring fairness. This was also supported to a small extent by various international conventions to which Kenya had subscribed.

Hence, even before a new Constitution was enacted in 2010, a healthy body of formal sources of the right to a fair trial existed in Kenya despite some notable areas of concern that this chapter will highlight (which, as we shall see, seemed in most cases to be generic and universal).

It would however be incorrect to conclude that the existence of formal legal provisions guaranteeing the right to a fair trial meant that the right was delivered or protected in practice. Even with the ostensibly robust set of rules in the repealed Constitution, human rights, including the right to a fair trial, never fully thrived in the country. As the prevalence of extrajudicial recourses to resolve disputes by both private citizens and public officers which were noted in the last chapter indicates, something was amiss in the judicial system leading to the perception that courts in the country lacked the requisite independence to justly resolve conflicts occurring in the society. A new Constitution was thus enacted in 2010 which, in respect of the right to a fair trial, sought to guarantee independence and impartiality of the Judiciary and entrench other safeguards aimed at protecting accused persons. Indeed, this will go a long way to addressing some of the issues that we will highlight, which may have led to the failure to safeguard the right under the repealed Constitution.

But against what backdrop will this new Constitution operate if it has to be more effective than what was experienced under the repealed system? The aim of this chapter is twofold. First, it seeks to make a general inquiry as to the sources and content of the right to

⁴ Repealed Constitution (Kenya) s 77(1)-(14).

fair trial in the Kenyan legal system. Secondly, it assesses the extent to which the provisions in the new Constitution have transformed the framework underpinning the right to a fair trial to ensure that the right is fully enjoyed. It is suggested here that although much may have been achieved through constitutional reforms, there are still some critical issues that are yet to be fully addressed to ensure optimal enjoyment of the right by individuals.

The chapter is divided into 5 parts including this introduction and the conclusion. While part 2.2 explores the formal sources of the right to a fair trial in Kenya by generally looking at the notion of fair trial as it exists in the country's law, part 2.3 develops on the provision of the 2010 Constitution – that international law is part of the national legal framework – to explore how international structures impacts on the right in municipal courts. In part 2.4, the three selected values (independence and impartiality of criminal justice institutions, timely trials and equality of arms) are used to investigate how the right actually operated under the repealed Constitution as well as the reforms that the new Constitution has brought to the enjoyment of its values.

2.2. Conceptualising the Right through its formal Sources in Kenya

2.2.1. Introduction

This part will serve two purposes: Foremost, it will be an introduction to the formal legal sources of protection of the right to a fair trial in Kenya, identifying the diverse material sources that the right derives from in its operation in the Kenyan legal system. Secondly, in order to determine the evolving landscape in the operation of the right to a fair trial, it makes an assessment of the reforms to safeguards offered by the right. This is done by comparing the operation of the right under the repealed Constitution and what is now provided for under the 2010 Constitution.

2.2.2. The Constitutional Safeguards

The main source of the legal right to a fair trial in Kenya is the Constitution. After a successful referendum in 2010, a new Constitution was adopted, repealing the old dispensation that had existed since Kenya attained her independence from Britain in 1963.⁵ This new Constitution expressly provides that, ‘All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with [the] Constitution.’⁶ By inference therefore, it is actually from the people that the rights including the right to a fair trial contained in the Bill of rights emanate.

2.2.2.1. General Operation of the Right under the Repealed Constitution

However, before we move our attention to the exact safeguards that have over time been offered to individuals, it should be pointed out that although the repealed Constitution contained a Bill of Human Rights that included provisions safeguarding the right to a fair trial, for many people, the adoption of a new Constitution was a redeeming moment for, among other institutions, the country’s criminal justice system.⁷ The general expectation for many Kenyans was that the new law would herald a new beginning where greater protection would be ensured not just for the law abiding citizens, but also in the process of determining the guilt or otherwise of those alleged to have breached societal values.⁸

Why would this be so when these rights were actually contained in the preceding supreme law? After all, like in many other Lancaster House constitutions, the Bill of Rights in

⁵ By the time the independence Constitution was repealed, a large number of amendments had already been effected so that it was not the same Lancaster house Constitution that was replaced in 2010.

⁶ Constitution 2010 (Kenya) art 1. The Repealed Constitution (Kenya) did not make any reference to the derivative power of State on the people.

⁷ The Constitutional review process began in earnest in 1992 when, because of abhorrence to massive human rights violations committed in the 1980s, mass action was adopted forcing the President to assent to minimal Constitutional amendments, which nevertheless failed to calm the move towards a total overhaul of the Constitution. Thus, in 1997, the Interparty Parliamentary Group was formed to advocate for further Constitutional reform that led to the adoption of the Constitution of Kenya Amendment Act and the so-called Bomas Process to adopt a new Constitution for Kenya.

⁸ This was aptly captured in the media during the pomp that accompanied the public promulgation of Constitution (2010) on 27th October 2010.

the repealed Kenyan Constitution was actually quite progressive and vibrant.⁹ Indeed, chapter V of the repealed Constitution was aimed at ensuring protection of human rights in general with Section 70 therein providing the basis for protecting fundamental freedoms in the following terms:

Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely -life, liberty, security of the person and the protection of the law ...

The substantive protections of the right to a fair trial were contained in section 77 which provided for legal protection in both civil and criminal trials. In criminal trials, it was provided that the accused persons had to be afforded ‘a fair hearing within a reasonable time by an independent and impartial court established by law’ unless the charge was withdrawn.¹⁰ These provisions were further developed in subsequent parts of that section which provided:

- (i) The essence of an open trial;¹¹
- (ii) The presumption of innocence until one was proved or had pleaded guilty;¹²
- (iii) The right to all information, from the time one was arrested until the end of the proceedings;¹³

⁹ An impetus for having a progressive bill of human rights enshrined in the Constitution may have been found in the international protection that had come to the fore after the II World War. It was not surprising that the Bill of right was adopted at a time when negotiations were underway at the United Nations Organisation for the adoption of binding international instrument for the protection of human rights in line with the provisions of the Universal Declaration of Human Rights (UDHR). With regard to the Kenyan negotiations, there were three Lancaster House Constitutional Conferences (in 1961, 1962 and 1963), but the most important one was the February to April 1962 conference where it was agreed that the Constitution should contain a Bill of Rights to secure individual liberties and freedoms (see, Bethwell Ogot, ‘The Decisive Years 1956-63’ in Bethwell Ogot and William Ochieng’ (eds), *Decolonization and Independence in Kenya, 1940-93* (James Currey, London 1995) 69 *et seq.*). The ICCPR was thereafter adopted by the UN in 1966 making those rights that had been included in the UDHR in 1948 enforceable as binding treaty provisions.

¹⁰ Repealed Constitution (Kenya) s 77(1).

¹¹ Ibid s 77(10). This provision is applicable to both civil and criminal matters

¹² Ibid s 77(2)(a), subject to sub-section (12) where the burden of proof may be invested on the accused. Hence, ‘the prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent (*Bukenya and Others v. Uganda*, 1972 EA 549)’.

- (iv) Individuals' right to effectively defend themselves including the rights to be given adequate time and facilities for the preparation of defence, and the choice whether to lodge personal defences or to use a legal representative of one's own choice;¹⁴
- (v) The right of accused individuals to confront the accusation against them through examination and cross-examination of witnesses;¹⁵
- (vi) The right to an interpreter if one could not understand the language used at the trial of the charge;¹⁶
- (vii) A prohibition of *ex-post facto* application of legal provisions;¹⁷
- (viii) Protection against double jeopardy;¹⁸
- (ix) The right against self-incrimination;¹⁹ and
- (x) The right of appeal.²⁰

Beside these protections, section 72 of that Constitution also offered other procedural protections to ensure that individuals were not deprived of their personal liberty except as the

¹³ This includes information as to the nature of the offence (under sub-section [2] and a copy any record of the proceedings made by or on behalf of the court at the end of the trial including the judgement (under Sub-section [3]). The information is to be given 'as soon as reasonably practicable in both cases, but at a requisite reasonable cost, in case of documents requested at the end of the trial.

¹⁴ Repealed Constitution (Kenya) s 77(2)(d). This is however limited by the Advocates Act, Cap 16 which provides access to the court only to legal practitioners admitted to the roll of advocates.

¹⁵ Ibid s 77(2)(e). This is afforded to the same extent as those applying to witnesses called by the prosecution. It also entails that one be allowed to be present in person during the trial subject to personal consent or to court's discretion to exclude one in certain instances. Thus, in *John Wanjala Wafula v. Republic*, Court of Appeal, Criminal Appeal No 95 of 95, a retrial was ordered by the Court of Appeal when written submissions were allowed after the defence was closed and neither the accused nor assessors were given access to these submissions. It was held that 'in a criminal trial, the accused is an integral part of the proceedings.'

¹⁶ This entails that the accused be given information, both at the time of his arrest (under sub-section 2[c]), and during trial (under sub-section 2[f]). The information has to be detailed enough to enable the accused know the exact nature and severity of his offence and the nature of the processes being undertaken.

¹⁷ Repealed Constitution (Kenya) s 77(4) and (8). This includes provision of trial of offences known to the law, both in terms of the existence of the provisions for offences and for the penalty to be imposed for the offence

¹⁸ Ibid s 77(5),(6).

¹⁹ Ibid s 77(7).

²⁰ This includes the right of appeal regarding violation of human rights in general. Thus, the Repealed Constitution s 85(7) stated that, 'A person aggrieved by the determination of the High Court under this section may appeal to the Court of Appeal as of right.'

law had authorised.²¹ It thus provided that arrested or detained persons were to be informed as soon as reasonably practicable, in the language they understood, of the reasons for arrest or detention. Further and closely related to the trial within reasonable time, such persons also had the right to be brought to a court as soon as it was reasonably practicable.²² This was normally within twenty-four hours of arrest or detention (or within fourteen days in case of capital offences). Any delays had to be justified by the arresting authority.²³

Hence, a broad range of safeguards were offered to individuals suspected of having committed criminal offences under the repealed Constitution.

2.2.2.2. General Protection of the Rights under the 2010 Constitution

Article 50 of the 2010 Constitution, titled ‘Fair hearing,’ is now, the operative section enshrining safeguards for persons accused of criminal offences during trial. It provides that ‘Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.’ Sub-clause (2) of that article then goes on to deal specifically with the rights of an accused individual in a criminal case which replicates the provisions in the repealed Constitution with some notable distinctions.

The first distinction concerns State-funded legal assistance. Whereas the repealed Constitution was categorical that ‘Nothing contained [in it should] be construed as entitling a

²¹ Repealed Constitution s 72(1).

²² The African Commission has, for example, interpreted these provisions to fall within the protection of fair trial (Nsongurua Udombana, ‘The African Commission on Human and People’s Rights and the Development of Fair Trial Norms in Africa,’ (2006) 6 *African Human Rights Law Journal*, 299). Most litigation concerning the right to a fair trial in Kenya also covered the notion of the right to be brought to court within the stipulated period (see eg *R v. Parko*, High Court Criminal Court No 85 of 2006, Judgement of 3 February 2009, [2009] eKLR; *R v. John Kinyua Muriuki*, High Court Criminal Case No 27 of 2007, Judgement of January 2009 [2009] eKLR; *Stephen Maina Njui v. R*, High Court Criminal Application No 128 of 2007, Judgement of 29 January 2009, [2009] eKLR; *Evanson Chege v. R*, High Court Misc. Criminal Application No 722 of 2007, [2009] eKLR. In all these cases, the rulings were to the effect that if a person is not produced before the court within the prescribed time, it is a violation of both the right under the Repealed Constitution (Kenya) s 72 and 77(1), (3).

²³ Repealed Constitution s 72(3).

person to legal representation at public expense,²⁴ the new Constitution provides that accused persons are entitled to have an advocate assigned to them by ‘the State and at the State’s expense, *if substantial injustice would otherwise result.*’

On the face of it, this is a significant change, though its precise impact depends on how the courts approach the question of when such State-funded legal assistance is necessary in order to avoid substantial injustice. Furthermore, the significance of the change effected here has to be measured in the light of the fact (as will be discussed later) that under the previous arrangements there was a limited legal aid programme under the ‘pauper briefs’ system.

The second important distinction between the old and new Constitutions is that although the repealed Constitution conferred rights, these were all subject to broad limitations clauses aimed at enforcing State security/public order. Indeed, the repealed Constitution had made every right ‘subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that *the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest* (emphasis added).’²⁵ Besides general limitations such as those that could be made ‘in the interests of public morality’, ‘in the interests of defence’, for ‘public safety’ or for ‘public order’,²⁶ there were specific limitations placed on the rights to fair trial (such as an absolute discretion for the courts to exclude any person from the proceedings if it is deemed that ‘publicity would prejudice the interests of justice’).

Such broad and unqualified general limitations upon the rights of individuals provided avenues for exploitation by the State in sensitive cases to ensure that the State always had an upper hand against individuals even when it was clearly in the wrong. Hence, Shivji saw such

²⁴ Ibid s 77(14).

²⁵ Ibid s 70.

²⁶ Ibid s. 77(11).

limitations as a deliberate attempt to extend State authority and limit individual freedom not in any way prompted by public welfare. He thus wrote:

[Such] legislation [was] about enabling the State and State organs to exert unquestionable power rather than about individual rights. And both as a matter of law and practice the power of the Executive [could not] be or [was] rarely challenged in the court of law or if challenged [stood] little chance of success.²⁷

In the case of the new Constitution, very few limitations (and certainly none which are absolute) are now placed on the enjoyment of rights. It must nonetheless be appreciated that ‘reasonable limitations’ have always characterised the formulation of most human rights instruments universally. For example, most instruments give trial courts the discretion to exclude the accused person from attending the proceedings.²⁸ The repealed Constitution was thus not an exception.

The third distinction between the old and new Constitutions (which may well have a particularly profound effect) concerns provisions governing the independence and impartiality of the Judiciary. Whereas the repealed Constitution failed to create effective structures to sustain an independent and impartial Judiciary, as it did not have any particular provision that expressly provided for the independence of national courts from other arms of government,²⁹ the new Constitution now gives express value to independence of the Judiciary.³⁰ In fact, the repealed Constitution did not define the basis upon which Judicial power was to be exercised in the same manner as it did in the case of the Legislature and Executive.³¹ But now, the 2010 Constitution specifically provides that, ‘Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this

²⁷Issa Shivji (ed), *The State and Working People in Tanzania* (Dakar: CODESRIA, 1985) 7.

²⁸ See eg ICCPR art 14, ECHR art 6, and Banjul Charter art 7 for express limitation to the enjoyment of the right to a fair trial they provide.

²⁹ This was compounded by the fact that no financial autonomy was given to that organ leading largely to the perception that the judicial organ was an appendage of the Executive.

³⁰ Constitution (2010) art 160.

³¹ Under the repealed Constitution, ss 23, 30 vested Executive and Legislative powers on the President and the National Assembly respectively but there was no such provision with regard to the Judiciary.

Constitution’, and further stipulates for the independence of the Judiciary.³² Hopefully, this independence will not be curtailed in practice.

2.2.2.3. Conclusion

A number of conclusions may be drawn from the above overview of the relevant constitutional provisions in the old and new Constitutions. First, the 2010 Constitution (which will be explored in more detail throughout this thesis) made certain changes which ought to provide an improved basis for protecting fair trial rights. Secondly, however, it would be too simplistic to conclude that the old Constitution was so fundamentally deficient that it can be identified as the sole, or even perhaps the primary, reason why the operationalisation of the right to a fair trial in Kenya has been problematic. There were indeed some critical structural deficiencies in the old Constitution, which we shall highlight in part 4.4 of this thesis. However, it is also notable that many provisions in the 2010 Constitution are quite similar and comparable to those in the old Constitution and other national and international frameworks on the subject of the right to a fair trial.

So, although the old Constitution had its shortcomings which may have provided the potential or opportunity for fair trial values to be undermined in certain circumstances, it did not require or compel that those opportunities routinely be taken. It follows then that although addressing the question as to why Kenya has experienced problems in properly operationalising the right requires that defects in the formal provisions of the Old Constitution be identified and analysed, a proper understanding of the origin or causes of problems will not be gained solely by doing so. By the same token, as we will see in later chapters, the reforms ushered in by formally changing the relevant Constitutional provisions in the 2010

³² Constitution (2010) art 159, 160.

Constitution ought not simply to be assumed to provide basis for resolving all the previous problems.³³

2.2.3. Statutes as Sources of Protection of the Right under the Repealed Constitution

2.2.3.1. Introduction

In addition to and supplementing the Constitution, various statutory provisions existed in the legal scheme for the protection of accused persons' right to a fair trial before the new Constitution was enacted. The repealed Constitution empowered Parliament to confer upon the High Court additional powers 'necessary or desirable for the purpose of enabling that Court, more effectively, to exercise the enforcement of human rights jurisdiction.'³⁴

These powers were essentially conferred by the Evidence Act and the Criminal Procedure Act³⁵ beside other written laws which are still in force even under the new Constitution (but it is anticipated that they will in due course be amended to make them conform to the new dispensation).

2.2.3.2. The Evidence Act

The Evidence Act contained ample provisions protecting accused persons, some of which may be noted. For example, the right against self incrimination was secured by provisions ensuring that confessions or admissions of facts tending to the proof of guilt made by accused persons were not admissible in court unless they were made in court, before a judge or a magistrate, or before a police officer (other than the investigating officer) of a rank not below the Chief Inspector of Police, and that a third party of the person's choice was to be present to

³³ From time to time in this thesis, comparison will be made between the Kenyan system and those of other commonwealth jurisdictions to highlight that some of these provisions worked quite well in other countries such as Australia and New Zealand.

³⁴ Repealed Constitution s 84(5).

³⁵ Cap 80 and cap 75 of the Laws of Kenya respectively.

witness the confession/admission.³⁶ Moreover, under the Act, witnesses' evidences in one case could not be used against them in other trials and advocates were also granted the privilege against being compelled to disclose communications with their client and *vice versa* as part of these safeguards.³⁷

The Evidence (Out of Court Confessions) Rules, 2009 made under the Act³⁸ clarified the safeguard against self incrimination by ensuring that the necessary information was available both to the accused individual and the police officers. It made it clear that confessions were to be made without coercion and in a language that the accused was comfortable with. It also provided for the form in which confessions were to be made and recorded to avoid intimidation of the accused and safeguarded the right to legal representation.

On the presumption of innocence, the Act put the burden of proof on the prosecution, save where the law creating the offence reverses this position.³⁹ The accused person was also entitled to immediate acquittal if the court was satisfied that the evidence given by either the prosecution or the defence created a reasonable doubt as to the guilt of the accused person in respect of that offence.

2.2.3.3. The Criminal Procedure Code

The Criminal Procedure Code also contained notable procedural protections for accused persons. For example, it provided for trials to be conducted in an open court to which the public generally had access.⁴⁰ However, in line with most international instruments on the

³⁶ Evidence Act s 25A. However, under s 156, a co-accused called as a defence witness may be asked any question in cross-examination notwithstanding that the answer may incriminate him.

³⁷ Ibid ss 128, 134, 136.

³⁸ Ibid s 25A.

³⁹ Ibid s 111.

⁴⁰ CrPC s 77.

issue, the presiding judge or magistrate could deny the public generally or any particular person access to court.⁴¹

Right to adequate information concerning the accusation was also safeguarded by the Criminal Procedure Code. Every charge had to contain sufficient information including a statement of the specific offence with which the accused person was charged and necessary particulars as to the nature of the offence.⁴² All evidence had to be taken in the presence of the accused, or, when his personal attendance had been dispensed with, in the presence of his advocate.⁴³ Also, the evidence had to be translated not only to a language understood by the accused persons, but also to English and Kiswahili for the benefit of the advocates and other interested persons.⁴⁴

Moreover, it was required that all judgments be made and explained in open court either immediately after the termination of the trial or at some subsequent time, of which notice was to be given to the parties and their advocates. The whole judgment could be read out by the presiding judge or magistrate if requested by either party, and in the presence of the accused (except where his personal attendance during the trial has been dispensed with and the sentence was one of a fine only or he had been acquitted).⁴⁵ A copy of the judgment and, when necessary, a translation was to be given to the accused person without delay.⁴⁶

Other safeguards found in the Criminal Procedure Code included protection from double jeopardy;⁴⁷ a secured access to adversarial proceedings where the parties could

⁴¹ Also Ibid s 77(2) where certain offences were to be heard in private.

⁴² Ibid s 134.

⁴³ Ibid s 194.

⁴⁴ Ibid s 198.

⁴⁵ Ibid s 68(1).

⁴⁶ Ibid s 170.

⁴⁷ Ibid ss 138, 218. However, under s. 139, individuals could nevertheless be tried again for a separate offence if established.

forward interrogatories in writing under which the court could examine the witness;⁴⁸ accused persons' right to be defended by advocates;⁴⁹ and their right to appeal.⁵⁰

2.2.3.4. Subsidiary Legislation

Beside the procedural statutes exemplified by the above legislation, a number of pieces of subsidiary legislation impacting directly on the right to a fair trial also existed under the repealed constitutional framework. Indeed, the Constitution itself gave the Chief Justice power to:

Make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred on it by or under [that] section (including rules with respect to the time within which applications may be brought and references shall be made to the High Court).⁵¹

Thus, the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules were made in this regard.⁵²

Moreover, the High Court (Practice and Procedure) Rules made under the Judicature Act and the Court of Appeal Rules under the Appellate Jurisdiction Act were intended to secure the enjoyment of certain values of the right to a fair trial. Among other things, these rules provided for the time and sitting of the relevant courts;⁵³ access by the parties to a matter to relevant information stored in court archives;⁵⁴ procedure for appeals to the Court of

⁴⁸ Ibid s 155.

⁴⁹ Ibid s 193 and part XI.

⁵⁰ Ibid s 361. Under s 379, a second appeal from the decision of a High Court to the Court of Appeal on a point of law was possible.

⁵¹ Repealed Constitution s 84(6).

⁵² Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules (Gicheru Rules) 2006. This Rules replaced The Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules (Chunga Rules) 2001.

⁵³ High Court (Practice and Procedure) Rules clearly outline when the courts would be sitting and how matters have to proceed during vacations that are clearly outlined.

⁵⁴ Ibid part III. This include specifically, the notes taken by the judge and evidence recorded in a case; and any pleading, application, order, exhibit or other document made, recorded or filed in a case.

Appeal;⁵⁵ judges power to assign advocate to represent an applicant or appellant if it appeared desirable in the interests of justice under the ‘pauper brief’ system;⁵⁶ and open hearing where all members of the public had access.⁵⁷

2.2.3.5. Conclusion

From the brief assessment of the protection offered by the statutes and statutory instruments, we can conclude that altogether, these written laws also gave considerable effect to the constitutional provisions on the right to a fair trial. In fact, provisions such as those adopting the ‘pauper briefs’ system even added to the protection of the right offered under the Constitution.⁵⁸

This statutory regime will continue to play an integral part in the scheme for the protection of the right to a fair trial even under the current Constitution to enhance constitutional safeguards that are offered. For instance, amendments to the Judicature Act have already been made to increase the number of Judges to ensure that more courts are opened to reduce the backlog of cases and ensure that trials are concluded without undue delays as part of judicial reforms underway.⁵⁹

2.2.4. Substantive Common Law as a Source of the Right

It ought also to be mentioned that beside the more formal legal provisions that we have highlighted above, the right to a fair trial also found solid grounding in the principles of Common Law and doctrines of Equity under Kenyan law. The basis for this was the Judicature Act which provided for the adoption of English common law and doctrine of

⁵⁵ This is generally the aim of the Court of Appeals Rules 2010.

⁵⁶ Court of Appeals Rules r 24.

⁵⁷ Ibid r 28. But the presiding judge may, in exceptional circumstances, direct that the public be excluded, if he is satisfied that national security or the interest of justice so require.

⁵⁸ Eg on the issue of providing legal aid under the Court of Appeal Rules r 24 where the Constitution did not envisage the same.

⁵⁹ Judicature Act s 7. The number of High Court Judges has been increased from a maximum of 70 to the current 150.

equity in Kenya.⁶⁰

Noteworthy also is the fact that statutes of general application in force in England and the procedure and practice observed in courts of justice in England on the 12 August 1897, were also to guide the courts in their determination of disputes.

Thus, the principles adopted by common law from its very formative years in England to protect accused individuals during trial could be applied to ensure that accused persons were granted a fair audience in criminal proceedings. It followed that Kenyan courts could draw not only from the English system, but also from other common law jurisdictions in case of inadequacy of the written law to offer effective protection to individuals accused of criminal offences.⁶¹

Indeed, norms of fair trial have a firm grounding in the common law.⁶² Historically in England, the bulk of legal principles by which the exercise of public power could be qualified were supplied by the common law. Here, most of the procedural protections were accorded to individuals under the principle of natural justice as part of the constitutional order.⁶³

On fair trial, natural justice requires that decision-makers act without bias (*nemo iudex*

⁶⁰ Judicature Act s 3(1)(c) provided that ‘insofar as those written laws do not extend or apply, courts [were to] be guided by the substance of the common law and the doctrines of equity’.

⁶¹ To date courts in Kenya make reference to old English cases as authoritative and also adopt decisions of other commonwealth jurisdictions as persuasive. Eg, in *Francis Koikai Katikenya v. Republic* [2006] eKLR the UK case of *Republic v. Turnbull* (1970) 3 All ER 549 was applied, while in *Godfrey Ngotho Mutiso v. Republic* [2010] eKLR, foreign cases including *Catholic Commission for Justice and Peace in Zimbabwe v. the Attorney General and Others* (1993) 2LRC 277 (Zimbabwe) and *Susan Kigula and 416 others v. A.G.*, Constitutional Petition No. 6 of 2003 (Uganda) were referred to).

⁶² Hence, procedural rights are noted to have for a long time been discussed under the common law doctrine of natural justice as well as in the American Constitutional doctrine of due process (Denis Galligan, ‘The Foundation of Due Process in Socialism’ in *Revolution and Human Rights* (International Association for Philosophy of Law and Social Philosophy, Franz Steiner Verlag, 1990) 240, 241; C.J.F. Kidd, ‘Disciplinary Proceedings and the Right to a Fair Criminal Trial under the European Convention of Human Rights’ (1987) 36 ICLQ 56).

⁶³ Colin Turpin, Adam Tomkins, *British Government and the Constitution: Text and Materials* (Revised 6th edn, Cambridge University Press 2007) 148. Human rights have now been expressly incorporated into English system by the Human Rights Act 1998, which makes the European Convention on Human Rights part of English law (see David Hoffman and John Rowe, *Human Rights in the UK: An Introduction to the Human Rights Act 1998* (2nd edn, Longman 2006) 55).

in causa sua), and allows those affected by the decision to be heard (*audi alteram partem*). These requirements secured the procedural rights of an individual involved in any judicial or quasi-judicial process. An accused person could for example appeal to common law if a decision-maker had some interest in the matter in question which compromised the requisite impartiality. In fact this safeguard existed whether the bias was actually real or just perceived (if the perception was reasonable), since justice was not only to be done, but was also to be seen to be done.⁶⁴

This common law approach has been developed in other jurisdictions to ensure that individuals found justice in legal proceedings. In the US, for example, fair trial rights for persons accused of criminal offences were encapsulated under the due process doctrine. Thus, in *Chambers v. Florida*,⁶⁵ Justice Black construed fair trial to prohibit the punishment of persons in criminal cases ‘until there [had] been a charge fairly made and fairly tried.’ The Supreme Court then used the ‘due process clause’ of the fourteenth amendment to elaborate on the constitutional essence of the fair trial rights in the sixth amendment which provided that:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the Assistance of Counsel for his defence.

Within this province of common law, therefore, convictions had to be made within the law; which has to be well applied, in good faith and within the confines of accepted conventions. There was thus a legal basis in common law for challenging convictions based

⁶⁴ See *R. v. Bow Street Metropolitan Stipendiary Magistrate ex P Pinochet Ugarte* (No. 2) [2000] 1AC 119, UKHL 35, [2004] 1 All ER 187.

⁶⁵ 309 U.S. 227 (1940)

on vague statutes, or to seek an accused person's acquittal where no concrete evidence existed, where testimonies were perjured, where evidence was suppressed; or where false evidence had been given.⁶⁶

2.2.5. Conclusion

It may thus be concluded that the formal law in Kenya has for a long time supplied a very fundamental basis for the operationalisation of the right to a fair trial even prior to the enactment of the current Constitution. Just like we have mentioned in the case of the Constitution, these statutes and statutory instruments largely built upon universal structures aimed at protecting accused individuals that at times even went beyond the particular provisions of the repealed Constitution and further developments are also possible as changes brought by the new Constitution indicate.

2.3. Conceptualising International and Regional Instruments in the Context of the Fair Trial Discourse in Kenya

2.3.1. Introduction

Having reviewed the safeguards on fair trial from the perspective of the national law in Kenya in the preceding section, this part moves on to look at the contribution of international law to the discourse on the right to fair trial that was sought to be applied to the national system. It will explore the general relevance that international law has had to the municipal protection of the right to a fair trial in Kenya which had for a long time been a dualist State until the 2010 Constitution adopted the monist principle. The second section shifts attention to the particular structures through which international law could have made incursions in the municipal system in Kenya and looks at the particular impact that international law may have had (or will indeed have) on the Kenyan system.

⁶⁶ Tinsley E. Yarbrough, *Mr. Justice Black and his critics* (Duke University Press 1988) 61.

2.3.2. Relevance of International Law to the National System under the Repealed Constitution

It is important to point out at the outset that as a dualist State under the repealed Constitution, for international law to become part of the national law of Kenya, Parliament had to expressly adopt the international instruments entrenching the respective values into the municipal system. Incorporation of international law into the municipal system was done either by directly annexing the treaty through a statute as was the case with international humanitarian law which was incorporated by annexing the four Geneva Conventions of 1948 to the Geneva Convention Act,⁶⁷ or by incorporating treaty provisions into the municipal system through their re-enactment into national law by specific legislation.

In the latter mode, Parliament would not specifically adopt the international instrument, but would enact its own statute taking into account the principles contained in the relevant international treaty. Hence, the long title of the Children's Act indicates that the law was adopted '*to give effect to the principles of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child and for connected purposes*'.⁶⁸ Children in conflict with the law could, therefore, appeal to the Children's Act in times of trial to ensure that they were not incarcerated in intimidating conditions that could prevent them from adequately defending themselves.

In the former case, by reference to the Geneva Conventions which was a national law under Geneva Convention Act, accused individuals could, for instance, appeal to the values in international humanitarian law that even in time of armed conflict, the State must not derogate from implementing its obligations relating to ensuring that they enjoyed the rights to a fair trial.

⁶⁷ Cap 198 of the Laws of Kenya.

⁶⁸ Act No 8 of 2001.

However, there was a problem with regard to operationalising international law in the municipal system of the country especially where the State had not taken steps to domesticate international instruments it had signed and/or ratified. In such cases, there was no express legal basis for which national courts could make direct reference to the particular instruments in settling disputes.

Nonetheless, even without direct incorporation of provisions of international treaties into Kenyan law, international law still had the potential to have some normative influence on to the country's criminal justice system wherein the right had already been incorporated in the Constitution. Courts could, for example, refer to the provisions of international treaties where ambiguities in the Constitution created a possibility for an interpretation that would constrain the enjoyment of the right by individuals.⁶⁹

Moreover, there are other ways in which the influence of international law could also have been exerted on the municipal law. Firstly, the structures created under international instruments usually have a limiting influence on the States approach to safeguarding the right to a fair trial in the municipal law. For example, the General Comments made by some treaty bodies such as the Human Rights Committee (HRC) usually help to clarify the extent to which State parties to particular treaties are bound by the treaty obligations. For instance, General Comment 32, relating to the provisions of article 14 of the International Covenant on Civil and Political Rights (ICCPR) contains guarantees that States parties must respect, regardless of their legal traditions and their domestic law.⁷⁰ With regard to the qualifications that are made to the enjoyment of the right, the General Comment, may well serve to limit the extent to which the qualifications found in the law are applied. It states that:

⁶⁹ As was held in *Peter Mburu Echaria v Priscilla Njeri Echaria* Civil Appeal No. 75 of 2001 at 27 [2007] eKLR.

⁷⁰ HRC, *General Comment No 32, Article 14, Right to Equality before Courts and Tribunals and to Fair Trial*, 23 August 2007, CCPR/C/GC/32, para 4.

States derogating from normal procedures required under article 14 in circumstances of a public emergency should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation. The guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights ... Similarly, as article 7 is also non-derogable in its entirety, no statements or confessions or, in principle, other evidence obtained in violation of this provision may be invoked as evidence in any proceedings covered by article 14, including during a state of emergency, except if a statement or confession obtained in violation of article 7 is used as evidence that torture or other treatment prohibited by this provision occurred. Deviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times.

Secondly, as an external source which is purely independent of the local political machinations, international law offered a neutral basis for comparative exploration of the particular values existing in national law. It is in this regard that we have already noted that on its face value, the provisions of the repealed Constitution was not actually fatal to the enjoyment of the right to a fair trial in Kenya, as it was not so different from the provisions in the ICCPR. However, considering the standards that the Human Rights Committee has established in its general comments, we may arrive at the conclusion that, under the repealed Constitution, the practice in Kenya failed to meet international standards.

2.3.3. Structures for Enforcement of International Law in the National System under the new Constitution

It cannot be overemphasised that Kenya has ratified various instruments providing the right to a fair trial in terms that were not so dissimilar in content to repealed Constitution. For example, the International Covenant on Civil and Political Rights stipulates that, ‘In the determination of any criminal charge against him ... everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law....’⁷¹ It then elaborated on the particular safeguard and permissible limitations in terms quite similar to those in the repealed Constitution. We may thus conclude from this that, in terms of substance, these treaties are unlikely to transform the trial landscape in Kenya even under the

⁷¹ Art 14. Kenya acceded to ICCPR on 1 May 1972.

2010 Constitution.

However, it should be pointed out that the mechanisms for the enforcement of these treaties may well have an impact on the enjoyment of the right to a fair trial in light of the monist scheme that the new Constitution now adopts.⁷² The materials from international processes may now form part of what the national courts will be required to take into consideration when adjudicating on criminal matters. This necessitates some review of these international processes of which some examples are notable.

Firstly, as a mechanism to enforce the International Covenant on Civil and Political Rights, member States are obliged to submit periodical reports on the progress they have made in ensuring the enjoyment of human rights in their country to the Human Rights Committee and are questioned where issues of concern arise. This mechanism has indeed offered some oversight over State practice with regard to some values enshrined in the right to a fair trial in the past. For example, when Kenya submitted her second periodic report in 2004 which was considered on 14 March 2005,⁷³ the Commission sought additional information regarding the constitutional or legal provisions underpinning the decision to remove more than 60 judges from office in what came to be known as the ‘radical surgery’ of the Judiciary, that was seen to violate the requirement for independence of the Judiciary.⁷⁴

Much may not have come out of the reporting process with regard to the perceived shortcomings of the ‘radical surgery’ in 2005. However, the brainstorming process that the reporting obligation entailed created a lively avenue for interrogating State action that seemed to violate the values enshrined in the right to a fair trial giving some focus to how the State should approach certain challenges in the administration of justice. Indeed, the fact that

⁷² Constitution (2010) art 2(5)(6), general principles of international law and statutes signed and ratified by the country form a part of the national law.

⁷³ CCPR/C/KEN/2004/2.

⁷⁴ CCPR/C/SR.2256.

scrutiny was directed towards the process may well have served to inform the structure later adopted under the 2010 Constitution which required vetting of all judicial officers by an independent vetting panel established under an Act of Parliament and not through an executive fiat.⁷⁵

Furthermore, as already noted in part 2.3.2 above, a way of promoting compliance, the Human Rights Committee also publishes its interpretation of the content of human rights provisions, known as ‘General Comments’ on thematic issues or its methods of work. Under article 14, the Human Rights Committee has published a General Comment on the Right to Equality before Courts and Tribunals and to a Fair Trial.⁷⁶ These General Comments offer much more than the examples we have highlighted above. For instance, on the basis of its provisions in part II (on equality before courts and tribunals) we are able to consider the generic right of equality of arms as a value of the right to a fair trial; or in light of part V, we could explore the intricate requirements entailed in protecting the rights of persons charged with a criminal offence in an attempt to offer grounds for improving the way the rights are enjoyed in the country.

From the regional perspective, the African Charter on Human and Peoples' Rights,⁷⁷ also supplies important principles and mechanism for the enforcement of the right to a fair trial that is comparable to the ICCPR.⁷⁸ It establishes the African Commission on Human and Peoples' Rights which, like the Human Rights Commission, has published interpretation on the content of the right to a fair trial in the form of Principles and Guidelines on the Right to a

⁷⁵ Under the 2010 Constitution, as we shall see in chapter iv, vetting of sitting judicial officers was required in order to restore confidence in the institution. However, this time round, an independent body with both local and international experts was employed to ensure that the process was above board.

⁷⁶ No. 32 CCPR/C/GC/32 of 23 August 2007.

⁷⁷ Adopted in Nairobi on 27 June 1981.

⁷⁸ Eg Banjul Charter art 7.

Fair Trial and Legal Assistance in Africa.⁷⁹ The Commission similarly receives periodic reports from member States and gives Concluding Observations. Kenya submitted her first report under the African Charter in June 2006 which was considered during the Committee's ordinary session held between 16 and 30 May 2007.

The international and regional processes and structures for enforcement of human rights will now form part of the law of Kenya under the new Constitution and will undoubtedly be taken more seriously especially since the State knows that courts may be called upon to interrogate how these mechanisms work.⁸⁰ Indeed, the influence of these international mechanisms to the protection of the right to a fair trial are enhanced by fact that individuals may now seek to challenge State action on the basis of the reports and recommendations arising from the reporting process and may also authoritatively cite the general comments of the international and regional bodies during litigation to support their positions.

Another structure in international law that is bound to influence the development of the way the right to a fair trial is to be enjoyed in Kenya is the Rome Statute of the International Criminal Court whose relevance has already been underscored by the commencement of two sets of cases concerning some Kenyan individuals by the Prosecutor of the Court following the post-2007 election violence in the country.⁸¹

The Rome Statute contains elaborate provisions to afford fair trial to accused individuals. Article 68 stipulates for the rights of accused persons. It supplies that, 'In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially,' and goes on to enumerate the minimum guarantees that the accused persons ought to enjoy in full equality.

⁷⁹ DOC/OS (XXX) 247.

⁸⁰ Constitution (2010) art 23.

⁸¹ Kenya ratified the Rome Statute on 15 March 2005 and, pursuant to article 126(1), the Statute entered into force for that State on 1 June 2005.

At the initial hearing of the Kenyan cases by the International Criminal Court, for instance, on the request of the defence for all evidence by the prosecution against the defendants, the Court ruled that this was part of the rights that defendants had. Thus, it ordered that those materials be supplied as soon as possible even prior to formal indictments against the suspects.⁸²

Although the proceedings of the ICC at The Hague may not directly influence the jurisprudence of the local courts, the particular relevance of that system to national law may nonetheless be enhanced by the institution of charges against the Kenyan suspects. For example, in order to avoid international trials of Kenyan citizens, it was initially suggested that a special local tribunal be established to look into the post-election crimes. The proposed tribunal was to be established under national law which was to incorporate provisions of the Rome Statute to ensure that there was adherence to international standards. Due to political intricacies in the country, that tribunal was never established.⁸³ However, the debate on the need for a tribunal/court that has jurisdiction over international crimes in the country continues.⁸⁴ It has even been suggested that the reforms following the enactment of the new Constitution in the country must take into consideration The Hague process.⁸⁵

Thus, with the confirmation of the Kenyan cases, for instance, the independence of the Judiciary will undoubtedly be enhanced as the government will not want to be seen to be interfering with the operations of the local courts as it seeks to have The Hague cases referred

⁸² See Prosecution's application requesting disclosure after a final resolution of the Government of Kenya's admissibility challenge and establishing a calendar for disclosure between the parties in the case of the *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision of 20 April 2011, ICC-01/09-02/11.

⁸³ As the implicated politicians initially thought that the ICC would not take up the matters immediately, they developed what has now become a popular adage that, 'let us not be vague, let us go to The Hague'.

⁸⁴ E.g. the CJ unveiled a plan of setting up an International Crimes Division of the High Court in a speech at Strathmore University, Nairobi on 26 November 2012.

⁸⁵ After the confirmation of the charges in the Kenyan cases by the Pre-Trial Chamber of the ICC, a panel of international and local experts was gazetted by the Attorney General to, among other things, advise the government on the possibility of applying to have the ICC transferred back to the country for a local trial.

back to the Country for trial.⁸⁶

2.3.4. Conclusion

Investigation on the operation of international law in the municipal system in Kenya reveals that even under the repealed Constitution, international law had some appreciable effect on how the right to a fair trial was effectuated in the criminal justice system.⁸⁷ However, a number of factors constrained their applicability. Firstly, the dualist system required incorporation of international instruments to make them applicable as national laws, something the repealed system did not embrace. Absent incorporation, it was difficult to make appeal to international mechanisms promoting the enjoyment of this right during criminal trials. Secondly, the fact that the African Court and the ICC were quite new at the time the Constitution was repealed, coupled with the fact that the right of individual petition under the Optional Protocol to the International Covenant on Civil and Political Rights was unavailable to Kenyans (as this convention has not been ratified by Kenya), made international law to end up adding only cosmetic value to the protection of the right to a fair trial.

As the new Constitution has transformed Kenya from a dualist to a monist state and now that general principles of international law and treaties signed and ratified by the country form a part of the national law,⁸⁸ it is likely that international treaties will have an impact on the current reforms. This will especially be so if the structures for enforcing international law are fully considered and adopted when enacting implementing legislation.

Importantly in this thesis, in part 7.5, international law will offer a good basis for assessing how to effectuate municipal structures in light of the State's international

⁸⁶ The government strategy in the Kenyan cases before the ICC has been to seek to have them transferred back to Kenya for trial. Thus, Kenya applied to the ICC to have the Court refer the matter back to Kenya arguing that there was now a well functioning that could effectively take up the matter basing their argument on the complementarity principle in article 2 of the Rome Statute.

⁸⁷ This was pointed out by the Court of Appeal in *Peter Mburu Echaria v Priscilla Njeri Echaria*, Civil Appeal No 75 of 2001, [2007] eKLR.

⁸⁸ Constitution (2010) art 2(5).

obligations. Indeed, reflection on provisions of international instruments will highlight the difficulties that may be faced in attempting to restructure the system in order to optimise the enjoyment of the right; thereby presenting us with an opportunity for deeper reflection on the viability of these options. For instance, we shall see that whereas informal dispute resolution mechanisms may be considered as avenues for diverting some cases from formal courts in order to reduce the workload of national courts and enhance expediency in trials, this may go against the requirement that criminal cases must be settled through tribunals established by law or that accused persons must be given the choice to decide whether they want to be represented by advocates. Therefore, to operationalise the informal system, we may need to consider ways in which it may be done without violating these other values as we shall attempt in chapter VIII.

Therefore, even though a discourse on all relevant international instruments is not central to the investigation in this thesis, the fact that the new Constitution has transformed the country from being a dualist to a monist State will lead us to explore the possible impact that the current reforms will have to the enjoyment of the right to a fair trial.

2.4. Formal sources governing particular values of Fair trial in Kenya

2.4.1. Introduction

Having looked at the sources of the right to a fair trial in the criminal justice system, this part turns its attention to how the repealed constitution dealt with the right to independent and impartial criminal justice institutions; the right to a timely trial; and the value of equality of arms. It also points out how reforms have enhanced the protection of the right under the current system.

2.4.2. The Right to an Independent and Impartial Tribunal

It is notable that almost all instruments enshrining the right to a fair trial usually begin with the requirement that entitles every person to a trial by an independent and impartial court. These provisions existed in the repealed Constitution, which (though it fell short in many regards as chapter IV shall reveal) also contained numerous safeguards aimed at ensuring that judges and magistrates were not prone to external influences. There was nonetheless no specific provision that required the Judiciary to be independent (apart from that which entitled accused persons to trial by an independent court).

We cannot, however, downplay that there were some provisions safeguarding the tenure of judicial officers and that some procedural protections were offered to those faced disciplinary action.⁸⁹ However, it is notable (as we shall discuss in more detail in chapter IV) that these were never fully implemented in practice, which may lead us to conclude that the mere incorporation of provisions aimed at protecting the right to a fair trial may not by itself guarantee the enjoyment of these rights and that it may take more than just written law to ensure that the values within the right are fully enjoyed.

With regard to impartiality, the Criminal Procedure Code established that if ‘a fair and impartial trial [could] not be had in the court trying the case,’ the accused individual could move the High Court to remove the case from that court and transfer it to another.⁹⁰ It is with this in mind that the High Court in *Kinyati v. Republic*,⁹¹ citing Indian authority held that:

Where the apprehension in the mind of the accused that he may not have a fair and impartial trial is of a reasonable character, there, notwithstanding that there may be no real bias in the matter, the facts of incidents having taken place calculated to raise such reasonable apprehension, ought to be a ground for allowing a transfer.

⁸⁹ Repealed Constitution (Kenya) s 62.

⁹⁰ CrPC s 81.

⁹¹ [1985] KLR 562, 569.

Similarly, in *Yusuf Sharif Ahmed v. Republic*,⁹² the court allowed the transfer of a case from one court to another on the ground that there was reasonable apprehension in the mind of the accused that he would not receive a fair trial.

To uphold the virtue of impartiality in cases before superior courts, it was common practice that judges would disqualify themselves from those matters where they had some interests or where there existed grounds that could lead to apprehension of bias against them.⁹³ At the High Court level, refusal by a judge to disqualify him/herself from a case would have been a good ground for an interim application to the Court of Appeal pending the final determination of the matter, or for a substantive appeal after an adverse judgement had been given.

Moreover as a guarantee of impartiality, open court proceedings to safeguards against judicial error or misbehaviour was guaranteed as a value of fair trial. As Bentham, noted, ‘Publicity is the very soul of justice. It is the keenest spur to exertion and the surest way of all guards against improbity. It keeps the judge himself, while trying, under trial.’⁹⁴ It is in this light that in *Scott v. Scott*, the Earl of Halsbury famously proclaimed that in England ‘Every court in the land is open to every subject of the King.’⁹⁵ This approach has also been formally adopted in Kenya.⁹⁶

Thus, even before 2010, independence and impartiality of the court generally found articulation both in law and judicial precedent. In practice, however, the safeguard of these

⁹²High Court Nairobi Misc Criminal Application No 452 of 2006 [2007] eKLR.

⁹³This was most common in civil matters. See e.g. *Kenya Shell Ltd. v. James Njoroge*, High Court Nairobi, Civil Application No 292 of 1998, in High Court Civil Case No 3452 of 1995; *A-Z Shah T/A Fashion Spot v. Jan Mohammed Investments Ltd and another*, High Court, Nairobi, Civil Appeal No 328 of 1999, 342 of 1999, 61 of 2000 and 65 of 2000 (Consolidated) [2009] eKLR

⁹⁴Jeremy Bentham, ‘Draught of a New Plan for the Organisation of Judicial Establishment in France’ cited in Postema, *Bentham and the Common Tradition* (1986) 358, 363-4.

⁹⁵(1913) AC 417.

⁹⁶Repealed Constitution (Kenya) s 77(10) and now Constitution (2010) art 50(1).

values was affected by a range of factors other than what was provided for in the formal legal provisions. As Lehtimaja and Pellonpaa suggest, the independence of the Judiciary depends on factors such as the manner of appointment and discharge of judges; the degree of stability and non-removability from office of judicial officers; their terms of service; and their physical, political, legal and logistical protection against outside pressures and harassment.⁹⁷

Independence and impartiality of courts in Kenya was rendered illusory by the very fact that the existing structures were inadequate to guarantee it. Among other problems which chapter IV will reveal was the absence of operational autonomy by the Judiciary. That institution was left to operate as a department either in the office of the Attorney General or under the Ministry of Justice. Its budget was supplied by the parent department which meant that it was ever beholden to the Executive through the parent ministry. Appointment of Judicial officers was also left to the President or appointees of the President ensuring that individual members were effectively controlled.⁹⁸

The new Constitution has now set out to address some of the problems experience under the repealed Constitution. Article 50 actually restates the individuals' right to be tried by an independent and impartial court established by law when charged with criminal offences and sets structures which support this. For example, as chapter VI shall highlight in greater detail, now, the Judiciary has been granted both budgetary and operational autonomy from other organs of government.

Nonetheless, concerns may still be raised as to how to address the culture that has developed in the country where the perception is still strong that the Judiciary is still a part

⁹⁷Lehtimaja and Matti Pellonpaa, 'Art 10' in Gudmundur Alfredson and Asbjorn Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Martinus Nijhoff 1999) 225.

⁹⁸This subject will be dwelt upon in details in the subsequent chapters.

and parcel of the government machinery aimed at social control and can never exist outside the structures of government.

2.4.3. The Right to a Timely Trial

Even before the enactment of the current Constitution, trial within a reasonable time was regarded as an integral part of safeguard to accused individuals. Beyond the provisions of section 77 of the repealed Constitution, in practice, superior courts were known to offer individuals reprieve from unduly prolonged judicial processes. In *Robert Tingo Michael v. Republic*,⁹⁹ for example, where after conviction, two appeals had been pending for twelve and seven years respectively, the High Court found that ‘the constitutional rights of the accused persons for expeditious disposal of their criminal appeal’ had been violated and ordered the release of the appellants. In these cases, the reason for the delays was that the appellants’ files had disappeared and the court therefore had no material to use in the appeal. Even though it was not the fault of the prosecution not the complainants that the files could not be found, the High Court was emphatic that it was only proper in the interests of justice to terminate these proceedings.

In *Githunguri v. Republic*,¹⁰⁰ the High Court held that delay in bringing a charge against an accused person after he/she had been released would prevent a new charge from being brought against that individual where no new evidence had become available to the prosecution. In that case, applicant had been charged in court earlier but the Attorney General had decided to terminate the proceeding only to commence it afresh after the lapse of four year without any claim that new evidence had been discovered. It was held that in such a case, even a successor to the office of the Attorney General (vested at the time with

⁹⁹ High Court, Bungoma, Criminal Appeal 148 of 2003 and Misc. Criminal Case No 8 of 2010 [2010] eKLR.

¹⁰⁰ High Court, Criminal Application No 227 of 1985 [1986] KLR 167.

prosecutorial powers under the repealed Constitution) could not be allowed to prosecute the same case.

The main problem with enforcing the right to be tried expediently arises from the fact that ‘reasonable time’ for concluding a matter is not a something that can be reduced to a mathematical equation to be applied to all cases in the same manner. It is usually left to the discretion of individual judges to decide whether there has been an inordinate delay in matters before them. These judges cannot be expected to be fully impartial when they have contributed to the perceived delays.

In Kenya, various factors ensured that most trials extended beyond what one would regard as a reasonable time within which matters should be concluded.¹⁰¹ While some of the factors such as complexity of the issues raised before the court were universal and affect criminal trials in other jurisdictions in the world,¹⁰² there were other factors that played a specific role in Kenya to ensure that most trials ended up unnecessarily taking too long to be concluded. For example, limited physical infrastructures (such as court building) and insufficient numbers of qualified staff meant that individuals generally had to be tried in places which were a considerable distance from the places where the alleged offence was said to have been committed. This in turn placed unmanageable workloads on individual judicial

¹⁰¹ Some of the factors like legal technicalities and judicial lethargy were highlighted in an article on civil justice by Christine Mungai (‘Mutunga’s Big Challenge’, *The East African* 28 July 2012) who pointed to the statistics that, on average, it takes 465 days for a matter to be concluded in court. Thus, as of December 2009, there were 910,013 cases pending in courts. At the Court of Appeal, there were 2,372 pending cases and 115,344 at the High Court. At the magistrates’ courts, there were 792,297 cases, with the majority (398,136) being traffic offences.

¹⁰² In *David Njoroge Macharia v. Republic*, the Court of Appeal explained that the legal issues raised in the case were complex, ‘with one of the issues relating to the right to legal counsel at state expense, completely novel,’ and raised before the highest court for the first time hence ‘requiring extensive research’ to explain the reason for the delay in delivering its judgment. Similar issues have been found to exist in other jurisdictions (eg in *India Sattatiya aka Satish Rajanna Kartalla v State of Maharashtra*, Appeal (Criminal) No 579 of 2005 and *Sambhaji Hindurao Deshmukh and Others v. State of Maharashtra*, Appeal (Criminal) 1097 of 2005).

officers resulting in repeated adjournments of cases, and consequent delays in concluding matters in court.¹⁰³

Now the Constitution of 2010 has actually replicated the provisions in the repealed Constitution regarding the trials within a reasonable time and the reforms that have followed have to some extent addressed some of the reasons that led to delay. With an improved budgetary allocation, for instance, more judges and magistrates are being hired and the plan to have more courts constructed has been mooted.

However some critical questions remain, for example the impact of poverty on an individual's ability to get the process expedited. This matter will be considered further in chapter VI.

2.4.4. Equality of Arms and Issues of Legal Representation

On the aspect of equality of arms, the repealed Constitution provided that the accused person had the right to defend him/herself *by a legal representative of his/her own choice*.¹⁰⁴ Indeed, this was an issue in *Okello v. Republic*,¹⁰⁵ where it was held to be an error and a breach of the Constitution for the trial magistrate to order the appellant to conduct his own defence when his advocate was not present in court.

However, a particular concern that always lingered was that not all litigants were endowed with the financial capacity to retain a counsel of their own choice due to rampant poverty. This brought into focus the need for legal aid and assistance for those who could not afford to retain legal representatives for themselves. Unfortunately, as noted above, the

¹⁰³ Ahmednasir Abdullahi, 'Restoring Public Confidence in Kenya's Discredited, Corrupt, Inefficient and Overburdened Judiciary: The Judicial Service Commission's Agenda for Reform,' (2011) *Kenya Law Review Journal*, Judges Colloquium.

¹⁰⁴ Repealed Constitution s 77(2)(d), and now Constitution (2010) art 50(2)(g).

¹⁰⁵ High Court, Criminal Appeal No 8 of 1986, [1986] KLR 219.

repealed Kenyan Constitution expressly excluded legal aid from the provision on the right to a fair trial and individual were not entitled to representation at the expense of the State.

To alleviate the difficulties that this caused, a system of ‘pauper briefs’ was created for those accused of capital offences tried at the superior courts.¹⁰⁶ In *Alloys Omondi Nanga v. Republic*,¹⁰⁷ a five-judge Court of Appeal bench upheld the ‘long-standing practice in our criminal justice system of giving free legal aid to indigent accused persons charged with murder undoubtedly to ensure that justice is done to such an accused person,’ approving of it as a ‘time honoured practice.’ However, as we shall see in chapter VI, the ‘pauper brief’ system still fell short of ensuring that justice was equally accessible to all accused individuals.

Formal sanctity has now been offered to State-sponsored legal aid by the 2010 Constitution which has been interpreted to entitle accused persons to free legal representation when conviction could lead to a death sentence, where complex issues of law arise that require technical understanding, or where the indigent is an infant or a person of unsound mind.¹⁰⁸

Nonetheless, it remains to be seen whether this will invariably ensure that fairness is done to all that lack the capacity to access legal representation. Indeed, other jurisdictions have developed jurisprudence on the right to legal assistance to meet their needs. In the US, for example, the right to legal aid was upheld for indigents in all criminal offences in *Gideon v. Wainwright*,¹⁰⁹ where the courts used the rule of fundamental fairness. In the UK, a legal

¹⁰⁶ In the ‘Pauper briefs’ system, the High Court allocate the accused persons lawyer to represent them who are then paid from the funds available to the Judiciary from State coffers.

¹⁰⁷ Court of Appeal, Criminal Appeal No 7 of 2006, [2006] eKLR.

¹⁰⁸ Court of Appeal, Criminal Appeal No 497 of 2007 [2011] eKLR. See also George F. Cole and Christopher E. Smith, *The American System of Criminal Justice* (11th edn, Thomson and Wadsworth 2007) 133.

¹⁰⁹ 372 US 335 (1963).

aid programme exists to serve indigent suspects from the time they are arrested and taken to court up to the trial level.¹¹⁰

It is however notable that most of these countries with effective legal aid programmes are economically developed countries.¹¹¹ In discourses about legal representation, developing countries usually seek to contextualise the ability to provide legal aid on the basis of economic capacity of the State to fund these ventures and this continues to be a challenge to attaining equality of arms in Kenya.

2.5. Conclusion

It is clear from the foregoing investigation into the sources of the right to a fair trial in the Kenyan criminal justice system that the formal law actually has a lot to offer to ensure that the right is optimally enjoyed. Indeed, as one of the aims of this thesis, we shall be highlighting from time to time throughout the remaining chapters how the new Constitution has actually made great strides in improving the scheme that already existed for safeguarding the right to a fair trial. It must moreover be appreciated that most of the issues of concern to the enjoyment of the right which have been highlighted in this chapter (and which we shall explore in more detail in the chapters that will follow) may not be unique to Kenya or may even exhibit universal tensions. However, their effects in Kenya have been quite adverse as the occurrences we mentioned in part 1.3.1 will attest.

Despite the improvements made in the new Constitution, it still remains to be seen if the problems presented for realisation of core fair trial rights in the past will in practice be eliminated under the new dispensation. We especially need to appreciate that in many

¹¹⁰ In the UK, the Criminal Defence Service (CDS) guarantees that people under police investigation or facing criminal charges can get legal advice and representation. The CDS is run by the Legal Services Commission in partnership with criminal defence lawyers and representatives.

¹¹¹ However, even some poor countries like Malawi have put in place quite a vibrant State-funded legal aid programme (for the underpinnings of legal aid in Malawi see Marshal Chilenga, *Civil Procedure in Malawi* (Kluwer International, 2011) 48).

respects, the provisions of the repealed Constitution (which adopted the Lancaster House model bill of rights) were comparable to standards found in international instruments. Moreover, the structures established under the Kenyan system are not too dissimilar to what is usually found in other jurisdictions that have nonetheless been quite successful.¹¹² Thus, the mere investigation into the formal law may not present us with the full picture of what has really affected the operation of this right in the country. Our attention must therefore be drawn to an inquiry into other perspectives that exist in this matter which a formalistic investigation cannot reveal. And even though the formal legal provisions are quite important to the operationalisation of the right to a fair trial, they may be no more important than historical, social, cultural and political factors which influence the operation of this right (and in some circumstances they may even be considerably less important). Thus, the mere passing of new laws without doing more to understand the contexts under which they operate may be unlikely to address all the problematic areas for the realisation of the right to a fair trial.

It is with this in mind that we shall explore in the following chapters how other contextual issues including the historical, social, cultural and political factors have impacted the enjoyment of the right to a fair trial in the Kenyan legal system in the past and what may be done in future to enhance the available safeguards.

¹¹² The repealed Constitution actually borrowed from the English system and its provisions closely resembled those in other Commonwealth countries like New Zealand and Australia.

CHAPTER III:

LEGAL PLURALISM AND COLONIAL INFLUENCES ON THE CONCEPTION OF THE RIGHT

This chapter explores the framework of legal pluralism established under the Judicature Act¹ against its historical backdrop. The exploration is important because the pluralistic system which the Act provides and the pre-colonial and colonial histories that belie the statute supply the context which has underpinned the operation of the entire legal system. It is argued that although the Judicature Act makes customary law applicable only to the resolution of civil disputes, the informal customary methods are applied even in matters that may be considered to be criminal. Thus, an investigation into their effect on the enjoyment of the right is very necessary. Moreover, from the historical perspective, the chapter argues that colonial attitudes against which the legal system was framed have tended to define how the government views individuals' rights. Hence, in spite the existence a Bill of Rights in the independence Constitution, the right to a fair trial was constrained by the State on the basis that national security concerns overrode the protection of the rights of individuals.

3.1. Introduction

The aim of this chapter is to tie the operation of the structures established by the formal law that we explored in the last chapter to the contextual factors affecting the enjoyment of the right to a fair trial, which will be explored in the rest of this thesis. This is done by unpacking the Judicature Act to reveal a plural legal system with robust structures underpinning the right to a fair trial in operation. In addition to the formal sources of law considered in the previous

¹ Judicature Act cap 8 of the Laws of Kenya.

chapter, this plural system also recognises the existence of extra-legal influences (such as African customs) that affect the operation of State laws.

It is moreover suggested in this chapter that the provisions of the Judicature Act reflect both pre-colonial and colonial attitudes on administration of Justice that supply important contexts over which the post-colonial protection of the right to a fair trial has operated. While the pre-colonial heritage supplied values of African customary law with its informal structures of dispute resolution, the colonial system introduced the formal law under which the right is usually expressed but which was laced with attitudes that put State security above the protection of individual rights.

It is argued from the pre-colonial set-up that, inasmuch as the customary scheme of law was never fully appreciated in the post-colonial legal system – especially on the side of the criminal justice – it has continued to operate in a manner that affects the rights to a fair trial of persons charged with criminal offences. On the other hand, the colonial legacy bequeathed the post-colonial system with attitude that put the State before the individual. Thus, despite the provision of the right to a fair trial in the repealed Constitution, in practice, the State was still able to suppress its enjoyment.

This chapter is divided into two broad and somewhat independent substantive parts which are nonetheless tied together by reference to the schemes articulated in the Judicature Act and are aimed at shifting the discussion from the formal law (in the last chapter) to other contextual factors which are also very important in the operation of the right in the country. The first part (3.2) reflects on the provision of the Judicature Act with regard to the sources of law and explores how the operation of informal customary systems in criminal dispute adjudication is facilitated under this scheme. Against the backdrop provided by the Judicature Act, the second part (3.3) makes a historical assessment of how the norms of fair trial

developed within the Kenyan legal system from the pre-colonial period to the period after Kenya got her independence.

3.2. Pluralism under the Judicature Act

3.2.1. Introduction

Before we proceed to explore the relevance of informal customary dispute resolution system to the right to a fair trial by reference to the provisions of the Judicature Act, it is important to reflect on the background and general importance of the Judicature Act in the whole scheme for the protection of the right to a fair trial in Kenya. It is notable in this regard that the way the entire legal system in the country operates is set out in the Judicature Act.

Arguably the most important provision outside the Constitution insofar as the establishment of the legal system is concerned,² the Act provides in section 3 that the jurisdiction of all courts in the country shall be exercised, hierarchically, in conformity with (a) the Constitution; (b) all other written laws – including some Acts of the UK Parliament cited in its Schedule; and (c) the substance of the common law and the doctrines of equity, operating alongside statutes of general application and the procedure and practice observed in English courts up until 12 August 1897. Further, the Act provides that African customary law shall ‘guide’ the courts in the resolution of *civil cases* before them and quite importantly also stipulates that courts are to decide all cases ‘according to substantial justice without undue regard to technicalities of procedure and without undue delay.’

² Most writers on Kenyan law cite this as the basis for defining what the law of Kenya actually is (*see eg* Salim Dhanji, ‘Kenya’ in Dennis Campbell (ed), *Remedies for International Sellers of Goods* Vol II (Yorkhill Law Publishing 2008) 358; ‘Kenya’ in Chris Armstrong, Jeremy De Beer and Dick Kawooya (eds), *Access to Knowledge in Africa: The Role of Copyright* (UCT Press 2010) 86; Patricia Kameri-Mbote and Collins Odote, ‘Kenya’ in Richard Lord, Silke Goldberg, Lavanya Rajamani and Jutta Brunnée (eds.), *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press 2012) 296. The Judicature Act, s 3 is comparable to article 38 of the Statute of International Court of Justice which is considered to be a statement of what the sources of international law are. (For this conception of art 38 of the Statute of ICJ *see* Vladimir Duro Degan, *Sources of international law* (Martinus Nijhoff 1997) 2-8; Peter Malanczuk, *Akehurst's modern introduction to international law* (7th Rev edn., Routledge, London 1997) 36; Malcolm Nathan Shaw, *International law* (5th edn., Cambridge University Press 2005) 66).

The Act, however, puts limitations on the English common law, the doctrines of equity and statutes of general application in England and on African Customary law insofar as they are to be applied by the courts. Whereas common law, the doctrines of equity and statutes of general application can only be applied in the country 'if the circumstances of Kenya and its inhabitants permit,' African customary law will only operate in civil matters, and even then, only if it is not repugnant to justice and morality and when it is not inconsistent with any written law.

It is to be noted that the Judicature Act was enacted well before the coming into force of the 2010 Constitution. In fact, it has its genesis as a colonial ordinance meant to operate in the colony of Kenya, but was retained at independence in 1964 as an Act of the Kenyan Parliament.³ Consequently, the scheme of law that it supplies is not fully in tune with the new constitutional framework. For example, whereas the 2010 Constitution acknowledges international law adopted by Kenya as forming part of the national law,⁴ no reference to this source is found in the Act. It is, therefore, foreseeable that this statute will have to undergo amendment to attain conformity and may even be repealed in line with the requirement that all laws should conform to the system under the new Constitution.⁵

3.2.2. Relevance of the Judicature Act to the Fair Trial Discourse

Notwithstanding, its failure to include all the sources of law in Kenya as provided by the newly enacted Constitution, some important issues touching on the right to a fair trial in criminal justice are illuminated by the provisions of the Judicature Act. Foremost is the fact that a hierarchical structure of the material sources of law that supports a liberal scheme of

³ See eg RE 1948, Vol V.

⁴ Constitution (2010) art 2(6).

⁵ Ibid art 2(4) provides that any law that is inconsistent with the Constitution is void to the extent of the inconsistency. Schedule 6, s 7 provides that 'all law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution,' and Schedule 5 provides a timeline ranging from 6 month to 5 years under which enactments have to be made to comply with the new Constitution.

positive law (highlighted in chapter II) was contemplated by the Act. In keeping with section 3 of the repealed Constitution which provided that any law that was contrary to its specific provisions was void to the extent of the inconsistency,⁶ the Judicature Act also put the Constitution at the apex with all the other sources coming below it.

This provision was very important to the protection of human rights insofar as it elevated all rights in the Constitution including the rights to a fair trial to the proportion of *grund norm*; having power to nullify all contravening provisions of all other laws.⁷ For accused persons, it meant that where a particular statute would lead to limiting their rights, they could look to the Constitution for a reprieve. In *Godfrey Ngotho Mutiso v. Republic*,⁸ for example, the court found the section of the Penal Code that provided for a mandatory death sentence for those found guilty of murder to be antithetical to the Constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial.⁹ The Court noted that ‘while the Constitution itself [recognised] the death penalty as being lawful, it [did] not say anywhere that when a conviction of murder is recorded, only the death sentence shall be imposed.’

Secondly, the Act also gave the courts wide discretionary powers to give effect to the principles of ‘substantial justice’. The Court of Appeal, the High Court and all subordinate courts had to decide cases without undue regard to technicalities of procedure and without undue delay. This was in recognition that procedural technicalities tended in most cases to compromise expediency. It also supported the notion that ‘fairness’ in the application of rules

⁶ Comparable to the Constitution (2010) art 2(4).

⁷ For an assessment of whether the Kenyan Constitution stands as *grundnorm*, see J.O. Rachuonyo, ‘Kelsen's Grundnorm in Modern Constitution-making: The Kenya Case,’ *Verfassung und Recht in Obersee* (Vol 20, Hamburger Gesellschaft für Völkerrecht und Auswärtige Politik, 1987) 416.

⁸ Court of Appeal, Appeal No 17 of 2008.

⁹ The court found that compulsory death sentence in the Penal Code against the provision of s 77(4) of the repealed Constitution of Kenya on fair trial that provided that ‘no penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.’

of procedure may sometimes require a departure from the rigid application of technical rules by the courts. Courts, as custodians of the Constitution, were therefore given broader protective powers to free them from legal technicalities to ensure that judicial processes gave effect to the spirit of protection of human rights during adjudication.

The third factor that may be derived from the provisions of Judicature Act is that there is recognition that written law alone cannot supply a complete scheme for regulating legal relationships and courts need to be empowered to look beyond the statutes to other sources of rules for regulating social behaviour. Thus, as already highlighted in the previous chapter, courts are also empowered to continue to apply common law as well as doctrines of equity when determining legal disputes in Kenya. From these, procedures established by the medieval English system continue to affect the way Kenyan courts operated long after the end of colonialism; albeit with the stated limitations.

3.2.3. African Customs and Criminal Justice System under the Judicature Act

Of a more profound effect, the Act also recognised African customary laws as part of the law to ‘*guide*’ the courts in the country on how to adjudicate. In doing this, the Act created the structure for a plural legal system to operate in the country wherein the formal Western statutory and common law system was to coexist side by side with the pre-colonial African traditional systems. Thus, a socio-cultural dimension was added to the operation of the country’s legal system.

The acceptance of African customary laws was in recognition that although colonial machinations had supplanted indigenous law with received English common law, customary laws could never completely be replaced. It was realised quite early during the protectorate occupation that for effective administration of both the settler and native population, the

traditional practices of Kenyan communities would have to continue to have a broader impact on the way disputes were being resolved among the indigenous communities.¹⁰ This structure was to be retained even after independence in the scheme created under the Judicature Act.

It is, however, notable that, at independence, the Judicature Act deemed it inappropriate to make customary law applicable to criminal adjudications. During the colonial period, African customs had been used in all manners of dispute resolutions where both parties were native Africans. However, just before independence, an Order-in-Council disallowed courts in Kenya from applying the unwritten African customary law in criminal adjudication.¹¹ This was implemented through the African Courts Official Circular instructing African courts to terminate all prosecution under African customary law.¹²

The reason for prohibiting the use of African customary law in criminal matters may have been due to the belief that rules framed under African customary were incapable of meeting the high threshold generally required in order to protect individuals during trial that the Independence Constitution envisaged. Under the Universal scheme already established by the international instruments in existence at the time of Kenya's independence, the safeguards provided for criminal cases offered more comprehensive protection than those in civil disputes.¹³ In the European human rights jurisprudence, for example, the requirements inherent in a fair hearing concerning the determination of civil rights and obligations were not as stringent as in cases concerning the determination of criminal charges.¹⁴

¹⁰ Minneh Kane, J. Oloka-Onyango and Abdul Tejan-Cole, *Reassessing Customary Law Systems as a Vehicle for Providing Equitable Access to Justice for the Poor* (Conference Paper, Arusha Conference, "New Frontiers of Social Policy" – December 12-15, 2005) 5.

¹¹ Under the Order-in-Council of 1963, inserted to the Constitution of Kenya ss 8 (8) and (16).

¹² No. AC 13/1/11/70 (June 1966)

¹³ Under the UDHR. See also ECHR art 6.

¹⁴ In *Dombo v. Netherlands* (ECtHR 37/1992/382/460) for instance, the European Court of Human Rights clarified that under the European Convention, contracting States have greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases.

As was noted in part 1.2.3 of this thesis, the distinction between safeguards afforded in criminal and civil matters arose because in civil cases the parties were normally deemed to stand on a more equal footing as private citizens since, unlike criminal disputes, the State was not a party.¹⁵ Furthermore, in civil disputes there was no prospect of being subjected to punishments operative in criminal cases such as deprivation of life and liberty.¹⁶

In the situation in Kenya therefore, it may have been deemed that there being no formal written materials to which courts could refer when they applied customary law, it was inappropriate for court to refer to them in criminal cases. The lack of certainty as to what the customary law was in fact went against the principle that ‘no one may be deprived of his freedom except for reasons and conditions previously laid down by law.’¹⁷ Thus, just before independence, attempts were made to codify and/or restate African customary law to bring certainty to that area of law. This however went only as far as the codification of some rules relating to law on personal status such as marriage, succession, adoption and a few other areas.¹⁸

Nonetheless, even without State recognition of African customary laws in criminal disputes, the impact of these laws was not diminished. As we shall see in chapters VII and VIII, being very dynamic, the African customary laws have had the tenacity to entrench themselves within the legal framework.¹⁹ It has in fact been argued that the indigenous laws

¹⁵ Although the government can sue and be sued under the Government Proceedings Act, but in this case as a private entity and not as a sovereign authority.

¹⁶ Tinsley E Yarbrough, *Mr. Justice Black and his critics* (Duke University Press 1988) 62.

¹⁷ Eg Banjul Charter art 6.

¹⁸ Eg, Eugene Cotran, *Restatement of African Customary Law: Kenya* (Vol I on the Law of Marriage and Divorce; and Vol 2 on the Law of Succession).

¹⁹ As Mathieu Deflem and Amanda Swygart argue of African customary law in general in their article ‘Comparative Criminal Justice’ in Dupont-Morales, Hooper and Schmidt (eds), *Handbook of Criminal Justice Administration* (Marcel Dekker inc, New York 2001) 53-4.

have shown a lot of resilience and that the concept of ‘justice’ remains rooted in them.²⁰ Hence, even in civil cases, with the qualification as to their application so as not to override written law, in some cases, customary values have been interpreted to surpass statutes, principles of common law and the doctrine of equity, which appear above it in the hierarchy of legal norms under the Judicature Act. Such was the case in *Virginia Edith Wambui Otieno v. Joash Ochieng Ougo and Omolo Siranga*,²¹ where the customary law of the *Luo* was applied by the Court of Appeal to allow the clan of a deceased prominent lawyer to bury his remains against the will of his widow (and even against possible arguments under the Law of Succession Act).²²

A reason for the resilience of customary law is the fact that these laws ‘exist as part and parcel of the fabric of local customs,’ making it ‘heavily rooted in the sentiments and beliefs of the people.’²³ One cannot, therefore, divorce the impact of culture and personal beliefs from the ends sought when policies are adopted. Criminologists have, for example, associated the lack of recognition for culture in policy formulations as an underlying cause of crime.²⁴ The *social disorganisation* theory sees the lack of articulation of values within a culture or between culture and social structure as causes of crime.²⁵

In criminal justice, therefore, the processes adopted are normally expressed – or indeed justified – as reflecting African customary principles. Woodman and Obilade write:

As a result of African customary law, the processing of disputes within African societies tends to be less often by adjudication than by methods which seek an

²⁰ Chukwuemeka Ebo, ‘Indigenous Law and Justice: Some Major Concepts and Practices,’ in *Vierleljahresberichte* (No. 76, 1979) 139, 139.

²¹ Civil Appeal No 13 of 1987, [1987] eKLR.

²² See Evans Monari, ‘Burial Law: Reflections on the S. M. Otieno Case,’ (1988) 31 *Howard Law Journal* 667, 671.

²³ Chukwuemeka Ebo, ‘Indigenous Law and Justice: Some Major Concepts and Practices,’ in *Vierleljahresberichte* (No 76, 1979) 139, 139.

²⁴ Bueno De Mequita and Cohen, ‘Self interest, Equity and Crime Control: A Game-Theoretic Analysis of Criminal Decision Making,’ (1995) 33 *Criminology* 483, 485.

²⁵ Ibid.

agreed compromise between the disputants... In African societies, the maintenance of social balance and harmony through an outcome which both disputants will accept – at least nominally, and perhaps as a result of powerful social pressure – is more often stated as ideal²⁶

It is in this light that customary practises have even existed outside the State system when individuals have opted to settled disputes informally. This has created a tiered and interactive normative system which has operated within and without the formal state legal system.²⁷

Within the State system, it is therefore common to find that, on account of sensitivities to African customs, procedural law adopts a communitarian approach to dispute resolution. The Criminal Procedure, Code for example, expressly encourages resolution of some minor criminal offences in manners derivative of the customary moral values. The Code provides that:

In all cases the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated.²⁸

‘Compounding’²⁹ of offences under this section has been a useful tool seen as benefiting the wrongdoers, the wronged persons as well as the society. Compromising allows the parties to avoid protracted criminal litigation; saving time, cost and mental agony which characterise protracted litigation. The injured parties also end up receiving some compensation which might not be possible in case of criminal prosecution when the offender

²⁶ Gordon Woodman and A. Obilade (eds.), *African Law and Legal Theory* (The International Library of Essays in Law and Legal Theory, Legal Cultures 8, Dartmouth, 1995) xv.

²⁷ Patricia Kameri-Mbote, ‘Gender Dimensions of Law, Colonialism and Inheritance in East Africa: Kenyan Women's Experiences,’ *Verfassung und Recht in Ubersee*, (2002) 35, 373, 379-80.

²⁸ CrPC s 176.

²⁹ This is the term that was used in the Indian Criminal Procedure code (which applied to Kenya before the Kenyan Code was enacted) to refer to compromise agreements in criminal case.

is sent to jail. The public, for its part, is saved the expenses borne by the State and generally views justice to have been done to all parties concerned.

In a similar vein, an amendment to the Criminal procedure Code, which introduced plea bargaining also sought to infuse communal values to criminal litigation,³⁰ providing that plea agreement may be reached after consultation with the victims and with due regard to the interests of the community thereby recognising that community perceptions are central to effective criminal justice.³¹

It is not just minor offences that reflect the way that the effect of the communitarian customary law is felt. Even in more serious offences, the courts' attitudes may have been swayed by the desire to make good to the injured party as mitigation for a felony. This may be seen in the context of the judgement in *Republic v. Thomas Patrick Gilbert Cholmondeley*,³² where it seems that the accused person's offer to take care of the family of the deceased served as good mitigation as a result of which a less severe sentence was imposed for manslaughter committed by a Kenyan aristocrat of affluent colonial background.

Moreover, even within the State system, informal structures of criminal adjudication have operated. To a large extent, they have been validated by executive and administrative machineries of government. For example, the chief and members of the provincial administration, who are tasked with maintenance of law and order, have allowed elders to adjudicate in criminal offences under their official mandate, thereby relegating the formal courts which, by strict formal law, are supposed to have exclusive jurisdiction over dispute resolution.

³⁰ S 137B, introduced by Act No. 11 of 2008, s. 3

³¹ S 137D.

³² High Court, Criminal Case No 55 of 2006, [2009] eKLR.

More importantly, outside the State system is the tiered normative framework. As will be highlighted in chapters VII and VIII, customary law has enhanced the relevance of alternative and informal systems of disputes resolution. As the customs of the respective communities continue to operate, the tendency has been for custom to find recognition outside the State-centred systems of dispute resolution.³³ This has had the effect of reducing the standard of procedural safeguards to those suspected of commission of criminal offenses. If besides State law, another method of adjudication is recognised and gets greater validity than what is offered by the State, then State law suffers.³⁴

3.2.4. Conclusion

The Judicature Act reveals that although the sources of the right to a fair trial that we identified in the last chapter largely fall within the scheme it supplies, there is more to the operation of the right than what has been adopted in the formal sources that we highlighted in chapter II. Indeed, the plural legal system that the Judicature Act establishes is in acknowledgement that the operation of the law including procedural safeguards it offers is likely to be influenced by external factors such as customary values. It may be in this regard that a departure from formalism when the courts are adjudicating on matters before them is sought since formal procedures may depart from societal values if they are rigidly applied.

Furthermore, we have seen that, although prior to the adoption of the 2010 Constitution the value of customary systems in criminal proceedings were not given express recognition, its values continued to be reflected in practice outside the State established system with many

³³ Martin Chanock, 'Law, State and Culture: Thinking About "Customary Law" after Apartheid' *Acta Juridica*, 53 (1991) 67.

³⁴ Chukwuemeka says in regard to the system in Nigeria, in spite of statutory and common law provision which modified or supplanted aspects of traditions, cases of violation of customs are still decided at village level by clandestine or ad hoc tribunals, in spite of existence of formal courts which is referred to as 'people taking the law into their own hands.' (See Chukwuemeka Ebo, 'Indigenous Law and Justice: Some Major Concepts and Practices', *Vierteljahresberichte*, (1979) 76, 139, 139-40. In Kenya, this is seen in the *Mungiki* trials carried out by village militias.

individuals preferring to settle personal disputes with criminal elements through customary means.

As we shall see in Chapters VII and VIII, the fact that people prefer to employ informal system of dispute resolution is an indication that there have been failures in the State system to safeguard individuals' right to a fair trial. For example, when criminal trials in formal courts are never completed within a reasonable timeframe, or when parties do not feel that they are adequately endowed or empowered to effectively defend themselves through advocates, they tend to avoid the formal courts and employ their customary practice in resolving their disputes.

Moreover, the informal customary systems may even provide a better option for ensuring that the right to a fair trial is optimally enjoyed. As we noted in chapter I, there were some fundamental failures in the legal system in Kenya which resulted to an almost total breakdown of the law and order at some points in time. As Oyelade Olutunji postulates, the customary systems 'are useful when the formal State institutions are unable to reach the people, or where such institutions have broken down or are affected by civil strife and conflicts.'³⁵ He further notes that customary law tribunals are usefully since they are 'inexpensive, accessible and speedy, [and] users of the system easily understand their proceedings.'

³⁵ Oyelade S. Olutunji, 'Administration of Justice in Traditional Africa: What Lessons for Modern Adjudication?' (2010) 16 *East African Journal of Peace and Human Rights*, 294, 295.

3.3. Historical Perspective in the Adoption and Operation the Right in Kenya

3.3.1. Introduction

Having dealt with legal pluralism above, a second important aspect outside the formal law that arises for discussion is the more general impact that the colonial history has had on the operation of the right to a fair trial which we shall turn to in this part.

It is notable that the legal scheme supplied by the Judicature Act that we have explored already was a direct result of the legal history of Kenya. Indeed, pre-colonial and colonial history has been central to the development of law in Kenya and still continues to determine how procedures operate in the criminal justice system. This will explain some of the tensions that we identified in chapter I regarding to how the right operates. For instance, whereas colonialism introduced western notions developed in Europe into the legal system in Kenya, African customs with its communal outlook on dispute resolution processes operating as both moral and legal values continued to operate. Thus for example, while the adversarial system with its assumption that parties are best placed to defend their own courses dominates the formal legal system and directs the modes of formal disputation, the persistence of customary law has long promoted informal non-adversarial dispute resolution. Hence, as *the IBA Report on the Legal System and the Independence of the Judiciary in Kenya*, rightly suggested, the way both the public and those exercising state powers impacting the enforcement of human rights, and specifically the rights to fair trial in Kenya has to be viewed within a historical context.³⁶

This part, therefore, seeks to give a historical context to the right to a fair trial discourse by looking at the pre-colonial, the colonial heritages and the post-independence factors which

³⁶ *Report of the IBA on the Legal System and the Independence of the Judiciary in Kenya*, November, 1996 (London, 2001) 8.

informed the development of the Kenyan legal system and processes that were adopted in criminal justice system to safeguard the rights of the accused persons during criminal trials.

3.3.2. The Pre-Colonial Legal Systems and the Scheme of Fair Trial

Prior to colonial occupation, there existed diverse linguistic and cultural communities in Africa, each occupying defined geographical territories that superseded the current State boundaries.³⁷ All these communities had their own political systems and adopted diverse legal philosophies and orientations to suit their specific situations and meet their perceived social needs.³⁸ Regarding tribal/customary law in Kenya, Prof. Ojwang' writes that this is 'linked to the cultural activities of more than 30 tribal/linguistic communities,'³⁹ while in Nigeria, Ebo notes the existence of diverse cultural communities and laws that were specific to particular groupings. He writes:

Like other systems of law, indigenous law in Nigeria served the needs of only the specific group which accepted its authority. Thus, it was the possession and right of a restricted group... a panorama of indigenous law would appear as a kaleidoscope of shifting types.⁴⁰

It is also noteworthy that in many ways, the evolution of the political and administrative systems, upon which the legal institutions within the cultural communities were hinged, is not peculiar to Africa. These legal codes evolved in response to social needs just as in other legal cultures elsewhere in the world. 'In their scope and objective,' notes Ebo, 'the principles of the indigenous systems of law were not too dissimilar to those of other societies in other parts of the world'.⁴¹

³⁷ Thus, eg, the Maasai occupy both Kenya and Tanzania; the greater Luo speaking people are found in South Sudan, Uganda and Kenya; and the Bantus are found in almost all countries south of the Sahara desert.

³⁸ Amazu A Asouzu, *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* (CSICL, Cambridge University Press 2001) 115-7.

³⁹ Jackton Ojwang, 'The Meaning, Content and Significance of Tribal Law in an Emergent Nation: The Kenyan Case,' (1989) 4 *Law and Anthropology* 125, 126; see also Aylward Shorter, *East African Societies* (Routledge, London 2004) 1 where the East African society is defined as 'heterogeneous and fragmented.'

⁴⁰ Chukwuemeka Ebo, 'Indigenous Law and Justice: Some Major Concepts and Practices,' (1979) 76 *Vierteljahresberichte* 139, 139-140.

⁴¹ Ibid.

However, despite the wide array of social traditions in the country and the similarities with other established legal traditions, generalisations concerning the customary laws of traditional societies in pre-colonial Africa can still be made.⁴² For example, it has been argued of the Nigerian systems that ‘in spite of [the] wide ranging variability of patterns, certain basic principles and conceptions are common to all of them,’⁴³ and various authors have also been able to distinguish general characteristics applicable to all African systems of law that they refer to as ‘customary’, ‘native’ or ‘tribal’ laws.⁴⁴ Therefore, where the scheme of African customary law is assessed, it is convenient to look at pre-colonial Africa where these laws were not limited to any geographical territory. Indeed, a generalisation of the salient features of all these tribal laws has been made,⁴⁵ from which some common features which may have an impact on the understanding of the criminal justice system can be drawn.

The first aspect is the pre-colonial African societies’ tendency towards a communal scheme of subsistence.⁴⁶ Here, individuals’ lives revolved around communal arrangements in property ownership, dispute resolution and the general social administration. The hierarchy between individuals and groups influenced the indigenous views, which tended to emphasise the communal good and communal justice as the cornerstone of human existence.⁴⁷ Hence, processes in the justice system, in both civil and criminal spheres, pursued a primarily moral agenda for the benefit of community.

⁴² Eg Makau Mutua, *Human Rights: a Political and Cultural Critique* (University of Pennsylvania Press 2002) 74-7.

⁴³ Ibid.

⁴⁴ Gordon Woodman and A. Obilade (eds), *African Law and Legal Theory* (Dartmouth, Aldershot, 1995) xiv-xx.

⁴⁵ Ibid.

⁴⁶ Theo Sundermeier, *The individual and community in African traditional religions* (Hamburg, LIT, 1998) 16 - 17.

⁴⁷ Segun Gbadegesin, *African Philosophy: Traditional Yoruba Philosophy and Contemporary African Realities* (P. Lang 1991) 104.

The second commonality of customary dispute resolution in Africa is the general perception that both civil and criminal sanctions revolved around restorative justice. Criminal sanctions were seen as an attempt to repair the damage caused to the society by the commission of a wrongful act or by the breach of an obligation. The aim was to restore the balance and heal the relationships that have been affected by the purported infringement of societal values.⁴⁸ This general approach has been articulated by various writers. While Anderson relates this scheme to *Ubuntu* in contemporary South African,⁴⁹ Ebo writing of Nigerian societies notes:

The true aim of justice is restoration of the balance upset by an unjust act ... A more accurate view is to regard it as a compensatory device which usually prescribes the compensation to be paid by the individual or his family ... Replacement of stolen or damaged property or some other adequate amends for injury done to another's right is considered as essential step toward the restoration of the community's peace and state of equilibrium.⁵⁰

Another common aspect of African customary views on dispute resolution is that normally, legal sanctions were not framed with specific infractions in view. It has been argued that the traditional community justice system looked 'beyond isolated acts of malfeasance to emphasise the paramount necessity of healing any breach in interpersonal balance caused by wrongful behaviour or an action.'⁵¹ As a result, the African system did not distinguish between criminal and civil wrongs.⁵²

These common perspectives in the African customary system impacted heavily upon the views on what the appropriate procedures for dispute resolution were. For example, in the traditional settings, the issues for resolution, whether capable of categorisation into civil or

⁴⁸ AM Anderson, *Restorative Justice, the African philosophy of Ubuntu and the Diversion of Criminal Prosecution*, (2003) NCJRS Library collection, 6.

⁴⁹ Ibid, 9.

⁵⁰ Chukwuemeka Ebo, 'Indigenous Law and Justice: Some Major Concepts and Practices,' (1979) 76 *Vierteljahresberichte*, 139, 140.

⁵¹ Ibid.

⁵² Ibid, 141-2.

criminal domain, were never seen as private; everything was of public concern. Trials were, therefore, to be held in the open; normally under a tree at the village centre or at the main market square in the area.⁵³ The proceedings in dispute resolution were inquisitorial rather than accusatorial. Witnesses would be called and their evidence reviewed by the King/Chief or panel of elders and the accused person would be given an opportunity to defend himself before judgement was handed down.

It was also expected that the umpires would be neutral and would not have any interest that would create a bias in the cases they decided.⁵⁴ The adjudicators were not expected to exercise their judicial powers arbitrarily. However, they had to be sensitive to the wishes of the people as the authority of their decision depended on their acceptability by the society. The umpires, who were normally the chiefs/kings or their nominees or respected elders in the community could not risk social dissatisfaction and unrest.

Communities also developed mechanisms to ensure that impartiality was maintained. For example, the Baganda⁵⁵ had a popular adage that a monkey cannot decide the affairs of the forest, meaning that one cannot be a judge in his own cause.⁵⁶

However, it has also been argued that the structure that was presented by African customs could never accommodate all notions of fair trial as it is now understood. For strict impartiality in decision making was never possible in a customary approach. The adjudicators required social backing to sanction their decisions; therefore, they would definitely be swayed by the demands of the society rather than strict adherence to the notions of neutral justice. Holleman demonstrates this by an example of a Shona chief sitting as a judge. ‘Knowing

⁵³ Eg T. W. Bennett, *Customary law in South Africa* (JUTA 2004) 166.

⁵⁴ Though it was not unheard that in certain cases, matter in which adjudicators had an interest would come before them for trial.

⁵⁵ This is the largest tribal community in Uganda, which arguably shares similar system with the Luhyas of Kenya on the basis of their common heritage and Bantu ancestry.

⁵⁶ See Monica Twesiime Kiirya, *Decentralisation and Human Rights in Uganda* (HURIPEC 2007) 10.

which direction the strongest wind blows,' he writes, the chief 'gives his judgement accordingly. He is not expected to be impartial but to, subtly, give regard to what the people want.'⁵⁷

Moreover, as no distinction was made between civil and criminal sanctions, there has been a tendency to treat all legal wrongs without distinction and therefore to underplay the severity of criminal sanction and not to accord due importance to the safeguards to those accused of criminal offences. As we noted in the last chapter, in most instruments safeguarding fair trial, a greater emphasis is given to fair trial safeguards in criminal rather than in civil matters. A customary approach in adjudication, however, tends not to give any greater status to the constitutional efficacy of procedural safeguards in criminal justice.

Such is the system that foreign occupation found in operation in most parts of Kenya which, by and large, accepted values of fair trials in the resolution of disputes. But this was bound to change with colonialism. With a foreign system supplanted over the traditional systems of the communities, the system could not continue to optimally operate to safeguard individuals. For instance, the safeguards adopted in this typically inquisitorial system in the customary dispute resolution system could not be accommodated by a purely adversarial scheme that the colonial system established. Further, by a distinction being placed between civil and criminal matters in the colonial legal structures, the concerns of the African systems were not adequately accommodated in the modes of dispute settlement adopted.

3.3.3. The Colonial Legal Systems and its Impact on the Right

Turning to the colonial period, it is notable that the formal legal system operating throughout the territory of Kenya, as it is known today, has its basis in the Berlin Conference of 1885,

⁵⁷ JF Holleman, 'An Anthropological Approach to Bantu Law: With Special Reference to Shona Law', 10 *Rhodes-Livingstone Journal* 51, 53.

when the European powers partitioned East Africa into spheres of influence, with present-day Kenya passing to the British, under the Anglo-German agreement of 1890.⁵⁸

Prior to that, the Imperial British East Africa Association (IBEAA) – which later transformed into the Imperial British East Africa Company (IBEAC)) – had already been granted a royal charter, and under a lease agreement with the Sultan of Zanzibar, was running the affairs of the territory.⁵⁹ The Company, under its charter, had been empowered to undertake the duties of general administration, the imposition and collection of taxes and *the administration of justice* in the areas under its control.⁶⁰ It was ‘empowered to appoint commissioners to administer districts, promulgate laws, *establish and operate courts of justice*.’⁶¹ The courts that were established by the company were however more concerned with the British citizens and crown subjects than with the African population which continued to transact their affairs through their own traditional systems.⁶² When the IBEAC became insolvent, ten years later, the territory was made a British protectorate and put under the direct control of the Crown.

⁵⁸ Government Publications relating to African Countries prior to Independence: Government Publications relating to Kenya (including the East Africa High Commission and the East African Common Services Organisation) 1897-1963, Publication no. R96995, 2006, Microform Academic Publishers.

⁵⁹ Under the 1886 Anglo-German agreement, the interior of the present day Kenya, the hinterland of the coastal area was put under the British sphere of influence and in 1887; IBEAC was granted a concession to run these area. IBEAC was given a royal charter in 1888. (see Asian-African Legal Consultative Committee, *Constitutions of African States* (Vol 1, Oceania Publications, 1972) 606.

⁶⁰ Asian-African Legal Consultative Committee, *Constitutions of African States* (Vol 1, Oceania Publications, 1972) 606.

⁶¹ YP Ghai and JPWB McAuslan, *Public Law and Political Change in Kenya* (OUP, Nairobi 1970) 8.

⁶² Ghai and McAuslan note that under the 1884 Treaty of Commerce between England and Zanzibar, the IBEAC was essentially granted jurisdiction over British Subjects, whereas in the territories belonging to the Sultan of Zanzibar was under the legal authority of the Sultan and his agents, but the Company was granted jurisdiction over the Sultan’s Subjects through Concession Agreement of 1895. In the internal territories, authority was normally based on agreement between the Company and the local rulers, which in most cases never included positions in relation to the exercise of authority over native populations (Ibid 18- 9).

The laws applicable within the British protectorate territory⁶³ were made under various Orders-in-Council issued by London.⁶⁴ Of greatest relevance to fair trial rights was the East Africa Order-in-Council of 1897 that dealt mostly with judicial matters.

It was unclear though from the 1897 Orders-in-Council which law was to be applied to the native population, but Ghai and McAuslan write that the Order-in-Council had little application to local population apart from the fact that it created native courts to deal with disputes arising among the native population within the protectorate. This Order-in-Council was however to become of momentous significance as it created the reception date upon which certain laws of England that are applicable to Kenya were later to refer.⁶⁵

Two years after the 1897 Order, the East African Order-in-Council tried to remove the ambiguity in the created system by clarifying that unless a contrary intention appeared, the Queen's regulations were to apply to natives of the protectorate. Another Order-in-Council issued in 1902 empowered the Commissioner (who was in charge of the administration of the protectorate) to make ordinances for the peace, order and good government of 'all persons' in the protectorate.

The 1902 Order-in-Council also established the High Court with full civil and criminal jurisdiction over all persons and matters. Such jurisdiction was to be exercised in accordance with certain scheduled Indian enactments and in conformity with the common law, doctrines of equity and statutes of general application in force in England on or before 12 August,

⁶³ The initial territory extended to Uganda as part of the inland territory of the Sultan of Zanzibar (Y.P. Ghai and J.P.W.B. McAuslan, *Public Law and Political Change in Kenya* (OUP, Nairobi 1970) 3-5.

⁶⁴ This was in accordance with the Foreign Jurisdiction Acts, 1843-1890. The most important Orders in Council included the East Africa Order in Council of 1897, which gave the Commissioner law-making powers to make regulations for the peace, order and good government of British subjects; and the East Africa Order-in-Council of 1902 under which the Commissioner was empowered to make Ordinances for the administration of justice, the raising of revenue and generally for the peace, order and good government of all persons in the Protectorate.

⁶⁵ Judicature Act s 3.

1897. This body of laws was to be applied throughout the Protectorate and was to be administered in the High Court and magistrates' courts to persons of all races.

It is important to note though that Britain's main interest in Kenya was not to control local people, but to construct a railway that would connect Uganda, Zanzibar, and the Indian Ocean. The railway was important for strategic and economic reasons; it was to be the main link that would connect Lake Victoria (the source of the river Nile in Uganda, which was also under British control. Moreover, there was also an increased interest over the regions and territories in Africa, including East Africa to open up the area for western trade. Thus, the Brussels conference of 1890 that was concluded by the General Act of the Brussels Conference was convened with these aims. Ghai and McAuslan write, regarding the final Act of the 1980 Brussels Conference:

The powers agreed in the General Act that they were ... [to] open up Africa to "legitimate" commerce, that this could be done most effectively by the "progressive organization of administrative, judicial, religious and military services in the African territories placed under the sovereignty or protection of civilised nations."⁶⁶

In a sense, therefore, the system of administration that was set up by the European powers was for the expedience of commercial ventures, rather than for the wellbeing of the native population. The administration of criminal justice was therefore to be structured to operate towards this end.

The problem from the very onset of the protectorate administration was to try and use the limited resources available to it to economically administer the protectorate. This was to be done in a manner that would also justify the occupation of the African territory. Hence, the

⁶⁶ Y.P. Ghai and J.P.W.B. McAuslan, *Public Law and Political Change in Kenya* (OUP, Nairobi 1970) 10.

administration was also keen to pursue another avowed purpose; to *civilise the African native population* by introducing the natives to a ‘civilised system of law.’⁶⁷

To reconcile these issues, the 1897 and 1902 Orders-in-Council created a mixed system of law; where the Africans could continue to run their affairs and apply their laws insofar as this was compatible with western moral prescriptions of the time.⁶⁸ Under the 1897 Order-in-Council, provisions were made for native courts through which the Queen’s Regulations were applied to the Africans,⁶⁹ but which nevertheless continued to use African system of dispute resolution.

Mostly, formal legal prescriptions were thought to be necessary with regard to matters that it was felt were too close to the colonial schemes of exploitation of natural resources as well ‘civilising’ the Africans. Many English and Indian statutes were therefore made directly applicable to Kenya.⁷⁰ The Commissioner (and later on the Governor when the title was changed) was also permitted to make laws that were specific to the occupied territories. The Order-in-Council of 1902 (and those that followed it) empowered the Commissioner or Governor to make ordinances for the peace, order and good government of all persons in the

⁶⁷ This was the position of the missionaries who preceded colonialisms in setting base in this territory. See also John Fredrick Lugard, *Revision of instruction to the Political Officers on Subject Chiefly Political and administrative* (Waterlow and Sons Ltd, London 1919) 296.

⁶⁸ AN Allot, ‘Judicial Ascertainment of Customary Law in Africa,’ (1957) 20 *Modern Law Review* 244, 244-6.

⁶⁹ Native Courts Regulation 1897 ss 51, 52.

⁷⁰ The construction of the railway has led to large scale immigration of people from India who were imported to work on the railway. Other immigrants from Europe, Australia, New Zealand, and Canada followed as economic interests grew. European settlers from South Africa also moved to the new British territory. To cater for this, the Orders-in-Council establishing the East African Protectorate introduced a system that was closely associated with India. Thus for example, a list of Indian Acts such as the Indian Penal Code, the Criminal Procedure Code, and the Evidence Act were made applicable to Kenya. Moreover, appeals from cases in Kenya therefore lay to the High Court of Bombay until 1897. See generally, James Reed, ‘Justice on Appeal: A Century Plus of Appeal Courts and Judges in Tanzania’ in Chris Maina Peter, Helen Kijo-Bisimba (eds.), *Law and justice in Tanzania: quarter a century of the Court of Appeal*, (Mkuki na Nyota, 2007) 55-80.

protectorate, and established courts with full civil and criminal jurisdiction over all persons in the protectorate.⁷¹

The consequence of this was that the system of courts for Africans was organised to incorporate elements of law alien to the Africans but which were to be applied through Africans mechanisms of dispute resolution. According to Ghai and McAuslan, 'There was a system of justice for non-Africans and another for Africans.'⁷²

The African system was in turn characterised by the use of courts as an integral part of administration that were used as 'agents of modernization' introducing into the African 'reserves'⁷³ alien ideas and rules to coexist with the traditional pattern of life there, to an extent, displacing customary rules and procedures; but not entirely.⁷⁴ As Mullei notes in this regard:

... On establishing their system of administration of justice, the British administration formally recognised certain indigenous agents of dispute settlement by granting jurisdiction to existing courts of local chiefs and council of elders. However, although reportedly based on traditional institutions, these courts were an integral part of the unitary judicial system of the colony.⁷⁵

It has thus been suggested that 'the body of law known as the Kenyan legal system hardly reflects the values and morals of the Kenyan people since it was largely composed of English traditions.'⁷⁶ Nevertheless, in the application of the received laws to 'native' Africans, a consciousness was retained for the sensitivities of the local cultural environment.

⁷¹ YP Ghai and JPWB McAuslan, *Public Law and Political Change in Kenya* (OUP, Nairobi 1970) 20.

⁷² Ibid 359.

⁷³ African 'reserves' were settlements where the native population was displaced to make way for the White settlers.

⁷⁴ YP Ghai and JPWB McAuslan, *Public Law and Political Change in Kenya* (OUP, Nairobi 1970) 359.

⁷⁵ Christopher Mullei, 'The Judiciary and Constitutionalism: Creating New Ethos and Values,' in Lawrence Mute and Smokin Wanjala (eds.), *When the Constitution Begins to Flower* (Vol. 1, Paradigms for Constitutional Change in Kenya, Claripress, Nairobi 2002) 58 at 61.

⁷⁶ See Winnie Mitullah, 'exercise of Executive Powers in Kenya: The Case of Prerogative of Mercy' in Morris Odhiambo, Osogo Ambani and Winnie Mitullah (eds), *Informing a Constitutional Moment: Essays in Constitutional Reforms in Kenya* (Claripress, Nairobi 2005) 1, 4.

In *Nyali LD v. Attorney General*, Lord Denning, commenting on the operation of common law in colonial Kenya states that:

Just as an English oak, so with the English common law. You cannot transplant it to the African Continent and expect it to retain the tough character which it has in England [...] So with the common law. It has many principles of manifest justice and good sense which can be applied with advantage to the people of every race and colour all the world over; but it has also many refinements, subtleties and technicalities which are not suited to other folk... In these far off lands, the people must have a law which they understand and which they will respect. The common law cannot fulfil this role except with considerable qualification.⁷⁷

The historical events related to colonialism had three important consequences for the enjoyment of human rights in general and the enforcement of the right to a fair trial in particular.

First, the desire to use the tool of law to enforce oppressive and exploitative rules ensured that respect for human rights was placed on a back burner. Criminal procedure was seen as a tool for enforcement of law and order for the benefit of the affluent in the society while the masses of poor were kept at bay through harsh penal rules that were meant to serve as a deterrent for those who would think to commit offences. The notions of fair trial, though to an extent brought in by operation of common law, were not fully enjoyed and a lot of violations may have resulted.⁷⁸

An example of this was the creation of institution of local chiefs and headmen through the Native Authorities Ordinance of 1902 and 1912, and the Native Authority (Amendment) Ordinance of 1920 (later translated into the Chief's Authority Act)⁷⁹ which proved to be a very effective way of controlling the local inhabitants. The chiefs exercised some judicial

⁷⁷ [1955] 1 All ER 646 (CA) (see also [1957] AC 253 (HL)).

⁷⁸ We shall review this scenario of how rights were enjoyed or constrained in the colonial period in the next chapter (chapter IV of this thesis)

⁷⁹ KHRC, 'Independence without Freedom: The Legitimation of Repressive Laws and Practices in Kenya,' in Kivutha Kibwana (ed), *Reading in Constitutional Law and Politics in Africa* (Faculty of Law UON 1998) 113, 116. Regulation 22 of 1902 created the posts of Headmen to assist, along with the Chiefs, colonial authorities in maintaining law and order.

jurisdiction in which they purported to apply customary law in the resolution of disputes. They however abused their powers with impunity and often used their posts to settle disputes in their own favour.⁸⁰

Another example is in litigation before the African courts, where legal representation was not permitted. The litigants therefore had to make their own case as best as they could.

This practice cast African customary laws in very bad light and arguably led to the feeling that these laws are oppressive and should not be used in a democratic society. Thus, Prof. Muigai writes:

The colonial State had been both a physical and ideological imposition on the colonised people. It drained the people of all sovereignty and monopolised all powers of the society. It was an edifice of power unaccountable and largely discretionary but nonetheless supported and reinforced by the law.⁸¹

The second consequence of the colonial heritage results from the diverse systems of law developed to regulate the relationship of the various people who lived in the colonies. A separate legal regime existed and was applied to the Whites, with statutes in existence in India and England being made applicable to them. For the native population, the applicable law was customary law, insofar as it was not inconsistent with the aims of the colonial establishment to keep an orderly society in the colony. For the Asian communities that had been brought in to help in the construction of the railway, in matters pertaining to their personal law, they were allowed to apply their own laws.⁸² As already mentioned, for the African, the bulk of the litigation was disposed of by the native courts, which administered both local customary law as well as statutory and received laws. And even in higher courts,

⁸⁰ KHRC ibid 117.

⁸¹ Githu Muigai, 'Legal Constitutional Reforms to Facilitate Multi-Party democracy: The Case of Kenya' in Joseph Oloka-Onyango, Kivutha Kibwana and Chris Maina Peter, *Law and Struggle for Democracy in East Africa* (Claripress, Nairobi 1996) 526, 530-1.

⁸² Thus, in relation to laws of marriage, succession, adoption etc, Indians were allowed to apply Hindu law while Muslims could also apply their own laws on these issues.

the High Court and the Court of Appeal were also required, when applying the general law in cases to which Africans were parties, to be guided by native law and custom. As a consequence, a system that was highly discriminatory was entrenched by the colonial administration violating the basic tenet that fair trial has to be accorded equally to all groups.

The third and most important consequence of the historical heritage and the pluralistic scheme of law that was introduced to the Kenyan legal system relates to the general perception of the role of law as a tool of social organisation that was exploited by the government to suppress dissent leading to the loss of faith in the state sanctioned laws.

It is against this colonial backdrop that independent Kenya built her post-colonial legal system.

3.3.4. The Post Independence Structure

Moving on to the independence period, the constitutional order that was adopted was not autochthonous but largely a result of compromises negotiated between Kenyan leaders and the British establishment during the Westminster Constitutional Conferences. Consequently, the independence legal system retained the subtleties of the colonial order. In fact, most colonial legal institutions continued to operate after independence with little cosmetic modifications in some cases.⁸³ As Prof Muigai aptly notes, other than renaming the statutes ‘Acts’ (instead of ‘Ordinances’ as they were previously known), the entire body of colonial law was retained at independence as part of the new nation.⁸⁴

Moreover, the plural legal system that had operated during the colonial period was retained at independence with common law and statutes still operating alongside African

⁸³ E.g., the courts were restructured with magistrates being classified as district magistrates, and resident magistrate who now exercised only judicial functions.

⁸⁴ Githu Muigai, ‘Legal Constitutional Reforms to Facilitate Multi-Party democracy: The Case of Kenya’ in Joseph Oloka-Onyango, Kivutha Kibwana and Chris Maina Peter, *Law and Struggle for Democracy in East Africa* (Claripress, Nairobi 1996) 526, 530-1.

customary law. For example, it has been argued that ‘The very first law handed down by the British to govern Kenya created a tradition of an all-powerful and unaccountable Executive,’⁸⁵ which continued to compromise the independence of the Judiciary even after independence. According to Prof Muigai:

The colonial legal order, the hand maiden of the colonial State, was dominated by a labyrinthine bureaucracy and highly coercive machinery. Colonial law reflected the authoritarian character of the colonial State and its autonomy from the people it governed... The Corpus of repressive laws which ranged from the Chief’s Authority Act, though the Public Order Act to Preservation of Public Security Act had been used in one form or another by the colonial regime to repress African nationalism and generally to subjugate and humiliate the colonised people ... the Judiciary was partisan against African nationalism and in favour of colonial rulers.⁸⁶

Noteworthy however, a bill of rights was introduced into the independent Constitution that directly recognised the right to a fair trial. This went a long way into enshrining the essence of these rights to the administration of criminal justice. But, what was essentially a liberal-democratic Constitution was superimposed over an authoritative public law system. This has been one of the most significant themes in Kenya’s constitutional and political history; repression continued to operate in spite of constitutional protection of rights.

Another notable aspect of the post-independence practices was the attitude adopted by the respective governments with regard to the human rights safeguards in the Constitution. Successive governments did not match the scheme of placing human rights in the Constitution. In the first place, their entrenchment there was not intended for the protection of the population against State excesses. Rather, this was meant to offer protection to foreigners who wanted to remain in Kenya on account of the extensive investment that they had made.

⁸⁵ KHRC, *Independence without Freedom: The Legitimation of Repressive Laws and Practices in Kenya*,’ in Kivutha Kibwana (ed), *Reading in Constitutional Law and Politics in Africa* (Faculty of Law UON 1998) 113, 116.

⁸⁶ Githu Muigai, ‘Legal Constitutional Reforms to Facilitate Multi-Party democracy: The Case of Kenya,’ in Joseph Oloka-Onyango, Kivutha Kibwana and Chris Maina Peter, *Law and Struggle for Democracy in East Africa* (Claripress, Nairobi 1996) 526, 530-1.

Secondly, the repression that was central to colonial rule continued to be experienced after independence.⁸⁷ In fact, the wholesome importation of colonial laws into the post-independence constitutional and political order, it has been argued, ‘meant that the new government was armed with a formidable weapon’.⁸⁸ Thirdly, constitutional amendments that compromised the scheme of the liberal Constitution were done in the name of Africanisation or localising the Constitution.⁸⁹ Hardly five years after independence, ten amendments had already been made to the constitution whose cumulative effect was to vest extensive powers in the person of the President and erode both judicial and legislative independence and powers to provide effective checks against executive excesses.⁹⁰

Hence, most of the things that ailed the formal system that we discussed in chapter 1.3 must be understood in the historical context even as we aim at enforcing the new Constitution.

3.4. Conclusion

We may conclude from the foregoing that beyond the positivist dimensions of procedural safeguards presented in chapter II, there also exist other important factors outside the formal laws which have underpinned the structures set up to enforce the right to a fair trial in Kenya. Indeed, we have seen that the fair trial safeguards in the repealed Constitution and other laws were largely formulated against a very particular historical, social and political backdrop that cannot be neglected in a proper conceptualisation of the right.

⁸⁷ The effect of colonialism on the post-independence development and application of norms of fair trial will be discussed more extensively in the next chapter (Chapter IV)

⁸⁸ Githu Muigai, ‘Legal Constitutional Reforms to Facilitate Multi-Party democracy: The Case of Kenya,’ in Joseph Oloka-Onyango, Kivutha Kibwana and Chris Maina Peter, *Law and Struggle for Democracy in East Africa* (Claripress, Nairobi 1996) 526, 530-1.

⁸⁹ Gibson Kamau Kuria, ‘Returning Kenya to its Original Values’ in Joseph Oloka-Onyango, Kivutha Kibwana and Chris Maina Peter, *Law and the Struggle for Justice in East Africa* (Claripress, Nairobi 1996) 341, 350.

⁹⁰ See Winnie Mitullah, ‘Exercise of Executive Powers in Kenya: The Case of Prerogative of Mercy’ in Morris Odhiambo, Osogo Ambani and Winnie Mitullah (eds), *Informing a Constitutional Moment: Essays in Constitutional Reforms in Kenya* (Claripress, Nairobi 2005) 1, 14.

It has thus began emerge from the investigation in this chapter that, firstly, even without African customary laws being adopted as part of the criminal justice framework, their relevance in dispute adjudication in the country was never diminished. The fact that they were formally recognised (in civil justice system) within the scheme of legal pluralism established by the Judicature Act enhanced their legal relevance. Even today, many individuals who are victims of crime will still prefer to have those cases resolved informally out of court.⁹¹

Secondly, the chapter has also highlighted that the failure of the formal legal system to safeguard the right to a fair trial for individuals accused of criminal offences has been influenced by the historical context of the legal system which must therefore be addressed if the newly enacted Constitution is to ensure that there is better enjoyment of the right.

More attention will therefore be paid to these contextual factors in subsequent parts of this thesis. While it will be argued in the next two chapters that the lack of independence and impartiality in the institutions of administration of criminal justice must be understood against the historical backdrop of the Kenya legal system, chapter VI will focus on poverty and illiteracy as important factors constrain the enjoyment of the right in the country. Finally, in chapters VII and VIII we shall review the place informal customary system to the fair trial discourse in criminal justice.

⁹¹ This theme will be the primary focus of chapter VII and VIII.

CHAPTER IV:

INDEPENDENCE AND IMPARTIALITY OF THE JUDICIARY

This chapter reflects on the overarching question of the independence and impartiality of the Judiciary as cornerstones of the protection of the right to fair trial. It makes an assessment of the concerns that have arisen from the effective insubordination of the Judiciary to the Executive arm of government from the colonial times up to the 2010 when the Lancaster Constitution was repealed. It also discusses the challenges that the 2010 Constitution faces in addressing the question of independence and impartiality of this important arm of government.

4.1. Introduction

The aspects of independence and impartiality of the Judiciary as values of the right to a fair trial were briefly introduced earlier in parts 1.3.3.1 and 2.4.2. The two concepts are multidimensional; having structural and procedural angles.¹ Their structural angle relate to the general characteristics that the Judiciary should possess as an autonomous organ of the State, while their procedural angle is aimed at directing how adjudication should be done by supplying the parameters through which the trial itself is to be measured.

Although closely related insofar as they seek to ensure that court processes are handled without bias and in a manner that attracts confidence of the end users of the process, independence and impartiality of the Judiciary as juridical concepts are quite different. Independence, as Winluck Wahiu, notes implies a ‘special quantitative as well as qualitative constitutional status or relationship between the judicial arm and other arms of government.’² It is concerned with the institutional autonomy or structural independence of the Judiciary *vis-*

¹ Donna Gomien, David John Harris, Leo Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter* (Council of Europe publishing 1996) 157.

² Winluck Wahiu, *Independence and Accountability of the Judiciary in Kenya* (Kituo Cha Katiba) available at: http://www.kituoachakatiba.org/index2.php?option=com_docman&task=doc_view&gid=364&Itemid=27 accessed 10 August 2012.

à-vis the Executive and the Legislature. Impartiality, on the other hand, implies firstly, a required state of mind or attitude of a judicial officer, in the exercise of power to act with autonomous judicial discretion; and secondly, the existence of safeguards that ensure that extraneous influences do not adversely affect adjudicatory processes.

The importance of the independence of the Judiciary and impartiality of judicial officers arise not only from the fact that it is the judicial institution that is tasked with the actual adjudication of disputes, whether civil or criminal, but also due to the fact that it is the courts that are empowered to enforce the rights of individuals.³ In Kenya, these roles are further enhanced by the superior courts having the power to declare null and void all laws that impugn the Constitution as well as to enforce human rights in general.

All these roles have a strong bearing on the protection of the right to a fair trial leading Prof. Yash Ghai to assert that the acceptance and enforcement of human rights depends on the legal institution itself.⁴ For example, while it is the courts that are required to give accused persons every opportunity to offer effective defence when they appear before them, the same courts are also duty-bound to constantly ensure that the Executive, through the director of Public Prosecutions, does not use the criminal process to fight its perceived opponents.⁵ Moreover, superior court may also be called upon to declare attempts by legislators to make laws that sanctions secret trials unconstitutional.⁶ These mandates can only be effectively carried out if the Judiciary is independent from the executive and the legislative arms of government, whose functions it is supposed to checks.

³ Constitution (2010) arts 22, 23 are similar in effect to s 84 of the repealed Constitution.

⁴ Yash Ghai, 'The Kenyan Bill of Rights: Theory and Practice' in Philip Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford University Press) 199-240.

⁵ This power is vested on the High Court, but appeals from it would go to the Court of Appeal and the newly established Supreme Court under Constitution (2010) Ch 10 (arts 163-168).

⁶ Constitution (2010) art 50(2)(d) entitles individuals to a public trial. However under sub-clause (8), this 'does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order or national security.'

According to Prof. Makau wa Mutua, the independence of the Judiciary requires a certain social system that supports general acceptable legal structures.⁷ These structures are underpinned by, among other things, adequate financial support for the Judiciary; institutional and budgetary autonomy for the organ; security of tenure for judges and magistrates; and internal disciplinary mechanisms for judicial officers.

Unfortunately, as we have already highlighted in the discussions in the previous chapters, the system in Kenya, and especially under the recently repealed Constitution, did not fully adapt to these structures. This chapter therefore seeks to interrogate the issues that created the backdrop against which notable problems were experienced in the establishment of the Judiciary as an independent and impartial guarantor of the constitutional rights of accused individuals. Besides identifying the relevant contextual (historical and political) factors, it shall also revisit the operation of the formal law by specifically highlighting the notable structural defects that existed under the repealed system.

The chapter has six substantive parts. The first part [4.2] reviews the evolution of criminal justice institutions from the colonial to the post-colonial period but before the new Constitution was enacted, focusing specifically on the factors that gave way to the attitudes that constrained the enjoyment of the right to a fair trial. The second part [4.3] looks at political influences that negated the independence of the Judiciary while the third part [4.4] focuses on the influences of corruption, ethnicity and cronyism on the independence of the Judiciary. In the fourth part [4.5], we shall reflect on the structural setup in the repealed Constitution which denigrated the provisions safeguarding the independence of the Judiciary while in the fifth part [4.6] highlights of how the new constitution has sought to address the issue of judicial independence will be offered, leading to the argument in the final part [4.6]

⁷Makau wa Mutua, 'The Ideology of Human Rights' in MK Addo, *International Law of Human Rights* (Dartmouth) 110.

that the 2010 Constitution has not created a panacea to resolve the whole range of problems that led the Judiciary to be dependent and partial under the repealed regime and that some issues of concern still persist even under the reformed structures.

4.2. Historical Influences to Institutional Development

As we alluded to in the last chapter, the structure and functioning of the Kenyan legal system has evolved within a historical context. This part aims to look at the particular historical influences to the development of the Kenyan Judiciary. It is argued that the system established by foreign settlement in the country bequeathed it with a Judiciary that was largely subservient to the executive organ of the State.

4.2.1. Colonial Influences

We have already seen that when the British took charge of the territory of Kenya under the Anglo-German agreement, they established a legal system that operated on both the precepts of the English Common Law introduced from Britain and India by the settler population, customary laws that governed the native communities, and various other principles set in place for the expediency of colonial administration.⁸

This very complex system was meant to govern a likewise complex socio-political environment made up of diverse racial, cultural and ideological grouping using very meagre resources which could not sustain independent organs that operated autonomously. And it is from this colonial system that the post-independence development of institutions of administration of justice emerged with structures under which courts were effectively subordinated to other State organs.⁹

⁸ See generally Channan Singh, 'The Republican Constitution of Kenya: Historical Background and Analysis,' (1965) 14 *International and Comparative Law Quarterly*, 878.

⁹ Maurice Nyamanga Amutabi, 'Power and Influence of Court Clerks and Translators in Colonial Kenya' in Benjamin N. Lawrance, Emily Lynn Osborn and Richard L. Roberts (eds), *Intermediaries, Interpreters and*

During the colonial period, the predominant view was that State security/existence, and not individual rights, was the paramount aim of administration of justice. The administration's main thrust was to use the most inexpensive means of ensuring effective administration that would encourage settlers to economically exploit the territory.¹⁰ Thus, in general, most violations of the right to a fair trial arose from the structures and institutions of administration of justice that were established at that time.

In relation to the judicial set-up, there was a lack of independence of the Judiciary due to the absence of a clear separation of power between the various branches of government. As the settler government had limited capacity to set up an effective administration for both the 'natives' and settler population, it sought to optimally utilise its limited human resources to entrench its rule. In that environment, administrative officers employed by the colonial government were given both executive and judicial responsibilities. Senior Commissioners and District Councils that were essentially executive organs were, for example, given enormous judicial roles.¹¹ As members of the Executive, these officers were tasked with the duties of general administration; to oversee law and order, including the power of arrest and detention of suspects, and also to investigate and prosecute breaches of law. Their judicial roles were therefore compromised by their power with regard to their other roles.

The merger of the Executive and the Judiciary existed even at very low levels of administration. Under the Native Tribunal Rules of 1913,¹² a council of elders which was

Clerks: African Employees in the Making of Colonial Africa (University of Wisconsin Press 2006) 202, 216. See also Charles Hornsby, *Kenya: A History Since Independence* (IB Tauris 2012) 1- 19.

¹⁰ YP Ghai and JPWB McAuslan, *Public Law and Political Change in Kenya* (OUP, Nairobi 1970) 359.

¹¹ Under Criminal Procedure Ordinance 1913, s 348A, Senior Commissioners (alongside the Magistrates) were given absolute jurisdiction only over the black members of the community, while in cases involving the white settler population, where punishment for the offence exceeded six months, the consent of the accused was required to give the Senior Commissioners.

¹² R 5(1).

primarily administrative – aimed at the maintenance of law and order in native reserves¹³ – was also given jurisdiction on petty criminal matters where both complainants and accused individuals were from the same community over which the councils exercised jurisdiction.¹⁴

At the higher level of the Judiciary, the Court of Appeal for Eastern Africa – which heard appeals from Kenya – seemed to be quite independent. Indeed, the significance of this Court, as Prof. Read notes, was in its ‘marking the separation of the judicial function from the political role of the Consul General.’¹⁵ However, some concerns persisted as the Court was constituted of judges who concurrently served in the High Courts in their respective countries.¹⁶ It was therefore, possible that a judge could find himself sitting to hear an appeal from his own decision.¹⁷ This State of affairs lasted until 1921 when the Court was reorganised to extend its territorial jurisdiction. It was then stipulated that a judge could not sit to determine an appeal from his own decision. Nonetheless, it is still arguable whether real impartiality was possible where the judges heard appeals from decisions of their peers in rank and colleagues in the same bench knowing that the same judges would also seat to determine appeals from matters that that they had decided.

The merger of the Executive and the Judiciary, which we identified earlier, bore quite heavily on right to a fair trial. Beside the general fact that it negated the essence of independence of the Judiciary, even the limited safeguards offered were compromised and

¹³ This was used to refer to African settlements where the black population were displaced to.

¹⁴ This aspect was emphasized by the Chief Justice in his Circular to Magistrates 2/1919, (1922-3) 9 KLR 177.

¹⁵ James Read, ‘Justice on Appeal: A Century plus of Appeal Courts and Judges in Tanzania’ in Maina Peter and Kijo-Bisimba, *Law and Justice in Tanzania: Quarter of a Century of the Court of Appeal* (Mkuki na Nyota/HLRC, Dar Es Salaam 2007) 55, 60-1, 63-6. The Consul General had before then held judicial power in the Consul court, although as early as 1980, Consul Courts were being presided over by professional judges.

¹⁶ The court had jurisdiction at various times, from 1902 to 1977 over the territory of Kenya, Uganda, Aden, Somaliland, Tanganyika, Zanzibar, Seychelles, and Nyasaland. (See James Read, ‘Justice on Appeal: A Century Plus of Appeal Courts and Judges in Tanzania’ in Maina Peter and Kijo-Bisimba, *Law and Justice in Tanzania: Quarter of a Century of the Court of Appeal* (Mkuki na Nyota/HLRC, Dar Es Salaam 2007) 55, 60-1).

¹⁷ In England, this had happened in *R v. Tolson* (1889) 23 QBD 168, where James Stephen had decided the original case in the High Court, and was also part of the CA which reversed his decision.

could not ensure fair trials. For example, since the Senior Commissioners who were also Magistrates were not trained in administration of justice, it was pertinent that any decision they made were to be revised by the professional Supreme Court. But the procedures used caused some concerns. The power of revision was similar to the appellate jurisdiction vested upon the same court, but the decision confirming or revising the order was deemed to have been made by the Magistrate or the Senior Commissioner who initially tried the case. The problem was that accused were never called upon to present their cases during the revision proceedings even where certain clarifications were required.

Thus, in *Suleiman Ahmed and Others v. R*,¹⁸ the appellant, native Nubians who had been arrested in Banned Forest area were charged with unlawful assembly while armed with dangerous weapons and were convicted and sentenced. However, during the revision proceedings, the Court of Appeal substituted their conviction with one made under a separate section. Therefore, when the appellants lodged their appeals, they did not know that the Trial Magistrate's ruling had actually been changed. They nonetheless sought to have their appeals heard even after this came to the attention at the appeal stage, but the Supreme Court declined holding that:

It [was] not open to any court, whether upon hearing of an appeal or otherwise to deal with an order made in revision; and whether the procedure followed in the making of such order was regular or irregular is a question into which this court may not properly enquire.¹⁹

It is on this foundation of the legal system that combined judicial with executive roles of the State in the same persons, and which did not also care to safeguard judicial impartiality that the Kenyan Judiciary was built to become an integral part of the government; meant to

¹⁸ Criminal Appeal No 27 of 1922, (1922-23) 9 KLR, 19.

¹⁹ Ibid 21.

serve the interest of the administration. This attitude persisted even after the separation of the Judiciary from the Executive.

4.2.2. Post-Independent Developments

At independence, even though a Bill of right was incorporated in the Constitution, which largely stipulated for separate organs to carry out State functions, because of the traditional disregard of independence of the Judiciary inherited from colonial time, it did not take long before their institutional independence began to be watered down without people raising any question about it.

The constitutional amendments were aimed at removing the provisions that secured human rights in the name of the security of State and public good along the lines that the colonial administration had operated; but mostly in order to strengthen the rule of those who had taken power at independence.²⁰ One such amendment removed the security of tenure of the Chief Justice and judges of the Court of Appeal and High Court so that they serve at the pleasure of the President who was the appointing authority.²¹ The government then went ahead to remove those who were perceived to be independent-minded by not renewing their contracts.²² Those whose tenure could not be terminated in this manner were abruptly transferred to other stations that were quite remote and were deemed to be unfavourable.

These moves were behind most of the degeneration from a more democratic independence government to authoritarian regimes within the first and second republics in

²⁰ Up to the 1992 when multipartism was re-introduced into Kenya, more than 30 amendments had been made to the independent Constitution (see Willy Mutunga, 'The Need for Constitutional Changes' in Kibwana, Maina Peter and Oloka-Onyango, *In Search of Freedom and Prosperity: Constitutional Reform in East Africa* (Claripress 1996) 410, 410).

²¹ This was done through the 22nd amendment to the Constitution done in 1986. Tenure was restored by the 25th Amendment in 1991.

²² Nowrojee gives the example of Mr. Justice Couldrey who was let go in November 1993 and Mr. Justice Torgbor in July 1994 (Pheroze Nowrojee, 'Why the Constitution Needs to be Changed,' in Kibwana, Maina Peter and Oloka-Onyango, *In Search of Freedom and Prosperity: Constitutional Reform in East Africa* (Claripress 1996) 386, 398).

Kenya.²³ The lack of judicial clout enabled the Kenyatta and Moi governments to criminalise political dissent by using criminal justice system to shut up their critics. It was possible to prefer trumped up charges against dissidents without anyone raising a voice.²⁴

Granted, for some time, an independent Judiciary was secured by the revival of the East African Court of Appeal (born out of the colonial Court of Appeal for Eastern Africa) that served as the final court of appeal for the three East African Countries of Kenya, Tanzania and Uganda after their independence.²⁵ The Court was staffed with judges from the three countries who were therefore not institutionally beholden to the Executive of any one particular country. The Court itself was quite keen to establish itself as an impartial tribunal by encouraging openness in its functioning. In *Omari Musa and Others v. Republic*, for example, Justice Newbold sitting in the court was categorical that:

[Justice] is not a cloistered virtue. It is a tree under whose spreading branches all who seek shelter will find it. But it is a tree which flourishes in the open, in the glare of public scrutiny ... if it is kept in the darkness of secrecy this tree will wither and its branches become deformed.²⁶

Unfortunately, the Court only lasted up to 1977. When the East African Community collapsed, its organs were wound up and the Court was replaced by separate appellate courts in each member country.²⁷ In Kenya, the Court of Appeal was entrenched in the Constitution

²³ In the use of 'republic' reference is made to the successive governments from the Kenyatta, to Moi and finally the current Kibaki rulership.

²⁴ See Kivutha Kibwana, 'One Year after Multi-party Elections: Whither Patriotism, Democracy and Kenya?' in Kibwana, Maina Peter and Oloka-Onyango, *In Search of Freedom and Prosperity: Constitutional Reform in East Africa* (Claripress 1996) 311, 331.

²⁵ Tanganyika got independence in 1961, Uganda in 1963, Zanzibar in 1964, and Kenya in 1964. After the unification of Zanzibar and Tanganyika to form Tanzania, the three countries created the East African Services Organisation (EACSO). Integration had already been mooted as part of the unification of the East African Countries to a federation during colonial time but had not been successful then instead, the East African High Commission that was the predecessor of the EACSO. A single appellate Court was part of the EACSO. (For an in-depth discourse on this, see PLO Lumumba, 'The East African Community Two: Destined to Succeed or Doomed to Fail?', (2009) 5 *Law Society of Kenya Journal*, 105 particularly 107-13).

²⁶ [1970] EA 42

²⁷ See James Read, 'Justice on Appeal: A Century Plus of Appeal Courts and Judges in Tanzania,' in Maina Peter and Kijo-Bisimba, *Law and Justice in Tanzania: Quarter of a Century of the Court of Appeal*, (Mkuki na Nyota/HLRC, Dar Es Salaam 2007) 55, 60-1).

as the highest court of the land. This effectively removed the cushion that the international appellate court had had and subjected the appeal process to the exigencies of national politics.

4.3. Political Influences

Indeed, it is after the collapse of the East African Court of Appeal that repression as a tool to check political opposition and suppress political dissent rose to its peak. Without a neutral overseer, Kenyan judges, as in the colonial period, were given to the bidding of the Executive as the government set out to utilise judicial devices and court proceedings to bolster existing power relations and control and entrench them.²⁸ In sensitive cases, trials were shrouded in secrecy; carried out without any warning to the accused person's relatives or lawyers.²⁹ Courts were known to give urgent orders that suited the Executive organ and judges could even constitute these courts in their houses to hear cases well beyond mid-night in disregard to the principle of open justice.³⁰

In these subservient courts, sentences based on the accused persons' confessions were easily handed down without the court seeking to know how the confessions were obtained.³¹ Claims of torture were habitually brushed aside as unfounded and unproven even when the accused bore signs of recent torture.³²

²⁸ See 'The Politics of Justice in Kenya' in Institute of Race Relations, *Race and Class*, 3 (Sage 1983) 245, 247.

²⁹ *The Making of the Constitution*, An NTV-Kenya TV Documentary series aired in 2010 (particularly part 3, available on Youtube)). Lawyer Betty Muringi and Raila Odinga (himself a detainee who later become the Prime Minister of Kenya) assert that trials were indeed known to have been taken place at night with a complacent 'subdued Judiciary'.

³⁰ Pravin Bowry, 'Shutting doors of justice,' *The Standard*, Nairobi, 21 October 2009.

³¹ Eg Lawyer Ng'ang'a Thiong'o was convicted for sedition on his own plea of guilty in 1986.

³² In the *Mwakenya* trials, the accused persons are said to have been given the option of confessing and receiving jail terms, detention without trial, being tortured to death, or be sentenced for treason which was punishable by death (KHRC, 'Independence without Freedom: The Legitimation of Repressive Laws and Practices in Kenya' in Kivutha Kibwana (ed), *Reading in Constitutional Law and Politics in Africa* (Faculty of Law UON 1998) 113, 136; Amnesty International, Kenya: *Torture, Political Detention and Unfair Trials* (1987). For use of torture in Kenya, see generally William Mbaya, 'Criminal Justice in Kenya: Role of the Judiciary in Safeguarding the Pre-Trial Rights of Suspects,' in Kivutha Kibwana (ed), *Reading in Constitutional Law and Politics in Africa* (Faculty of Law UON 1998) 298.

In *Mutunga v. Republic*,³³ one of the rare cases that came to the open court, the appellant³⁴ was arrested and charged at the Chief Magistrate's Court with being in possession of seditious material. He approached the High Court to challenge the Chief Magistrate's decision after several unsuccessful bail applications. In its ruling, the High Court seemed to follow the policy of suppression adopted by the State at the time.³⁵ It held that in line with the deeply held notion that subversion ranked as one of the worst felonies, the gravity of the offence was an ample justification for the prolonged detention. It further held that extended detention was necessary since investigations were required on the origin, authorship, printing, publication and circulation of the documents found in the Applicant's possession. This was despite the fact that the Prosecution had not brought up this contention in court and that their proof would be of no value to the case before that Court.

In the sensitive cases, courts usually laid emphasis on the colonially developed notions that State wellbeing overrode the enjoyment of human rights; that rights only existed and were enforceable where law and order prevailed.³⁶ This culminated into a dubious ruling in *Republic v El Mann* – a decision that held sway for a long time.³⁷ In this case, the accused had sought to prevent the use of certain self incriminating evidence on the ground that it violated his right to a fair trial.³⁸ However, by restrictive interpretation of the Constitution to facilitate 'public good,' the Court found the evidence admissible. In the process, the Court held that

³³ High Court Miscellaneous Application No 101 of 1982, [1986] KLR 167.

³⁴ Then a law lecturer and later the first Chief Justice under the Constitution (2010).

³⁵ This policy had seen detention of various scholars from the public universities in the country that had forced a number of them to go into self-exile. Dons like Ngugi wa Thiong'o, Maina wa Kinyatti, Mugo Micere among others were forced into exile after spates of detention (See eg Ngugi's Biography, 'Detained.')

³⁶ *Mutunga v. Republic* High Court Miscellaneous Application No 101 of 1982, [1986] KLR 167, 30.

³⁷ [1969] EA 357.

³⁸ He cited the repealed Constitution s 77(7) on the right against self-incrimination.

constitutional provisions were to be interpreted in the same manner as any Act of Parliament.³⁹

The soundness of the *El Mann* decision was unsuccessfully challenged in *Okang v. Republic*,⁴⁰ where the accused person's fingerprints were taken without his consent while he was in police custody. In upholding *El Mann* doctrine, the court ruled that the provisions on the right to a fair trial must be construed strictly. It held that the right against self-incrimination only guaranteed the right to remain silent at one's trial and no more.

A convergence of courts' attitude in interpreting law to limit enjoyment of rights, both to a fair trial as well as the freedom of expression contained in the Constitution is epitomised in the case of *Republic v. Maathai and 2 Others*,⁴¹ where allegation of corruption and incompetence of the Court resulted into the conviction of the accused persons for contempt of court. These allegations has been published in a weekly magazine, *Viva*, in February 1984 and resulted into proceedings against the author and the publishers of the magazine. In finding against the accused, the court reverted to the notion of public welfare and social policy.

In a similar vein, in *Republic v. Lawford Ndege Imunde*,⁴² the accused was charged with sedition arising from entries in his diary of comments critical to the government concerning the assassination of the Minister for Foreign Affairs and was sentenced to imprisonment.⁴³ As the Magistrate put it:

The offence is serious and comes at a time when the government is doing all it can to curb malicious and uninformed rumours which can only lead to chaos and with

³⁹On a restrictive interpretation, it gave the literal meaning to the repealed Constitution s 77 (the protection of the right to a fair trial).

⁴⁰High Court, Criminal Case 1189 of 1979 (unreported)

⁴¹Cited in Kathurima M'Inoti, 'The Judiciary and Multiparty Politics in Kenya, 1990-1992,' in Kivutha Kibwana (ed), *Reading in Constitutional Law and Politics in Africa* (Faculty of Law UON 1998) 535.

⁴²Criminal Case No 150 of 1990.

⁴³In fact, the accused had been arrested without a warrant and held *incommunicado* for eleven (11) days prompting a *habeas corpus* application, which was subverted by him being charged before the application could be heard.

all the good and exemplary foundation that the government has laid, the remaining duty of the court is to ensure that the stability, peace and tranquillity that we enjoy under the umbrella of the government is not abused by individuals or group of individuals irrespective of their status in society. As a warning to others who may still be in the dreamland of the accused thinking of destabilising the solid, just and fair government, a custodial sentence commensurate with the time is called for.⁴⁴

Against this backdrop, the most damning was the perception that the Judiciary might have been receiving directions from the State. This arose from both the public statements of the Executive that were judicially enforced and from inferences from decisions handed down by courts at critical stages of political changes. An example of the former, arose in 1993 when the President made a statement at a public rally directing magistrates not to grant bail to those accused of having unlicensed weapons. Soon thereafter, the Chief Justice issued circular ordering Magistrates not to offer bail to those suspected of arms offences.⁴⁵ The later may be found on the review of cases decided between 1990 and 1992 at the transition from the single-party system to multipartism. Indeed, as Kathurima M’Inoti, a Commissioner of the International Commission of Jurists (ICJ) and a former chairman of its Kenyan chapter, states:

What emerges from consideration of judicial decisions handed down by the courts over the period is that judicial attitude appears to be closely informed or influenced by the views of the Executive. The judgements suggested that courts regarded themselves as the defendant of the Status quo.⁴⁶

In reviewing a number of cases,⁴⁷ M’Inoti finds that the changes in the attitude of the court closely followed the changes in Executive attitude to certain political environments.

⁴⁴ Cited in Kathurima M’Inoti, ‘The Judiciary and Multiparty Politics in Kenya, 1990-1992’ in Kivutha Kibwana (ed.), *Reading in Constitutional Law and Politics in Africa* (Faculty of Law UON 1998) 535, 538-9.

⁴⁵ *The IBA Report on the Legal System and the Independence of the Judiciary in Kenya, November, 1996* (London, 2001) 14-15.

⁴⁶ Kathurima M’Inoti, ‘The Judiciary and Multiparty Politics in Kenya, 1990-1992’ in Kivutha Kibwana (ed.), *Reading in Constitutional Law and Politics in Africa* (Faculty of Law UON 1998) 535, 537.

⁴⁷ *Republic v. George Moseti Anyona and Three Others*, High Court, Miscellaneous Criminal Application No 358 of 1990, (found in M’Inoti ‘The Judiciary and Multiparty Politics in Kenya, 1990-1992’ in Kivutha Kibwana (ed.), *Reading in Constitutional Law and Politics in Africa* (Faculty of Law UON 1998) 539); *R v. Sheikh Abdulaziz Rimo*, High Court Miscellaneous, Application No 112 of 1990.

In *Anarita Karimi Njeru* case,⁴⁸ for example, the Applicant, a rebel Member of Parliament in the one-party system had been accused of misappropriating school funds and sentenced to a term in prison. During the trial, she unsuccessfully sought to have an adjournment to enable her to call witnesses in her favour. She also lost in an attempt to appeal to the High Court on the ground that she had not done so within the prescribed time.⁴⁹ She therefore brought a constitutional application to the High Court arguing that an application under this section was ‘*without prejudice to any other action which might be lawfully available.*’⁵⁰ The Court however declined to hear her application. It held that the Constitution did not allow one who had already sought another available remedy to seek a remedy thereunder.

Just as it had held in the *El Mann* case, the Court took the view that the Constitution in Kenya was to be interpreted like any other statute, and on this account proceeded to give a strict construction to section 84(1) of the repealed Constitution.⁵¹ In the Court’s view, since the applicant had already sought another remedy, the one under section 84 was no longer available to her.⁵²

In *Koigi wa Wamwere v. AG*,⁵³ on the other hand, the same Court held that if an accused person had another remedy which had not been exhausted, he or she could not bring an

⁴⁸ *Anarita Karimi Njeru v. Republic (No 1)* [1976-80] 1 KLR 272.

⁴⁹ Her main ground of appeal was that she had been denied the opportunity to call witnesses in her favour and therefore, her right to fair trial had been violated.

⁵⁰ Repealed Constitution s 84(1).

⁵¹ Citing the *El Mann v. Republic* [1969] EA 357 which had been decided on the premises that the Constitution should be construed like an Act of Parliament.

⁵² However, in *Rev. Lawford Ndege Imunde v. AG*, (High Court Miscellaneous Application No 180 of 1990, an appeal from *Rev. Lawford*, Criminal Case No 150 of 1990 discussed earlier in this chapter), the same Court was to later rule that if a decision had been rendered by the High Court and later came back again to the same court for a remedy to the same breach, for further consideration, the second case was to lie before a greater number of judges and could not be just dismissed.

⁵³ High Court, Miscellaneous Application No 574 of 1990; (1991) 31 *Nairobi Law Monthly*, 21, 26.

application under section 81(4), effectively contradicting its earlier position in *Anarita* by again using the same strict interpretation.

In the *Koigi* case, the applicant had been charged with treason. Fearing that his trial being political in nature could not be fair, he approached the High Court to seek a declaration *inter alia* that his right to be presumed innocent until proven guilty; to be presented with adequate facility to prepare his defence; and to a Counsel of his own choice, had been violated. In refusing to grant the application, the Court found that at the stage of trial, it could not be valid to complain since the issues in question were triable under his treason case. He therefore had an alternative remedy, to raise the matter at the trial itself.⁵⁴

These set of rulings created the impression that judges lacked the independence to act against the government and ended up using technicalities in the law to refuse to enforce the rights of the individual. Indeed, after leaving the Bench, retired Justice Shield is reported to have acknowledged that some powerful forces interfered with the judicial process ensuring that justice could not be dispensed independently. He concluded that because of the extent of entrenchment of the practice, independence of the Judiciary would remain a far cry as long as interference went on.⁵⁵

4.4. Corruption, Ethnicity, Cronyism and the Independence of the Judiciary

In chapter VI we shall make a detailed investigation of the social influences impacting on the enjoyment of various safeguards to the accused persons in criminal trials. It is, however, notable at this juncture in the context of independence of the Judiciary that corruption,

⁵⁴ For analysis of the distinction between the *Anarita* and the *Koigi* cases, see Kathurina M’Inoti, ‘The Reluctant Guard: The High Court and Decline of Constitutional Remedies in Kenya,’ in Kivutha Kibwana (ed), *Reading in Constitutional Law and Politics in Africa* (Faculty of Law UON 1998) 535, 560.

⁵⁵ Retired Justice Shields, ‘Judiciary is Influenced – Shields’ *The Standard*, Nairobi, 16 December 1994, 3.

entrenched ethnicity, and cronyism have played a particular role in constraining the independence of the Judiciary and more particularly the impartiality of judicial officers.

Corruption has for a long time been thought to be widely entrenched in the country's public sectors and the Judiciary was notably one of the hardest affected institutions creating an environment under which the abuse of court processes was quite predominant.⁵⁶ For example, it was often suspected that accused persons were able to pay to 'make their files to disappear' from the court registry or to even bribe the judges/magistrates to rule in their fair or against their opponents.⁵⁷ Thus, the adage 'why hire a lawyer when you can buy a judge?' became quite common in the country.⁵⁸

Moreover, the ethnicization of the Judiciary in Kenya also served to create a negative perception of Judiciary as an organ of State. In an investigation on the legal system done in 1996, the International Bar Association noted that 'tribal loyalties remained quite strong' in the country.⁵⁹ It found that loyalties to the tribe came first with loyalty to the State being 'a distant second.' According to that research, the extent of ethnicity was such that race relations were more harmonious and far better than the relationship between some tribes.⁶⁰

⁵⁶ Mary Noel Pepys, 'Corruption within the Judiciary, Causes and Remedies' in Transparency International, *Global Corruption Report 2007: Corruption in Judicial Systems* (Cambridge University Press 2007) 4. The Committee on the Administration of Justice appointed by the CJ in January 1998 and headed by Justice Kwach in its report also noted incompetence, drunkenness, racketeering, and sexual harassment as widespread in the Kenyan Judiciary. See also Abdi Hassan, 'Judges, Lawyers versus the Citizens: Away with this Hypocritical Charade,' *Daily Nation*, Nairobi, 1 October 2010. For a more in depth analysis of judicial corruption see Peter Anassi, *Corruption in Africa: the Kenyan Experience* (2004) Ch 7.

⁵⁷ This attitude was expressed by a number of individuals during a field research conducted between March and June 2010 when I talked to court users in Kibera and Makadara in Nairobi and also in Butali and Kitale outside Nairobi. In the vetting of judges by the Vetting Board as required under the Constitution (2010), one of the Judges was removed because it was noted that he frequently dined with litigants on whose favour he ruled.

⁵⁸ Mary Noel Pepys, 'Corruption within the Judiciary, Causes and Remedies' in Transparency International, *Global Corruption Report 2007: Corruption in Judicial Systems* (Cambridge University Press 2007) 1, 4.

⁵⁹ *The IBA Report on the Legal System and the Independence of the Judiciary in Kenya, November, 1996* (London, 2001)

⁶⁰ It is noteworthy that ethnic loyalty informed the reform debate that centred on the call for *Majimboism* (regionalism based on ethnicity) and was the distinguishing philosophical principle in the controversial 2007 elections leading to the 2008 post-election violence.

Compounded by the attitude that one needed to ‘know somebody’ powerful in order to succeed in Kenya,⁶¹ it was viewed as a possibility that complainants from judge/magistrates’ tribesman received favourable response from the courts in cases where the accused persons came from other ethnic communities.⁶² Thus, like the elective posts in government, judicial offices came to be viewed as a part of the national ‘cake’ that was to be shared among the more than forty two ethnic communities.⁶³ This attitude was largely exploited by politicians to compromise institutional independence of that organ. It was thus common to hear people in the streets complaining that judicial appointments were dominated by members of one ethnic group to the exclusion of others.

Similarly, the strength with which cronyism operated in the Judiciary arguably also compromised the impartiality of its officer. Petter Langseth rightly notes that cronyism usually creates the misperception that public figures have the license to dispense favours and feel that they are above others before the law.⁶⁴ In Kenya, the friendly favours given by politicians and executive officer were known to encourage political patronage that actually interfered with the judicial processes. This led Nowrojee to lament that:

In the place of law and human rights, political patronage [had] ascended. So that a large part of the Kenya public [had] come to believe that it is better, for instance in the event of a dispute, to get a political godfather to arrange to have it resolved in one’s favour rather than follow the law and go to court and have the problem determined in accordance with the law.⁶⁵

⁶¹ Roy Cullen, *The Poverty of Corrupt Nations* (Blue Butterfly 2008) 13.

⁶² This attitude was expressed by a number of individuals during a field research conducted between March and June 2010 when I talked to court users in Kibera and Makadara in Nairobi and also in Butali and Kitale outside Nairobi.

⁶³ See generally, Michela Wrong, *It is our Time to Eat* (Fourth Estate, London 2009). See its commentary by Stephen Robinson, ‘It’s Our Turn to Eat: The Story of a Kenyan Whistle Blower by Michela Wrong’ *The Sunday Times*, 22 February 2009.

⁶⁴ Petter Langseth, *Strengthening Judicial Integrity against Corruption* (UNODCCP, Vienna 2001).

⁶⁵ Pheroze Nowrojee, ‘Why the Constitution Needs to be Changed,’ in Kibwana, Maina Peter and Oloka-Onyango, *In Search of Freedom and Prosperity: Constitutional Reform in East Africa* (Claripress 1996) 386, 389.

These factors effectively diminished public confidence in the Judiciary leading to a general perception that the institution could not be trusted to deliver justice in sensitive matters. During the post election violence, for example, the parties refused to go to court claiming that they were compromised and could therefore not be trusted to be impartial in the matter.⁶⁶

4.5. Structural Deficiencies in the Repealed Constitution

Having looked at the constraints on judicial independence from historical and political perspectives, and also at the influences of corruption ethnicity and cronyism on this norm, this part shifts to investigate how constitutional provisions in the repealed Constitution actually watered down judicial independence. Although it was argued in chapter II that the repealed Constitution provided a good underpinning for the enjoyment of the right to a fair trial, it must however also be appreciated that there were a number of deficiencies in that law whose impact on the enjoyment of the right were not wholly insignificant. Indeed, although the independence Constitution granted the Judiciary some measure of formal independence, in many ways, it also failed to create adequate structure that would safeguard the independence and impartiality of the Judiciary. Thus, the critical areas in which there were shortcomings will be addressed in this part.

The first notable problem was that the repealed Constitution did not clearly set the Judiciary as an independent arm of government, and whereas the Executive authority of the State was vested in the President and the Legislative authority in Parliament,⁶⁷ there was no

⁶⁶ Both the Report of the Commission of Inquiry into the Post-Election Violence; the report of the UN Special Rapporteur on Extrajudicial, Arbitrary or Summary Executions, Mission to Kenya 16-25 February 2009 (Alston report); and the Report of the Independent Review Committee (IREC also referred to as the Krieglar Report) bore this.

⁶⁷ Repealed Constitution ss 23, 30. See also *The Judiciary Transformation Framework, 2012-2016*, 9.

corresponding provision for the Judiciary.⁶⁸ Just as it was during the colonial times, the Judiciary continued to be viewed as an appendage of the Executive.

The second aspect leading to the lack of independence in the Judiciary resulted from its lack of functional autonomy. Whereas structurally the Judiciary was an autonomous organ, it was functionally placed under the office of the Attorney General (or the Ministry of Justice whenever this portfolio existed in the Cabinet). The Judiciary did not have an independent power to run its affairs but was funded through the parent administrative/executive department. It therefore depended on the good will of the Executive and Parliament to operate effectively. It has moreover been noted that the courts being under the office of the Attorney General, which was also the principle prosecuting arm of government, meant that the salaries of judges came from people who regularly appeared before them.⁶⁹

Furthermore, as we shall see in chapter VI, this effectively resulted in underfunding where the Judiciary had to operate on a limited budget and could therefore not employ enough staff. And even when it got to employ, it could not retain the most talented and ambitious lawyers due to poor pay. Inadequate budgetary allocation also meant that there was inadequate facilities and accommodation for the Judiciary.⁷⁰

A third issue arose from the subordination of the Judiciary to the Executive by the vesting of unchecked power of appointment of judicial officers on the Executive. The President had the power to appoint judges of the Court of Appeal and High Court without any effective oversight. Indeed the appointment was to be made under the recommendation of the

⁶⁸ 'The State of Judiciary in the NARC Era: Independence, Interference or Both' in Winnie Mitullah, Morris Odhiambo and Osogo Ambani, *Kenya's Democratisation: Gains or Loses? Appraising the Post-KANU State of Affairs* (Claripress, Nairobi 2005) 37.

⁶⁹ See Pheroze Nowrojee, 'Why the Constitution Needs to be Changed,' in Kibwana, Maina Peter and Oloka-Onyango, *In Search of Freedom and Prosperity: Constitutional Reform in East Africa* (Claripress 1996) 386, 388-9.

⁷⁰ The Expanded Legal Sector Reform Strategy Paper (E-LSRSP - 2002) 18.

Judicial Service Commission (JSC).⁷¹ However, the Commission consisted entirely of presidential appointees. The Chief Justice, who was its chairman and the Attorney General, an ex-officio member, were both appointed unilaterally by the President, while the other Commissioners were to come from the High Court, the Court of Appeal and the Public Service Commission, which was chaired by the Attorney General. There was virtually no consideration for competence and integrity with the only limitation being that a candidate had to have some minimum number of years of experience to be considered for appointment.⁷²

Closely related to the above factor, the fourth reason why independence of the Judiciary was compromised arose from the role that the Chief Justice played. As well as being the head of the Judiciary, he served as a judge of both the High Court and the Court of Appeal. He was also vested with the ultimate responsibility of allocating matters within the higher Judiciary as the chief administrative officer. For the High Court, he administratively constituted benches to determine the cases filed at the court besides being empowered to constitute special benches that could determine specific matters (such as constitutional petitions and judicial reviews). He also decided where the High Courts would have a bench and posted judges to the respective areas, and was empowered to make Rules for efficient administration of justice as well.⁷³ These were too many roles that made him a very powerful figure.

Hence, the Chief Justice being a direct presidential appointee gave the Executive great control over the holder of the office and the vast powers he had were problematic insofar as impartiality was concerned. Earlier Chief Justices, for example, left a vacuum in the enforcement of constitutional rights by omitting to draft Rules regulating the submission of

⁷¹ Repealed Constitution (Kenya) s 61(2).

⁷² One had to have practiced law or have been a magistrate for at least 7 years to be appointed a judge.

⁷³ Eg under Repealed Constitution (Kenya) s 84, for enforcement of human rights and fundamental freedoms.

constitutional matters.⁷⁴ It was inconceivable that an individual could sue to force the officeholder to exercise this jurisdiction and succeed. At one time it was even held that the lack of rules for submission of constitutional claims meant that the courts could not entertain cases regarding enforcement of the Bill of rights. Thus, in *Joseph Maina Mbacha and 3 Others v. AG*,⁷⁵ Justice Dugdale observed that the provisions for protection of human rights under the Constitution was as dead as a dodo and could only be resurrected by the mercy of the Chief Justice who could choose to make the requisite rules for their enforcement.

A fifth aspect arose from the tenure of members of the Judiciary. Although judges were granted security of tenure, with regard to the Chief Justice the President could choose to appoint a holder in an acting capacity pending confirmation and keep them in abeyance. Between 1964 and 2000, for example, more than nine Chief Justices served for less than three years – four of them serving for less than one year, and on average they all served for about three years; all of them in an acting capacity.⁷⁶

The judges' security of tenure was also compromised by the fact that they could easily be removed on grounds of incapacity or misbehaviour.⁷⁷ The President just needed to unilaterally appoint a Commission on whose recommendation he would remove an unwanted judge. The only condition was that members of the Commission had to either be sitting or retired judges.⁷⁸ In fact, as evidence that the Executive abhorred the constitutional security of

⁷⁴ This was a requirement under the repealed Constitution (Kenya) s. 84.

⁷⁵ High Court, Miscellaneous Criminal Application No 356 of 1998. See also *Gibson Kamau Kuria v. AG*, High Court, Miscellaneous Civil Application No 55 of 1988; *Felix Njagi Marete v. republic*, High Court, Miscellaneous Civil Application No 668 of 1986.

⁷⁶ *IBA Report on the Legal System and the Independence of the Judiciary in Kenya*, November, 1996 (London, 2001) 12- 13.

⁷⁷ Repealed Constitution s 62(3).

⁷⁸ *Ibid* s 68(1)(c).

tenure, it initiated an amendment to the Constitution in 1988 that removed judges' security of tenure.⁷⁹ This was only restored in 1990 under intense pressure.⁸⁰

Another problem with regard to the independence of the Judiciary arose from the existence of contract judges. These (mostly foreign) judges' salaries were highly subsidised by the government of the United Kingdom, Kenya's former colonial master. It was therefore argued that their loyalty and allegiance was uncertain, which raised the question of legitimacy.⁸¹ The impression was that the Judiciary still danced to the tune of the colonial masters long after independence.

Although having neutral and disinterested umpires might have been good for the independence and impartiality of the court system, the lack of tenure for the contract judges removed that possibility. Their services could be terminated (as any other contractual agreements normally are,) if they went against the government. They were therefore pliable to administrative pressure through the threat of determination of their contracts.⁸² This ensured that the holders of the offices could be easily controlled by the Executive to do their bidding.

There is evidence that contract judges who refused to be compromised by that the Executive had their contracts unceremoniously terminated. For example, when his contract was terminated, Justice Shield is reported to have informed the convenors of a seminar he was to attend that, 'Unfortunately I shall be unable to attend as I have joined the large number of Kenyan judges who have to relinquish their office because of presidential pressure.'⁸³

⁷⁹ Ibid s 62 amended by Act No 4 of 1988 s 3 to remove security of tenure of judges

⁸⁰ Ibid s 62 again amended by Act 17 of 1990 s 4 to re-establish security of tenure.

⁸¹ *IBA Report on the Legal System and the Independence of the Judiciary in Kenya, November, 1996 (London, 2001)* 9.

⁸² Ibid.

⁸³ Ibid.

Similarly, the existence of the Commissioners of Assize in the structure of the Judiciary was problematic. These Commissioners were practicing advocates who were normally temporarily appointed to help clear a backlog of cases. The question was would they not receive preferential treatment when they appeared before magistrates as advocates when they could hear appeals from these magistrates as such Commissioners? Moreover, since their decisions was at the level of High Court judgments, it was questionable whether it was proper for them to be binding precedents when the author could still argue cases before the magistrates. Would they not create precedents to favour their clients?

The constitution ambiguity in relation to the hierarchical structure and the powers of the superior courts also reduced the independence of the Judiciary. The repealed Constitution did not provide for a constitutional court but instead gave the role of constitutional interpretation to the High Court; which was itself an inferior court to the Court of Appeal. This was initially interpreted to mean that a constitutional matter could not be raised during an appeal to the Court of Appeal.⁸⁴ It was only through the appellate court's interpretation that it later clarified that by virtue of its superiority it impliedly had the power to interpret the Constitution. With regard to Courts Martial, the Constitution itself restricted appeals only to the High Court, with no possibility of a second appeal to the Court of Appeal.

From the foregoing, it is clear that it was highly unlikely that the Judiciary could be independent and impartial. Any little independence and impartiality that was exercised could be viewed as done from the grace extended by the Executive. Thus, it has aptly been noted that although:

⁸⁴ In *Anarita Karemi Njeru (No 2)* (1979) KLR 42 the Court of appeal itself found that it lacked jurisdiction to entertain appeals from Constitutional applications at the High Court, since the lower court had exclusive jurisdiction in matters of interpretation of the Constitution.

[The] Judiciary was purposely designed to serve the interests of the government of the day. This assignment of a narrow role to the Judiciary was achieved through the establishment of constitutional rules that enabled the Executive to control the Judiciary, rules which remained in place until the promulgation of a radically different Constitution in August 2010.⁸⁵

4.6. Intervention of the New Constitution

It is in this context that the judicial reforms were sought under the new Constitution.

Ahmednasir Abdulahi, one of the Commissioners with the first reconstituted Judicial Service Commission, holds the opinion that the Judiciary and the justice system were chosen as a test case for reform by the new Constitution for two reasons:

First, the rot in that sector was so dire and cancerous that the drafters in their wisdom thought that not a second more should be wasted in addressing the crippling problems facing the justice system. Second, the Judiciary was so weak and discredited that, unlike the Legislature and the Executive, it had no leverage during the constitution making process. It was historically a cowed and emasculated institution answerable to the Executive and was devoid of a credible voice to voice any concern it had as it related to the provisions of the Constitution.⁸⁶

On the realisation of the structural inconsistencies in the provisions of the repeal Constitution, the 2010 Constitution attempted to address the most glaring of the defects that made it impossible for institutions in criminal justice to operate independently so as to secure the rights of individuals to a fair trial. The following are some of the visible interventions:

4.6.1. Entrenchment of Values to the Exercise of Public Powers

A pertinent feature of the 2010 Kenyan Constitution is the entrenchment of national values and principles of governance into the Constitution that bind all State organs, State officers, public officers and all persons in applying or interpreting the Constitution or any law or when making or implements public policy decisions.⁸⁷ The values and principles include the rule of law, democracy and participation of the people; human dignity, equity, social justice,

⁸⁵ Judiciary Transformation Framework 2012-2016 (Kenya), 8.

⁸⁶ Ahmednasir Abdulahi, 'Time for Kenyans to Take Back their Country,' *Sunday Nation*, Nairobi, 3 July 2011, 18.

⁸⁷ Constitution (2010) art 10.

inclusiveness, equality, human rights, non-discrimination; good governance, integrity, transparency and accountability. This is further buffered by the requirement that individuals to be appointed judges should be of high moral character, integrity and impartiality.⁸⁸

These provisions have helped to demystify the exercise of power with regard to the appointments in the Judiciary and have introduced a participatory process in the appointment of judicial officials who would not be beholden to any particular individual. After the enactment of the Judicial Service Act 2011 in conformity with the 2010 Constitution, the post of the Chief Justice and other Judges were advertised. Applicants were then subjected to public interviews by the Judicial Service Commission which was broadcasted live on national televisions.

For the first time in Kenya, applicants including members of the upper Judiciary and senior practicing lawyers were subjected to open scrutiny for suitability to serve in the Judiciary.⁸⁹ This was aimed at restoring public trust in that institution by bring it closer to the people and giving it legitimacy as well as ensuring that only the best candidates were employed. Indeed, the Constitution now expressly provides that judicial authority is derived from the people.⁹⁰

4.6.2. Entrenchment of Independence of the Judiciary as a Constitutional Value

The other intervention by the new Constitution is through express incorporation of the principle of independence and impartiality of the Judiciary. It is provided that, ‘In the exercise of judicial authority, the Judiciary ... shall be subject only to [the] Constitution and the law

⁸⁸ Ibid art I66(2).

⁸⁹ Ibid art 10(2)(c) on National Values.

⁹⁰ Ibid art 159.

and shall not be subject to the control or direction of any person or authority.’⁹¹ And to ensure that this is possible, the tenure of judges has been secured by various provisions.

Firstly, provisions are made to prevent the removal from office of the Chief Justice and judges unless they reach retirement age or choose to resign in writing.⁹² If it is on account of impropriety or incapacity, an elaborate procedure for the removal of judges is given.⁹³ The removal may be initiated only by the Judicial Service Commission acting on its own motion, or on the petition of any person to Commission in writing, setting out the alleged facts constituting the grounds for the judge’s removal. If according to the Commission there is a ground for removal of a judge, it is required to send the petition to the President who is then bound to suspend the judge from office and, in the case of the Chief Justice, appoint a tribunal consisting of the Speaker of the National Assembly, as chairperson, three superior court judges from common-law jurisdictions, an advocate of fifteen years standing, and two other persons with experience in public affairs. In the case of other judges the tribunal shall consist of a chairperson and three other members from among persons who hold or have held office as a judge of a superior court, or who are qualified to be appointed as such but who, in either case, have not been members of the Judicial Service Commission at any time within the immediately preceding three years, an advocate of fifteen years standing and two other persons with experience in public affairs.

To ensure that the judge against whom a tribunal has been formed is not unduly prejudiced, it is provided that he is to be put on half salary until finally removed or reinstated. The tribunal is further required to inquire into the matter, report on the facts and make binding

⁹¹ Ibid art 160(1).

⁹² Ibid art 167.

⁹³ Ibid art 168.

recommendations to the President expeditiously. An aggrieved judge has the right to appeal to the Supreme Court, within ten days after the tribunal makes its recommendations.

Secondly, the independence of the Judiciary is guaranteed by the stipulation that the office of a judge of a superior court cannot be abolished while there is a substantive office-holder. This is aimed at ensuring that the judges' impartiality is not compromised by the possibility that they might lose their jobs or even have their terms of service altered to their prejudice for not ruling in a particular way.⁹⁴

The third intervention by the 2010 Constitution is that financial autonomy has been granted to the Judiciary. The Constitution establishes an independent Judiciary Fund to support the function of that institution and the Judiciary is now allowed to submit its own budgetary estimates to Parliament without any input from the Executive (as was the case in the National Budget for the year 2011-2012, which was the first one under the new Constitution). Furthermore, judges' remuneration and benefits including the retirement benefits have now been directly charged on the Consolidated Fund, and cannot be varied to their disadvantage even on their retirement.

Last but not least, the Constitution also grants immunity to the members of the Judiciary from both civil and criminal actions for their judicial conducts. Judges and magistrates are now not liable in an action or suit in respect of things they do or for omissions in good faith in the lawful performance of judicial functions. In *Moses Wamalwa Mukamari v. John O. Makali & 3 Others*,⁹⁵ it was held that, by virtue of the constitutional immunity, a judicial officer cannot be made a party to any claim arising from his work. According to the High Court sitting in Bungoma:

⁹⁴ Ibid art 160(2).

⁹⁵ High Court, Civil Suit No 42 of 2012 [2012]eKLR

Even if there be any liability, which is quite a rare incident, on a cause of action arising from the exercise of a judicial function, that liability is the liability of the state. That being the case, it will be contrary to the Constitution to enjoin the judicial officer in a suit challenging what he did in the lawful exercise of a judicial function.

This contrast with the old system where, for example, in 2003 the Anticorruption police unit (ACPU) interrogated Justice Oguk, a sitting judge of the High Court in relation to claims of misuse of judicial powers and was made to record a statement with the police. Although the judge moved to court to object to the way he was being handled arguing that, under the law, police could not question him on the manner he performed his judicial functions, the State still preferred criminal charges against him and he was made to appear before a magistrate while still serving as a puisne judge. In due course, he was forced to vacate his office by the pressure that was being exerted on him.⁹⁶ This scenario was also repeated in 2009 when Kakamega-based judge Said Juma Chitembwe, was arraigned in court on allegations of fraud.⁹⁷

4.6.3. Reconstitution of the Judicial Staff through Vetting

The most drastic interventions by the 2010 Constitution was in the requirement for the reconstruction of the Judiciary to rid it of the tainted individuals and restore public confidence in the institution. Indeed, most of the moves towards constitutional reforms in Kenya were largely informed by the perception that the Judiciary was unable to meet the expectation of the masses by opening access to justice. Various reports all too clearly gave credence to this perception; the most controversial being that of the Integrity and Anticorruption Committee chaired by Justice Aaron Ringera that led to the purge in the Judiciary dubbed ‘radical surgery’⁹⁸

⁹⁶ See ‘Embattled Oguk on Fraud Charge,’ *Standard*, Nairobi, 28 June 2003.

⁹⁷ See, ‘Judge charged in court over fraud claims,’ *Daily Nation*, 29 December 2009.

⁹⁸ ‘An Anatomy of Corruption in Kenyan Judiciary,’ *Report of the Integrity and Anticorruption Committee*, 2003 submitted to the CJ on 2 October 2003 (This was Serialised in the *Daily Nation*, 4 October 2003, 13-6.

The Ringera report indicted five Court of Appeal Judges, eighteen High Court Judges, eighty two magistrates and forty three paralegal officers. The Court of Appeal and High Court judges implicated were given the option of retiring or facing tribunal appointed by the president to investigate them. Although a majority of them retired, most of those who faced the tribunal were cleared of wrongdoing by the tribunals established to investigate them and reinstated.

To avoid a similar scenario as the ‘radical surgery’ which was perceived to be selective and targeting some individuals, the transitional provisions in the 2010 Constitution require the vetting of all sitting employees of the Judiciary within a year of its coming into force before they can resume their official functions.⁹⁹ This was facilitated by the enactment of the Vetting of Judges and Magistrates.¹⁰⁰ The Act established an independent board known as the Judges and Magistrates Vetting Board consisting of citizens and non-citizens, including both lawyers and non-lawyers and provided for an elaborate procedure for their election to ensure that the vetting process was legitimate.

The incumbent Chief Justice was required to vacate that office within six month of the coming into effect of the new Constitution but as a safe landing, he was given the option of retirement or serving at the Court of Appeal as a Judge subject to the vetting requirement.¹⁰¹ He opted to retire.

4.6.4. Alteration of Judicial Structure and Creation of the Supreme Court

The 2010 Constitution has also altered the Structure of the Judiciary and created a new apex court. The repealed Constitution provided for two superior courts; the Court of Appeal and

See also ‘Corruption in the Judiciary: Preparing for Minister Kiraitu Murungi’s Radical Surgery,’ *The Nairobi law monthly*: Issues 80.

⁹⁹ Constitution (2010) 6th Schedule, s 23.

¹⁰⁰ No 2 of 2011.

¹⁰¹ Constitution (2010) 6th Schedule, s 24.

the High Court. Whereas the Court of Appeal bore only an appellate mandate, the High Court was given both unlimited original jurisdiction, a supervisory role for the subordinate courts alongside an appellate jurisdiction.

Under the new Constitution, another court - the Supreme Court - with both original and appellate jurisdiction has been created at the Apex of the Judiciary. Its appellate jurisdiction is with regard to matters related to the interpretation of the Constitution and those which are perceived to be of general public importance.¹⁰² Therefore, it is plausible that appeals in criminal matters on issues of safeguarding the individuals' rights to fair trial and those which raise a point of law would lie at this superior court.¹⁰³ The Supreme Court also has the exclusive power to hear disputes relating to presidential elections.

The Supreme Court will not operate only as a forum for dispute resolution. It also has the power to clarify the law and provide advisory opinions to the government with regard to any matters relating to devolved governments that the Constitution has now established.¹⁰⁴ The court will also hear appeals from the Court of Appeal in criminal matters in cases that involve substantive constitutional questions.

To redress the historical injustices of the past Judiciary, the Supreme Court Act 2011 sought to create a special category of Jurisdiction for the Supreme Court.¹⁰⁵ The Supreme Court was empowered on its own motion or on application by any party, to review the judgments or decisions of any judge or magistrate who shall have been removed from office either on the recommendation of a tribunal established by the President, or removed on

¹⁰² Ibid art 163. This is to be done under a certificate issued by the court of Appeal and which may be varied by the Supreme Court itself.

¹⁰³ 5 yrs has been granted under Chapter XVII (on Transitional and Consequential Provisions) for the full implementation of the new Constitution.

¹⁰⁴ Sekou Owino, 'A Break with the Past as Draft Law Proposes Higher Standards for Court of Last Resort,' *Daily Nation*, Nairobi, 3 June 2011.

¹⁰⁵ Supreme Court Act 2011 s 14.

account of the vetting process for judicial officers that the Constitution envisaged, or those who would have opted to resign or retire as a result of a complaint of misbehaviour or misconduct, if the matter for review formed the basis on which that judicial officer had departed from the Judiciary.

The Supreme Court Act also provides that on an appeal from the Court of Appeal to the Supreme Court, the Court may not only review the lower court's decision on appeal but may choose to conduct a fresh hearing. This means the Court will be able to decide to hear the case without necessarily considering the evidence that was adduced earlier in the lower court.

4.6.5. Decentralisation of the Administrative Powers within the Judiciary

The 2010 Constitution has also intervened by the decentralisation of the administration of the Judiciary to secure institutional independence and impartiality in criminal justice processes. Although the Chief Justice is retained as the head of the Judiciary, the new Constitution now establishes other offices to take on the roles that were exclusively vested on the Chief Justice under the repealed Constitution. The Chief justice is now deputised by the Deputy Chief Justice and the Constitution gives the Chief Registrar of the Judiciary a constitutional sanction as the chief administrator and accounting officer of the Judiciary unlike what existed under the repealed constitutional framework where these powers were vested on the Chief Justice.¹⁰⁶

Even though the Chief Justice serves the President of the Supreme Court (deputised by the Deputy Chief Justice as the Vice-president of the Court),¹⁰⁷ he no longer sits in any other (superior or inferior) court. He does not even serve as the direct heads of other courts subordinate to the Supreme Court. While the Court of Appeal is headed by the President of the Court of Appeal elected by the judges of that Court from among themselves, the High Court is led by a Principal Judge elected by the judges of the High Court from among

¹⁰⁶ Constitution (2010) art 161.

¹⁰⁷ Ibid art 163(1).

themselves.¹⁰⁸ Nonetheless, the Chief Justice retains the power to constitute a bench of an uneven number of judges of the High Court consisting of not less three judges to hear any matter which the High Court certifies as raising a substantial question of law.

4.6.6. Reconstitution of the Judicial Service Commission

Lastly, in a departure from the position under the repealed Constitution, the 2010 law stipulates for a more independent Judicial Service Commission consisting of officials that are not beholden to the Executive or any other organ.¹⁰⁹

It is this Commission that is tasked with the promotion and facilitation of the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice. It recommends to the President persons for appointment as judges and is charged with reviewing and making recommendations on the conditions of service of judges and judicial officers (but not on their remunerations). It also appoints, receives complaints against, investigates and removes from office or otherwise discipline registrars, magistrates and other judicial officers.

These functions are exercised under the Judicial Service Act,¹¹⁰ which also establishes the National Council on Administration of Justice¹¹¹ consisting of all stakeholders in the administration of justice to ensure a coordinated, efficient, effective and consultative approach in the administration of justice and to reform of the justice system.

4.6.7. Conclusion

Considering the history of the Kenyan Judiciary, it was not superfluous that beyond particular safeguards we have reviewed above, the framers of the Constitution went ahead to also expressly set out independence of the Judiciary as a constitutional value among other national

¹⁰⁸ Ibid arts 164, 167.

¹⁰⁹ Ibid art 171(1).

¹¹⁰ No 1 of 2011.

¹¹¹ Judicial Service Act, part VI.

values to guide the Judiciary in the administration of justice. It has indeed been opined that it was the rot in the Judiciary that the 2010 Constitution sought to address when these changes were stipulated.¹¹² For example, in *Dennis Mogambi Mong'are v. Attorney General & 3 others*,¹¹³ the Constitutional bench of the High Court noted that the vetting of judges and magistrate was laudable as it would help restore confidence in the Judiciary and put it in its rightful place as the arbiter of justice.

It is therefore plausible to conclude that from these interventions, the 2010 Constitution has to a large extent ensured that the Judiciary in Kenya will be independent and impartial by clearly re-establishing the institution as an effective and separate arm of state operating independent of the other State organs.

4.7. Recurrent Challenges

Even as well intentioned moves are being taken to address the shortcomings in the criminal justice institutions under the reforms ushered in by the 2010 Constitution, some challenges on how to maintain their institutional integrity during the reform process cannot be ignored. Indeed, some of the measures employed to remove the vices that have bedevilled the Judiciary may be perceived to threaten the avowed aim of the reforms – to enhance the independence of the institution – and compromise the ability of judicial officer to operate with full impartiality.

Whenever it is sought to remove judicial officers who fail to live up to the expected standard of practice, the question invariably arises whether such moves do not in themselves interfere with the institutional independence; serving to further destabilise the institution. For instance, after the Kwach Commission on the Judiciary castigated the Judiciary for failure to meet the required standard of integrity, there was an interesting interchange between members

¹¹² Emeka –Mayaka Gekara, 'Judges Restless ahead of Vetting,' *Sunday Nation*, Nairobi, 18 December 2011,10.

¹¹³ High Court, Nairobi, Petition No 146 of 2011, [2011] eKLR.

of the Judiciary and the Chief Justice as to the effect of that report. Whereas the judges complained that the report had had a negative effect of bringing the Judiciary's conduct into disrepute by tainting even the hard working officers, the Chief Justice felt that it was 'in bad taste' for the Judiciary to be seen to be wanting to protect itself even where there was a glaring problem that needed to be addressed.¹¹⁴

While the restoration of confidence in the Judiciary might require a public and open purge (such as the Ringera-led 'judicial surgery') or even prosecution of those found to practice corruption, the need to protect institutional integrity through the assurance of judicial independence may also mean that such a public 'embarrassment' of individual officers should be avoided.

Debates on the provision for vetting of judges have thus developed along these lines. It is arguable that the requirement for vetting of sitting member of the Judiciary under the 2010 Constitution has put the judges and magistrates in a vulnerable situation. Even as emphasis is put on the national values in the Constitution, pressure has been exerted on the long-serving judges to account for the perceived failure of the entire system under which they served. The vetting process has even been viewed by some as a sacrifice of the judges for mistakes committed by the Executive,¹¹⁵ and it has been argued that the requirement for vetting 'is a blanket condemnation that subverts the essence of the new Constitution,' going against the principle of natural justice that no man shall be condemned unheard.¹¹⁶

This concern was brought to the fore during the operationalisation of the provisions for the creation of the Court of Appeal and the requirement for the vacation from office of the Chief Justice as well as the creation of the office of the Deputy Chief Justice. An invitation to

¹¹⁴ Peter Anassi, *Corruption in Africa: the Kenyan Experience* (2004), 82-3.

¹¹⁵ Emeka-Gekara Mayaka, 'Top Judges Face Crisis of Confidence,' *Daily Nation*, Nairobi 2 July 2011, 10.

¹¹⁶ *Ibid.*

qualified persons to apply for these posts was made and inevitably, a number of senior judges from the Court of Appeal and the High Court applied and were subjected to public vetting by the reconstituted Judicial Service Commission. Because the Court of Appeal was formerly the highest court in the land, it was expected that its judges would stand a better chance in these interviews, but during the televised proceedings, some of the judges were accused of being ‘gatekeeper’ for the powers that be in the Judiciary while others were criticised for their past rulings or for being insufficiently educated for the posts they held.

Ultimately, only ‘outsiders’ made it to be Chief Justice and Deputy Chief Justice under the new dispensation. For the seven-member Supreme Court (which includes the Chief Justice and his Deputy as members), only one Court of Appeal judge and two High Court judges were successful. The most senior judge along with other highly ranked judges in the old Judiciary failed in both the quest to be Chief Justice and/or Supreme Court judges.

The fact that Court of Appeal judges were by-passed by their juniors from the High Court arguably disrupted the hierarchy and may have greatly demoralised these judges. The former appellate judges may now find their decisions being reviewed by those who were their juniors. According to Mayaka, ‘For a profession that reveres seniority, this reversal of roles is certainly likely to cause discomfort.’¹¹⁷ Indeed, the whole process may have left many a judicial officer traumatised and therefore unable to continue serving well within the reconstituted Judiciary.

Furthermore, concerns with the composition of the reconstituted Judicial Service Commission tasked with the role of recommending the employment of members of the Judiciary as well as carrying out disciplinary functions over that institution has been raised. The inclusion of practicing advocates as representatives of the Law Society of Kenya in the

¹¹⁷ Ibid.

Commission interviewing applicants to the higher Judiciary in 2011 was criticised as a compromise to the independence and impartiality of the Judiciary. This was questioned at the High Court in *Re the Matter of Winding up of Kenya Data Networks Limited*,¹¹⁸ where the impartiality of a Judge against the influence of a member of the Judicial Service Commission appearing before the court was raised. Although in this case, the court held that there was no limitation in any law barring a member of the Judicial Service Commission from practicing in court, the concern was indeed noted.

In an article in the press, reflecting on the tough questions asked by the Commissioners, an MP also wondered how ‘lowly’ magistrates could resist pressure when these Commissioners – who were effectively their employers – appeared before them. Looking at the way some of the advocates sitting in the Judicial Service Commission had conducted themselves, ‘showing bare-faced contempt and lack of respect for some of the most senior judges in the country,’ the MP lamented:

What chance does a poor magistrate sitting in some upcountry courts have in denying a plea placed before him by such a powerful ‘employer’? Or indeed, do opposing advocates start on an equal footing when they appear in the same courtroom but on opposite sides with the advocate sitting in the JSC?¹¹⁹

A further challenge that may need to be addressed under the new Constitution is with regard to accountability of the Judiciary for mistakes that may be made by its members. Notably, corruption, which has been a great concern under the repealed constitutional dispensation, might invariably require accountability through a judicial process. The prosecution of Justice Oguk in 2003 and Justice Juma Chitembwe in 2009,¹²⁰ for instance, received wide public approval because of the overwhelming negative evidence against

¹¹⁸ High Court, Nairobi, Winding up Cause No. 34 of 2010 [2011] eKLR.

¹¹⁹ Nicholas Gumbo, ‘Ahmednasir Should Stop Humiliating Judges,’ *Sunday Nation*, Nairobi, 8 May 2011, 32.

¹²⁰ See part 4.4.2 of this Thesis.

them.¹²¹ It is plausible to argue that the threat of prosecution for misconduct is a good deterrent for judges notwithstanding that it might also create a fear on their mind when they are performing their functions.

On the alternative, internal disciplinary procedures that will avoid negative publicity that may bring the institution to disrepute may be utilised.¹²² However, this also carries a danger with it that when the whole process is shrouded in secrecy, it may easily be tainted by claims of victimisation on the one hand or cover-up on the other. It may even be argued that such moves impugn the spirit of the constitution on the need for transparency in administration of Justice. Thus, although the Constitution forestall the need for drastic steps such as the prosecution of judges by providing proper procedures for the appointment of members to the bench (that will ensure that they are all suitable to serve) as well as creating appropriate disciplinary proceedings against errant officers, a rigid foreclosure of their prosecution (as supplied by the 2010 Constitution) may nonetheless embolden the few unscrupulous individuals who might get through the appointment procedures undetected and against whom disciplinary sanctions will not be stringent enough to be deterrent.

The role of Commissioners of Assize is another concern that has not been fully addressed under the 2010 Constitution. The Chief Justice appointed under the new Constitution has already called for application from those interested for the position of Commissioners of assize under the Commissioner of Assize Act.¹²³ This Act provides that the Chief Justice and the Attorney General may jointly ask the President to appoint

¹²¹ 'Embattled Ojuk on Fraud Charge' *East African Standard*, 28 June 2003; 'Judge Charged in Court Over Fraud Claims,' *Daily Nation*, Nairobi, 29 December 2009.

¹²² As formulated in the Latimer House Guidelines that was formally endorsed by the Commonwealth Heads of Government in Abuja, Nigeria in 2003. See also Justice Désirée Bernard, *The Impact of Corruption within the Court System on its Ability to Administer Justice* (Speech made at the 14th Commonwealth Law Conference, on September 2005).

¹²³ Commissioners of Assize Act s 2.

Commissioners of Assize from persons qualified to be High Court judges to expedite the trial and determination of any criminal or civil causes or matters pending in the High Court. The persons appointed is subject to the terms and conditions of the instrument of appointment and serves for such period, or for such criminal or civil session or part of a criminal or civil session of the High Court as specified in the instrument.¹²⁴

As noted earlier, since these Commissioners remain in practice, there is the perception that they may influence the decisions of the court in favour of their clients.

4.8. Conclusion

So far, this chapter has highlighted some of the challenges that the legal system has had to face under the repealed Constitution as well as in the transition to the new Constitution in shaping the criminal justice system's attitude towards protecting accused persons. Although we have mainly dealt with the independence of the Judiciary as a facet of the recognised protection of the right to a fair trial, it is becoming evident that the unsatisfactory institutional structures do compromise the enjoyment of the right to a fair trial.

We have seen that in order to address the underlying causes of the failure of the criminal justice system's approach to safeguarding accused persons, the new Constitution has endeavoured to correct the structural deficiencies of the repealed Constitution in order to bring both sanity and clarity to institutional set up of administration of justice in Kenya. But this is not without practical problems; some of which have been highlighted in the final part of this chapter. We may thus conclude that having a good constitutional document may still fail to fully secure optimal operation of the safeguards that the right to a fair trial grants to accused individuals unless other interventions are considered.

¹²⁴ S. 12 of Cap 12 of the Laws of Kenya.

CHAPTER V:

PROSECUTION AND FAIR TRIAL SAFEGUARDS

After looking at the right to a fair trial from an institutional perspective relating to the independence and impartiality of the Judiciary in the last chapter, this chapter will investigate the institutional arrangements for making prosecution decisions which have an impact upon the enjoyment of fair trial rights. The structural deficiencies of the repealed Constitution with regard to the exercise of the power of prosecution by the office of the Attorney General will be discussed and an assessment of the extent to which the new Constitution transforms the exercise of this power to ensure that procedural justice is availed to those accused of criminal conduct made.

5.1. Introduction

Before we move away from the institutional set-up to the socio-cultural aspects affecting the enjoyment of the right to a fair trial in subsequent chapters of this thesis, this chapter addresses the other important institutional factor affecting the enjoyment of the right, that is the arrangements regarding the exercise of powers to institute, continue and terminate criminal charges at the trial stage. As we did in the previous chapter, here also, we shall be looking at the very positive constitutional interventions aimed at ensuring better enjoyment of the protection offered to individuals during prosecution, which nonetheless fail to address all problematic aspects in the formal criminal justice system.

It is notable in this regard that unlike the notion of judicial independence which is expressly acknowledged as a value of the right to fair trial, independence of institutions empowered to conduct criminal prosecutions is rarely, if ever, found in constitutional/human rights provisions regulating the right to a fair trial. However, we shall see in this chapter that

decisions relating to the institution and continuation of criminal proceedings have a particular impact on the notions of the equality of arms and (to some extent) the right to timely trials, which can never be fully enjoyed unless the independence and impartiality of the institutions responsible for prosecution is secured. Indeed, in the Kenyan context, we shall see that historically, the prosecutorial roles played by the Attorney General, the Director of Public Prosecutions and the police presented particular problems to safeguarding the constitutional right to a fair trial.

The chapter is divided into three substantive parts. In the first part, the argument is made that the role played by the prosecuting arm of government requires that the responsible organs be independent and impartial (just as it is the case with the Judiciary) if the right to a fair trial is to be fully secured. In the second part, we shall review the provisions of the repealed Constitution regarding the various organs that were empowered to carry out prosecutions, and highlight the areas of concern in relation to the safeguards offered to the accused individuals during trial. We shall then assess the extent to which the new Constitution has intervened to address the identified problems in the last part.

5.2. Prosecutorial Independence and the Right to a Fair Trial

Besides the key role that the Judiciary plays in adjudication (for which, as we saw in the last chapter, the Constitution has created checks to ensure that its powers are not abused), the organs responsible for prosecution are also very vital to the criminal justice process. Therefore, the Constitution in Kenya also provides structures aimed at ensuring that the prosecutors do not misuse the powers that it delegates.

To that end, the Constitution operates in two ways: First, it stipulates for judicial oversight over prosecutors to ensure that the prosecutorial discretion is appropriately exercised not only because the leverage given to prosecutors gives it a head start over the

accused persons but also because it has a strong bearing on the time that it takes for the matters in court to be concluded.¹ Secondly, the Constitution also provides for independence and impartiality of those responsible for prosecution since the way prosecutions are conducted invariably affect the equality of arms between the parties in criminal proceedings.

Unfortunately, independence of prosecutors is not always seen as a core safeguard to fair trials. There have even been times when it has been thought unnecessary for prosecutors to be impartial. For example, when the notion was once raised in the English House of Commons, the response was:

Whoever heard of an impartial prosecution? It was not in the nature of a prosecution to be impartial. If a man prosecuted a murderer who killed his relation, was he impartial? If a man pursued with a legal vengeance a robber who assails his purse, could he be said to be impartial? Was he not necessarily and naturally biased against the robber, or the murderer? In a prosecutor, impartiality would be a failing; for impartiality was very near akin to indifference; and what stimulative could indifference be to inquiry? Or what promoter of justice did there ever appear, whose prominent feature was apathy to offence?²

However, as the need to protect individuals became increasingly felt, safeguards were introduced by granting accused persons human rights and the courts power to protect them from being unduly prejudiced by prosecutors in search of convictions.³ In this regard for instance, all instruments containing the right to a fair trial require prosecutors to prove beyond reasonable doubt that the accused persons they seek to have convicted have indeed infringed the law and should therefore be meted with sanctions.

It must nonetheless be acknowledged that such provisions cannot by themselves prevent States through the prosecutors from getting their way even with the courts being vigilant to

¹ As we shall see when we discuss the aspect of *nolle prosequi* in this chapter in part 5.3.3.

² TC Hansard, 1812, Great Britain Parliament, 'Expedition to the Scheldt,' in *The Parliamentary debates from the year 1803 to the present time, Volume 15*, (House of Commons Parliamentary debate, 5 February 1810) 309, 319.

³ This is seen in the UN Charter's approach to protecting human rights as a cornerstone for world peace (articulated in the preamble and art 1 and 2) and the UN also taking further measures to formulate human rights instruments incorporating in them among other rights the right to a fair trial.

see that prosecutors discharge their heavy burden of proof. With pressure from the government, there is still the risk that prosecutors can employ extra-judicial manoeuvres to obtain convictions. A prosecution system with structures that are used for unbridled vengeance therefore poses danger to accused persons whether guilty or innocent. And to expect that oversight by the Judiciary over prosecutors alone will be sufficient to protect individuals facing criminal charges under such a system undermines the very essence of fair trial.

It is thus desirable that prosecution should be carried out in a manner that will safeguard the rights of the accused individuals and uphold the sanctity of the process as well as the dignity of the individuals concerned. This can only be possible if proper institutions, complementing the Judiciary, are set up and used for the prosecution of crimes. It is for this reason that professional entities are usually established to carry out prosecution with a rationality borne out of neutrality that they alone can have rather than to allow the injured individuals themselves to litigate. For that professionalism to be optimal, autonomy of prosecutors from the victims of the alleged offence, as well as from other organs of the State is necessary.

But in the adversarial system such as that adopted in Kenya, the use of professionally impartial and neutral State prosecutors also presents a problem with regard to equality between the parties that will ensure the requisite fairness. While the value of equality of arms is a necessary ingredient of the right to a fair trial in all legal systems, whether inquisitorial or adversarial, the potential for it to be threatened is more pronounced in adversarial systems because of the ‘partisan’ role ascribed to the parties, one of whom is the state prosecutor.⁴

⁴*Said Muto Masila and Another v. Republic*, High Court, Criminal Appeal No 341 of 2003 [2006] eKLR, 4;

In the adversarial system, accused individuals, either acting in person or with legal representation by advocates, have to directly contend against the prosecutor in proceedings that are dominated by the submission of parties. The parties have to make their cases as best as they can while the judges sit as neutral umpires, rarely participating in the course of the trials that are accusatorial in nature and take the form of a battle between parties. Judges would only intervene to ensure that there is fair play by both sides and no more at the trial stage.⁵

The adversarial system itself is founded on the legal assumption that even though the State, through the prosecutor takes over the matter, the parties are equal and have equal capacity to effectively make their own cases. But this is actually a fallacy. Equality that would ensure fairness between the prosecutors and the accused individual is quite illusory since prosecution is done by an arm of the government which has more resources. The same government also has autonomy over the use of force which makes it such a formidable opponent. Thus, in the US case of *Berger v. United States*,⁶ it was noted that universally, prosecutors usually have a head-start against the accused individuals. ‘They are representative not of an ordinary party to a controversy,’ but of a sovereign who makes the law and has its full force behind him.

Fortunately, it is in the scheme of human rights protection that the government is also charged with the function of protecting all individuals including those it suspects to have violated the law. As the High Court observed in *Samson John Nderitu v. Attorney General*:

⁵ The extent to which Judges do intervene can be quite controversial but rarely will the judge intervene to directly question a witness in the adversarial system and when he does, it will only be because some point of clarity is at issue (Małgorzata Wąsek-Wiaderek, *The Principle of ‘Equality of Arms’ in Criminal Procedure Under Article 6 of the European Convention on Human Rights and its Functions in Criminal Justice of Selected European Countries: A Comparative View* (Leuven University Press 2000) 33).

⁶ 55 s. ct. 629 (1935).

The office of the Attorney General [who was the chief public prosecutor then] plays a double role of catering for the interests of both the state and its citizens. This double role enjoins the office of the Attorney General to ensure that it exercises care and fairness in its handling of the citizens.⁷

The sovereign whom the prosecutor represents therefore has an obligation to govern impartially, which, according to the Judges in the *Berger case*, is ‘as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.’⁸

This can only be achieved in adversarial criminal proceedings when the legal system is able to support procedural equality of arms by creating a sort of balance between the prosecutor’s office and the accused individuals. Making the prosecution departments independent and autonomous is one way of doing this,⁹ as was aptly pointed out by the Court of Appeal in *Elirema & another v. Republic* when it said:¹⁰

In a criminal prosecution, there must be a prosecutor to discharge certain functions, which functions cannot be discharged by the Court before whom the prosecution is being conducted. That proposition is inherent in the fact that in Kenya the administration of justice is operated on the “adversarial system” in which it is assumed that each party or side to the dispute knows best what its case is and can and must be expected or assumed to know best how to present its side of the case to the Court.

In *Samuel Chege Gitau and 20 others v. the Attorney General*,¹¹ the High Court further stated that: ‘When it comes to matters of litigation, where a state is involved as a party it stands on equal footing before the seat of justice. It does not enjoy any privileged position and in this courts’, opinion, it is entitled to be called upon to justify its actions to the other party.’¹²

⁷ [2010] eKLR

⁸ *Berger case* 55 s. ct. 629 (1935).

⁹ See European Commission of Human Rights in *Pataki and Dunshirn v. Austria*, Report of the Commission adopted on 28 March 1963, 6 (1963) *Year Book on European Convention on Human Rights* 714, 731-2.

¹⁰ Criminal Appeal No 67 of 2002, [2003] KLR 537, 543.

¹¹ Nairobi, High Court, Civil Case No 548 of 1995.

¹² *Samuel Chege Gitau and 20 others v. the Attorney General*, Nairobi, High Court, Civil Case No. 548 of 1995, 35.

The prosecutor must therefore be seen as a ‘minister of justice’, whose role is to assist the court in the administration of justice ensuring that to the greatest possible extent, the correct outcome is arrived at during trial.¹³ He has a dual obligation: a duty not only to seek to secure a conviction of the guilty but also to protect the innocent. Sir Horace Awory stated in *R v. Banks* in this regard that: ‘Counsel for the prosecution throughout a case should not struggle for a verdict against the prisoner, but they ought to bear themselves rather in the character of ministers of justice assisting the administration of justice.’¹⁴

This view finds expression in Kenya in the case of *Republic v. Pattni*, where the High Court observed that the role of the prosecutor ought not to be to attempt to obtain conviction by all means or to regard itself as appearing for any party.¹⁵ The prosecutor’s duty is to put before the court fairly and impartially the whole facts; even those which would compromise the prosecution case; and to assist the court in all matters of law applicable to the case. The same was also reiterated by the Court of Appeal in *Thomas Patrick Gilbert Cholmondeley v. Republic*.¹⁶

Hence, the exercise of the prosecutor’s mandate invariably requires independence and impartiality and the organs empowered to conduct criminal prosecutions need to be adequately safeguarded against external influences, especially from the other organs of State.¹⁷ In fact, although the prosecutor is not in the contemplation of the fair trial norms

¹³ American Bar Association, Section of Criminal Justice, *Criminal justice*, (Vol. 19, ABA 2004) 49.

¹⁴ 2 KB 621.

¹⁵ High Court, Criminal Case No. 229 of 2003, [2005] KLR 310.

¹⁶ Court of Appeal, Criminal Appeal No 116 of 2007, [2008] eKLR, 6.

¹⁷ Jacqueline Hodgson and Andrew Roberts, ‘Criminal Process and Prosecution’ in Peter Cane and Herbert M. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) 82.

strictly captured in the requirement for independence and impartiality,¹⁸ these qualities are universally acknowledged as imperative to a fair trial.¹⁹

It should at the same time be emphasised that the need for independence and impartiality does not diminish the demand for appropriate judicial oversight over the prosecuting organs. Although courts should not actively participate in the decision on whether or not to prosecute in light of the aforementioned independence, they need to provide oversight to ensure that the court process is not abused to the disadvantage of the accused persons.

It is these issues of prosecutorial independence and impartiality on the one hand, and judicial oversight on the other, in the context of Kenya that we shall almost exclusively dwell on in this chapter, but comparison with a few selected Commonwealth jurisdictions will be offered where necessary.

5.3. Prosecution in Kenya Prior to the 2010 Constitution

Various aspects of criminal prosecution under the repealed Constitution in Kenya caused a lot of concerns, which in turn led to substantive review of the structure under the 2010 Constitution. Some reflection is therefore necessary to identify what the issues really were and also whether the new constitution actually resolves these issues in totality.

¹⁸ Provisions of fair trial safeguards in both the Constitution and various international instruments such as ICCPR art 14, African Charter art 7 etc, require that the tribunal/courts established by law are to be independent and impartial. It can therefore be argued that it is not in their contemplation that the same requirements should be met by the prosecutorial arm of the criminal justice machinery.

¹⁹ See eg *Prosecutor v. Momcilo Krajisnik*, ICTY, Decision of interlocutory motion challenging Jurisdiction 22 September 2000, André Klip and Göran Sluiter, *Annotated leading cases of international criminal tribunals: The International Criminal Tribunal for the Former Yugoslavia 2001* (Intersentia nv 2005) 17; Kalman Gyorgy, 'The Public Prosecutor's Office in Transitional Period' in *The Transformation of the Prokuratura into a Body Compatible With the Democratic Principles of Law: Proceedings, Multilateral Meeting Organised by the Council of Europe With The Co-Operation of the Office of the Prosecutor General of the Republic of Hungary*, Budapest, 27-29 September 1994, 13.

But before we delve into these concerns, we shall first review in this part the structures that existed under the repealed Constitution as a backdrop against which subsequent investigation will be later made.

5.3.1. Structures Established for Prosecution

Before the enactment of the 2010 Constitution, the power of criminal prosecution in Kenya was vested in the Attorney General whose office bore an almost exclusive role of lodging criminal cases before all the courts in the Country.²⁰ He was empowered:

(a) to institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any offence alleged to have been committed by that person; (b) to take over and continue any such criminal proceedings that have been instituted or undertaken by another person or authority; and (c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or another person or authority.²¹

The Attorney General's functions did not end with institution and termination of criminal suits. He was also the Executive's chief legal advisor and acted on behalf of the government on all civil cases as well as being an ex officio Member of Parliament.

The power to prosecute was however very rarely exercised directly by the Attorney General himself. It was delegated to the Department of Public Prosecution under the authority of the Director of Public Prosecution and other delegates including the police, who acted under the direct superintendence of the Director of Public Prosecution.²²

The office of the Director of Public Prosecutions, for its part, was not itself a constitutional office but just an administrative department established within the office of the Attorney General under which there were also state counsels both of whom worked under the

²⁰As we shall see shortly, trial magistrates could permit the prosecution to be conducted by any person, but no person other than a public prosecutor or other officer generally or specially authorized by the AG was entitled to do so without permission.

²¹ Repealed Constitution s 26(3).

²² Criminal Procedure Act s 85.

authority of the Attorney General but with the Director of Public Prosecutions directing their day-to-day work.

Since the Directorate of Public Prosecutions was inadequately resourced in terms of personnel and finance to be able to conduct all criminal prosecutions in the country,²³ the bulk of prosecutorial work fell to the police, from whose ranks some officers were empowered to act as prosecutors in the subordinate courts.

Other prosecutors could also be appointed by other authorities besides the Attorney General under specific Acts of Parliament, but even then, they were to act under his general or special instruction. For example, under the Local Government Act, local authorities were empowered ‘subject to the general or special directions of the Attorney-General,’ to appoint the council clerk or any other person in writing to prosecute offences under the Act or the by-law made by the local authority concerned in subordinate courts.²⁴ Such appointee would have all the powers conferred on a public prosecutor by the Criminal Procedure Code.²⁵

In rare cases, individuals could also conduct private prosecution with the consent of the trial court but the Attorney General’s office still determined whether or not a matter that was being privately prosecuted would proceed.²⁶

It should be noted at this juncture that the prosecution structure that existed in the Country was not so peculiar. It closely resembled those that have existed in other Commonwealth countries. In Australia where there exists a Commonwealth Director of

²³ As shall be discussed in chapter 6 of this thesis.

²⁴ Local Government Act s 260(1).

²⁵ Cr.PC s 86.

²⁶ Ibid 88. This is, as we shall see shortly, subject to the power of the AG to take over the prosecution and even terminate it. This happened, for example, when private prosecution instituted by Mr. Clifford Derrick Otieno against Kenya’s First Lady, Lucy Kibaki, and was later taken over and withdrawn by the Attorney General.

Public Prosecutions,²⁷ for instance, although the Office of the Director of Public Prosecutions is said to operate independently of Government, the ultimate authority for authorising prosecutions lies with the Attorney General who delegates his powers to the Director of Public Prosecutions and police prosecutors. In Hong Kong also, the Director of Public Prosecutions heads the Prosecutions Division which is under the Department of Justice led by the Secretary for Justice. Hence, the Director of Public Prosecutions is superintended by the Secretary for Justice, who is a political appointee accountable to the Executive.

Whilst the Kenyan arrangement under the old Constitution was not unlike those found throughout the Common Law world and may thus seem unremarkable, problems arose from way the provisions granting the powers to prosecute were implemented. Those who carried out these roles actually misused their position to disadvantage the accused person giving rise to the need for formal institutional changes of the sort which the new Constitution provided.

Some of these problems will now be highlighted below.

5.3.2. Concerns Regarding the Power of Prosecution under the Repealed Constitution

5.3.2.1. Concerns Associated with Overlapping Mandates of the Attorney General

The set-up of the institutions for prosecution of offenders was quite problematic insofar as the powers of prosecution were unduly lumped in with other vast roles vested in the office of the Attorney General. Besides having the ultimate authority on matters of criminal prosecutions, the Attorney General was also the chief legal advisor to the Executive as well as a Member of Parliament.²⁸

²⁷ Established under the Director of Public Prosecutions Act 1983, and with each state and territory also having its own Director of Public Prosecutions.

²⁸ While the repealed Constitution (Kenya) s 26 supplied the general power of the AG including as a principal legal advice and the chief public prosecutor, s 36 made him an ex officio MP. Indeed, for a long time, the AG successfully argued that his exercise of power of *nolle prosequi* was unfettered. Eg in *Mwangi and Seven Others v. AG*, [2002]KLR, a three judge bench held that only the High Court could question the exercise of

Having all these powers centralised in one person created a risk of abuse of office and required a lot of good faith on the part of the officeholder. Thus, noting the potential for abuse, the High Court in the case *African Commuter Services Limited v. the Attorney General and the Kenya Civil Aviation Authority*, held that the Attorney General's powers were:

[N]ever intended to create an institution whereby if a citizen ... either by himself or herself in his/her human form, or through a juristic person pitches himself/herself/itself in a legal battle against the State or *vice versa*, the office of the Attorney General was to provide its shoulders for the government and its institutions to perch themselves on, or its bosom for any to hide in, to the detriment of the weaker party.²⁹

Nonetheless, the courts were also largely responsible for the fortification of the Attorney General's prosecutorial discretion. For example, the Court of Appeal held in *Nicholas Muriuki Kangangi v. Attorney General* that no charges could stand in court without the express instruction of the Attorney General.³⁰ Similar findings were also made in *Jopley Constantine Oyieng v. Republic*³¹ and in *Stephen Gichuhi and 30 others v. the Republic*,³² which made these powers prone to abuse as we shall see with regard to the exercise of the powers of *nolle prosequi*.

This practice provided a basis for external influences being exerted on the prosecutor by members of the other organs in which he served (a concern that has also been noted in other jurisdictions with a similar system),³³ that was exhibited in some notable ways.

Firstly, as an *ex officio* Member of Parliament, the Attorney General was partly accountable to the Legislature and was thus amenable to political pressure unless he was quite

power by the AG since only that court had been specifically given jurisdiction over applications made by the AG

²⁹ Nairobi, High Court, Civil Case No 1208 of 2003.

³⁰ Court of Appeal, Nairobi, Civil Appeal No 331 of 2010, [2011] eKLR.

³¹ Court of Appeal, Nairobi, Criminal Appeal No 45 of 1988.

³² High Court, Nairobi, Criminal Application No 820 of 2002.

³³ Eg, while reviewing the system in New Zealand, Jacqueline Hodgson and Andrew Roberts noted that there is always a tension 'between independence and some form of democratic accountability (Jacqueline Hodgson and Andrew Roberts, 'Criminal Process and Prosecution' in Peter Cane and Herbert M. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) 84.

resolute on protecting his independence (something that could even lead to his dismissal). A case in point is where due to politics of intrigue in play at the time, Parliament sought to compel the Attorney general to prosecute a politician and businessman, Stanley Munga Githunguri on charges of contravening the provisions of the Exchange Control Act.³⁴ Although the then Attorney General rebuffed this attempt, he was soon removed from office and four years later, one of his successors even attempted (but without success) to prosecute Mr. Githunguri on the same grounds.³⁵

Secondly, although the Constitution provided for his independence in executing his mandate as the chief prosecutions officer, being a member of the Executive, the Attorney General as an appointee of the President could not realistically be expected to act independently of the person who appointed him.³⁶ Indeed, the repealed Constitution had attempted to safeguard the Attorney General's prosecutorial independence by granting the office-holder security of tenure. However this was quite precarious.

First, the Executive showed scant regard for protecting the Attorney General's security of tenure. As we noted in the last chapter, in 1988, the government actually successfully sponsored a motion to amend the Constitution to take away the Attorney General's security of tenure (alongside that of the Chief Justice). This was only restored in 1990 after immense public pressure.

Second, (something that also reinforces the view of the Executive's contempt of the security of tenure of the Attorney General) even during the periods when the Constitution

³⁴ In the Kenya National Assembly Official Record (Hansard of 9 June to 30 July 1981 at 768), the then Attorney General argued before the House that Prosecution was not persecution and the House could not challenge his decision not to proceed against Mr. Githunguri on the evidence contained in the inquiry file.

³⁵ In *Stanley Muga Githunguri v. Republic*, Miscellaneous Criminal Application No 180 of 1985, [1985] KLR 91. It was left to the High Court to find that there had been an undue delay and it would be unfair for the Attorney General to introduce a matter over which his predecessor had withdrawn.

³⁶ Repealed Constitution (Kenya) s 109(1).

secured the Attorney General's tenure, none of the Attorneys General ever served their full terms. Indeed, the provision for the Attorney General's security of tenure was not water-tight and the President could easily have him removed.

Under that Constitution, the President had the power to unilaterally appoint a tribunal to remove the Attorney General.³⁷ This did not require any petition at all. The President also solely determined the membership of the tribunal. Thus, even the most powerful of the Attorneys General could not contend with a President intent on having him removed. For example, notwithstanding his security of tenure, Sir Charles Njonjo who was the AG and a powerful Minister for Constitutional Affairs was forced to resign in 1983 after a judicial inquiry curiously concluded he had abused his office amid allegations that he was trying to take over the Presidency.³⁸

Hence, as the controversial manner in which the power of *nolle prosequi* was used, which we shall see later, will attest, the overlapping roles of the Attorney General actually negated the constitutionally secured independence of the attorney General's office in carrying out prosecutions,.

5.3.2.2. Concerns Associated with the Diversity of Institutions Empowered to Prosecute

Moreover, although the Attorney General was ultimately responsible for prosecution, this was usually done by other officers working under him. The positions of these other officers were even more uncertain with regard to independence and professionalism than in case of the Attorney General. This further led to some other notable concerns in the exercise of these powers.

(i) The Director of Public Prosecutions

³⁷ Ibid s 109(5).

³⁸ The political intrigues that led to Njonjo resigning may be seen in debates in Parliament found in the Kenya National Assembly Hansard of 15 March – 12 July 1983, 1819.

With regard to the Director of Public Prosecutions, he was also an Executive appointee. Although he was supposed to serve under the Attorney General, he was appointed by the President to whom it is arguable he was beholden. It would thus seem that there was no clear chain of command that would secure institutional independence. Whilst the Director of Public Prosecutions was required to receive instruction from the Attorney General, he was a civil servant who served at the pleasure of the President and was subject to Executive machinations.³⁹ His tenure was contained in the Gazette notice appointing him and which was determined by the Executive without any statutory regulation.⁴⁰

Thus, for example, Philip Murgor who served as Director of Public Prosecutions between 2003 and 2005 publicly complained that his work as the Director of Public Prosecution was often being frustrated by other officers in Government. He was soon to be unceremoniously removed even before his tenure expired.⁴¹

(ii) State Counsels

The State Counsels who worked in the Attorney General's chambers under the supervision of the Director of Public Prosecutions also served at the pleasure of the President.⁴² As civil servants employed by the Public Service Commission whose members were appointed

³⁹ Repealed Constitution (Kenya) s 24.

⁴⁰ Removal by the President was normally effected by transferring an unwanted individual from the post of DPP to another post in the civil service from where he or she would serve at the pleasure of the president.

⁴¹ 'Kenya' in Sanja Tatic, Christopher Walker (eds), *Countries at the Crossroads: A Survey of Democratic Governance* (Rowman and Littlefield 2006) 272.

⁴² Repealed Constitution (Kenya) s 24 provided that:
Subject to this Constitution and any other law, the powers of constituting and abolishing offices for the Republic of Kenya, of making appointments to any such office and terminating any such appointment, shall vest in the President.

exclusively by the President,⁴³ and with the Commission empowered to exercise disciplinary control over them, they were susceptible to punishment if they refused to tow-the-line.⁴⁴

Thus again, the controversial manner in which the power of *nolle prosequi* was usually exercised may have been a reflection of the lack of prosecutorial independence by the prosecuting state counsels.

(iii) Police Prosecutors

It ought to again be pointed out at this stage that like most of the issues raised in this thesis, the questions regarding the use of police prosecutors is not unique to Kenya. Universally, the issue reflects the tensions that exist between the need for independence of the prosecutor from the investigating organ on the one hand, and desire for expertise which specialist prosecution agencies may promote but which may be prejudicial to having them investigate and prosecute on the other.

It may indeed be argued that sometimes, it is necessary to grant special powers to prosecute certain offences to some autonomous agencies to enhance effectiveness and competency borne out of specialisation. For example, the State's anti-corruption agency may be better placed to try graft cases which are within its special mandate.⁴⁵ Similarly, environmental crimes may be more professionally and expediently prosecuted by an autonomous environmental agency.⁴⁶ In the United Kingdom, for instance, apart from the Crown Prosecution Service (CPS), which carries out most of the prosecution work, other

⁴³ Ibid s 106(2). The provisions for the removal of the members of the PSC (contained in s 106(8)) were similar to those for removal of judges which gave the President exclusive and unfettered powers to establish a tribunal and determine its membership.

⁴⁴ Ibid ss 107, 108.

⁴⁵ Eg the Anti-Corruption Commission (KACC) that was established under the Anti-Corruption and Economic Crimes Act 2003 had the power of prosecution similar to that borne by the police (under s 32) thus granting it some autonomy to enable it operate more effectively.

⁴⁶ NEMA is established under the Environmental Management and Coordination Act No 8 of 1999, s 7, which also creates environmental offences in part XIII.

organs like the Revenue Department have been empowered to undertake certain specialised work of prosecution.⁴⁷

By the same token, however, one could challenge the use of specialised agencies which conducts investigations into certain offences and arrests suspects and at the same time prosecutes them on the ground of requirement for independence.⁴⁸ In Kenya, the use of officers above the rank of Assistant Inspector of Police who could be appointed by the Attorney General as prosecutors under the Criminal Procedure Code⁴⁹ caused some particular in practice.

Firstly, the use of non-lawyers for a technical work best suited for lawyers was a challenge. Indeed, the disciplinary requirements of the police force in the country have been noted to be far removed from the demands for independent exercise of rational reasoning that is required of a prosecutor. The Kenyan police are known for their colonial mindset, usually associated with human rights violations.⁵⁰ They cannot therefore be expected at the same time to possess the requisite independence for prosecutors. And it does not help that most of those who join the police force in Kenya are individuals perceived not to have performed well academically.⁵¹

⁴⁷ House of Commons, Justice Committee, *The Crown Prosecution Service: Gatekeeper of the Criminal Justice System*, Ninth report of Session 2008-09, Report (The Stationery Office, 2009) 48.

⁴⁸ It was in this regard that Parliament refused to grant the Ethics and Anti-Corruption Commission (EACC) established under the Ethics and Anti-Corruption Commission Act (replacing the Kenya Anti-corruption Commission) the power to prosecute. The Ethics and Anti-Corruption Commission Bill 2011 had proposed granting of prosecuting powers to the EACC but this was rejected in Parliament during debate on the contention that it would be prejudicial to the suspects to have them investigated and prosecuted by the same persons thereby violating their Constitutional rights.

⁴⁹ CrPC s 85.

⁵⁰ See eg Michelle Kagari and Sophy Thomas, *The Police, the People, the Politics: Police Accountability in Kenya* (Commonwealth Human Rights Initiative and Kenya Human Rights Commission 2006) 3.

⁵¹ The qualification to the forces was very low grades that only those who could not join university joined the police. See generally, Michelle Kagari and Sophy Thomas, *The Police, The People, The Politics: Police Accountability in Kenya* (Commonwealth Human Rights Initiative, Kenya Human Rights Commission, CHRI 2006) 90.

Secondly, we ought to note that the repealed Constitution's requirement for independence and impartiality in the exercise of powers of prosecution by the Attorney General is by inference, applicable to all officers to whom these powers were delegated.⁵² Indeed, the need for autonomy between the prosecutor and the police was actually noted by the High Court in *Republic v. Pattni*,⁵³ when it held that whereas the repealed Constitution empowered the Attorney General to require the Commissioner of Police to conduct investigations, as the chief prosecutor, the Attorney General's office was not itself to be involved in the actual investigations.

With the primary responsibilities of investigating crimes and where necessary, arresting the suspected offenders, police officers actually lacked the requisite independence and impartiality to prosecute under the repealed Constitution. Being members of the disciplined forces which prioritise values of taking orders from superiors, it would have been difficult for the officers not to be swayed by the pressure exerted by their superiors in the force, and by extension, the Executive, when they acted as prosecutors.⁵⁴ Thus, the vast roles borne by the police also raised a similar concern as those earlier noted in relation to the multiplicity of conflicting roles being vested on the Attorney General.

Indeed, bias was sometimes palpable in cases where the police carried out the investigation, arrested and prosecuted the alleged offender. In *Wako Galgalo & 6 others v. Republic*,⁵⁵ one of the claimants' contentions was that a fair and impartial trial could not be possible in view of witnesses' discomfort with the prosecutor who had himself been the investigating officer. In fact, it was contended that the prosecutor would find it difficult to

⁵² Repealed Constitution (Kenya) s 26.

⁵³ High Court, Criminal Case No 229 of 2003, [2005] KLR 310.

⁵⁴ *The Police, the People, the Politics: Police Accountability in Kenya*, A joint Report by the Commonwealth Human Rights Initiative and Kenya Human Rights Commission (2006) 27.

⁵⁵ Criminal Miscellaneous Application No 46 of 2004, [2005]eKLR.

stand down and give evidence of his own investigation if he played both roles. Although the applicant did not succeed in his contention on a technicality that this was a matter to be tried by the court on merit, this was a clear example of the difficulty that the use of police prosecutors portended to fairness in criminal trials.

A third issue that arose from the use of police prosecutors was that the lack of sufficient number of advocates in the country meant that non-lawyers professional police officers were actually used to prosecute the majority of the cases that came before the courts. It is notable that police prosecutors were almost exclusively used in matters before the subordinate courts where the vast majority of criminal trials are usually commenced and even finalised. Here, some very serious offences are also tried alongside minor misdemeanours. For example, robbery with violence, a capital offence, is triable at the magistrate's court alongside minor cases of affray. Police officers therefore ended up handling some very serious issues that one expects would be handled by experts who appreciate the value of the safeguards offered to persons accused of such offences.

Even before the 2010 Constitution was enacted, in an attempt to minimise the risk of having incompetent officers carrying out the work of prosecution, the law actually limited the authority of the Attorney General to delegate his power to prosecute only to officers above the rank of Assistant Inspector of Police;⁵⁶ which the Court of Appeal clarified in *Roy Richard Elirema & Another v. Republic*,⁵⁷ meant that the Attorney General had no power to appoint a police officer below that rank. This did not however fully address the issue as most officers were promoted to this rank from the streets without any legal or human rights training.

⁵⁶ CrPC s 85.

⁵⁷ Criminal Appeal No 67 of 2002, [2003] KLR 537. See also *Macdonald Kahindi v. Republic*, Court of Appeal, Criminal Appeal No. 29 of 2007 [2009] eKLR.

In order to avoid the pitfalls of using non-professional personnel in some Jurisdictions which utilise police prosecutors, trained lawyers are usually employed as police prosecutors. For example, in Australia, inasmuch as most States and Territories almost exclusively utilise sworn police officers as police prosecutors in the summary courts, those employed are normally trained lawyers.⁵⁸ In New Zealand, on the other hand, police prosecutors, who may be sworn members of the police or civilian lawyers employed as non-sworn members of the police, are employed to prosecute matters in district courts. In smaller courts, the police prosecutors will normally consist entirely of sworn officers, while in larger courts a combination of sworn and non-sworn prosecutors are used.⁵⁹

This does not however mean that the use of lawyers within the police structures completely resolves all the concerns arising from the employment of police prosecutors; even in the countries where these officers are used, it has also been questioned whether the police are sufficiently equipped for prosecution.⁶⁰ In acknowledgement of these challenges, other States have now moved to completely phase out police prosecutors and employ professional prosecutors. In England and Wales (as well as Northern Ireland), for instance, the police were stripped of the responsibility to prosecute crime in 1986 and the power given to the Crown Prosecution Service.⁶¹

5.3.3. The Exercise of *Nolle Prosequi* and the Right to a Fair Trial

We have already alluded to the improper exercise of power of *nolle prosequi* under the repealed Constitution, which was arguably the most problematic aspect in terms of protecting the right to a fair trial *vis-à-vis* the power of prosecution under that system, which we shall

⁵⁸ Although being a lawyer is not a requirement to be a police prosecutor, in practice, it is persons with law degrees that are employed.

⁵⁹ But in New Zealand, these non-sworn officers are given some relevant training before they undertake prosecution which can hardly compare with the minimal training that the police prosecutors are offered.

⁶⁰ Enid Mona Campbell and Harry Whitmore, *Freedom in Australia* (Sydney University Press 1973) 123, 255.

⁶¹ John Sprack, *A Practical Approach to Criminal Procedure* (Oxford University Press 2011) 70.

now turn to. Indeed many violations of individuals' rights experienced during criminal trials may have arisen from the ultimate power that the Attorney General had to terminate criminal matters pending before any court at any stage without being challenged.

Although it was expressly stipulated that the provision to the effect that a person or authority 'was not subject to the direction or control of any other person' was not to be construed so as to preclude the courts supervisory jurisdiction,⁶² subordinate courts could never question the prosecutor's withdrawal of cases before them since they did not have supervisory jurisdiction.⁶³ Only the High Court (and by extension the Court of Appeal as the superior most court) could do so.⁶⁴ There were therefore many unmitigated abuses of the power to terminate cases by the Attorney General at the subordinate courts.⁶⁵

The most common of these practices was when prosecuting officers instituted criminal charges against individuals on the pretext of facilitating investigations even where there were no reasonable grounds to do so in the first place. After the investigations, if no evidence was found to support any charge, the cases would simply be withdrawn. If on the other hand, new evidence which supported a different charge from the one instituted was discovered, the matter would be withdrawn and a new charge instituted.

In *Republic v. Pattni*,⁶⁶ the High Court was forced to decline the withdrawal of a matter before it when it became apparent that the prosecution side had arrested Pattni without grounds and only intended to use the court process to assist it to conduct its investigations. It

⁶² Repealed Constitution s 123(8).

⁶³ Ibid s 26(8) provided that the Attorney General and by extension his delegates were 'not subject to supervision by any person or authority' when prosecuting criminal offences.

⁶⁴ Ibid s 84. In *Mwangi and Seven Others v. AG* [2002]KLR, a three judge bench had held that only the High Court could question the exercise of power by the AG since only that court had been specifically given jurisdiction over applications made by the AG.

⁶⁵ For how drastically this power has been applied, see eg Gitau Warigi 'Justice Does not Live Here Anymore' *Sunday Nation*, Nairobi, 22 May 2005; J. Kadida 'Wako Stops Case Against the VP' *Daily Nation*, 6 May 2005; J. Kadida 'Wako Stops Case Against Himself' *Daily Nation*, Nairobi, 9 March 2005; P. Mwaura 'Criminal Libel: Why Was the AG Shy?' *Saturday Nation*, Nairobi, 22 January 2005.

⁶⁶ High Court Criminal Case No 229 of 2003, [2005] KLR, 310.

held that the Attorney General's office could not be allowed to use its constitutional discretion to offend provisions of the same Constitution relating to prompt and timely trials. According to the Court, once the Attorney General decided not to pursue a matter, his right to change his mind was lost as inordinate delay would be taken to mean that the Attorney General had actually decided not to pursue the matter. It even suggested that time was ripe for the introduction of a limitation period within which a criminal prosecution may commence in order to avoid the abuse of the court process by the Attorney General.

Another way in which the withdrawal of cases prejudiced the right to a fair trial was that it gave undue advantage to the prosecution side by allowing the withdrawal and reinstitution of cases where fatal mistakes had been committed. *Nolle prosequi* allowed prosecutors to withdraw such cases so as to correct the errors discovered before reinstituting them without falling afoul the law. This led to the High Court in *Samuel Muchiri W. Njuguna v. the Attorney General and 6 Others* to condemn this practice which ensured that the police could continue to hold the plaintiff 'on a short leash with the threat reversed, that they could arraign him in court again.'⁶⁷

The existence of many appeals to the superior courts on this ground points to the fact that it may actually have been a common practice.⁶⁸ In *George Gitau Wainaina v. Republic*,⁶⁹ for example, the prosecutor had sought to enter *nolle prosequi* when it was realised that the court would dismiss the matter due to the prosecution having been conducted by an unqualified police officer. The withdrawal of the suit was however vehemently opposed by

⁶⁷ High Court, Nairobi, Civil Case No 838 of 2003.

⁶⁸ Eg, appeals on this ground were made in *Crispus Karanja Njogu v. Republic*, Criminal Application No 39 of 2000; *Gregory and Another v. Republic thro' Nottingham and two others* Nairobi, High Court, Miscellaneous, Civil Application No 996 of 2002 Consolidated with Miscellaneous Civil Application 1322 of 2002, [2004]1KLR 547.

⁶⁹ High Court, Criminal Revision No 68 of 2003, [2008] eKLR.

the accused who contended that having attended the court thirty one times in a span of fifteen months, it would be unfair for it not to proceed to a conclusion.⁷⁰

Accepting the Applicant's contention, the Court ruled that although under the (repealed) Constitution the Attorney General was not subject to 'the direction or control of any other person or authority',⁷¹ it also entitled the accused individuals to a fair trial. According to the Court, a *nolle prosequi* which would lead to a retrial after six years since the alleged offence was committed violated the right of an accused person to a trial within a reasonable time. It was noted in this case that because of the prolonged trial, even the administrative chief to whom the complaint had been made had already retired; a fact that would make it difficult to get him to give his testimony again if a retrial was ordered.

Thus, *nolle prosequi* may have often resulted in prolonged trials where accused persons were perpetually put on their defence without being able to plead double jeopardy or *autrefois acquit*. As Chief Justice Gleeson and justice Hayne have observed, among the reasons why the constitutional principle against double jeopardy was developed was to address the imbalance of power between prosecutors and accused individuals, to foreclose the possibility of prosecution being used as an instrument of tyranny as well as to help bring finality to litigation.⁷²

The improper exercise of the power of *nolle prosequi* also went against the principle of equality of arms where, for instance, accused persons were not treated equally with the prosecutor with regard to the ability to correct errors noticed in the case by being allowed to restart it after correcting the mistake.

⁷⁰ It had been conducted contrary to the CrPC s 85(2) that required prosecution by officer not below the rank of assistant inspector of police.

⁷¹ Repealed Constitution s 26.

⁷² In *R v Carroll* [2002] HCA 55; 213 CLR 635; 194 ALR 1; 77 ALJR 157 (5 December 2002).

It may be pointed out in conclusion that in this part, we have only cited cases in superior courts which are reported and therefore documented. But the large number of appeals on this ground indicates that misuse of the power of *nolle prosequi* may have been a common practice. Hence, a good number of cases, especially those before subordinate courts, which could never question the exercise of these powers, seem likely to have gone unnoticed.

Clearly therefore, the structure of prosecution in Kenya was problematic insofar as the safeguards to the right to a fair trial was concerned. Whether in relation to the role of the Attorney General or that of his delegates, the failure to achieve the full extent of independence contemplated by the repealed Constitution, and the inadequate judicial oversight that was palpable in the system caused problems for the attempt to secure the right to a fair trial in the country.

5.4. Interventions in the 2010 Constitution

The myriad problems facing criminal prosecution vis-à-vis the protection of right to a fair trial under the repealed Constitution did not go unnoticed by the framer of the new Constitution. Indeed, the 2010 Constitution has made great strides in addressing most of the concerns that arose from the exercise of prosecution powers and supplies the criminal justice processes with many features aimed at ensuring independence, impartiality and professionalism in criminal prosecutions.

This is done firstly, by the removal of the power of prosecution from the Attorney General's office and vesting it in the new independent office of the Director of Public Prosecutions whose only role will be to carry out criminal prosecutions.⁷³ It is now provided that:

⁷³ Constitution (2010) art 157.

The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.⁷⁴

Secondly, although the President continues to be the appointing authority for the Director of Public Prosecutions, his power is checked by the National Assembly which has to approve the President's nominee before the appointment becomes effective. To that end, the Constitution has further enshrined national values and principles of governance that are binding on all State and public officers when applying the provisions of the Constitution.⁷⁵ These values which are also applicable to the appointment of the Director of Public Prosecutions include norms such as the rule of law, democracy and participation of the people, inclusiveness, transparency, professionalism, merit and accountability.

In early 2011, an attempt by the President to appoint the first Director of Public Prosecutions along with other public officers under the current Constitution was vehemently opposed by civil society and a suit was filed to challenge these appointments.⁷⁶ The President was ultimately forced to withdraw his nominees and to delegate the power to a special and inclusive interview panel, which was mandated to receive and process applications, and interview and recommend at least three suitable candidates for appointment.⁷⁷ The post was thereafter advertised and applicants interviewed before the President chose one nominee for

⁷⁴ Ibid art 157(10).

⁷⁵ Ibid art 10.

⁷⁶ *CREAW and 7 others v. Attorney General*, High Court, Petition No 16 of 2011 [2011] eKLR.

⁷⁷ The panel consisted of the AG; a representative of the Office of the President; a representative of the Office of the Prime Minister; a representative of the Ministry of Justice, National Cohesion and Constitutional Affairs; two representatives of the Law society of Kenya; and a representative of Central Organization of Trade Union (COTU). The advertisement was carried in the local dailies and at the office of the public communication website on 17 March 2011.

the post.⁷⁸ The nominee was further subjected to vetting by Parliament before he was finally approved.⁷⁹

To avoid a repeat of the conflict that was witnessed in these appointments, the Public Appointments (Parliamentary Approval) Act, 2011 now seeks to clarify the procedures for appointing public officers under the Constitution or any other law for which the approval of Parliament is required. The Act provides that a Committee of the relevant House of Parliament will have to inquire as to the procedure used to arrive at the nominee before it approves the Appointment.⁸⁰ This must necessarily entail advertising the post and allowing the public to participate in the process as envisaged by the Constitution.

The third mechanism that the Constitution has employed is by providing measures to ensure that the Director of Public Prosecutions is not externally influenced. The office holder has now been given security of tenure and shall serve for a non-renewable term of eight years. This term limit has been imposed in order to ensure that the office-holder does not serve for too long to be able to entrench the vices detected in the old system.

He or she may also be removed from office before the expiry of his term but only on the grounds of inability to perform the functions of the office arising from mental or physical incapacity; failure to comply with the constitutional provisions on leadership and integrity (contained in Chapter Six of the Constitution); bankruptcy; incompetence; or gross misconduct or misbehaviour.⁸¹

⁷⁸ This was done in consultation with the Prime Minister according to the transition provisions in the new Constitution.

⁷⁹ This was not without controversy that the vetting committee and Parliament failed to take into account the integrity questions about the nominee (who formerly served as a DPP under the old Constitution).

⁸⁰ Public Appointments (Parliamentary Approval) Act s 7.

⁸¹ Constitution (2010) art 168.

A person intending to have the Director of Public Prosecutions removed on the above grounds will have to apply to the Public Service Commission, which, if it finds merit in the complaint, will forward the matter to the President for the appointment of a tribunal. The President can only appoint the tribunal upon the recommendation of the Commission.⁸²

A fourth measure that the Constitution adopts is one that is aimed at depoliticising the use of *nolle prosequi* by the government by giving courts the final power to ensure that this power is not abused. Now, the Director of Public Prosecutions cannot discontinue a matter without giving a reason to the trial court.⁸³ This supervisory power is not limited to the superior courts but may be exercised even by the subordinate courts. In *Republic v. Enock Wekesa and another*,⁸⁴ the High Court ruled that a valid writ of *nolle prosequi* needed to have proper reasoning for it to be accepted by the Magistrate's Court seized of the matter. It held that the trial magistrate had been right to dismiss a writ of *nolle prosequi* entered by a State Counsel without giving a reason since the constitution itself provided that the Director of Public Prosecution can only withdraw a matter on valid grounds.

Despite the State's contention that the Attorney General was authorised to enter *nolle prosequi* as part of his independence and was not bound to give any reasons to the trial court, the Court ruled that the trial Magistrate was right in seeking reasons so as to satisfy herself that there was no abuse of the legal process since it is provided that in exercising the powers conferred to him or her, the Director of Public Prosecutions shall have regard to the public interest; the interests of the administration of justice; and the need to prevent and avoid abuse of the legal process.⁸⁵

⁸² Ibid art 158.

⁸³ Ibid art 157(8).

⁸⁴ High Court, Kitale, Miscellaneous Criminal Revision No 267 of 2010, [2010]eKLR

⁸⁵ Constitution (2010) art 157(11).

The Constitution provides further that if the prosecutor discontinues proceedings after the close of the prosecution's case, the defendant shall be acquitted.⁸⁶ The accused individuals in this circumstance will be set free and it will not be possible to retry them for the same offence as they will in that case be able to plead *autrefois acquit*.⁸⁷

In line with the new Constitution, National Prosecutions Service Bill 2011 now sets the stage for an autonomous Office of Director of Public Prosecutions. The Bill creates a National Prosecution Service (NPS) that will have powers to recruit staff without going through the Public Service Commission. It also gives the Director of Public Prosecutions functional, operational, financial and administrative autonomy that is necessary to actualise the constitutional independence under Article 157.

Lastly, there is a move towards phasing out police prosecutors and recruiting professional lawyers to undertake prosecutions at all levels of the Judiciary to allay the problems associated with the use of non-professional personnel to conduct criminal prosecutions.⁸⁸

It is therefore clear that in its entirety, the new system actually creates a professional entity with the capacity to operate independently and impartially in line with the Constitution. The accused individuals will therefore be able to enjoy more safeguards under the new Constitution in respect to equality of arms and expedient trials.

5.5. Conclusion

In this chapter, we have sought to highlight that addressing concerns related to institutions responsible for prosecutions is a critical component in the move to secure the full enjoyment

⁸⁶ Ibid art 157(7).

⁸⁷ Ibid art 50(2)(o) provides safeguard against trial for an offence in respect of an act or omission for which the accused person had previously been acquitted.

⁸⁸ See UNODC, 'Launch of Joint UNODC and DPP Report: Towards Professionalized Prosecution Services in Kenya,' available at: <http://www.unodc.org/easternafrika/en/criminal-justice.html> accessed 25 October 2011.

of the right to a fair trial. We have noted that prosecutorial independence on the one hand, and judicial oversight of the exercise of these powers on the other, are critical to ensuring equality of arms and to some extent, achieving the expedition of criminal trials.

From the way the prosecutions were done under the repealed Constitution a lot was left to be desired, which necessitated legal reforms that came in the form of the 2010 Constitution. For example, among other things mentioned, we have noted that not only has the powers of prosecution been streamlined under this Constitution by the removal of that mandate from the office of the Attorney general and vesting it in a totally independent office of the Director of Public Prosecution (with the trappings that the office-holder is not subject to instruction or orders from any other authority), but also the role of the Directorate of Public Prosecutions has been limited to criminal prosecutions alone.

Nonetheless, the new Constitution does not fully address some of the issues of concern within the repealed constitutional framework. Firstly, with regard to prosecution by the police, the Director of Public Prosecutions is still empowered to delegate his authority to subordinate officers, which arguably includes designated police officers, who are expected to act not just in accordance with his special instructions but also to general ones. No qualification has been imposed on those to whom the power may be delegated.

Secondly, the autonomy of prosecuting crimes granted to the Directorate of Public Prosecutions has not been clarified. On the one hand, many specialised State agencies such as the anti-corruption organs will still have to depend on the Director of Public Prosecution in case a matter is required to be prosecuted. As earlier indicated, although the Independent Ethics and Ant-Corruption Bill, 2011 initially sought to grant the successor commission to the Anti-Corruption Commission the power to prosecute any matter within its mandate, Parliament removed this provision from the Act that as finally approved on the argument that

the organ cannot be allowed to be an investigator as well as a prosecutor. However, the Political Parties Act of 2012 on the other hand actually gives the Independent Electoral and Boundaries Commission powers to prosecute electoral offenders under its mandate in the new Constitution contrary to the arguments made in relation to the Anti-Corruption Commission thereby causing some confusion.

Lastly, the Department of Public Prosecutor in its *Democracy and Governance Office Activity Data Sheet* has also identified the chronic under-staffing of the Department, insufficient working resources in terms of equipment and literature and the lack of relevant, issue-specific training for prosecutors as persistent challenges.⁸⁹ Even if all the institutional challenges were to be addressed by the enabling statutes, there would still be some limitation as to how effective the right to a fair trial will be safeguarded considering, for example, the impact of poverty in the country which will be addressed in the next chapter. The desire to do away with the police prosecutors and to employ only trained lawyers to take up all criminal prosecutions will undoubtedly be hampered by the lack of adequate financial resources by the State.

This and those factors identified in the last chapter may lead to the conclusion that there is need to look beyond Parliament and the formal courts to address the challenges to the enjoyment of the right to a fair trial. Thus, in the next chapter, we shall begin to explore how social and economic factors have had an impact on the enjoyment of the right to a fair trial in criminal justice in Kenya.

⁸⁹ Implementation Letter No 4 DAGA 615-006.

CHAPTER VI:

IMPACT OF POVERTY AND ILLITERACY ON THE ENJOYMENT OF THE RIGHT

The chapters that follow move away from looking at the underpinnings of the right to a fair trial from a purely formalistic perspective to addressing the socio-cultural influences on the enjoyment of this right. In this chapter, we shall be investigating the impact of poverty and illiteracy on the enjoyment of the right against a similar backdrop as that in part 4.4, where corruption and ethnicity were seen as negative influences on the independence and impartiality of the Judiciary. The specific aim is to show that there are other important factors, which may not be purely legal, that nonetheless play an important part in determining how the benefits of the legal safeguards are enjoyed during trial. We seek to underscore that the role of social and cultural factors cannot be ignored when addressing the concepts underpinning the right to a fair trial.

6.1. Introduction

In this chapter we will explore the specific influences that poverty and illiteracy have had on the enjoyment of the right to a fair trial in Kenya. Together these represent two key social factors which have presented significant problems in effectively operationalising fair trial rights. Although the issues we highlight here are not exhaustive, they serve to illustrate the fact that an understanding of whether, and to what extent, the right is effectively protected requires one to move beyond the formal legal provisions to other relevant factors which are often neglected in discussions on legal safeguards provided to accused individuals.

The methodology adopted in this chapter deviates a bit from that used in the previous chapters in that besides using desk-based resources, the material here also contains

information sourced from empirical investigation obtained from field tours in Kenya which were carried out between March and May 2010. For that purpose, visits were made to two busy urban court stations in Nairobi and two other court stations serving rural areas. In Nairobi, Kibera Law Courts were visited between 15 and 19 March 2010 and Makadara Law Courts between 22 and 26 March of the same year. For the rural areas, Butali Law Courts were visited between 3 and 8 May 2010 while Kitale Law Courts were visited between 10 and 15 May 2010. Thus, some of the assertions in this chapter are based on personal observations of actual court proceedings.

Within the same period, discussion with various legal practitioners and other stakeholders in administration of justice (including members of civil society organizations interested in the criminal justice and individuals who are the end users of criminal justice institutions) were held in order to get the perspective of persons who actually interact with the criminal justice process.

The discussion in this chapter proceeds from the premise that all rights, including the right to a fair trial are universal; they do not differ from society to society or from community to community. It has in this regard been stated that, 'to call them human rights imply that they are [...] due to every human being in every human society.'¹ Yet, even as Henkin correctly points out that 'these rights do not differ with geography or history, culture or ideology, political or economic system, or stage of development,' they nonetheless operate within different social and cultural contexts that must be addressed.²

¹ Louis Henkin, 'Rights: Here and There,' (1981)81 (8) *Columbia Law Review* 1582, 1582.

² Elisabeth Reichert, 'Human Rights: An Examination of Universalism and Cultural Relativism,' (2006) 22(1) *Journal of Comparative Social Welfare* 23, 24, 29; Diana Ayton-Shenker, 'The Challenge of Human Rights and Cultural Diversity', United Nations Background Note, United Nations Department of Public Information DPI/1627/HRmMarch 1995.

In the last two chapters, for example, it was noted that there were some particular problems in enforcing the independence and impartiality of institutions responsible for criminal justice in Kenya even though the existing laws in that respect might not have been particularly unique. Although the substantive provisions may have been similar to those in other commonwealth jurisdictions, the same problems might not have been experienced in those other jurisdictions.³

Indeed, there are some factors presented by the social and cultural environment that contribute to the failure to adequately safeguard the right to a fair trial which cannot be adequately addressed by the universal human rights instruments and the generic legislation reflecting these rights in domestic laws. For instance, even as the right to accord all accused persons every opportunity to defend themselves either in person or through advocates of their choice is usually found in the constitutions of many countries, the impact of poverty and illiteracy on this right (which differs from place to place) is seldom given much attention by States.⁴ Thus, a large portion of the population end up not availing themselves of these rights because they are poor and cannot hire lawyers and the State cannot afford to offer legal aid in all cases. In Kenya, for instance, it was observed during the field visit conducted during this research that most individuals had to defend themselves in person and many of them were not able to offer credible defences as they did not fully comprehend the entire process.

It is therefore important to look at the social and cultural environment that affects operation of the formalist right to a fair trial in order to identify how the formal law can address them. This chapter will put the spotlight on poverty and illiteracy as some of the major social influences.

³ See part 5.3.1 of this thesis.

⁴ The debates on this issue are usually limited only to the right to legal aid which some States may not fully provide.

However, it needs to be pointed out that poverty and illiteracy are not the only relevant social influences that could be investigated. In chapter IV, while discussing the issue of independence of the Judiciary, it was highlighted how corruption and ethnicity led to a perception of a general lack of independence and impartiality in the administration of criminal justice. In the next chapter two chapters, we shall also investigate other social and cultural influences that are reflected in how the right has operationalised in Kenya. But by virtue of the overarching impact of poverty and illiteracy on both the institutional and procedural aspects of criminal justice and for the sake of brevity, we shall focus on the two aspects alone in this chapter.

In parts 6.2 and 6.3 we will look at the influences of poverty and illiteracy respectively on the enjoyment of the right to an independent and impartial tribunal, the right to a trial within a reasonable time and the right to equality of arms. We shall then proceed in part 6.4 to review how the new Constitution has sought to mitigate the violations oftenly associated with these two factors to underscore that it is possible to develop approaches that will ensure that notwithstanding the social influences, these rights are universally enjoyed.

6.2. Influence of Poverty

Poverty has largely been viewed as a major constraint to the enjoyment of human rights even beyond the economic, social and cultural rights to which it is often associated.⁵ As Thomas Pogge postulates in respect of the civil and political rights, the enjoyment of human rights entails that as far as it is reasonably possible, any coercive social institution should be

⁵ For a nexus between poverty and human rights see eg David Bilchitz's, *Poverty and Fundamental Rights, The Justification and Enforcement of Socio-Economic Rights* (Oxford University Press, 2007); Thomas Pogge, 'Severe Poverty as a Violation of Negative Duties,' (2005)19 (1)*Ethics and International Affairs* 55; Thomas Pogge, 'Severe Poverty as a Human Rights Violation,' in *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor* (Oxford University Press, 2007); Pablo Ruiz-Tagle, 'Poverty and the Creation of Fundamental Rights' *SELA 2005 Panel 2: The Institutional Strategies for Eradicating Poverty*; Connie Ngondi-Houghton, *Access to Justice and the Rule of Law in Kenya* (A Paper Developed for the Commission for the Empowerment of the Poor, 2006) 10. This also kept cropping up in discussions with various stakeholders during the course of the research.

designed so that all human beings affected by them have secure access to the rights.⁶ This will usually be hampered by poverty which constrains the State's ability to design structures with adequate physical infrastructure and human resources to ensure effective administration of justice. On the part of individuals, those charged with criminal offences cannot take advantage of the legally available safeguards such as the right to hire the best advocates of their choice if they are poor.

Thus, addressing the impact of poverty in the developing States which are characterised by financial and budgetary constraints is central to any attempt to effectively operationalise the right to a fair trial to ensure its full enjoyment. It is in that context that this part seeks to highlight the effect that poverty has had on the rights to a trial within a reasonable time by an independent and impartial tribunal while at the same time ensuring equality of arms between the state and the individuals facing criminal trial.

6.2.1. The Profile of Poverty in Kenya

With a population of approximately 39.8 million people, a gross domestic product (GDP) of about 838 US dollars per capita, and a per capita income of 680 US Dollars, Kenya lies among the groups of nations that are classified as poor, underdeveloped or developing countries.⁷ It has also been classified as a low-income nation by the World Bank and was ranked among the 'medium human development' States of the world in the United Nations Development Programme's Human Development Report.⁸ This report further indicates that 22.8 percent of the Kenyan population live on less than a dollar a day.⁹

⁶ Thomas Pogge, *World Poverty and Human Rights* (2nd Edn, Polity Press 2008)

⁷ Federal Research Division, *Country Profile: Kenya*, (Library of Congress, June 2007).

⁸ World Bank Classification of 2010; UNDP, Human Development Reports at hdr.undp.org.

⁹ UNDP Human and income poverty: developing countries / Population living below national poverty line, Human Development Indices: A statistical update 2008.

It is to be noted at this stage that as an issue of concern for the right to a fair trial, poverty is not a factor that is peculiar to Kenya. In fact, in terms of economic development, the country, which has been ranked number 148 among 177 States by the World Bank, fares comparatively better than her neighbours.¹⁰ Nonetheless, as one of the poor nations, there are many violations of individuals' rights during criminal trials in Kenya that are attributable to poverty which necessitates some examination.

Firstly, in terms of infrastructure and manpower, the State has not been able to create an environment which ensures that individuals access the rights that the Constitution supplies. Secondly, with only a few individuals owning the vast majority of wealth whilst the majority live in poverty, a famous Kenyan politician labelled it 'a country of ten millionaires and ten million beggars.'¹¹ This inequality has led to many citizens being unable to meet their basic needs let alone fund their defences during criminal trials.

By way of illustration, the impact of poverty is reflected in the Kenyan criminal justice system in the following ways:

6.2.2. Poverty and Institutional Independence and Impartiality

It has already been noted that the structural setup of the Judiciary and other institutions of the criminal justice system (which we reviewed in the last two chapters) largely depend on the financial facilitation by the State to ensure the requisite independence and impartiality as a facet of the right to a fair trial. For example, how the Judiciary controls the environment in which judges do their work impartially is largely dependent on financial autonomy granted to the institution and how well those who serve there are remunerated.

¹⁰ World Bank Data online at <http://data.worldbank.org/country/kenya> last visited on 3 March 2012.

¹¹ A quote which formed the title to Mwangi Wa Githinji's book, *Ten millionaires and ten million beggars* (Ashgate, Aldershot, 2000). See also John Thinguri Mukui, *Poverty Analysis in Kenya: Ten Years On* (CBS, SID and SIDA, 2005).

Even in developed States, financial considerations impact heavily on the institutional independence. In some affluent countries, budgetary dependency by the Judiciary on other organs has been considered a setback to independence of the Judiciary. In the US, for instance, Douglas and Hartley note of a potential ‘assault’ on the Judiciary by ‘the punitive threats to decrease judicial budgets and salaries of judges in the wake of unpopular court rulings.’¹²

In poor countries, underfunding is a more patent threat flowing from the states’ inability to balance their national budget. To overcome this, it is common that related government departments are funded from the same kitty from where it is thought that prioritisation will be facilitated than would be the case if each department was to have its own distinct pot of money. It is in this regard that the Kenyan Judiciary was for a long time funded from the allocation to the Attorney General’s office and thus did not have the autonomy to determine its financial priorities.

The flipside of this budgetary arrangement was that the Judiciary had to play second fiddle to the parent institution through which these funds were channelled. Notable also (from the discussion in chapter V) is that the Attorney General’s office was also the principal prosecuting organ of the State. This created a perception that there was no separation between the prosecutor and the judge whom the accused person faced in court; and that the State was actually the judge in its own cause.

Another point of concern over judicial independence in the country has been with regard to remuneration for judicial officers. Widespread corruption within the Judiciary and other organs in the criminal process in Kenya has been largely blamed on the work

¹² James W Douglas and Roger E Hartley, ‘The Politics of Court Budgeting in the States: Is Judicial Independence Threatened by the Budgetary Process?’ (2003) 63 (4) *Public Administration Review*, 441.

environment which includes meagre pay that these officers receive.¹³ As the Human Rights Committee notes, the independence of the Judiciary as a value of the right to a fair trial in article 14 of the International Covenant on Civil and Political Rights imposes a duty on the States to ensure that judicial officials are adequately remunerated.¹⁴ It has even been suggested that low pay for judicial officials leaves them susceptible to political pressure through economic manipulation.¹⁵ If not well paid, judges are bound to depend on others to be able to meet their personal and material needs. Thus, poorly paid judges have been found to be more open to receipt of bribes.¹⁶

Furthermore, financial constraints are often cited as a major reason why it is impossible to create effective institutional structures tasked with the responsibility of prosecuting suspects. A good example is the use of police prosecutors which we discussed in the last chapter. The use of police officers, whose primary task is to investigate crime, to conduct most prosecutions largely arises on account of insufficient manpower at the office of the Director of Public Prosecutions since that organ is not adequately facilitated to hire its own prosecutors. Just recently, the office of the Director of Public Prosecution appointed under the new Constitution requested to be allowed to employ 350 prosecutors in order to phase out the institution of police prosecutors and to support the devolved structures established in the 2010

¹³ *The Report of the Integrity and Anti-Corruption Committee of the Judiciary of Kenya* (The Ringera Report, Vol. 1, September 2003), Justice Ringera, *Corruption in the Judiciary*, Presentation made at a World Bank Forum in Washington DC on 25 April 2007.

¹⁴ Human Rights Committee, General Comment 32 para 19.

¹⁵ See Frederick Lee Morton, *Law, politics and the judicial process in Canada* (University of Calgary Press 2002) 22.

¹⁶ Peter H Russell, 'Towards a General Theory of Judicial Independence' in Peter H. Russell, David M. O'Brien (eds), *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* (University of Virginia Press 2001) 18.

Constitution. However, the State was only able to provide funds to employ 66 persons; a number well short of what was required.¹⁷

Clearly therefore, independence and impartiality in the institutions of criminal justice require a lot of financial input to facilitate the establishment of autonomous structures that are able to ensure that they are not beholden to any other organ of State; something that poor countries, like Kenya, may find difficult to support financially.

6.2.3. Poverty and Timely Trials

Besides its negative impact on the independence and impartiality of institutions, poverty also constrains timely trials, another key safeguard in the right to a fair trial.

From the perspective of the state, effecting expediency in criminal trials may require a lot of financial resources which poor States may not be able to afford. In many situations, delays caused by inadequate structures that are experienced in criminal trials undermine the value of judgments on account of the prolonged anxiety that it causes to litigants.¹⁸ It requires a lot of monetary investment to develop sufficient physical infrastructure and employ enough judicial and prosecutorial staff to handle all criminal matters to ensure that no delays are occasioned.

One of the major setbacks to the completion of criminal matters in good time in Kenya has been the inadequacy in the number of judges, magistrates and administrative staff employed within the Judiciary. According to the Kenyan Section of the International Commission of Jurists (ICJ-K), by early 2012, there were just 332 judges and magistrates serving a population of over 38 million people; a number that had not even reached the

¹⁷ See Rawlings Otieno, 'Tobiko Pleads for Money to Hire Staff', *Standard*, Nairobi 20 February 2012; Gilbert Ochieng, 'State to employ 930 prosecutors,' *Star*, Nairobi, 8 March 2012.

¹⁸ 4 American Bar Association, *Attacking litigation Costs and Delay Final Report of the Action Commission to Reduce Court Costs and Delay* (1984) 7.

maximum prescribed by law.¹⁹ Another research by the same organisation revealed that 85% and 84% of the respondents respectively did not think that the 48 judges and 278 magistrates in Kenya (at the time of the research) were enough.²⁰ It is telling that 12% of these respondents had matters that had been in court for more than three years with three percent saying that their cases had been ongoing for more than 10 years.²¹

It has also been suggested that the poor remuneration that is offered has left magistrates (in whose courts the majority of criminal cases are tried) quite demotivated leading to an under par performance in the Judiciary.²² This has been compounded by the fact that career progression within the Judiciary has been poor with many magistrates stagnating in the same positions for years as the State cannot afford the increased burden to the exchequer that regular promotions may occasion.²³

Inadequate physical infrastructure in the form of court buildings and accommodation for judicial officers in all parts of the country has also led to very few courts being set up. In most cases, the courts in the country are only found in urban areas. Hence, complainants and witnesses in remote areas are left to travel long distances to attend court which may make them fail to arrive on time for the hearing of their matter. On 13 May, I met a gentleman at the registry at the law courts in Kitale who was inquiring whether his matter had already been heard. He was supposed to have been in court in at 9 in the morning, but, because his home

¹⁹ ICJ-K at http://www.icj-kenya.org/index.php?option=com_content&view=categories&id=79&Itemid=119 last visited on 26 March 2012.

²⁰ *Strengthening Judicial Reforms in Kenya, Volume V: Public Perceptions of the Magistrates' Courts*, Research by ICJ-K, 23.

²¹ Ibid.

²² Magistrates' salaries in Kenya are quite low when compared with that of the Judges (of the superior courts of record) which has been cited as a cause of demotivation on and lethargy in the Judiciary (See *Strengthening Judicial Reforms in Kenya, Volume V: Public Perceptions Of The Magistrates' Courts* (ICJ-K), 41).

²³ See Paul Ogemba, 'Magistrates Push for Repeal of Death Penalty,' *Daily Nation*, 4 August 2011 where it is reported that during interviews for judges, the magistrates being interviewed complained to the Judicial Service Commission of career stagnation that has demotivated many in their ranks.

was located in a remote area and he could not afford the bus fare, he had had to walk about 25 Kilometres and could only get there at 11 am; and needless to say, after his case had already been set aside.

Even though failure to attend court may lead to dismissal of suits or the continuation without the evidence sought, in practice, the courts usually allow for adjournment to enable parties to attend or procure the attendance of witnesses if convinced that there were good reasons for their failure to attend on the date set for hearing.²⁴ In *Joseph Lekulaya Lelantile and Joseph Lemuru Hezron v. Republic*,²⁵ for example, the case was adjourned about 14 times to enable the inspector to come and complete his evidence before the trial Court had to proceed without that evidence. One of the reasons that may lead to these adjournments may be that since these individuals sought to come to court come from far away, the prosecutors will need time to find out why those summoned fail to appear before the matter proceeds without that witness.²⁶

On the part of the individuals facing trial in rural areas, even those who can hire advocates (who are quite few in rural areas due to rampant poverty) are adversely affected by the impact of poverty. Where courts are quite far from the scenes of crime, a lot of time may be required for possible witnesses who will testify in favour of the accused to be identified and brought to court. This may also lead the defence side to seek for adjournment hence further delays in conclusion of cases.

Thus, it may be argued that the element of the right to a fair trial that requires expediency in conclusion of matters is largely violated in the country when the brunt of

²⁴ See eg the situation in *Fatayi Adebisi Aluwatosin v. Republic* [2006] eKLR.

²⁵ Court of Appeal, Criminal Appeal No. 33 of 2000

²⁶ In *Republic v. Edwin Gitonga Ngoroi*, in the High Court at Meru, [2009]eKLR, 3 adjournments were granted to procure the attendance of the doctor who performed the post-mortem before the case proceeded without his evidence.

adverse effect is borne by the rural population in the country.²⁷ Nonetheless, even in urban areas, the negative impact of poverty on trial within a reasonable time is also felt. In this environment, poverty has been noted to increase the chances of truancy which in turn leads to an increase in the number of persons coming in contact with the criminal justice system and thus the judicial workload.²⁸

When I visited Kibera and Makadara law courts in Nairobi, for instance, there was noticeable many cases, most of which only came up for a mention in the morning, and the ones which proceeded went on late into the evening. In all the days that I visited these courts there was not a single day that all the matters in the day cause list were ever heard to the end as the magistrates had to adjourn the remaining cases at about 5 pm.

From my visits, it was apparent that on average, in courts situated in densely populated areas, a magistrate handles more cases a day than his/her counterpart in places with sparse population.²⁹ This makes it quite difficult to accord enough opportunity to each individual without too much time being taken before the matter is finally concluded in areas where magistrates handle more cases. Hence, poverty posed as much challenges in the urban areas as it did in rural areas vis-à-vis how long it took to conclude criminal trials.

6.2.4. Poverty and Equality of Arms

It was noted in Chapter II that the principle of equality of arms arises from the general provision that seeks to guarantee to each individual equal access to justice and equal

²⁷ Under art 14 of ICCPR, 'All persons shall be *equal* before the courts and tribunals.'

²⁸ This was the opinion expressed by Ms. Priscila Nyokabi, the Executive Director of Kituo Cha Sheria, an organisation specialising on legal aid to indigent persons in Kenya. The interview was conducted on 5 May 2010. Similar views were expressed by Peter Onyango, an advocate with the Justice Makers project CLEAR Kisumu who had participated on legal aid in Kodiaga prison in an interview on 8 May 2010.

²⁹ In my investigation of the Court Cause lists of May 2010, I discovered that Kibera and Makadara courts in Nairobi showed that a magistrate there handled more matters a day than in courts in the Butali law court in Malava and in Matuu in Ukambani which are in rural areas.

protection of the law that is found in various instruments.³⁰ In the context of the right to a fair trial, the provisions seek to afford litigating parties – and especially the weaker parties – a reasonable opportunity to make their case under conditions of equality. The idea is that both parties should procedurally enjoy an equal position throughout the duration of trial and should also be given equal treatment by the court.³¹

The principle of equality of arms encompasses a number of safeguards offered within the right to a fair trial. For instance, the right to legal representation by an advocate of one's choice, and the right to legal assistance in some cases for those who cannot afford to hire advocates of their own choice are provided to accused individuals.³² Moreover, procedural safeguards, such as the right for the accused individuals to have adequate time and facilities to prepare their defences and the right to call witnesses to testify in their favour are also offered within the fair trial safeguards in order to ensure that accused individuals can content with some parity with the prosecution side.

For the sake of brevity, in this part we shall focus on the aspect of the right of accused persons to have legal representation to exemplify the challenges poverty poses to the attainment of equality of arms. We shall however also briefly highlight challenges on other values under the principle of equality of arms towards the end of this part in order to show that the effect of poverty to the enjoyment of this right is quite cross-cutting and is not just limited to the issue of legal representation.

It is notable in this regard that the enjoyment of the right to a fair trial necessarily entails massive expenditure, which unfortunately is constrained in most cases by both individuals' poverty and budgetary limitations on the State in poor nations. From the

³⁰ Constitution (2010) art 27; ICCPR art 26; Banjul Charter art 3.

³¹ See also Stefania Negri, 'Equality of Arms: Guiding Light or Empty Shell', in Michael Bohlander (ed), *International criminal justice: a critical analysis of institutions and procedures* (Cameron May 2007) 1.

³² Constitution (2010) art 50.

individuals' perspective, since the accused persons have to contend against the State which is far better equipped, making an effective defence for them would necessarily require a substantial financial input. In criminal trials, lay accused persons may for instance not be able to comprehend the legal process and may need to hire advocates to represent them. However, on account of poverty, procuring the services of an advocate of one's choice may be a tall order for a majority of individuals facing trial.

On the part of the State, on the other hand, whereas individual poverty enhances the necessity for having a robust State-sponsored legal aid programme, a common argument associated with the general underdevelopment has been that a poor State such as Kenya cannot sustain an effective universal legal aid project.³³ Hence, only a limited free State-sponsored legal aid programme has existed in Kenya which has usually benefited only those being tried for certain offences.³⁴

Limiting free legal aid to a particular offence presented a number of problems in the enforcement of the right to equality of arms. For example, contrary to the principles of non-discrimination, under the 'pauper briefs' system that has been running in the country, there was disparity in the treatment of capital offences. Whereas murder suspects, whose trials are in the first instance initiated at the High Court, were given free legal aid, those tried for robberies with violence (also a capital offence) whose trials commence at the magistrates' court, were not. Thus, while murder suspects were always represented during trial, robbery with violence suspect who could not hire their own advocates had to defend themselves in

³³ It is to be noted that legal aid is not a right to all accused of criminal offences but when justice requires (Art. 14, ICCPR; HRC General Comment No. 32). See also Simon Rice, *A Human Right to Legal Aid* (February 4, 2009). Available at SSRN: <http://ssrn.com/abstract=1061541>.

³⁴ As mentioned in chapter II, before the enactment Constitution (2010), a 'pauper brief' system in Kenya provided representation for only those being tried of capital offences at the High Court leaving out any other deserving cases including capital trials undertaken by the magistrates unsupported by a legal aid programme.

person. A majority of capital offenders therefore had to face the prospect of death sentence without professional legal representation.³⁵

It does not mean that because of this discrimination in law murder suspects were always better off compared to those for robbery with violence. First, all robbery with violence suspects had the possibility of two appeals; one to the High Court and the other to the court of Appeal. Murder suspects, on the other hand, had to be contented with only a single appeal from the High Court to the Court of Appeal since their trials commenced at the High Court. Secondly, even where a counsel was appointed for a murder suspect, the right of representation, which entails effective legal counsel,³⁶ was not always ensured. There was no regulation as to how the appointed advocates were to carry out their functions, leaving the accused persons at the mercy of ‘their’ advocates. These advocates were never adequately remunerated and with only a token fee for disbursement, most lawyers were quite unmotivated to offer effective defence and never actually felt so obligated.³⁷ In 2009, for instance, advocates practising in Nyeri High Court returned all the pauper briefs to protest against a judge’s posting.³⁸

Thirdly, the ‘pauper brief’ system suffered from the problem of negative public perception from those that it was intended to benefit. Since the system was run by the Judiciary with the presiding judges taking the decisions whether to allocate lawyers in these

³⁵ According to the KNCHR, sample assessment report submitted by 9 prisons in the country showed that out of 1311 convictions for capital punishment, 1171 were for robbery with violence compared to only 140 convicted for murder (see The Kenya National Commission on Human Rights: Position Paper No 2 on the Abolition of the Death Penalty).

³⁶ Eg as held in the US case of *Strickland v. Washington* 466 U.S. 668 (1984).

³⁷ Priscilla Nyokabi, the Executive Director of Kituo Cha Sheria, an NGO providing legal aid pointed to this as a factor for having ineffective State-sponsored legal aid programme in Kenya in the interview with her on 5 May 2010. Kituo cha Sheria also uses volunteer advocates who are only given disbursement but who arguably prefer this approach that the pauper brief system.

³⁸ This strike was reported by Wambugu Kanyi in *The Star*, of 10 September 2009 (‘Nyeri Lawyers Resume Work after 2-Week Strike’ at p 7). Though the return of pauper briefs was not mentioned, Ms Nyokabi *above* mentioned this as a case in point. This was confirmed as having taken place by Gordon Ogado, an advocate of the High court of Kenya in a discussion on 7 May 2010.

cases, the lawyers were perceived to be representatives of the State rather than the accused persons. Some of them never really defended the accused as it is required of a legal counsel representing an accused individual. Indeed, it was with this problem in mind that in the US in the case of *Powell v. Alabama*, the Supreme Court affirmed that the role of a counsel chosen to represent a pauper was not to conduct himself as *amicus curiae* but had to actually argue his case in favour of his client.³⁹ In Kenya, a similar jurisprudence does not exist.

The negative perception about the ‘pauper brief’ system was further precipitated by a structure where both the Judiciary and the office of the prosecutor were under the same governmental department. There was therefore a general impression of lack of independence in running the legal aid programme which was quite amenable to influences by the Attorney General’s office that had the overall financial control.

This may also have further created the impression that advocates were being imposed on the accused persons by the State. There was no procedural requirement for the court to inquire as to whether the accused individual had consented to representation or whether the appointed advocates have received instruction from their clients. Individuals who were uncomfortable with the arrangement and could have protested against it may have been too overawed by the process to object.

Nonetheless, under a doctrine of *acquiescence* developed by the courts, it was presumed that where an accused person had not protested about the court appointed advocate, he had accepted him/her. In *Alloys Omondi Nanga v. Republic*,⁴⁰ for example, a court-appointed advocate had represented the appellant, accused of murder. No inquiry was made by the High Court as to whether he had consented to the legal representation. On appeal, the

³⁹ 28 US 45 (1932).

⁴⁰ Criminal Appeal No 7 of 2006, [2006] eKLR.

appellant therefore claimed among other things that he had neither consented to nor was approached by the court appointed counsel for instruction. He therefore argued that his constitutional rights to representation by a person of one's choice had been impinged.

In its finding, although the five-judge panel of the Court of Appeal felt that 'in light of the time-honoured practice,' the Chief Justice had validly assigned the accused person legal assistance and there was no material to show that the appellant had objected to the legal representation offered to him, it noted the procedural discrepancy that could impose an advocate to an accused. It thus strongly recommended that rules be made to require the recording of the consent of the accused to legal representation, since some people may not appreciate the imposition of advocates upon them by the State.

Another problematic legal issue that developed from the partial legal aid programme offered concerned the concept of *waiver of rights*. In a number of cases, the Court of Appeal enumerated the principle that when an appellant, who had been represented by an advocate failed to raise a claim of violation of his rights at the first opportunity, they would be deemed to have waived their rights.⁴¹ Unlike robbery with violence where suspects were not offered free legal services by the State and could therefore be permitted to bring up a matter of violation of his right at any time during legal proceedings, those suspected for murder (who had been given legal aid under the 'pauper briefs' system) would be deemed to have waived their rights if their court appointed advocate failed to raise an objection that their rights had been violated immediately a violation occurred.

⁴¹ James Githui Waithaka and Another v. Republic, High Court, Criminal Appeal No. 115 of 2007; Protas Madakwa Alias Collins and Two Others v. Republic, High Court, Criminal Appeal No. 118 of 2007; Thomas Sangare Kelolon v. Republic, High Court, Criminal Appeal No 169 of 2006.

It may be strongly contested that the notion of *waiver of rights* is conceptually wrong and unconstitutional.⁴² On a grammatical as well as purposive construction of the Constitution, it would appear that even if individuals do not assert their rights, it is incumbent upon the courts to inquire into whether the processes adopted in matters they are seized of complied with the set procedures.⁴³ The court should, on its own motion, seek to know whether there was a violation of rights and if so, to hold it in favour of the accused individuals.

Besides the issue of legal representation, poverty also leads to the violation of other limbs of the right to a fair trial that negates equality of arms. A few examples may suffice. Firstly, for poor suspects from remote areas where there are no courts, trials are held under an intimidating environment in far off places which they are not quite familiar with where families and friends may not be able to offer the moral support during trial. According to Peter Onyango, an advocate with the Justice Makers project, CLEAR, Kisumu who had participated on legal aid for prisoners in Kodiaga prison on 13 June 2009, a number of prisoners had alleged that they had confessed to what they actually never committed after being induced to believe that it was the easiest way out and that they could easily recant it later when the pressure on them had reduced as they would be given the opportunity to present their cases towards the end.⁴⁴

Secondly, poverty may render the granting of bail useless for the majority of suspects who are unable to meet the terms for the release issued by the court. Some people may

⁴² Especially as human rights are held to be inalienable (See Preamble to the UDHR).

⁴³ Thus, in *Elirema and Another v. Republic* CA Criminal Appeal No. 67 of 2002, [2003] KLR 537, it was held that despite (among other thing) the fact that the issues raised in the 2nd appeal was never raised during the trial nor at the first appeal, they were points of law that merited the Court's determination. The CA held therein that 'Each court is presumed to know its jurisdiction and it cannot be a valid answer for us to tell the appellants that they ought to have raised these issues before the two courts bellow (at 539-40).

⁴⁴ This interview was on 8 May 2010.

therefore continue to be incarcerated even after having secured bail for inability to provide the requisite security. And even for those that are bailed on a free personal bond, they may be unable to attend far flung courts each time they are required, thereby inviting the court to issue arrest warrants on them.

Thirdly, when witnesses who have had to travel long distances are required to attend court again and again, they may become reluctant to cooperate with the court which in turn will adversely compromise preparation of the accused person's defence especially when it is defence witnesses who are compelled to testify.

Moreover, when witnesses' attendance cannot be procured without unreasonable delay or expense, the law permits the court to employ other measures that diminish the constitutional safeguards to obtain evidence that will assist in the disposal of the matter. For example, written testimonies which cannot be tested through cross examination may be admitted.⁴⁵

Thus, to amplify the effect of poverty on the right to a fair trial, the Kenya National Commission on Human Rights points out that:

The poor are more likely to be convicted of a capital offence because they cannot afford good lawyers. Defending a capital offence is one of the most expensive undertakings; most accused persons are also poor and they cannot afford to put up an adequate defence. Good lawyers are quite costly. Legal aid by non-governmental organizations such as FIDA and Kituo cha Sheria is limited to major cities.⁴⁶

This peril is not limited to those accused of capital offences but is also faced by other accused individuals in almost all other criminal trials.

⁴⁵ Evidence Act s 33 permits the admission of written statements by persons who cannot be found or whose attendance cannot be procured without unreasonable delay or expense in certain circumstances.

⁴⁶ The Kenya National Commission on Human Rights: Position Paper No 2 on the Abolition of the Death Penalty

6.3. Influence of Illiteracy

The other social aspect that usually constrains the enjoyment of the right to a fair trial is illiteracy. And although illiteracy may not be a factor that directly affects independence and impartiality of the institutions of administration of criminal justice like poverty, when the two factors are compounded it becomes harder to ensure that the right is actually enjoyed.

Among the values that we are looking at, illiteracy arguably affects the right to equality of arms the most. However, its operation also interferes with expediency of trial which is a necessary precursor to the holistic enjoyment of the right to a fair trial. We shall therefore consider its impact on these two values in this part after reviewing the profile of illiteracy in Kenya.

6.3.1. Profile of Illiteracy in Kenya

According to data by the UNESCO Institute of Statistics, in 2009, 61.9% of the population over the age of 15 years in Kenya were literate.⁴⁷ This may seem to indicate that many Kenyans fare quite well in terms of literacy and therefore it should not be an important issue.

However, taking the statistics on face value may be misleading since the assessment is given only against the backdrop of the ability of individuals to read and write and does not assess the ability of individuals to comprehend what they read, and more so when it relates to technical subjects. A more comprehensive investigation, titled *the Kenya National Adult Literacy Survey* conducted earlier by the Kenya National Bureau of Statistics (KNBS) in collaboration with the Department of Adult Education and UNESCO, Nairobi Office is quite telling in this regard.⁴⁸ In that study, it was found that many persons who are usually indicated to be literate were actually unable to effectively perform within the context of

⁴⁷ At <http://www.uis.unesco.org>, last visited on 28 March 2012.

⁴⁸ The research was carried out between June and August 2006.

knowledge economies.⁴⁹ Further, although there was generally a high level of literacy in the country, when other indicators were used, only 29.6 % of the adult population had acquired the desired mastery level of literacy.

Also notable from that research was the revelation that there was a high gender and regional disparity with regard to literacy. It showed that in terms of literacy, women performed worse than men⁵⁰ and urban areas recorded higher literacy rates than rural areas. For example, while in Nairobi the adult literacy rate was 87.1 %, in North Eastern Province, only 9.1 % of adults were literate.⁵¹

It is in these contexts that most of the violations of the right to a fair trial occur and we therefore ought to assess the impact of illiteracy.

6.3.2. Illiteracy and Equality of Arms

Since many poor individuals end up representing themselves in person when facing trial, the issue of illiteracy comes into play with regard to equality of arms in a number of ways. In this part, emphasis shall be on the right to an interpreter, but we shall also later on briefly exemplify this on other values of the right to a fair trial to again show that the effect of illiteracy is also cross-cutting.

In respect of the right to an interpreter, illiteracy usually merges with the ethnic dimension of the Kenyan society to further limit equality of arms in criminal trials. With more than 40 linguistic communities in the country, a common problem relates to the need for translation and interpretation for the majority who are illiterate and understand neither English nor Swahili, the languages used by the courts in Kenya, so that they can effectively

⁴⁹ UNESCO Institute of Statistics Data for 2009.

⁵⁰ According to UNESCO Institute of Statistics Data, in 2009, while 70.7% of males over 15 years were literate, only 53.4% of female were.

⁵¹ This was also the conclusion of the *Kenya National Human Development Report 2009, Youth and Human Development: Tapping the Untapped Resource* (UNDP Kenya 2010) 10.

interact with the court.⁵² It often is the case that people will use their native tongues for ordinary communication and whenever they are uncomfortable, they may lose the little grasp of English or Kiswahili they have. Translators are therefore often required for such individuals when they appear in court.

The right to have an interpreter for persons who do not understand the language of the court is itself a value enshrined under the right to a fair trial.⁵³ This is aimed to ensure that the accused persons have the chance to effectively lodge their defences. As the Human Rights Committee puts it in General Comment No. 13, the right to an interpreter is ‘of basic importance in cases in which ignorance of the language used by the court or difficulty in understanding may constitute a major obstacle to the right of defence.’⁵⁴

In fact, it is in recognition of language disparity in the country that the Criminal Procedure Code expressly stipulates that there should be translation for the benefit of both the accused persons and the advocates of all evidence given, if it appears that it has been given in a language not understood by the relevant parties.⁵⁵ The court is further required to indicate the language in which the accused was informed of the charges as was established in *Richard Kariuki Mwangi v. Republic*.⁵⁶ The Court in this case was of the considered view that ‘the rights of an accused person ... cannot be waived on the belief that the accused is presumed to understand the language of the court.’ Indeed, in another case, *Diba Wako Kiyato v. Republic*,⁵⁷ the Court held that: ‘It is a fundamental right in Kenya, whatever the position is elsewhere, that an accused person is entitled to the assistance of an interpreter through whom

⁵² Under the Constitution, the official languages, and thus the languages of the courts are English and Kiswahili. Before the new Constitution, English was the official language while Kiswahili was the national language.

⁵³ Constitution (2010) art 50(2)(m); ICCPR art 14 (3)(f).

⁵⁴ At Para 13.

⁵⁵ Criminal Procedure Act s 198.

⁵⁶ High Court, Nyeri, Criminal Appeal 103 of 2005, [2008] eKLR.

⁵⁷ (1982-88) KAR 418.

the proceedings shall be interpreted to him in a language which he understands.' It was further established in *Jackson Namukoa munyasi v. Republic*,⁵⁸ that:

'It is imperative for courts when recording a plea of guilty to ensure that before an accused person is convicted, the charge and all the ingredients of the offence are explained to the accused in his own language or in a language which such an accused understands. It is therefore important for the language used and the translator to be shown.'

And in *Antony Njeru Kathiari and another v. Republic*,⁵⁹ the court noted: 'the practice of recordings (sic), if not the name of the interpreter, at least the nature of the interpretation, in judgements rendered by trial courts.

Although the Court of Appeal (the highest Court in Kenya at the time⁶⁰) reiterated in *Jackson Leskai v. Republic*,⁶¹ that it is the court's duty to ensure that the accused person's right to interpretation 'is safeguarded and to demonstratively show its protection,' the recurrence of this issue on appeal shows that it is indeed a common violation by the trial courts.⁶² In the *Kiyato case*, for example, the accused person had been convicted of robbery with violence and sentenced to hang. On appeal to the Court of Appeal, he successfully argued that although he had asked the court for a Borana interpreter, a Somali interpreter was used and he was therefore unable to follow the proceedings in the trial court.⁶³ A similar issue also arose in *Abdalla v. Republic*.⁶⁴ As we have already noted, since most individuals may not

⁵⁸ High Court, Bungoma, Criminal Appeal 81 of 2004, [2005] eKLR

⁵⁹ Criminal Appeal Case No. 21 and 23 of 2004.

⁶⁰ Constitution (2010) now establishes a Supreme Court in art 163.

⁶¹ Criminal Appeal No 313 of 2005.

⁶² Eg in *Paul Mutungu v. Republic* [2006] eKLR it was contented that the court proceedings (in which the accused allegedly pleaded guilty to a capital offence) were in English and Swahili whereas the accused only understood Kibutsotos, a dialect of the Luhya language. See also *Boit v. Republic* (2002) KLR vol 1 at 816; *Joseph Mackenzie v. Republic* [2006] eKLR; *Albert Ochieng Omondi v. Republic* [2006] eKLR; *Maurice Wambua Muia v. Republic* [2006] eKLR; *Antony Njeru Kathiari and Another v. Republic*, Criminal Appeal No. 21 and 23 of 2004; *Daniel Murithi v Republic*, High Court, Meru, Criminal Appeal 33 of 2006 [2010] eKLR

⁶³ Borana and Somali languages, as in many native languages are quite closely related but are not the same.

⁶⁴ See also, *Swahibu Simbauni Simiyu and another v. Republic* (2006) Court of Appeal, Kisumu, [2006] eKLR.

have the means to appeal on account of both illiteracy and poverty, this common violation may often go un-redressed.

Another issue with regard to the right to an interpreter is the vast difference that normally exists between most languages and English and Kiswahili. On this account, what is said may quite easily be lost or misinterpreted in the translation to the prejudice of the accused person. In *Maurice Wambua Muia v. Republic*,⁶⁵ for example, the High Court had to justify some discrepancies in the statement by a witness on the ground that the witness gave her oral evidence in Kikuyu but it was written in English and explained to her in Kiswahili.

Beside the questions posed with regard to interpretation on the facilitation of equality of arms, a few other concerns that arise may be pointed out. Firstly, it is obvious that people who cannot read will not be able to make sense of what is taking place in court on their own. Hence, even where legal safeguards are offered, the intended beneficiaries will never be able to take advantage of them if they are unable to comprehend the processes that they are subjected to. And even for those who can read and write, the situation is usually made worse by the legal system that thrives on the use of legal jargon which is a domain of lawyers that even those who are not classified as being illiterate but who are not educated in the law may not understand.

Mullei rightly points out that the formal courts in Kenya are usually not the most hospitable of places. 'In the minds of ordinary people, [they] conjures, images of grandness while its language sounds as so much mumbo jumbo.'⁶⁶ It is in a similar vein that Justice D.P. Bernard noted that:

⁶⁵Criminal Case 173 of 2003, [2006] eKLR.

⁶⁶ Christopher Mullei, 'The Judiciary and Constitutionalism: Creating New Ethos and Values,' in Lawrence Mute and Smokin Wanjala (eds.), *When the Constitution Begins to Flower* (Vol 1, Paradigms for Constitutional Change in Kenya, Claripress, Nairobi 2002) 58, 63.

For too long the court has been regarded as a mysterious organisation too complex for ordinary minds to comprehend, with its sombre attire, legal jargon and age-old traditions. Appearing before an austere personage dressed in peculiar black robes and looking down from on high can be a terrifying experience for the average person.⁶⁷

The stress, anxiety and intimidation of the court setting may further lower people's capacity to comprehend the proceedings that they are subjected to. Thus, an innocent person may feel so confused and intimidated that he may plead guilty because he cannot see any other way to make the problem go away.

In the appeal in *Issa Abdi Mohamed v. Republic*,⁶⁸ the Appellate Court observed:

During the hearing of this appeal, the Appellant struck me as a person who was oblivious of what was going on in court. He was totally ignorant and confused regarding what was going on in court. I am certain he exhibited the same characteristics and/or tendencies during the taking of the plea. In the premises I doubt very much whether the appellant understood the charge so as to respond ... 'it is true' ... 'I am guilty as charged.' These words were a creation of the presiding magistrate.

A second issue that may be pointed out in respect of the lack of understanding of court practices, which may lead to the disruption of courtroom procedure, is that ignorant individuals who are accused may seek to use disruptive techniques to avoid the court process.⁶⁹ This usually opens such a person to contempt of court proceedings, but may also lead to the exclusion of the disruptive individuals' from further proceedings.

In principle, doing away with the attendance of the accused person is allowed by the Constitution.⁷⁰ In practice, however, this would be fatal to the accused individuals' defence with great ramification to the fair conclusion of the case. In *James Kinyanjui Nduati & 2*

⁶⁷ Justice Désirée Bernard, *The Impact Of Corruption Within The Court System On Its Ability To Administer Justice* (Speech made at the 14th Commonwealth Law Conference, on September 2005).

⁶⁸ [2006] eKLR

⁶⁹ In Kitale, an individual who had been accused of assault kept on making noise and threatening the accused person in court no. 5 on 11 May 2010. At one time he muttered that the court was not interested in the fact that the lady he allegedly assaulted was in fact his wife and that he was rightly entitled to chastise her under their customs.

⁷⁰ Constitution (2010) art 50(8).

Others v. Republic,⁷¹ for example, one of the appellants had been excluded throughout the trial by the two learned Magistrates who separately heard the case as he did all sorts of mischief to disrupt the proceedings by either shouting or jumping up and down in the dock. He was eventually convicted in absentia and sentenced to death by the trial court but on appeal, the conviction was set aside and a re-trial ordered. In arriving at this decision, the High Court considered ‘that the conviction of the... Appellant was wholly erroneous. Having been excluded from the trial, he could not at the end of the trial be convicted of the offences laid therein. He could not lawfully be convicted in a trial in which he had never participated.’

Lastly, we have already noted the position in Kenya where jurisprudence has developed that if a person was represented, and did not raise the issue of violation of his/her right at the earliest opportunity, it would be deemed that he had waived his right. On the other hand, although unrepresented individuals were not presumed to have waived their rights, it would be most unlikely that such individuals would even know their rights in order to lodge an appeal, let alone get to claim the right at a future time unless they are instructed to do so by an advocate.

In these circumstances therefore, prosecutors, whether policemen or trained lawyers, usually fare better than laymen since they are well versed with this criminal law and court practice from their training and/or experience than most individuals who may be coming to court less often. Therefore, if unrepresented (as is usually the case especially in rural areas in Kenya), accused persons can never be said to stand on an equal footing with the prosecution side.

Moreover, we need to point out that the problem of representation is compounded by the fact that there are simply not enough advocates in Kenya to serve the whole population of

⁷¹ High Court Nairobi, Criminal Appeal 1091 of 1991 [1998] eKLR

persons needing legal representation.⁷² Of the just over eight thousand qualified practitioners, about five thousand advocates are in active practice having taken out a current practising certificate.⁷³ The majority of these advocates practice in Nairobi and in a few major towns, leaving some small towns and courts in rural areas without any advocate making it even more critical since the most illiterate portion of the population is actually found there.

Thus, in *Samson John Nderitu v. Attorney General*,⁷⁴ Justice Waweru aptly acknowledged that it was quite common, given ‘the state of legal awareness, or lack of it in the general population’ in the country that litigants never know the existence of the rights available to them in law. This is one of the aspects that critically constrain the equality of arms between the accused and the prosecutor.

6.3.3. Illiteracy and Timely Trials

Finally, moving on to the issue of timeliness of trials, illiteracy operates almost on similar grounds as those that constrain equality of arms. From the foregoing discussion, for example, it emerges that many appeals usually arise from the incapacity of individuals to comprehend the proceedings in criminal trials which in turn enlarges the time that is taken to conclusively complete a matter.

Although the right of appeal is in itself a fair trial safeguard,⁷⁵ when a large number of appeals, which are necessitated by the prevalence of illiteracy are lodged, it tends to clog up the courts and extend the time taken to conclude not only the matters in question, but also other matters that come to the courts due to the increased workload.

⁷² This was expressed as a critical aspect by Gertrude Angote, the Coordinator, Legal Aid and Education at Kituo Cha sheria and an Advocate on an interview on 5 May 2010 at the Kituo Cha Sheria premises.

⁷³ According to the Law Society of Kenya list for 2012, there were 5,240 in active practice as of 2 August 2012.

⁷⁴ [2010] eKLR.

⁷⁵ Constitution (2010) art 50(2)(q).

These appeals sometime also lead to re-trials that further prolong the process. In *Richard Kariuki Mwangi v. Republic*,⁷⁶ for instance, the State Counsel successfully sought a retrial after conceding that the conviction was erroneous because of the failure by the court to indicate the language in which the proceedings had been conducted. It was argued that this was necessary notwithstanding that it would prolong the trial; the process having already taken one year and eight months and the accused having been subjected to incarceration for three years.

Moreover, the disruption of proceedings by ignorant individuals who think that this would lead to their acquittal as was the case in *James Kinyanjui Nduati and 2 Others v. Republic* (earlier cited) may also lead to re-trials that effectively cause delays to the final determination. In that case, a retrial was ordered even though the accused had already been incarcerated for more than nine years.

With regard to the need for translation (itself a value recognised as a safeguard for fair trial), a number of concerns lead to prolonged criminal proceedings. First, a lot of time is usually taken when an interpreter is called in, which effectively reduces the requisite expediency. Indeed, it needs to be noted that translation is not only necessary for the benefit of accused persons but may also be required for the benefit of the court, the prosecutors and the advocates. Hence, it may be necessary that evidence is translated into more than one language as was the case in *Maurice Wambua Muia v. Republic* where English, Swahili and Kikuyu were all used.⁷⁷ Secondly, when translators (of which there are very few qualified) are not found, adjournments usually follow leading to some very straight forward matters

⁷⁶ High Court, Nyeri, Criminal Appeal 103 of 2005, [2008] eKLR.

⁷⁷ Criminal Case 173 of 2003, [2006] eKLR

taking a lot of time. For instance, in *Bishar Abdi v. Republic*,⁷⁸ the Court had to adjourn for a Borana interpreter to be found.

Illiteracy may also lead to some accused individuals jumping bail because they did not fully grasp the terms under which they were released which would in turn affect the trial of other co-accused. In *Mary Wambui Kinyanjui v. Republic*,⁷⁹ for example, the advocate for the applicant stated in an affidavit of evidence that the applicant had failed to appear in court after she had understood the prosecutor to have told her that the matter would not proceed any further since her co-accused had jumped bail.

And it is not just the accused persons who skip attending court. Witnesses may also fail to respond to a summons since they are unable to read or comprehend the enormity of the matter that they are called to attend to. Furthermore illiterate individuals, whether the accused or witnesses, have been known to go to the wrong court and thus miss the hearing thereby leading to unnecessary adjournments and even court sanctions.⁸⁰

Lastly but not the least, it is notable that in general illiteracy usually correlates with crime and the higher the illiteracy level the higher the crime rate.⁸¹ Higher levels of criminality are usually experienced in slums dwellings and in rural areas where illiteracy abounds than in affluent neighbourhoods. In Kenya, the Commission of Inquiry into Post-Election Violence (CIPEV) chaired by Justice Philip Waki, the Independent Review Commission on the General Elections held in Kenya on 27th December, 2007 chaired by Justice Krieglar as well as the report of Philip Alston, the UN Special Rapporteur on

⁷⁸ High Court, Criminal Appeal No 48 of 2006 [2008] eKLR.

⁷⁹ [2006] eKLR

⁸⁰ This issue was included in the research by the ICJ-K in *Strengthening Judicial Reforms in Kenya, Volume V: Public Perceptions of the Magistrates' Courts* (ICJ-K) and was found to be an issue to a small extent.

⁸¹ GR Siegel, *A research study to determine the effect of literacy and general educational development programs on adult offenders on probation, Adult Probation of the Superior Court in Pima County, Arizona* (1997).

Extrajudicial, Arbitrary or Summary Executions,⁸² all pointed to the prevalence of criminal activities in the slum settlements and rural areas during the post election violence that rocked the country in 2008. It is also in this regard that the evidence sought to be presented by the Prosecutor in the Kenyan cases before the ICC concentrated on activities that took places in these areas.

The enhanced levels of crime occasioned by illiteracy and ignorance of the law actually lead to an increase in the workload of the criminal courts, which in turn leads to delays in conclusion of criminal cases. Thus, a casual perusal of the court course lists in Kenya indicates that due to the unmanageable court workload, cases will more often only come up for mention with the main trials being postponed time and again.⁸³

6.4. Intervention by the New Constitution

The 2010 Constitution and some other pieces of legislation have sought to address most of the concerns attributed to poverty and illiteracy in relation to the operationalisation of the safeguards offered to suspects during trial. For example, unlike under the repealed Constitution wherein it was expressly provided that no person could claim the right to be represented by an advocate at the expense of the State, the 2010 Constitution obligates the State to formulate a programme that will ensure individuals are able ‘to have an advocate assigned to [them] by the State and at State expense, if substantial injustice would otherwise result.’⁸⁴

⁸² After his mission to Kenya between 16 and 25 February 2009.

⁸³ This according to Philip Kichana, former chairman of Public Law Institute and advocate of the High Court of Kenya in an interview with him on 16 May 2010. Court course list in Kenya can be found online at www.kenyalaw.org.

⁸⁴ Constitution (2010) art 50(2)(h).

This provision was considered in *David Njoroge Macharia v. Republic*,⁸⁵ where the Court of Appeal was of the opinion that in addition to situations where ‘substantial injustice would otherwise result,’ persons accused of capital offences (where the penalty is loss of life) have the right to legal representation at the State expense. This effectively removed the disparity that existed in the treatment of robbery with violence suspects and other suspected capital offenders.⁸⁶

To ensure that trials are not unduly prolonged, the 2010 Constitution envisages formulation of rules with minimal and simplified procedures. It is now expressly provided that in their functioning, the courts shall ensure that justice is not delayed’ and that ‘justice shall be administered without undue regard to procedural technicalities.’⁸⁷ Hopefully judicial reforms that are being undertaken to comply with the provisions of the new Constitution will incorporate an element of informal criminal adjudication, as it shall be argued in the next chapter of this thesis, to alleviate the problem of case backlogs and ensure timely trials are undertaken.

Already, as part of the judicial reforms, a proposal has been made by the Judicial Service Commission to have the Judiciary decentralised to ensure that its services are accessible throughout the country under the devolved structures established by the Constitution. On the interim, the plan is to decentralise the Court of Appeal by creating six permanent benches of the Court at various cities/towns around the country.⁸⁸ Under the current system, the appellate judges have had to travel from town to town to hear appeals

⁸⁵ Court of Appeal, Nairobi, Criminal Appeal No 497 of 2007 [2011] eKLR.

⁸⁶ However in this case, the Court was unwilling to:

Go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a re-trial where no such legal representation was provided. The reasons are that, firstly, the provisions of the new Constitution will not apply retroactively, and secondly every case must be decided on its own merit to determine if there was serious prejudice occasioned by reason of such omission.

⁸⁷ Constitution (2010) art 159(2)(b)(d).

⁸⁸ We will clear backlog in six months, says Chief Justice, *The Standard*, Nairobi, 19 October 2011

throughout the year. In the same vein, steps have been taken to establish 14 new High Court branches mostly in the remote parts of the country.

Moreover, extra staff is currently being recruited in the Judiciary and the office of the prosecutor. It has also been proposed that each judge will have a research assistant to ensure that they are able to carry out their work more professionally and expediently.⁸⁹ As part of these far reaching reforms, computerisation of all the operations of the Judiciary is underway as it is anticipated that this will reduce the delays that are occasioned by the manual case management system.

The new look Judiciary has also already started experimenting with videolink as a way of expediting trial without undue expenditure. In *Republic v. Kipsigei Cosmas Sigei & Another*,⁹⁰ Justice G.B.M. Kariuki ruled that:

The absence of specific legislation on video evidence does not... outlaw or render inadmissible video evidence. This court has a duty to adopt a commonsense approach in the face of these challenges when faced with questions of admissibility of video evidence notwithstanding that there is absence of regulations to direct the manner in which such evidence should be adduced or admitted. This court has inherent power to do justice in accordance with the law. This is core.

Hence, in *Livingstone Maina Ngare v Republic*,⁹¹ two witnesses domiciled in the United States of America who had expressed fears for their safety and security were they compelled to come to Kenya, prompted the prosecution to successfully request that the trial court be re-located to the USA for the purposes of receiving the evidence of the two witnesses. The Chief Justice by publication in the official gazette designated the Kenyan Embassy in Washington D.C, a court, for the purposes of receiving the evidence.

⁸⁹ Dave Opiyo, 'CJ unveils judicial reforms road map,' *Daily Nation*, Nairobi, 19 October 2011

⁹⁰ High Court, Kakamega, Criminal Case No. 19 of 2004,

⁹¹ Criminal Revision No. 88 ff 2011 [2011] eKLR

Within the spirit of the new Constitution, the Judiciary is now moving towards reduction of ‘legalism’ in criminal procedure and are progressively adopting procedures that ensure substantive justice. Illiterate accused persons will now be able to enjoy such safeguards as found in the Criminal Procedure Code that requires the use of ordinary language and as far as possible avoiding the use of technical terms.⁹²

Nonetheless, there are some concerns that cannot be addressed by the formal law. For example, it will be hard to take out the sting of the criminal procedure to illiterate persons who speak neither English nor Swahili even by using an interpreter if the meaning of what is said is lost in the translation. Other avenues will have to be explored if the right to a fair trial is to be fully enjoyed.

6.5. Conclusion

In recognition of the social forces that operate within the legal system, the new Constitution has sought to create structures that minimise the negative social influences to the enjoyment of the right to a fair trial. For example, financial autonomy of various State organs including the Judiciary and the office of the Director of Public Prosecutor have been safeguarded to allow departmental prioritisation which enables the justice system to operate more effectively. Free legal aid to accused individuals (albeit limited to situations where it is deemed that injustice will occur if none is offered) has also been enshrined in the Constitution to ensure that accused individuals enjoy equality of arms with the prosecution side.

However, even if all the institutional challenges were to be addressed by the enabling statutes as the Constitution requires,⁹³ there would still be some limitation as to how effective the right to a fair trial will be safeguarded against a backdrop of the social factors at play. It is

⁹² Cap 75, s 137(a)(ii)(iii).

⁹³ The 5th schedule to the Constitution required that legislation be enacted within specified time to enforce the provisions of the Constitution.

in this light that the legal sector reform, within the framework of poverty reduction strategy plan (PRSP) has sought to conceptualise the justice system, not just within the legislative context, but also within the notion of social wellbeing by, for example, laying emphasis on making justice more accessible to the poor.⁹⁴

These social factors need not necessarily lead to the violation of values of fair trial. In fact, some adaptations in the legal system may help to overcome their negative impact. Cutting down on legal technicalities, for example, may cushion people facing criminal justice system from prejudice resulting from illiteracy. It may also make the criminal processes less protracted and help avoid unnecessary delays that create backlogs which in turn burdens the already strained budget. It is in this regard that it will be argued in the next chapter, among other things, that adaptations in the criminal justice system that apply informal and customary modes of dispute resolution may be desirable to serve as a filter and ease the workload of the formal courts which can then optimally be used for the most deserving matters.

⁹⁴ Maria Nassali (ed), at Introduction to *Reforming Justice in East Africa: A Comparative Review of Legal Sectors Processes*, (Kituo Cha Katiba: Law and Justice Series, Kampala 2008) 1.

CHAPTER VII:

IMPACT OF INFORMAL DISPUTE RESOLUTION PROCESSES ON THE RIGHT

The aim of this very short chapter is twofold: first, it seeks to present African customs as an important socio-cultural aspect that removes the right to a fair trial from being a concern under the formal system alone and extends the debate to the arena of the informal system. Secondly, it is aimed to be an introduction to the concept of customary dispute resolution in the context of the dual system that was discussed in chapter III. Although these customary modes are not formally adopted into the Kenyan criminal justice system, in practice, they are seen to operate in a manner that is very influential to the formal safeguards offered to the accused individuals in criminal justice.

7.1. Introduction

In the preceding chapters, this work has dealt with the underpinnings of the rights to a fair trial in the formal legal system in Kenya by locating their legal bases and identifying factors that affected their application in criminal justice. Looking at the formal system alone does not however give a full picture of how these rights operate.¹ Informal systems based on African customary law also play a key role in the way these rights are enjoyed by persons suspected of acts that amount to criminal offences.

The relevance of customary law and African traditional modes of dispute resolution in Kenya is underscored in the law by the Constitution,² the Judicature Act³ and other Statutes,⁴

¹ Similar sentiments have been expressed by Van Der Waal in the case of South Africa when he argues that ‘the formal and informal are intertwined and need to be understood as complementary part of the same social reality’ (CS Van Der Waal, ‘Formal and Informal Dispute Resolution in Limpopo Province, South Africa’ in Manfred Hinz and Helgard Patemann (eds), *The Shade of New Leaves: Governance in Traditional Authority: A Southern African Perspective* (LIT Verlag Münster, 2006) 135, 135).

² Constitution (2010) art 159(2).

³ Judicature Act s 3(2).

which not only accord them recognition, but also encourage their development as alternative to the formal system.⁵ However, in the sphere of criminal litigation, no mechanisms exist through which informal modes of dispute resolution have been entrenched by the State. Conflicts in the criminal arena have thus largely remained a matter between the offender and the State.⁶

The role of the informal customary systems of dispute resolution in discourses on the rights to fair trial in criminal justice can, nonetheless, never be discounted. Three factors greatly enhance the role they play. Firstly, because of the impact of poverty and illiteracy, which we discussed in the previous chapter, many Kenyans in the rural areas and city slums who fail to find justice in the formal courts, utilise informal and customary modes to address matters that are of criminal nature. In these forums, little attention is given to legal safeguards for those suspected of wrongdoing. Without any regulation, these systems portend a lot of violation of the suspects' rights in which the State cannot intervene to prevent.

Secondly, on the other hand it is possible to view informal customary systems as one mechanism for addressing some of the failures of the formal court system to safeguard fair trial rights.⁷ Among other things, adopting informal customary systems may help reduce delay in disputes resolution and enhance equality of arms between the parties involved in an environment where widespread poverty has made legal representation for the majority of litigants impossible. This will be possible if the challenges in respect to independence and impartiality of the informal systems are addressed.

⁴ Eg the Law of Succession Act, (Cap. 160) s. 33 provides for interstate succession to be carried out by customary law in certain cases; the Land Disputes Tribunal Act (cap. 18) ss. 3-6 etc.

⁵ Constitution (2010) art 159(2)(c) stipulates that: 'alternative forms of dispute resolution including ... traditional dispute resolution mechanisms shall be promoted'.

⁶ R Sarre and K Earle, 'Restorative Justice' in R. Sarre and J. Tomaino (eds), *Key Issues in Criminal Justice* (2004) 144, 145.

⁷ An aspect addressed in Chapter V of this thesis.

Thirdly, customary dispute resolution also offers a perspective that merges the rights of individuals and the rights of the community in criminal justice giving the legal system sanctity in the eyes of the community in which it operates. Most individuals will find some relevance in the informal systems, which present conflict resolution as aimed at redressing social imbalances caused by wrongful acts.⁸ The fact that the formal system distinguishes between civil and criminal wrongs and offers divergent modes of resolution may be viewed as problematic by those whose reasoning are culturally oriented, creating dissatisfaction with the State system.

This chapter and the one that follows subject the alternative and informal customary dispute resolution to a critical assessment in light of the rights to fair trial. They espouse the thesis that informal customary modes of dispute resolution play an important role in determining how various rights operate within the criminal justice system, and may to an extent serve to validate legal protection of the rights to fair trial. But first, this chapter seeks to set the background for the analysis that will follow in the next chapter by explaining the legal structures in existence and identifying the context in which the informal customary systems operate. It will be proposed that there is an international context of States' human rights obligations that cannot be fully addressed unless the informal criminal justice processes are contextualised alongside the State-operated processes.

There are four substantive sections in this chapter. The first part makes a general overview of nature of dispute resolution in Kenya discussing the civil-criminal distinction that is made in the law and highlighting the difficulties that exist in enforcing this distinction. The second part introduces the concept of alternative and informal dispute resolution operating

⁸ Chukwuemeka Ebo, 'Indigenous Law and Justice: Some Major Concepts and Practices,' (1979) 76 *Vierlejahresberichte* 139, 139.

within the legal system. The third part then moves to look at the informal non-State systems operating in the Kenyan criminal justice system.

It will be noted that there are some particularly problematic aspects inherent in the informal structures that may seemingly be irreconcilable with the protection of human rights. The final part will thus attempt to address this issue by contextualising the informal dispute resolution modes within the State's human rights obligations in international law. It will be argued that there is an international context of States' human rights obligation that cannot be addressed unless the informal criminal justice processes are contextualised alongside the State-operated processes.

7.2. The Nature of Dispute Resolution in Kenya

Since our central concern in this and the next chapter is to address the place of informal customary systems of dispute resolution in criminal justice in Kenya, this part will highlight the existing structures of dispute resolution in the country and explain how the informal customary modes have operated alongside the State-established systems.

Briefly looking at the general operation of modes of dispute resolution in the formal legal system, disputes in Kenya are classified as being either civil or criminal following the Anglo-American common law traditions.⁹ Whereas the civil matters are deemed to be concerned with the rights and duties of citizens in dealings with other citizens, criminal offences are regarded as offences against society.¹⁰

⁹ Bronwen Morgan and Karen Yeung (ed), *An introduction to law and regulation: text and materials* (Cambridge University Press 2007)203-4.

¹⁰ Carrie Garrow and Sarah Deer, *Tribal criminal law and procedure* (Rowman Altamira 2004) 3.

This classification is deemed to be important because it determines the procedure through which different disputes are to be resolved.¹¹ Because crimes are considered to be wrongs against the society, criminal sanctions are determined and enforced by the State against the accused individuals,¹² and the State is expected to employ all necessary resources at its disposal in order to ensure that law and order is maintained. A flip side of this is that individuals are placed at a disadvantage when they have to contend against the State. More emphasis is therefore put on criminal procedure to help safeguard individuals against prejudice and reduce the inequality between the parties during trial.¹³ Formal adjudication through pre-established principles of law is therefore viewed as key to the protection of the accused person during trial. As already noted in chapter II, criminal dispute resolution jurisdiction is conferred to the courts by the Constitution,¹⁴ the Magistrates' Courts Act,¹⁵ Criminal Procedure Code,¹⁶ and the Appellate Jurisdiction Act.¹⁷ These laws by effect vest the Magistrates' Courts, the High Court, and the Court of Appeal – and now under the new Constitution the Supreme Court also¹⁸ – with criminal jurisdiction. So far, no other mode of dispute resolution beside these courts has been formally exploited.

In civil matters, on the other hand, since it is individuals and groups (including legal persons) that are trying to enforce their claims against each other, the disparity between the

¹¹ The bulk of procedural law is supplied on the basis of this distinction. Thus, civil procedure is generally found in the Civil Procedure Act, Cap 21 of the laws of Kenya, while criminal procedure is supplied by the Criminal Procedure Code (Cr.PC, Cap 75).

¹² Carrie Garrow and Sarah Deer, *Tribal criminal law and procedure* (Rowman Altamira 2004) 3; Stephen Elias, *Legal Research: How to Find and Understand the Law* (Nolo 2009) 51.

¹³ Tinsley E Yarbrough, *Mr. Justice Black and his critics* (Duke University Press, 1988) 62. See also UDHR art 10; ICCPR art 14; African Charter art 7; and ECHR art 6.

¹⁴ Constitution (2010) arts 159, 163-5.

¹⁵ Magistrates' Courts Act, Cap 10 of the Law of Kenya.

¹⁶ Cr.PC Schedule 1.

¹⁷ Appellate Jurisdiction Act, Cap 9 of the Law of Kenya.

¹⁸ The Supreme Court has been established as a new addition to the judicial system by the new Constitution by art 163.

parties are not as great as in criminal cases.¹⁹ It is therefore common to have flexibility in the modes of civil dispute resolution. In business transactions, for example, the contractual nature of relationship between the parties has made informal and alternative dispute resolution (ADR) quite acceptable.²⁰ Hence, although the bulk of procedural law for determination of civil disputes are generally found in the Civil Procedure Act and the Rules, parties may choose to resolve their matters by other means such as arbitration and determine what procedures would be applicable.²¹

However, just as in most African States, a rigid distinction of disputes is not possible in Kenya where the bulk of the alternative and informal modes of dispute resolution have been supplied by customary laws of various communities. These communities do not distinguish between civil and criminal disputes. Rather, as Nel writes, '[Their] customary dispute resolution systems focus more on the relationship between the disputants and what the wrongful acts has done to the relationship or to peaceful coexistence in the community.'²²

These systems tend to operate dynamically within and outside the State system.²³ Hence, customary law intervention has made the scheme of dispute resolution in Kenya to exist under several tiers of both formal and informal modes which interact in both civil and criminal spheres.

¹⁹ Although it is possible that even parties to a civil dispute will not stand on equal footing and thus, the law supplies fair trial safeguards to parties even in civil matters.

²⁰ Donald P Arnavas, *Alternative dispute resolution for government contracts* (CCH Incorporated, USA 2004) 1.

²¹ Arbitration Act, No 4 of 1995 s 20.

²² S Nel, 'Community Courts: Official Recognition and Criminal Jurisdiction - A Comparative Analysis,' (2001) 34 (1) *Comparative and International Law Journal of Southern Africa* 87, 91.

²³ Eg Whereas the Executive administration has supported communal dispute settlement militias have operated informal criminal trial processes in spite of express prohibition that has now been enshrined in the Prevention of Organised Crimes Act (No 6 of 2010).

7.3. Alternative and Informal Dispute Resolution

Before attempting to distinguish between the alternative and informal customary dispute resolution modes and looking at their relevance in criminal matters, we need to establish the various formal and informal modes of dispute resolution available in Kenya.

The formal modes are constituted exclusively of the courts and specialised tribunals established under the Constitution, bearing both civil and criminal jurisdiction. The formal specialised tribunals generally operate just like the regular courts but with specialised mandate and are normally not bound by the general rules of evidence and procedure.²⁴ This thesis shall not dwell much on the specialised tribunals, but it suffices to mention that although in most cases they are utilised in civil disputes,²⁵ they may also have great relevance to criminal proceedings. After the infamous post-election violence in 2007-2008, for example, it was suggested a special tribunal that would try suspects for offences related to the conflict and to address the human rights violations that occurred should be created as the first alternative.²⁶ A Bill was discussed by the Cabinet but it failed to receive approval prompting the International Criminal Court (ICC) to take up the matter.²⁷

Important to our discourse (and therefore needing some general analysis), informal modes of dispute resolution include both *State-centred* systems, normally referred to as the alternative dispute resolution (ADR) mechanisms; and *non-State* dispute resolution mechanisms, which consist of informal customary tribunals.

²⁴ A general overview of operation of tribunal is given in Robin Creyke (ed.), *Tribunals in the common law world* (The Federation Press, NSW. See specifically Tom Smyth, 'Overview', ix).

²⁵ Eg the National Environment Tribunal under Environmental Management and Co-ordination Act (No 8 of 1999) s 125.

²⁶ This was one of the recommendations of the Commission of Inquiry into Post-Election Violence (CIPEV) chaired by Justice Philip Waki.

²⁷ See, 'Bribe Claims over Kenya Tribunal,' *BBC*, 11 February 2009; Danielle Kurtzleben, 'Govt Fails to Keep Word on Tribunals,' *IPS*, Washington, 3 August 2009.

The State-centred systems revolve around a range of processes – such as arbitration, negotiation, mediation, and conciliation etc – which are fashioned to meet the specific needs of parties locked in a dispute.²⁸ They are usually taken as alternatives to litigation or to the formal courts. In Kenya, their sanctity is validated by the Arbitration Act,²⁹ which gives parties the right to submit their matters to determination by arbitrators admitting procedures of their own choice.³⁰

The so-called alternative dispute resolution mechanisms are favoured because of the flexibility they offer to dispute resolution as well as due to their expediency, impartiality, economy, and for their capacity to save business and personal relations.³¹ Indeed, as Woodman argues, it is never sufficient to look at the appropriate remedy as a temporal resolution of dispute, as the notion of dispute ‘extends to continuing future relations between parties.’³² Importantly also, Fidjoe notes that alternative dispute resolution mechanisms not only save private time and energy and increases participation in the justice system, they also save public expenditure by shortening court dockets thereby reducing backlogs.³³ Hence, though in most cases they are discussed in relation to civil disputes,³⁴ alternative dispute resolution mechanisms offer values that are quite cross cutting and addresses concerns that are relevant to both civil and criminal disputes resolution.

²⁸ Eg, Prof. Fiadjoe notes that ADR are preferred since they are fast, parties can choose to involve experts, they are flexible; economical; render finality to disputes; adaptable to diverse disputes etc (see Albert K. Fiadjoe, *Alternative dispute resolution: a developing world perspective* (Routledge-Cavendish, London 2004) 1)

²⁹ Act No 4 of 1995 that repealed Cap 49.

³⁰ Arbitration Act s 29.

³¹ Albert K Fiadjoe, *Alternative dispute resolution: a developing world perspective* (Routledge-Cavendish, London 2004) 1.

³² Gordon Woodman, ‘The Alternative Law of Alternative Dispute Resolution,’ (1990) 32(1) *Les Cahiers de Droit* 3, 7.

³³ Albert K Fiadjoe, *Alternative dispute resolution: a developing world perspective* (Routledge-Cavendish, London 2004) 1.

³⁴ See eg Roger E Hartley, *Alternative dispute resolution in civil justice systems* (New York: LFB Scholarly Publishing LLC, 2002); Edward A. Dauer, *Alternative dispute resolution: law and practice* (Juris Publishing, Inc 2004).

It should however be noted that arbitration and the other modes mentioned above are but just some of the many alternative dispute resolution mechanisms that exist. More broadly, it has been suggested that it is more beneficial to look at alternative dispute resolution mechanisms not just as alternative to litigation, but rather as a variety of methods of dispute resolution.³⁵ This would imply that beside the general classification of alternative dispute resolution mechanisms to include modes of arbitration, mediation, conciliation and negotiation etc, the term could be used to encompass all processes ‘which are not established, adopted or made effective by the State.’³⁶ Alternative dispute resolution mechanisms would in this sense also include the informal customary modes, whether sanctioned by the State or not, which we shall refer to as the *non-State* Systems/mechanisms.

In Kenya (and indeed in many African Countries), the non-State Systems, exist in a complex pattern outside (but alongside) the State-established modes.³⁷ On account of the predominance of African customs which predates the establishment of the formal State, in most parts of the country cultural dispute resolution modes have existed and prevailed in many a dispute. It may indeed be impossible to provide empirical data to the extent of their predominance by virtue of the fact that the systems are informal and unregulated. However, their overarching effect is quite clear.³⁸ In some areas it is said that the influence of such

³⁵ Albert K Fiadjoe, *Alternative dispute resolution: a developing world perspective* (Routledge-Cavendish, London 2004) 2.

³⁶ Gordon Woodman, ‘The Alternative Law of Alternative Dispute Resolution,’ (1990) 32 (1) *Les Cahiers de Droit* 3, 3. Here, the terms ‘dispute’ and ‘conflict’ are used interchangeably in the notion that Prof. Woodman discusses in the referenced paper.

³⁷ See eg Kennedy Mkutu, ‘Mitigation of Armed Criminality through an African Indigenous Approach: The Case of the Sungusungu in Kenya,’ *Crime Law Soc Change* (2010) 53:183–204; CS Van Der Waal, ‘Formal and Informal Dispute Resolution in Limpopo Province, South Africa,’ in Manfred Hinz and Helgard Patemann (eds), *The Shade of New Leaves: Governance in Traditional Authority: A Southern African Perspective* (LIT Verlag Münster, 2006) 135, 135; JPC Nzomiwu, *The Concept of Justice Among the Traditional Igbo: An Ethical Inquiry* (Fides Publishers, Awka 1999) 41.

³⁸ A number of investigation on the operation of customary dispute resolution in various parts of Kenya have been written covering diverse groups such as the most of the nomadic groups in Northern Kenya including the Somalis (Tanja Chopra, ‘Dispensing Elusive Justice: The Kenyan Judiciary amongst Pastoralist Societies,’ (2010) 2 *Hague Journal on the Rule of Law*, 95).

systems has been so great that people prefer to have their conflicts resolved through these modes to the extent that they withdraw most cases from the court, including capital offences in order to settle them through local mechanisms.³⁹

On account of the diversity of the mechanisms that exist all over the country, for the convenience of the analysis, we shall further classify these informal *non-State* mechanisms as *customary modes* and *militia or vigilante groups*. The purely customary modes of dispute resolution are unregulated by the State and the law remains silent about them; neither approving nor disapproving of their operation. On the other hand, tribal/ethnic militias and vigilante groups are prohibited by law and exist under the radar of state law but nonetheless still actively operate.⁴⁰ In their operation, these groups exploit customary law to sanctify their illegal activities and receive social approval and/or acceptance.

Furthermore, as was discussed in chapter III, the plural Kenyan legal system that was established at independence under the Judicature Act essentially incorporated African customary law into the national law. A unique consequence of this was that another class of the mechanisms that may be referred to as *semi-State-sanctioned* informal systems of dispute resolution exist. These arise when the informal *non-State* systems of dispute resolution operate outside direct legal sanction but with some State recognition and backing and are sometimes even exploited by the state itself in the process of administration. For example, in rural areas, administration chiefs are empowered to convene *barazas* in which disputes may be informally resolved. The chiefs may impose sanctions upon any party found to be guilty of a wrong. These chiefs do not only act as enforcers of the formal criminal system but also the informal systems where customary laws are generally applied.

³⁹ Tanja Chopra, 'Dispensing Elusive Justice: The Kenyan Judiciary amongst Pastoralist Societies,' (2010) 2 *Hague Journal on the Rule of Law*, 95.

⁴⁰ Most of these tribal/ethnic vigilante groups have been proscribed under the Prevention of Organised Crimes Act (No. 6 of 2010).

Pluralism therefore presents us with two approaches from which we may review the impact of the informal/customary modes of dispute resolution. Whereas juristic pluralism would lead us to look at the systems recognised by the constitutional order to determine which norms will operate and to what extent, diffuse pluralism on the other hand, would allow us to make an analysis where the relevant groups have their own rules regulating social behaviour whose operations are ‘neither sanctioned nor emanate from state law.’⁴¹

7.4. Non-State-Sanctioned and Semi-State-Sanctioned informal Dispute Resolution Systems in Criminal Dispute Resolution

Since our main concern is with the customary systems and how they operate alongside the formal courts; and now that we have identified where these modes fall in the scheme of dispute resolution in general, in this part, we shall use both juristic and diffuse legal pluralism to further investigate the operation of the classes of informal mechanisms of dispute resolution that exist in the country, namely; the customary modes, the militias and vigilante groups and the semi-State sanctioned informal systems.

7.4.1. The Customary Modes

The informal dispute resolution methods falling into the customary category follow the traditions and custom of the people as the basis for conflict resolution. Organisations enforcing customary and traditional order are normally ethnic-oriented; operating among a particular linguistic community and enforcing their rules through moral and customary sanctions, although sometimes also by coercive sanctions.

A good example of a system operating under this mode is that of the Somalis of northern Kenya.⁴² Among this group, the *Maslah*, a customary court system based on cultural

⁴¹ Patricia Kameri-Mbote, ‘Gender Dimensions of Law, Colonialism and Inheritance in East Africa: Kenyan Women's Experiences,’ 2002 (35) *Verfassung und Recht in Ubersee* 373, 379-80.

⁴² Although again, this has now received some State recognition through the provincial administration system and may therefore fall under the third category of semi-State sanctioned informal systems.

practices and Islamic religion is so popular that people ever so often refuse to use the State courts preferring to have their disputes privately settled through customary means.⁴³ During intermittent clan clashes in Northern Kenya, clan members of the victims' communities are even known to intercept suspects who are being taken to the formal courts arguing that courts take a long time to resolve the disputes thereby creating further tensions between the clans.⁴⁴

At *Maslah* hearings,⁴⁵ elders usually sit at a public place either under trees, in school halls or in mosques and places of worship in the villages to listen to the parties involved in a dispute and arrive at a settlement. Traditionally, these hearings are required to be impersonal and rational and the elders can only sit when tempers had cooled down (e.g. in cases of conflicts that have resulted to deaths, after the official mourning period). Both the complainants; usually a family or a clan, and the accused persons and their families or clans are heard before a settlement is reached. At the end, the group at fault is required to pay compensation to the injured family or clan. This may be in the form of animals or even blood money, determined on the basis of the severity of the wrong committed.⁴⁶

In 2009, for example, after clan fighting between *Murule* and *Gare* in Mandera District had left more than 20 people dead and hundreds displaced, *Maslah* courts were reportedly used to arrive at an amicable settlement between the warring groups. The demand for the bereaved clans was for acknowledgement and payment of compensation for the deaths and

⁴³ Adow Jubat and Boniface Onger, "Where Traditional Courts Reign", *Standard*, Nairobi, 1 July 2009.

⁴⁴ Ibid.

⁴⁵ These processes are also referred to as *xeer* and are applicable among the Somalis in Somalia, Kenya and Ethiopia (See, Isobel Birch and Halima Shuria, *Perspectives on Pastoral Development: A Casebook from Kenya* (Oxfam 2001) 33).

⁴⁶ Andre Le Sage, *Stateless Justice in Somalia: Formal and Informal* (Centre for Humanitarian Dialogue, Rule of Law Initiatives Report 2005) 35.

injuries. 'Tradition dictates that victims of clashes be compensated with camels or cash equivalent,' Aliow Hussein, a Somali elder disclosed.⁴⁷

Customary dispute resolution is also largely utilised by Kisiis in rural Nyanza, where just like it is with the Somalis, community members are known to prefer cultural ways of dispute resolution to the formal courts. A former Kisii Police Chief, Augustine Kimantiria,⁴⁸ says that this has even led to failure by witnesses to testify in criminal trials and offenders just end up negotiating with their accusers after they have been arrested or charged in court.⁴⁹

Beside the Somalis and the Kisiis, other communities including the Maasai, the Luo, the Pokot, the Turkana, the Samburu and the Marakwet, to name but a few also employ customary dispute resolution to most social conflicts,⁵⁰ making informal customary dispute resolution a central aspect of criminal conflict resolution in Kenya.

7.4.2. Militias and vigilante Groups

Just as the purely customary systems have been exploited for dispute resolution, over the years, other groups have also sprung up, exploiting the customs of the people in the various areas to try and fill in the gap in the maintenance of law and order. These groups, at a point in time develop adjudicatory organs which carry out 'trials' and execute punishment to the defaulters in order to maintain peace and order among its ranks and/or the society from which it operates.

The failure of the government machinery to prevent the ever-increasing crime rate has fed into the perception that it is the community itself that can get justice by organising

⁴⁷ Adow Jubat and Boniface Ongeri, "Where Traditional Courts Reign", *Standard*, Nairobi, 1 July 2009.

⁴⁸ Kisii is a region in the Western part of Kenya which is characterised by enormous cultural attachment by the (Kisii Speaking) community

⁴⁹ David Omwenga, 'Criminals' field day as witnesses chicken out,' *Standard*, Nairobi, 25 November 2009.

⁵⁰ Sultan Somjee, *Peace Building Cultures of the Maasai and Pokot* (Centre for Conflict Resolution, 2000); Betty Rabar and Martin Karimi (eds), *Indigenous Democracy: Traditional Conflict Resolution Mechanisms - Pokot, Turkana, Samburu and Marakwet* (Intermediate Technology Development Group – Eastern Africa, 2004).

vigilante groups to carry out these functions through the application of cultural modes of the respective ethnic communities. How have these organisations operated with regard to the notion of crime and punishment? A few examples of groups with notoriety that have caused great concern in the country may be highlighted here.

The first of such groups, are the *Sungusungu* and *Chinkororo* that operate in western parts of Kenya among the Kisiis and Kurias. *Sungusungu* first got public attention in 1982 in Tanzania among the Sukuma tribe as a grass-roots law and order organization formed with the goal of controlling the increasing number of cattle rustling and general insecurity.⁵¹ The 1979 war in Uganda had led to an increase in the number of illegal guns which the young jobless males used to cause chaos.⁵² *Sungusungu* was thus formed to prevent further degeneration.⁵³ Its cadre were peacemakers – council members used to arbitrate disputes involving debts or adultery with fines and sometimes ostracism.⁵⁴ With concrete institutions of social control, *Sungusungu* was socially entrenched and spread out to other areas, including Kenya, to the Kisii and Kuria communities where it came in to the spotlight in 1998.

Among the Kisiis, groups similar to *Sungusungu* called *Chinkororo* emerged at the same time.⁵⁵ Initially operating with the sanction of the district administration,⁵⁶ local norms of crime, trial and punishment distinct from those embodied in the national penal code were

⁵¹ *Taamuli* (Vol. 1, Dept of Political Science, University of Dar es Salaam, 1990)66-70; John Harbeson, Naomi Chazan and Donald Rothchild, *Civil Society and the State in Africa* (Lynne Rienner Publishers, 1994) 270-1

⁵² The war was fought between Uganda and Tanzania in 1978–79 that led to the deposition of Dictator Idi Amin Dada.

⁵³ *Utafiti*, (Vol 9, East African Literature Bureau 1987) 32, 45; Harry West and Parvathi Raman, *Enduring Socialism: Explorations of Revolution and Transformation, Restoration and Continuation* (Berghahn Books, 2009) 179.

⁵⁴ See JT Mwaikusa, 'Maintaining Law and Order in Tanzania: The Role of *Sungusungu* Defense Groups' in J Semboja and O Therkildsen (eds), *Service Provisioning under Stress in East Africa* (Copenhagen: Centre for development research 1995).

⁵⁵ Mwangi Kagwanja (ed), *Killing the vote: State Sponsored Violence and Flawed Elections in Kenya* (Kenya Human Rights Commission 1998) 47.

⁵⁶ Districts were administrative divisions within the provincial administration manned by the District Commissioners (DCs). The district were divided into Divisions under District Officers (Dos) and further into Locations, under the Chiefs; Sub-locations, under the Assistant Chiefs; and Villages, under Village Elders.

developed by these groups.⁵⁷ However, their greatest notoriety came predominantly from the violence that they perpetrated.⁵⁸ The organisations were used to punish adulterers, run-away wives, debtors, and witches.⁵⁹ They revived aggressive customary attitudes against women and became heavily involved in the killings. The ‘thieves’ that were caught were taken through Kangaroo court procedures established by these groups. Suspects were normally forced to confess by being tortured; sometime even to death. With the increase in notoriety through perpetuation of violence, these groups began to keep their distance from the police and Judiciary to avoid the systemic corruption of those institutions and to guard their independence.⁶⁰

Beside the *Sungusungu* and *Chinkororo*, the *Mungiki* and the *Anti-Mungiki* militias have also gained notoriety for informal dispute resolution. Operating in central Kenya the *Mungiki* group began as a quasi-religious group in the 1980s operating exclusively as a Kikuyu membership group, claiming ideological links with the anti-colonial *Mau-Mau* movement. It recruited its members through traditional oath-taking. With increase in insecurity, the groups came in to fill in the gap by operating as an enforcer of community values and traditional morals, advocating for values such as decency in dressing and holding ‘trials’ for people who violated its strict rules. With time, it began to demand payment from the people in return for the ‘guaranteed’ security, operating protection rackets in villages and city slums. It also began to operate among the informal privately-owned public transport sector (commonly called

⁵⁷ Kennedy Agade Mkutu, ‘Mitigation of Armed Criminality through an African Indigenous Approach,’ (2010) 53 *Crime Law and Social Change*, 192-4.

⁵⁸ Eg, Gladys Mutiso, ‘Four murdered, heads severed, NTV, 22 September 2010, where it was reported that in Nyasore village, the dreaded *Sungu Sungu* vigilante group had frog marched four suspects from a funeral meeting and executed them before chopping off their heads. The vigilantes were apparently on a mission, hunting down those they suspected were responsible for the shooting to death of a prominent church elder.

⁵⁹ Kimani Njogu and Hervé Maupeu, *Songs and Politics in Eastern Africa* (African Books Collective 2007) 235-40.

⁶⁰ See generally, Suzette Heald, *Making Law in Rural East Africa: Sungusungu in Kenya* (Working Paper no. 12, Crisis States Research Centre 2007).

Matatus). The group would even confiscate the properties of small businessmen who refused to pay a daily ‘fee’.

The *Mungiki* also allegedly developed close links to senior politicians. During the 2002 general elections, it is said to have supported the pro-government candidate and was therefore allowed to operate without police harassment even as its cadre committed atrocities against individuals perceived to be against the government preferred candidate. During the 2007 general election and the subsequent post-election violence, the group cast itself as the defender of the beleaguered Kikuyu community in the Rift Valley province, but its main target remained the very same Kikuyus it sought to protect.

When *Mungiki* became a great menace to the society and State machinery seemed to have failed to respond, some village militias were set up, taking over local security, mostly with the support of the police and/or administration officers. The Anti-*Mungiki* groups had their own kangaroo courts to try suspected *Mungiki* adherents who they would mostly execute after the ‘trials’.

Other communities also set up groups aimed at protecting their members against the *Mungiki* menace or to generally redress communal grievances. The Luo in city slums, for example, formed the ‘*Taliban*’ and the ‘*Baghdad boys*’ to enforce Luo interests, while among the Sabaot of Mount Elgon in Western Kenya, the Sabaot Land Defence Force (SLDF) was set up to protect the land rights of the Sabaot community along the Kenya/Uganda border.⁶¹

The SLDF was blamed for most of the violence that rocked the Mt Elgon area from around 2004 until 2008. Its hit-and-run attacks from the Mt Elgon forest were a major challenge to the authorities, who appeared to be incapable of quelling the rebellion, until the

⁶¹ Ben Rawlence, “*All the Men Have Gone*” *War Crimes in Kenya’s Mt. Elgon Conflict* (Human Rights Watch 2008).

government was forced to send in the army to assist the police to bring back law and order. The army killed most of its high ranking officials including its head, a man called Wycliffe Matakwei Kirui Komon.⁶²

Most of the vigilante groups have operated with informal support from powerful figures in the Government or even with sanction from the provincial administration. Police and security officials have also been implicated in the organised vigilantes groups' activities thereby sustaining their operations.⁶³

7.4.3. Informal Semi-State-Sanctioned Systems

Informal semi-State-sanctioned dispute resolution is a concept well known to the Kenyan legal system and has been widely applied in the resolution of civil disputes that have a customary context over the recent history. For example, section 9A of the Magistrates' Courts Act (cap. 10), inserted by the Magistrates' Jurisdiction (Amendment) Act 1981 provided for certain land disputes to be referred from courts to a panel of elders for resolution. This was later repealed by the Land Disputes Tribunal Act (Chapter 18 of 1990) which also established a Land Disputes Tribunal that was to be composed of elders and administrative officers.⁶⁴

The same has also been, more controversially (but to a large extent) applied in Criminal justice, the most prominent being under the provincial administration.⁶⁵ Over the years, under the office of the President, this administrative structure has existed to carry out the mandate of ensuring law and order.⁶⁶ Within it, the country was divided into provinces, districts,

⁶² 'Droves of Militia Surrender,' *Daily Nation*, Nairobi, 25 May 2008.

⁶³ 'Police Abetting Gang's Extrajudicial Killings,' *Standard*, Nairobi, 6 October 2010.

⁶⁴ Ss 4, 5.

⁶⁵ The provincial administration was established through a presidential circular in 1965 and enriched by the Chiefs Authority Act.

⁶⁶ The new Constitution provides for the restructuring of this system of provincial administration to comply with the new county-based devolved system that has now been created. A number of those interviewed during the field research for this thesis, including lawyers Gordon Ogado, Philip Kichana and Dorothy Angote also argued that Kenyans wanted the scrapping off of the provincial administration as it epitomized colonial

divisions, locations, sub-locations and villages. Each was put under the charge of administration officers ranking in a hierarchical order.

The powers of some of the officers within the provincial administration dates back to colonial times having been retained after independence. Indeed, during the colonial period, the colonial administration, seeking to utilise its limited human resources of the settler communities, had set up administrative officers for administration of Justice. The District Commissioners and District Officers had been empowered to sit as magistrate and determine criminal cases among the native population. Other officers such as the chiefs and village headmen had been employed effectively by the colonial administration to control people in native reserves. These chiefs and headmen habitually settled all manner of disputes and even meted out punishment to alleged offenders.

The discretionary powers of the administration officers were further buffered by certain statutes. Under the Chief's Authority Act,⁶⁷ the chiefs were given very wide powers to control individuals within their locations.⁶⁸ They were given the authority to appoint village elders and youth to help them.⁶⁹ The village elders had to be members of the local communities of good standing,⁷⁰ and just like the chiefs, performed quasi-judicial functions. Among the Luhya of western Kenya, for example, these elders referred to as the *Likurus* or *Mukasas* held public forums to settle local disputes including those that were criminal in nature, and only when they were unable to settle these disputes could they go to the formal courts. In so

oppressions that were retained by successive governments after independence. Widespread corruption and politicisation of the system informed the clamour for abolition of the provincial administration.

⁶⁷ Cap 128 of the Laws of Kenya, (a good number of sections were repealed vide Act 10 of 1997 following complaints that these officers abused their powers and violated the basic rights of individuals.

⁶⁸ The role of the chiefs was to maintain law and order and prevent crime in their area of jurisdiction (ss 6, 8 of the Chief's Authority Act).

⁶⁹ Chief's Authority Act s 7.

⁷⁰ The 1997 amendments stipulated that the village headman had to have a good knowledge of the people in the area, and it was required that the chief would consult with and receive views from members of the public on a suitability of any candidates to be the village headperson (Chief's Authority Act s 7A).

doing they tended to apply local customs and traditional values that they were well acquainted with, and which were easily understood by the people in the area, thus giving their decision some social legitimacy.

7.4.4. Conclusion

It is therefore noteworthy that most non-fully sanctioned informal systems of dispute resolution including the customary modes identified in part 7.2.1 and the Militia and vigilante groups in part 7.2.2 of this thesis have (at least at one time or another) operated with some backing from the government through the structure of the provincial administration to help in the maintenance of law and order by adjudicating over social conflicts. Julius Kitili, a senior police officer in Wajir in Northern Kenya is, for example, on record saying that the use of the *Maslah* was preferred by the government as it helped reduce piling up of cases in courts.⁷¹

A complex relationship was therefore maintained between the informal customary systems of dispute resolution and the State in Kenya which has nonetheless not been formally recognised in the criminal justice system to warrant the consideration of the informal modes from a human rights perspective. It is indeed in acknowledgement of the relationship that has always existed between the State-sanctioned and informal customary systems that the new Constitution seeks to promote regulated traditional modes of dispute resolution.⁷²

7.5. Informal Dispute Resolution Modes from the Perspective of State's Human Rights Obligation in International Law

One may validly question the significance of informal dispute resolution mechanisms to a discourse on fair trial in criminal justice since most of their practices fail to adhere to the established human rights standards. A review of the operation of the informal criminal justice

⁷¹ Adow Jubat and Boniface Onger, "Where Traditional Courts Reign", *The Standard*, Nairobi, 1 July 2009. He however says that ideally, there were crimes such as defilement against which the administration did not support the cultural settlements.

⁷² Constitution (2010) art 159(2)(c).

system in Kenya, however, imminently reveals that a number of the mechanisms operate within acceptable purview of notions of natural justice and may therefore easily be accepted as valid dispute resolution mechanisms, notwithstanding that a good number of them, especially the militias and vigilante groups, portend a threat to the maintenance of law and order and perpetuate a lot of injustice.

It may indeed be argued that very existence of informal systems implies that individuals are denied the protection entailed in the provision of fair trial, and a key theme to the rule of law, namely that a person suspected of a criminal offence ought to be tried by an independent and impartial tribunal established by law. This poses a challenge to the State as when such groups continue to operate in spite of being declared illegal, the State is divested of the power to enforce obedience to law.⁷³

This however leads one to ask: Would the State be responsible for the failures to safeguard suspected criminals who go through these illegal procedures? If we approach this question from the perspective of international law,⁷⁴ we shall find that norms of human rights have developed obligations according to which States must protect individuals and ensure that they enjoy their rights optimally.⁷⁵ Thus, human rights protections are claimed not just against the actions of the State through its agents, but also against conduct of non-State actors. The State is under an obligation to not only ensure that its agents do not violate the relevant rights but to prevent violations by non-State actors as well.⁷⁶ This finds sanctity in the Constitution

⁷³ This is central to the Austinian theory of law as a command of the sovereign backed by sanction (John Austin, *The Province of Jurisprudence Determined* (J. Murray (ed.), London 1832).

⁷⁴ Art 21(4) stipulates that 'the State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.'

⁷⁵ Eg under ICCPR art 2; African/Banjul Charter art 1; ECHR art 1 etc.

⁷⁶ States' human rights obligations have been classified as obligation to respect, protect and fulfil. The obligation to respect requires States to refrain from interfering with the enjoyment of rights. The obligation to protect requires them to prevent abuses by third parties while the obligation to fulfil requires them to take steps to ensure the realisation of rights. Although this nomenclature is common to economic social and cultural rights (ESCR), its relevance is on the whole human rights arena. For an appraisal in light of the ESCR Ida Elisabeth

itself in the provision that, ‘It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.’⁷⁷

This dual obligation implies with regards to the rights to fair trial, first, that the State must develop means that would optimise the enjoyment of highest standard of procedural safeguards for those tried for criminal offences in the formal courts.⁷⁸ Secondly, the State has a duty to ensure that any mode that is operated within its jurisdiction is capable of offering the relevant safeguards. The Human Rights Committee of the United Nations has reiterated in the context of the right to a fair trial, that there is also a general obligation for States to *protect* the rights under the Covenant for persons who are affected by the operation of customary and religious courts.⁷⁹

It is therefore not enough that the State should proscribe these organisations and groups. If they continue to operate without sanction, the State would have by dereliction of its duty failed to live up to its obligation.

7.6. Conclusion

The investigation in this chapter which contextualised informal dispute resolution mechanisms in the structure of criminal disputes adjudication has highlighted that there is actually a cultural context to the operation of the right to fair trial that emerges from customary practices of dispute resolution which are rampant in Kenya. This necessitates that we look beyond the formal criminal justice system, upon which most discourses on the right

Koch, *Human rights as indivisible rights: the protection of socio-economic demands under the European Convention on Human Rights* (Martinus Nijhoff Publishers 2009) 14.

⁷⁷ Constitution (2010) art 21.

⁷⁸ This obligation was explained by the Human Rights Committee (HRC) in General Comment No 32 relating to Article 14: Right to equality before courts and tribunals and to a fair trial. In para 4, the HRC states that ‘Article 14 contains guarantees that States parties must *respect*.’

⁷⁹ HRC General Comment 32 para 24.

to a fair trial normally dwell, to be able to fully address concerns that are associated with the full enjoyment of the right to a fair trial in the criminal justice system.

The impact of the informal customary modes of dispute resolution to the criminal justice system may be approached from two perspectives: First by viewing the existence of the unregulated informal mechanisms as evidence that the formal modes of criminal trials are unable to meet public expectation thus driving individuals to seek other alternatives. Second, we may also look at the informal systems that exist with the view to establish what roles they could play to enhance or constrain the enjoyment of these rights. The next chapter will embark on the latter issue in more detail.

CHAPTER VIII:

THE ROLE OF CUSTOMARY CRIMINAL DISPUTE RESOLUTION MECHANISMS IN THE FAIR TRIAL DISCOURSE

This chapter continues to look at the informal customary dispute resolution systems introduced in the last chapter but focuses specifically on the value that the informal systems might add to the formal system's mechanisms for protecting the right to a fair trial through an amalgamation of the two systems. It is suggested that with a well thought out plan, the two systems may well support a framework where the negative ascription of both the formal and informal systems that we have seen are eliminated.

8.1. Introduction

If we revisit our core thesis, it has been the argument from the beginning of this work that the justice system in Kenya operates, and should therefore be viewed against a particular historical, social and political backdrop against which the formal system developed. It is on that basis that the current chapter seeks to explore whether an amalgamation of the formal (courts) system and the informal systems operating in Kenya might present a valid option for better protection of human rights in the criminal justice system and enforcement of the constitutional rights to fair trial.

The first part makes a critique of the formal system highlighting the reasons which drive individuals to embrace informal criminal justice processes. The second part revisits the relevance of the informal criminal justice system in the discourse on the rights to fair trial, while the third part reflects on reasons for and against the adoption of the informal/customary adjudicatory system in criminal justice.

In the fourth part an overview of the approach taken by Uganda and Rwanda – two East African countries that have adopted informal system into their laws – as examples of how informal/customary dispute resolution mechanisms may adopted in the State system is given, while the last part offers some suggestions on the way in which an amalgamation of the formal and informal systems may be approached under the framework supplied by the new Kenyan Constitution.

8.2. A Critique of the Formal System *vis-à-vis* the Informal Mechanisms

This part will explore the existence of unregulated informal systems as indicative of inability of the formal courts to meet public expectations from two angles: Firstly, on the premise that the defects in the judicial structure and the failure of judicial officials to uphold appropriate standards lead people to seek other alternatives. The second dimension is that even with proper structures and propriety in judicial conduct, formal courts may still fail to meet the expectation of the people on account of individual and societal perceptions born out of cultural orientations leading them to informal customary modes of settling individual and societal conflicts.

8.2.1. Failure of Formal Adjudicatory Machinery

Regarding the first perspective, Uwazie argues that disputants normally respond to deficiencies in the state system ‘by searching for a more satisfactory form of dispute management.’¹ In the same vein, Fiadjoe mentions a number of factors that make alternative modes of dispute resolution attractive. He notes that spiralling costs, lengthy delays, court backlogs, and for those individuals who cannot retain lawyers, the formalities of the formal legal process that are quite intimidating making it difficult for them to effectively participate

¹ Ernest Uwazie, ‘Modes of Indigenous Disputing and Legal Interactions among the Ibos of Eastern Nigeria,’ (1994) 34 *Journal of Legal Pluralism* 87, 89.

in the proceedings in this forum usually make them want to avoid litigation as a way of settling conflicts and discourage people from going to court.²

Throughout this thesis, we have endeavoured to show that all these factors have in one way or another operated in Kenya to constrain the enjoyment of the right to a fair trial and must have undoubtedly contributed in limiting the appeal of the formal system of criminal justice in the country; thereby leading people to resort to the informal modes of dispute resolution. In chapters V and VI, for instance, we dwelt at length on the institutional defects, especially with regard to independence and impartiality in the formal court system, to explain why the rights to fair trial was not being fully realised in Kenya. It was argued therein that factor such as unsatisfactory procedures for the appointment of judges, magistrates and prosecutors, and budgetary structures that put the Judiciary and the prosecution department under effective Executive control made these institutions beholden to the Executive. We also saw in chapter VII that these factors were compounded by poverty and budgetary constraints on the state leading to inadequate funding and poor remuneration for employees of criminal justice institutions that made these officials susceptible to corruption and improper practices.

Indeed, the ineptness of criminal justice institutions in Kenya to effectively carry out its mandate within the old constitutional framework due to prevalence of corruption, ethnicity and patronage, which was highlighted in part 4.4, was a great impediment to access to justice undoubtedly leading to erosion of the confidence of individuals in the formal dispute adjudication institutions. It is in that regard that various investigations cast doubts on the ability of the system to safeguard individuals suspected of criminal offences.³

² Albert K Fiadjoe, *Alternative dispute resolution: a developing world perspective* (Routledge-Cavendish, London 2004) 8.

³ Eg, Binaifer Nowrojee, Bronwen Manby (eds), *Divide and rule: state-sponsored ethnic violence in Kenya* (Human Rights Watch, Africa Watch Committee, New York, 1993) 49; *Kenya: judicial independence, corruption, and reform* (International Commission of Jurists [1952-]. Kenya Section, 2005) 45; Godwin R.

Moreover, as was noted in the last chapter, the fact that structurally, the common law norms that were wholesomely incorporated into the criminal justice system in Kenya, which viewed criminal conflicts as an issue between the state and the suspects, presented some problematic assumption in the overall acceptability of the system. As Prof. Christie notes:

The key element in a criminal proceeding is that the proceeding is converted from something between the concrete parties into a conflict between one of the parties and the State ... The one party that is represented by the state, namely the victim, is so thoroughly represented that she or he for most of the proceedings is pushed completely out of the arena ... She or he is a sort of double loser; first, *vis-à-vis* the offender, but secondly and often in a more crippling manner by being denied rights to full participation in what might have been one of the more important encounters in life. The victim has lost the case to the State.⁴

The problem was therefore not just on account of the failure to safeguard the right of the accused persons. Even those whose interests the State sought to represent also felt marginalised and had little regard for the formal system.

It is arguably on account of all these factors that many individuals sought alternatives in means that they could identify with to settle their dispute outside the State-sanctioned systems. According to the Executive Director of Kenya Human Rights Commission, Muthoni Wanyeki, the prevalent mob violence in Kenya is usually as a result of a failure by the criminal justice system. She opines that citizens organise in vigilante groups and take the law into their own hands whenever the State fails to protect them against rampant crimes.⁵

8.2.2. Prevalence of Perception of Disregard for Societal Values by the State-Centred adjudicatory Mechanisms

Beside the argument that the state of the judicial structures do attract people to seek alternatives in the informal modes of dispute resolution, cultural perceptions also play a central role in making people favour the informal customary modes of dispute adjudication. It

Murunga, Shadrack Wanjala Nasong'o, *Kenya: the struggle for democracy* (Zed Books, Codesria 2007) 252; Smokin Wanjala, 'Conventional Methods of Checking Maladministration and Abuse of Office' in Winnie Mitullah and others (eds), *The Case for an Ombudman in Kenya* (Claripress 1997) 67.

⁴ N Christie, 'Conflicts as Property' (1977) *British Journal of Criminology* 1, 3.

⁵ Walter Menya, 'Police Lead in Human Rights Violation – Report' *Daily Nation*, Nairobi, 22 September 2010.

needs to be appreciated in this regard that public perception of how a system runs is as important as how good the system actually is. On this account, it is quite probable that people may still shy away from a perfectly operating set of State-run systems manned by competent and efficient officers if they view them to be unresponsive to their particular demands.

The legal basis for perception as a key feature of criminal justice is found in the truism that ‘justice must not only be done, but should manifestly and undoubtedly be seen to be done.’⁶ Even with good provisions in the Constitution, when it is perceived that its benefits are not being enjoyed, in the eyes of the people, the system will be a failure. This was in Chief Justice Madan’s mind in *Republi v. Stanley Munga Githunguri*, when he pointed out that ‘the Courts of Justice must reflect the opinion of the people.’⁷

In Kenya, peoples’ opinions are highly influenced by personal values derived from the cultures and traditions of their ethnic communities which offered an important backdrop against which the criminal justice system operates.⁸ Thus, in an initial field research conducted by the World Bank’s *Justice for the Poor* Program in Northern Kenya, it was noted that the difference between the local socio-cultural systems and official laws and legal processes strongly affected the way people perceived the official justice system and determined how they interacted with courts.⁹

We have already noted in part 3.3.2 of this thesis that although customs differ among different tribal communities, a number of aspects commonly associated with African

⁶ *R v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256, [1923] All ER 233.

⁷ [1986] 1 KLR 1.

⁸ Even in other jurisdictions eg Canada, Australia and South Africa, cultural context of the criminal justice has been recognised. Thus, training on the social contexts for judges was introduced to improve judicial decision-making on the rationale that the multi-cultural social environments necessitated the knowledge of social contexts by judicial officers to help reduce discrimination arising out of lack of sensitivity towards communal values (*see* Suki Goodman, ‘The Social Context Training Cooperation between SIDA and the Law, Race and Gender Unit, University of Cape Town,’ SIDA Evaluation Report 07/19, Department for Africa, 2007).

⁹ Sourced from www.worldbank.org/justiceforthe poor

customary law apply generally and affect the perceptions about the legal system and on processes that are associated with individual rights during criminal trials. We saw that there is a common thread in the traditional African dispute resolution systems: Firstly, these systems tend to express legal processes communally, combining perception of individual rights and entitlements with duties and responsibilities towards the community as a whole. Secondly, they tend to favour processing of disputes in manners that are less contentious, seeking to arrive at an agreed compromise between disputants because it is perceived that the main aim of dispute resolution is the maintenance of social balance and harmony through an outcome which both disputants will accept. Lastly, dispute resolution is seen, not as a private affair, but a matter that the society as a whole has an interest with the consequence that openness in proceedings is perceived as imperative.

Indeed, it is arguable that these concerns are captured even in formal instruments making provisions on human rights in Africa. For example, it may be argued that these conceptions informed the formulation of the African Charter, which beside six articles dedicated to group rights,¹⁰ also incorporates three articles specifically stipulating for duties of individuals towards the society on the view that the rights entail correlating duties to make social life meaningful.¹¹

Against that communitarian backdrop, it may seem that the society has even more interest in what is perceived as being criminal than in civil matters as the classification of wrongs as crimes is premised on the fact that though victims may be identifiable individuals, the proscription of the conduct or omission is so important to the society that the conduct or

¹⁰ Banjul Charter arts 18-24.

¹¹ Ibid 27-29. The rights are subjected to considerations such as 'the rights of others, collective security, morality and common interest.'

omission amounts to a wrong against the society itself.¹² Since individuals are seen as a member of the community whose rights are deemed to correlate strongly with duties they bear towards the society rather than as independent moral agents, they need to be at the centre of the criminal justice process.¹³

Unfortunately, these ‘African values’ seem not to have been fully incorporated into the Kenyan criminal justice system which, as we have already mentioned, fully replaced the injured individuals as parties to criminal disputes with the State by virtue of the country’s colonial heritage. And as Fiadjoe notes, even for the accused persons, the State-centred formal system of litigation is such that there is limited participation in the process for them after they have retained lawyers.¹⁴ This may have generated the perception that the State is not interested in the people but is rather keen to pursue its own processes. Thus a research carried out by Wanjala in the 90s, found that more than sixty five percent of the litigants were always not satisfied with the outcomes.¹⁵

This state of affairs has a direct impact on the enjoyment of the rights to fair trial by those who face criminal trials. When people perceive the courts to insensitive to their cultural values, they might not offer themselves to participate in the court processes, say, as witnesses. Whereas the State could then use its advantage on resources at its disposal to investigate, identify and compel witnesses to give testimonies to build a case against accused persons, individuals, lacking

¹² In this regard for example, Blackstone defined crime as ‘a violation of the public rights and duties due to the whole community considered as a community.’ Others have defined crimes as a breach of duty imposed by law for the benefit of the community at large. (See Michael Jefferson, *Criminal Law* (8th Edn, Pearson Longman 2003) 12-3.

¹³ In the African Charter on Human and Peoples’ Rights, for example, rights and corresponding duties are articulated and individuals are not only seen as bearing rights, but also as owing duties to other individuals and the communities they belong to. For a discourse on the range of Communitarian philosophies, see Amitai Etzioni, “Wilson Carrey McWilliam’s Conservative Communitarianism,” (2006) 35 *Perspectives on Political Science*, 200.

¹⁴ Albert K Fiadjoe, *Alternative dispute resolution: a developing world perspective* (Routledge-Cavendish, London 2004) 8.

¹⁵ Smokin Wanjala, ‘Conventional Methods of Checking Maladministration and Abuse of Office’ in Winnie Mitullah and others (eds), *The Case for an Ombudman in Kenya* (Claripress 1997) 67, 72-3. The figure included the individual complainants as well as the accused persons in criminal cases.

similar resources, would not be able to get witnesses from the hostile community to voluntarily assist them to make their cases.

Again, communities that do not accept the formal court will normally seek to settle scores irrespective of the fact that the guilty persons have been formally charged. Individual or groups may choose to retaliate to redress themselves creating a vicious circle that adds to the workload of the courts if the underlying conflict is not addressed resulting to perpetual litigation.¹⁶ These retaliatory conducts being criminal themselves mean that the new offenders will also have to be prosecuted. In the long run, this would lead to clogging the criminal justice system.¹⁷ In relation to the rights to fair trial, the enhanced criminal activities cause delays resulting from increased workload and backlog of cases and ultimately also encourages underground unregulated processes to take over. Indeed, informal customary dispute resolution modes present a continuum that the Kenyan criminal justice system cannot neglect.

It has thus been noted that in order to dispense justice equitably and equally to all, a deeper appreciation of socio-cultural contexts is required.¹⁸ It must therefore be appreciated that the essence of the rights to fair trial is that it seeks to ensure proper administration of justice by the court.¹⁹ This is not only realisable through the procedural safeguards that are provided by the courts to individuals, but also by structuring the institutions in a manner that attracts the full confidence of the people to its processes by an appreciation of their cultural values.

¹⁶ This is common among communities that practice cattle-rustling, which it was noted in Parliament, has become a 'dangerous affair' (*Kenya National Assembly Hansard* of 10 December 2008, 37).

¹⁷ Thus, according to Ms Mary Khaemba, the Prisons director of programmes in charge of rehabilitation, Kenya's 94 penal institutions host 53,000 inmates, twice their capacity. While others have estimated the number to be even as high as 300 per cent of what they ought to hold ('The Price of Justice: Only the Poor End up in Prison,' *Daily Nation*, Nairobi, 30 October 2010).

¹⁸ Kenya Judicial Sector Assessment: Social Context in the Magistrates Courts, Concept Note March 2008.

¹⁹ Gomien, Harris and Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter* (Council of Europe publishing, Strasbourg 1996) 157-9.

8.3. Revisiting the Relevance of Informal Criminal Justice Discourse

So far, we have established that the informal customary dispute resolution mechanisms serve the discourse on fair trial in the Kenyan criminal justice in a number of ways. First, simply by the fact that informal systems exist and continue to operate without sanction may be taken as a good indicator of the ultimate consequences of the failure of the formal State-systems to adequately fulfil procedural requirements. In the absence of an independent, impartial and effective court system dispensing justice expediently, people tend to revert to other systems they understand.

Secondly, it shows that it is not just violation of the rights of the accused persons that leads to people resorting to other dispute resolution alternatives. The interest of the society, say, for example, in ensuring that justice is also done to the victims determines whether accused persons will enjoy their rights. When the concerns of the society are deemed to have been neglected, the efficacy of the formal system is lost. Therefore, a wholesome approach to the safeguards provided by fair trial will require an appreciation of other interests also in order to make enjoyment these rights a reality.

Third, the overarching existence of informal systems in Kenya highlights the importance of custom in dispute resolution. It is notable that militia and vigilante groups usually entrench themselves in the community by exploiting cultural sentiments to validate their activities. When this happens, the State loses control of the criminal justice system and incurs the liability for failure to ensure that adequate protection is offered to suspected offenders.

Fourth, it reveals that the informal justice systems, once entrenched, tend to pervade all other social processes. Indeed, it has been argued of some of the militias and vigilante groups

that they have generated far-reaching effects on local security, to the extent that their success holds out possibilities for them to extend their activities into other spheres.²⁰ Thus, even though when the informal mechanisms of dispute resolution have gotten out of control, the State has reacted by proscribing the responsible organisations and criminalising their membership,²¹ this has normally failed to stop their operations. The organisations simply go underground and extend their activities by, for example, imposing ‘protection levies’ in order to sustain themselves. Because of their immense influence, they tend to bring into their fold powerful individuals.²² It is even thought that some political leaders and powerful administrative officers support the proscribed organisations for political gain.²³ Moreover, when the State has reacted by arresting and prosecuting adherents, due to the large number of members, it has normally led to congestions in prisons and huge backlogs in courts. It is therefore argued that the State is normally either unable or unwilling to effectively address the endemic crisis.²⁴

A merger of both the Western and customary systems may therefore be desirable as it may improve the protection of the right to a fair trial for those accused of criminal offences. Exploiting some of the already existing informal systems may indeed improve the State-run criminal justice system while helping to regulate the informal systems. This might not only serve to avoid having non-State sanctioned system operating adverse to the formal

²⁰ See eg Suzette Heald, ‘Controlling Crime and Corruption from Below: Sungusungu in Kenya,’ (2007) 21(2) *International Relations*, 183.

²¹ Eg it was reported on the press that the government has banned 33 such groups including *Mungiki* and *Chinkororo* in 2010 under the Organised Crimes Act, 2010 (Cyrus Ombati, ‘State Outlaws 33 Criminal Gangs,’ *The Standard*, Nairobi, 20 October 2010; Fred Mukinda, ‘All Out War Against Organised Gangs,’ *Daily Nation*, Nairobi, 21 October 2010).

²² ‘Trail of Fear as Mungiki Returns to Full Business,’ *The Standard*, Nairobi 22 November 2010.

²³ It is suspected that during the post-election violence, both the conflicting sides funded rival militias to protect their communities giving the youths a free hand in committing atrocities against the masses. Indeed, the ICC prosecutor is looking at this angle in his investigation on the post-election crimes committed in Kenya.

²⁴ This view has for example been expressed by the Kenya Human Rights and Gender Commission with regards to the endemic militia problem in Northern Kenya (See, Mike Mwaniki, ‘Rights Body Wants Action on Isiolo Militia,’ *Daily Nation*, Nairobi, 29 September 2010).

system, but may also ensure that there is a just resolution to social conflicts of a criminal nature.

8.4. Merger of the Formal and Informal Systems

An effective merger of the two systems that have operated independently needs to be backed by clear assessments of its viability; a good starting point may be to consider what effects a merger will ultimately have for the criminal justice system. Indeed, two views, opposition and supporting the merger of the formal and informal systems can be presented by looking at the advantages and disadvantages that are offered. We shall therefore briefly reflect on some of the things that may lead to us to refuse to adopt this approach and others that may direct us toward supporting an amalgamation of the two systems.

8.4.1. The Negatives of a Merger

In opposition to the amalgamation it may be argued that the operation of the informal modes portends a lot of difficulties in the conceptualisation of obligation of the state. The safeguards that are offered to the accused in criminal trials in formal courts are normally the first casualty of the informal criminal processes. Other human rights of individuals also suffer. A number of these problems may be mentioned here.

First, while official judgments usually target the individual perpetrators of criminal activities, it is not uncommon for customary systems to prescribe punishment for the entire kin-group of the perpetrators.²⁵ This means that although the wrongs are committed by certain individuals in the community, the processes target even those who have not acted in a manner contrary to the law. People may find themselves being punished without the presence of the necessary elements of *actus reus* and *mens rea*. It is indeed a principle of common law that is

²⁵ TO Elias, *Nature of African Customary Law* (Manchester University Press ND 1972) 87-91; Paul Kuruk, 'African customary law and the protection of folklore' *Copyright Bulletin* (Vol. XXXVI, No. 2, 2002) 9-10.

central to the protection of individuals that the ‘intent and the act must both concur to constitute the crime.’²⁶

Secondly, the presence of militias dispensing criminal justice has enhanced lawlessness and caused a lot of injustices to the masses who initially give sanctions to them in the hope that this would lead to greater social justice. With the militias employing kangaroo trials and meting out punishment concurrently, it seems impossible that any person facing this kind of procedure would be able to enjoy fair trial when the community has predetermined that they are guilty of an offence. People may be forced to confess and the trials are usually just a public show to be a warning to others not to ever contravene social mores rather than to enable the process to come out with a just conclusion.

A third problem arising from an amalgamation of the two systems of dispute resolution is with regard to the content of the applicable principles of law. Whereas the formal State has developed both substantive and procedural rules that seek to protect individuals against prejudice, informal systems adopt cultural values of the communities as the basis for determination of guilt. Most of these cultures have entrenched discrimination by virtue of their patriarchal setup. For example, customary processes usually revolve around men to the exclusion of women.²⁷ Women suspects may not therefore receive equal treatment from customary tribunals. Moreover, the unwritten nature of law that is applied in these tribunals usually impugns the rights of suspects not to be tried for acts that do not constitute offences known to the law.

²⁶ As per the Kenya CJ in *Fowler v. Padget* KB (1798) 7 TR 509.

²⁷ See eg, Albert Mugambi Rutere, ‘Women and Patriarchal Power in the Selected Novels of Ngugi Wa Thiong’o,’ (2010) 70(7) *Humanities and Social Sciences*, 2765. For the operation of customary law in South Africa, see, T. Bennett, ‘Re-introducing African Customary Law to the South African Legal System,’ (2009) 57 *American journal of comparative law*, 1.

As early as the 17th Century, enforcing unwritten criminal law against individuals was causing a lot of problems to the conception of criminal law. In the trial of William Penn,²⁸ one of the contentions was with regard to the content of the unwritten common law against which the accused was tried. He argued:

The question is not whether I am guilty of this indictment, but whether this indictment be legal. It is too general and imperfect an answer, to say it is the common law, unless we knew both where and what it is. For where there is no law, there is no transgression; and that law which is not in being, is so far from being common, that it is no law at all... Certainly, if the common law be so hard to understand, it is far from being common.

It has therefore been argued that since a crime is a wrong against the State and subject to punishment by the State, it can only be a crime if it is created by the State and contains provisions for punishment to be administered.²⁹ ‘An act that is not declared a crime by statute or ordinance is not a chargeable offence, no matter how wrong it may seem.’³⁰

Even from the community’s view, various issues may limit the effectiveness of the process to meet the ends of justice. For example, it may be difficult to enforce the attendance of witnesses to testify during the informal trial processes. The system depends heavily on moral sanctions which may not hold strong within integrated multi-cultural societies.

Keeping informal structures within limit is another challenge that an amalgamated system has to surmount. The practice of the old provincial administration system illustrates how difficult such a task may be. Of the quasi-judicial administration, for example, Sang writes contemptuously, “Purporting to exercise “presidential” powers, they arrogated themselves the role of judge, often getting involved even in sensitive cases like sexual assault,

²⁸ ‘Trial of William Penn,’ 6 How. St. Trials, 952 (1670).

²⁹ Richard Quinney and John Wildeman, *The Problem of Crime: A Critical Introduction to Criminology* (Harper and Row 1977) 19.

³⁰ Wayne W Bennett and Karen M Hess, *Criminal investigation* (8th edn, Cengage Learning 2006) 7.

and in the process, extorting cash from both victims and villains. This promoted a heinous crime that resulted in life-long psychological trauma for the victims.”³¹

Furthermore, extraneous considerations sometimes play into the decisions taken in the informal systems. For societies which believe in sorcery and witchcraft, emotions may prevail over rational reasoning in the ultimate decision of the adjudicatory body which is mandated to apply customary principles to resolution of criminal dispute.³²

Lastly, the reluctance to permit legal experts during informal systems may also be viewed as problematic when we allow the informal customary systems to operate alongside the formal courts. In the customary tribunals, the parties are usually expected to present their own case which impugns the right to legal representation by a person of one’s choice. Legal representation is usually not permitted in informal customary tribunals partly in order to make the process uncomplicated for the consumption of the laymen who preside over the cases or for those who seek the resolution of conflicts as well as for the general public.

8.4.2. Positives of a Merger

If however we only look at the numerous negative ascriptions of the customary criminal justice systems, we will miss the point. First, informal systems are a reality in the Kenyan criminal justice system and whether they are regulated or not, they continue to operate as a constituent part of criminal disputes resolution. That these informal systems portend so many problems means that something needs to be done to end the *status quo*. Since banning the tribunals has so far not been effective, amalgamation may present a good option to bring them under state control.

³¹ Sang, ‘Do Away with the Archaic Chief’s Act Now,’ *Daily Nation*, Nairobi, 14 September 2010.

³² See eg Adam Ashforth, ‘Witchcraft, Violence and Democracy in New South Africa’ in Tom Young (ed), *Readings in African Politics* (Indiana University Press 2003) 225.

Secondly, some benefits may also be derived from the operation of customary system alongside the formal courts. As Galanter postulates, an exclusively State-centred dispute resolution system is deficient in the policy to improve access to justice.³³ Noting that most disputes, both civil and criminal, which under the formal system, ought to be settled by court in fact never get to court, he suggest that the best approach is to look at access to justice not only in light of the courts, but also in light of the lesser normative orderings.³⁴

Informal systems have the potential for increasing effectiveness of the law by providing a wider access to justice.³⁵ Thus, the Criminal justice section of the American Bar Association (ABA) through it ADR and Restorative Justice Committee called for the re-evaluation of ADR as an avenue for the improvement of dispute resolution in the criminal justice realm.³⁶

As we have seen, in Kenya, the need for such a paradigm is enhanced because the legal environment is wrought with setbacks such as widespread poverty and illiteracy that is also compounded by a struggle by the formal courts for legitimacy. The incorporation of informal processes in the criminal justice system may bring various benefits to the whole legal system.

Firstly, a notable feature of the formal criminal trials has been delays occasioned backlogs in courts due to the sheer number of matters that that the courts handle. One of the ways to address this, it has been suggested, is by diverting some cases from the courts to other alternative modes of conflict resolution. Customary modes offer a good forum through which deviation may operate especially since they are already in existence. As we shall see in the case of Rwanda where after the 1994 genocide, the courts were overwhelmed by the sheer

³³ Marc Galanter, 'Justice in Many Rooms: Courts, Private Ordering, and Indigenous Laws,' (1981)19 *Journal of Legal Pluralism*, 1, 1-2.

³⁴ Ibid 17.

³⁵ Gordon Woodman, 'The Alternative Law of Alternative Dispute Resolution,' (1990) 32 (1) *Les Cahiers de Droit*, 3, 3-4.

³⁶ Kimberlee Kovach, 'Alternative Dispute Resolution and the Potential to Change the State of Criminal Justice System' in Victor Streib (ed), *The State of Criminal Justice 2007-2008* (ABA, Criminal Justice Section, Washington 2008) 137.

magnitude of crime. In order to handle them, the country had to resort to a traditional system of dispute resolution; the *Gacaca*.

Secondly, it has also been argued in favour of incorporating the informal systems to criminal trial that exclusive utilisation of formal court as the only means of settling criminal disputes robs individuals of the right to fully participate in the dispute resolution process where conflicts are the ‘property of lawyers.’³⁷ Sanctioning the informal customary systems to operate alongside the formal courts would help to enhance community ownership of and support for the criminal justice system. By allowing them to complement the courts, the whole amalgamated system would be seen as aimed at benefiting the whole community by bringing the processes closer to the people while at the same time accepting the values that the formal system portend. Adopting communally generated modes of resolving disputes would therefore render legitimacy to both the informal systems and the formal court by enhances system satisfaction.³⁸

Another reason why allowing informal systems to operate may benefit the criminal justice system and enhance the enjoyment of the rights to fair trial is that these systems have the potential to improve public accessibility to justice thus enhancing fairness in criminal proceedings. For example, even though both the Constitution and the Criminal Procedure Code explicitly provide for open trials to which the public has access,³⁹ the technical nature of the proceedings dissuades most people from attending. People also suffer from language barrier despite translation services being offered to the accused in formal proceeding in court. First of all, as we saw in part 6.3 of this thesis, employing enough interpreters is costly to the

³⁷ N Christie, ‘Conflicts as Property’ (1977) *British Journal of Criminology* 1, 4.

³⁸ Kimberlee Kovach, ‘Alternative Dispute Resolution and the Potential to Change the State of Criminal Justice System’ in Victor Streib (ed.), *The State of Criminal Justice 2007-2008* (ABA, Criminal Justice Section, Washington 2008) 137.

³⁹ Constitution (2010) art 50(1) and CrPC s. 77.

State. Secondly, it may be difficult to find competent interpreters from all linguistic communities, and even when they are found, legal meaning of many words may be lost during translation. Also, using interpreters tend to consume more time that could otherwise have been used to clear court backlogs. Customary forums may offer respite from these since they transact in the local languages and do not adopt technical procedures.⁴⁰

Moreover, as we saw in part 6.2 of this thesis that, in most rural areas, courts are located a long distance from each other. For the majority, this requires them to travel long distances if they are to attend court. Therefore, unless people are directly affected or are compelled to appear, for example, to give evidence, they normally do not go to court. Formal courts have thus remained remote and alien to most Kenyans who, in spite of numerous conflicts, have never had the occasion to attend court proceedings. One effect of this has been that while it may be easier for the State to compel attendance of prosecution witnesses by employing the resources at its disposal, the defendants have normally been prejudiced where their cases depended on voluntarily evidence being given by witnesses who cannot make it to court.⁴¹ Even the establishment of a few more courts as envisaged under the reforms underway might not be sufficient to resolve this issue.

Customary systems, on the other hand, have the advantage of spread. They are found in almost every village in the Country. To utilise them in criminal trial would therefore facilitate trials being held at the places where the offences were committed where the relevant evidence

⁴⁰ This has been discussed in chapter VI of this thesis.

⁴¹ CrPC s 141 provides that the court can compel witnesses to attend and give material evidence. However, evidence from compelled witnesses may have little benefit for the accused person on account of fear by the witnesses who may think that they are required to take a particular stance in order to secure their own liberty.

may be found. It also makes them accessible to everybody desiring to attend and take part in the proceedings.⁴²

Furthermore, the need for the aggrieved party to benefit from the dispute resolution process is one of the things that have made individuals seek to settle their matters out of court since the formal criminal courts do not offer compensation. Customary justice in most communities required that the persons affected by a wrongful conduct be compensated. For example, the Somalis of Kenya usually award man-prices to the victim's family when a case has been established against the accused person or clan. This enables the restoration of communal harmony and enhances finality in the resolution of disputes.

In that regard, the Permanent Secretary at the Ministry of Home Affairs believes courts are not the cure for social problems. 'There is no need to take a poor person to court when you know they will not get justice... because they cannot afford legal counsel.'⁴³

It has been argued that informal modes empower people by allowing creative conflict resolution whose benefits might not be easily quantified but nonetheless arise.⁴⁴ Melissa Lewis and Les McCrimmon aptly summarise the perceptions that endears people to alternative dispute resolution in the conception of criminal processes:

Part of the support for the use of ADR processes sprang from a radical critique of the traditional Western justice paradigm. Formal court processes were criticised as being expensive, inaccessible, conflict-inducing, and disempowering for those involved. On the other hand, ADR was seen as a more accessible, flexible and efficient form of justice which allowed for the active participation of all parties and assisted in the preservation of relationships.⁴⁵

⁴² Though as a caveat here, there are certain traditions where some groups are not allowed to attend trial. For example, in some patriarch communities, women are restricted from such gatherings unless they are party to the dispute.

⁴³ 'The Price of Justice: Only the Poor End up in Prison,' *Daily Nation*, Nairobi, 30 October 2010.

⁴⁴ Kimberlee Kovach, 'Alternative Dispute Resolution and the Potential to Change the State of Criminal Justice System,' in Victor Streib (ed), *The State of Criminal Justice 2007-2008* (ABA, Washington 2008) 137, 142.

⁴⁵ Melissa Lewis and Les McCrimmon, *The Role of ADR Processes in the Criminal Justice System: A view from Australia*, ALRAESA Conference, 4-8 September 2005, Entebbe, Uganda.

These factors play out in Kenya thus necessitating some reflection in this context.

8.5. Reflection on the System in some Neighbouring Jurisdictions

Before we consider the possible structures for an amalgamation in Kenya, some examples of how States have adopted alternative dispute resolution mechanisms may be offered. Rwanda and Uganda, which have utilised two different innovative models of informal dispute resolution, present some approaches that may benefit the Kenyan system. Whereas Uganda has employed informal systems for minor disputes (of both civil and criminal nature), Rwanda employed *Gacaca* court to address a major criminal catastrophe. Although the models in the two countries are not perfect and have been variously criticised for failure to safeguard those who appear before them, for our discussion, the environment under which they have operated offers a critical basis for their consideration.

8.5.1. Uganda: The Local Council Courts (LCC)

Uganda which, to some extent, has exploited an informal communal system of dispute resolution⁴⁶ has an almost similar historical and cultural background as well as concerns and challenges with regard to the effectiveness of the criminal justice system as Kenya. For example, the questions normally raised in analysis of the effectiveness of judicial system of Uganda, as in Kenya, revolve around poverty and cost –thus accessibility – corruption, political interference, illiteracy etc.⁴⁷

In Uganda, diversion from the regular justice process occurs mainly through the discretion afforded to the local council courts established under the Executive Committees (Judicial Powers) Act.⁴⁸ Disputes at family and community level are handled by these local

⁴⁶ For Analyses of operation of human rights in Uganda generally see eg, John Mubangi, 'The Protection of Human Rights in Uganda: Public Awareness and Perceptions,' (2005) 3 *African Journal of Legal Studies*, 166.

⁴⁷ International Monetary Fund, *Uganda, poverty reduction strategy paper annual progress report*, Issues 3-301, 42.

⁴⁸ Executive Committees (Judicial Powers) Act Cap 8 of the Law of Uganda.

courts which serve as the courts of first instance for most rural communities. The courts are empowered to apply traditional African modes of settlement of disputes. Although these are largely civil courts, they have special jurisdiction in criminal matters relating to children for the offences of affray, common assault, causing actual bodily harm, theft, trespass and malicious damage to property.⁴⁹

The local councils in general exist in five levels operating within an outline geographical jurisdictions. For example, level 3 of the courts operate as sub-county courts while level 2 are found at the parish level. The lowest in hierarchy is level 1 of the court operating at the village level. Appeals from one level lie to the next superior level before the matter finally goes to the judicial courts. However, one may choose to go directly to the police and to the State courts and overlook the local councils.

The local council courts were introduced by the revolutionary government after the 1986 coup to help bring back order to the country.⁵⁰ Their value was further enhanced by the armed conflict in Northern Uganda that largely destroyed the socio-economic lifestyle of the people.⁵¹ According to the United Nations Development Programme, the perpetual conflict caused 'massive displacements resulting in the disruption of family and community life, and damage to social values and customary practices ... tearing the social fabric in these parts of the country.'⁵² Access to justice became a challenge to most rural communities and especially persons living in internally displaced persons' camps. For instance, in Pabbo Camp in Gulu district, the nearest formal courts were an hour away in Gulu town.

⁴⁹ Ibid s 6. See Joseph Oloka-Onyango and Abdul Tejan-Cole, 'Reassessing Customary Law Systems as a Vehicle for Providing Equitable Access to Justice for the Poor,' *Arusha Conference, 'New Frontiers of Social Policy'*, 12-15 December 2005, 6.

⁵⁰ Theodora Keir Starmer, A. Christou (eds), *Human rights manual and sourcebook for Africa* (BIICL and BHRCEW, Starmer and Christou) 950.

⁵¹ Ifeonu Eberachi, 'Armed Conflicts in Africa and Western Complicity,' (2009) 3 *African Journal of Legal Studies* 53, 62-6.

⁵² UNDP, Uganda at <http://www.undp.or.ug/projects/18>

Local council courts therefore played an important role to redress problems in the formal system. A survey indicates that the local council courts are generally perceived as ‘accessible in physical and technical terms, affordable, user friendly, participatory and effective and their judgements are generally enforceable.’⁵³ There was thus a general preference by the masses to utilise this form of dispute resolution which were found ‘everywhere’ within the Country.⁵⁴

However, these courts, often the only ones available to villagers, reportedly exceed their authority by hearing criminal cases not involving children.⁵⁵ Since they are so entrenched, it is common that they sit to resolve matters beyond their jurisdiction. Wambi notes, ‘the problem is implementation at the grassroots. You find local councils who should not be attending to cases of defilement calling (local council) courts and sitting to adjudicate on these matters.’⁵⁶

The local council courts have also been attacked for other reasons. For example, they have been said to entertain corruption and chauvinism.⁵⁷ The councils being elected are also faced with the possibility of political bias. Hence, a person known to be a supporter of a political party that does not control the local council may find himself unable to receive a fair hearing against a person from the party in authority. Moreover, as in most informal courts, lawyers are never allowed to represent clients at council courts which may raise some question about fairness of the trials. Nonetheless, advocates may give prior advice to the parties.

⁵³ The Nordic Consulting Group, ‘A Baseline Survey on the Operation of Local Council Courts,’ DANIDA Judiciary Programme (Kampala, 1998). See also Amanda Ellis, Claire Manuel and Mark Blackden, *Gender and Economic Growth in Uganda: Unleashing the Power of Women* (World Bank 2006) 67.

⁵⁴ International Monetary Fund, *Uganda, Poverty Reduction Strategy Paper Annual Progress Report*, Issues 3-301, 44.

⁵⁵ See US Department of State website on Uganda, entry by Bureau of Democracy, Human Rights, and Labor 2006 at <http://www.state.gov/g/drl/rls/hrrpt/2006/78763.htm> last visited 19 August 2012.

⁵⁶ Wambi Michael, ‘No Safe Haven for Ugandan Girls,’ *Inter Press Services*, 10 July 2009.

⁵⁷ Lisa Karanja, *Just Die Quietly: Domestic Violence and Women's Vulnerability to HIV in Uganda*, (Vol 15(A), Human Rights Watch, 2005) 12.

The identified problems notwithstanding, the local council courts have offered a good basis for informal dispute resolution even in criminal matters.

8.5.2. Rwanda: The *Gacaca*

Rwanda is another country that we may consider. After the 1994 genocide, the post-genocide government wanted maximal accountability for all crimes committed during the genocide. At the higher level, it was perceived that international responsibility would suffice for those highly responsible. The United Nation therefore set up the International Criminal Tribunal for Rwanda (ICTR). Those to be tried by this international Court were quite few. The national courts were to take the bulk of the cases. This was overwhelming and resulted in a great backlog and congestion in prisons, as well as questions regarding the neutrality and independence of the judicial officials were encountered.⁵⁸

An alternative system was found in the customary dispute resolution of the Rwandan people, *Gacaca*. Arguably, *Gacaca* created a forum with express validity in an environment that was acceptable and familiar to Rwandan culture. Whereas the common Rwandans had little or no knowledge of what was going on at the ICTR, which was hosted in Arusha by the United Republic of Tanzania, the victims of the genocide could now get to hear the truth and know that their claims were not just glossed over in a cloudy processes taking place far away from where the offences were committed or even in local formal courts that were overwhelmed by the great number of cases.

Gacaca trials gave the victims of the genocide a viable means of participating in the system of justice and seeing the outcomes. For these reasons, *Gacaca* trials become an important way for justice to be visible and appropriate for the victims of the genocide.

⁵⁸ Eg Eugenia Zorbas writes that there were less than 20 lawyers left in the country, the courts infrastructures had been pillaged and even those associated with the system had been involved (as victims or genocidaires (see Eugenia Zorbas, 'Reconciliation in Post-Genocide Rwanda,' (2004) 1 *African Journal of Legal Studies* 29, 34 -5).

One of the common concerns that came up regarding the use of *Gacaca* was the fact that it was impossible for unbiased trials to be held.⁵⁹ Due to the scope of the genocide, there were very few Rwandans who were untouched by it. This meant that the judges, witnesses and the larger community already have a pre-conceived bias going into the trials; whether formal or informal.

Moreover, from the informality of the process and the lack of legal counsels for defendants some perceived that there was a lack of due process. Indeed, the *Gacaca* proceedings were overseen by locally-elected judges and participation by lawyers during the trial was forbidden.⁶⁰ This was nonetheless deemed necessary to ensure that the process was uncomplicated by intricacies of legalism that characterise formal litigation.

However, it is the ability to redress such an enormous number of workload against the backdrop of a very fragile social environment created by the genocide that the *Gacaca* system is greatly credited. In just over two decades, the country was able to process more than 800,000 criminal cases without congesting the prisons and bringing a total to collapse of the criminal justice system.⁶¹ Moreover, *Gacaca* proved substantially cheaper compared to the conventional justice institutions especially when compared to the immense costs involved with the running of the United Nations International Criminal Tribunal for Rwanda (ICTR).

By reducing the backlog of genocide cases, *Gacaca* may have contributed to the improved living conditions in Rwandan prisons and saved government resources necessary to sustain such a large prison population. *Gacaca*'s emphasis on popular participation during hearings has also yielded significant dividends. In particular, much of the Rwandan

⁵⁹ Christopher J L e Mon, *Rwanda's Troubled Gacaca Courts* (2007) 14(2) *Human Rights Brief* 16 at <<http://www.wcl.american.edu/hrbrief/14/2lemon.pdf?rd=1>> accessed on 21 April 2012.

⁶⁰ Phil Clark, 'Gacaca: Rwanda's Experiment in Community-Based Justice for Genocide Crimes Comes to a Close,' *Foreign Policy Digest*, April 2010.

⁶¹ See Human Rights Watch, 'Overview of Human Rights Issues in Rwanda, 1 available at <http://hrw.org/wr2k6/pdf/rwanda.pdf> last visited on 21 April 2012.

population argues that *Gacaca* has been important for recovering truth in the form of legal facts regarding the genocide, providing therapeutic truth, allowing individuals to tell and hear personal narratives of the genocide, in turn enabling them to deal emotionally and psychologically with the past.⁶²

8.6. Approaching the Challenges to the Amalgamation

Seeing that informal systems have found some acceptability in other jurisdictions, let us now consider how informal customary system may be effectively applied to complement the formal courts in Kenya without falling afoul acceptable standard of safeguards.

Within the right to a fair trial discourse, the starting point should be in the re-designing of the criminal justice system to incorporate proper protective structures. Indeed, in chapter IV, it was argued that one of the reasons why the old system was unable to fully safeguard the accused persons during criminal trials was because of reactive designing of structures of the legal system; addressing only the concerns that were deemed immediate. Avoiding that pitfall would require that the new system is specially designed to address the negative ascriptions of both the formal courts and the informal cultural modes.

This work does not propose to give a clear answer as to how the system would be formulated to address all concerns, some of which have already been highlighted. However, taking its cue from the Ugandan and Rwandan approaches, the following part suggests some consideration that may make the new system more efficient.

Foremost, it is critical that any structure for resolution of disputes has to be in tandem with constitutional provisions on human rights and the ideals of justice. These ideals are found in various human rights instruments both binding and non-binding. In fact, the constitutional and international human rights instruments prescribe only the minimum

⁶² Human Rights Watch, 'Overview of Human Rights Issues in Rwanda, 1.

standards of safeguards that, if possible, are to be surpassed while setting up the structures for implementation. Hence, the Constitution provides that the rights that are contained in it ‘do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law,’ while in international law, because the adoption and ratification of treaties requires general consensus of diverse States, States only end up settling at safeguards that are generally acceptable to all contracting States.⁶³

The sanction for customary law and informal tribunal in criminal dispute can be found both in the new Constitution and in international law. Article 159 of the Constitution stipulates how judicial authority is to be exercised. It not only vests adjudicatory and dispute resolution jurisdiction with the courts and tribunals that it establishes,⁶⁴ but also empowers Parliament to set up other courts and local tribunals.⁶⁵ Importantly, the article expressly provides that ‘alternative forms of dispute resolution including reconciliation ... traditional dispute resolution mechanisms shall be promoted.’⁶⁶ From this, we may conclude that besides granting formal courts authority to apply customary laws, Parliament is now under a constitutional obligation to create a scheme under which customary courts vested with customary law jurisdiction will operate. This will give sanctity to the informal customary tribunal being established by law.

The Constitution also sets the pillars upon which proper administration of justice during adjudication and conflict resolution shall rest. These include the principles of equal and prompt justice administered without undue regard to procedures.⁶⁷ These principles do not

⁶³ See Vinod Sharma, *Human rights violation: a global phenomenon* (APH Publishing, New Delhi 2002) 218.

⁶⁴ Constitution (2010) arts 163, 164, 165, 169, 170.

⁶⁵ Ibid art 162 provides for the establishment of specialised labour, employment, environmental and land tribunals by parliament while art 169 (1)(d) and (2) mandates parliament to establish other subordinate court and local tribunals.

⁶⁶ Ibid art 159(2)(c).

⁶⁷ Ibid art 159(2). Art 10(2)(b) also makes non-discrimination and protection of the marginalised a national value and principle for governance.

only underpin the need for the informal system to support delivery of justice by the formal courts, but also set the benchmark for the informal customary adjudicatory modes. Hence, the Constitution stipulates that the rights to fair trial cannot be abrogated by the State despite any other of its provisions.⁶⁸

In international law, on the other hand, it may seem problematic to put traditional courts within the scheme envisaged under the obligation to ensure the enjoyment of the rights to fair trial. Nonetheless, there is no prohibition against such tribunals operating. The Human Rights Committee in its General Comment on the rights to fair trial,⁶⁹ only sets out an obligation for the State to protect the rights under the Covenant of any persons affected by the operation of customary and religious courts.⁷⁰ The African Commission on its part recognises that ‘traditional’ courts are capable of being used as avenues for dispute resolution, and provides ‘a minimum [standard applicable] to all proceedings before traditional courts.’⁷¹

How would these courts then operate to meet the basic/minimum standards? The Constitution sets the parameters within which the informal cultural disputes resolution mechanisms are to operate. For example, these modes may not be used in manners that would either contravene the Bill of Rights, are repugnant to justice and morality or that result in outcomes that are inconsistent with the written law.⁷² Some issues will therefore need to be addressed when setting up the system.

Attempting to merge two totally different systems that have operated on very different planes will, however, present a great challenge three of which we shall address here. First, the level of autonomy from the State that the informal customary systems should have will need

⁶⁸ Ibid art 25.

⁶⁹ HRC General Comment No 32.

⁷⁰ Ibid para 24.

⁷¹ The Principles and Guidelines on the Right to a Fair trial and Legal Assistance in Africa, DOC/OS(XXX)247, Principle Q.

⁷² Constitution (2010) art 159.

to be determined. The informal customary systems' appeal to the masses has been underpinned by their independence from the State. If the systems are therefore intricately tied to the State system, people may tend to shun them and turn to other uncontrolled informal systems such as the vigilantes and militia groups. This will go against the very reason for the incorporation of the informal customary modes; to regulate their operation and check the violations of the suspects' rights to fair trial that occur during the informal trials. On the other hand, it is not possible to meet the 'basic requirements' of fair trial (that the Human Rights Committee sets) if the customary systems are so loosely connected to the State that adequate superintendence is rendered impossible.

An approach to this may be that while the State should maintain some distance from the substantive adjudicatory functions, it should be possible that persons dissatisfied with the customary systems are able to appeal to the formal courts which would be able to correct any legal errors committed. The formal courts should also actively play a behind the scene role of reviewing the decisions of the customary tribunal by the requirement that a summary of the proceedings should be written and forwarded to a designated court for review and documentation. In this way, the judgments of such courts would be validated by formal courts in light of fair trial guarantees. An advisor/clerk may be used to ensure that the formal laws are not violated and that the outcomes are documented. He will not be a controller of the process, rather an advisor.

The second challenge the merger of the informal customary system with the formal courts will face is with regard to the determination of the type of jurisdiction that should be allocated to the informal systems. Whereas maintaining the cultural efficacy of the informal customary modes of dispute resolution requires minimal interference with their customary

jurisdiction, it would be impossible to secure the accused person's rights without putting a limit to their jurisdiction.

Legally, it may be easier to allocate jurisdiction over minor criminal offences to the informal customary tribunals. These tribunals are quite beneficial. They may, for example, be justified as providing the means through which the State is able to ensure greater enjoyment of the rights to fair trial in the formal courts. Their utilisation will greatly assist in decongesting the formal system, diverting the less serious matters from the courts, enabling them to have greater capacity to accord the rights to fair trial to accused persons who appear before them.

Moreover, if we use the justification that because of their pervasive nature, the informal customary systems cannot just be wished away, then granting them minimal jurisdiction in minor matters helps to bring them under State regulation and check against unwanted excesses. Even within international law, this justification seems to give informal systems some acceptability. The African Commission, for example, concedes that customary modes have some relevance to the settlement of minor criminal offences and would therefore not be in contravention of the relevant fair trial safeguards if they are able to meet certain basic requirements.⁷³ The same concession is seen within the universal system where the Human Rights Committee states that where customary law mechanisms are used, proceedings before them must be limited to minor criminal matters.⁷⁴

No international guideline has however been given as to what would constitute minor criminal offences to be tried by the customary courts. The State will therefore have to

⁷³ Principle Q of Principles and Guidelines on the Right to a Fair trial and Legal Assistance in Africa gives 12 minimum guarantees that the traditional customary systems must ensure in order to secure the rights to fair trial.

⁷⁴ General Comment 32, para 24.

determine the threshold beyond which the informal tribunals will have no authority to handle (an issue that is quite important but beyond the scope of this work).

A greater problem with regard to the determination of the jurisdiction of the informal customary modes is that people who use them to settle disputes normally find them quite relevant in settling many serious criminal matters. In fact, individuals usually resort to the customary modes due to the severity of criminal activities that overwhelm the State system. In Rwanda, for example, after the 1994 genocide, the country had to resort to *Gacaca* tribunals to supplement the international trials in Arusha and the formal courts in the country when these systems were unable to fully address the conflict.

Although the Rwandan conflict is an extreme example, it is not impossible to locate widespread criminal activities that may justify the adoption of these modes for serious offences. An example is what occurred after 2007 general elections in Kenya, where not only more than 1000 lives were lost, but more than half a million people were also displaced from their homes by the violence that ensued.⁷⁵ Moreover, among the nomadic pastoralist communities, the problem of cattle-rustling has been a major concern for many years most of the time resulting to deaths and even occasioning threats to regional peace.⁷⁶ In fact, it is among these communities that the customary systems have been predominantly used in relation to serious offences such as murder.⁷⁷

⁷⁵ Kimani Njogu, *Healing the Wound. Personal Narratives about the 2007 Post-Election Violence in Kenya* (African Books Collective 2009) 2. See also Human Rights Watch, *Ballots to bullets: Organized Political Violence and Kenya's Crisis of Governance*, Volume 20, Issue 1.

⁷⁶ Eg perpetual cattle rustling problem forced 7 eastern Africa countries to form IGADD the predecessor of IGAD and its peculiar early warning system. See Samson S. Wasara, 'Conflict and State Security in the Horn of Africa: Militarization of Civilian Groups' (2002) 7 (2) *African Journal of Political Science*, 39.

⁷⁷ Tanja Chopra, *Building Informal Justice in Northern Kenya* (Justice for the Poor and LRF, Research Report 2008) 5; Tanja Chopra, *Justice Versus Peace in Northern Kenya* (volume 2 issue 1, World Bank, Justice and Development working Paper 2009).

It is beyond the scope of this thesis to try and address this issue fully and offer a clear cut answer to the problem raised. It is noteworthy however that a possible solution may lie with the creation of a two tier customary legal regime to complement the formal court system. One tier of the system would be the regular complementary informal tribunals to be used on a day-to-day basis for minor offences. The other tier could be set with a pre-emptive but temporal and overarching jurisdiction to handle emergencies when they occur. That would mean that a statutory framework for a *Gacaca*-like tribunal would be established whose operation would be set in motion either by a resolution of Parliament or by an Executive order with parliamentary sanction when an emergency like the post-election violence arises. The later tribunal could also be established to run continuously as one of the parliamentary established tribunals (under article 159 of the Constitution) but given a limited geographical jurisdiction for areas notorious for widespread communal conflicts. To offset the possibility of violation of rights in these instances, State superintendence over the role of these extraordinary tribunals would have to be enhanced to ensure that they accord the accused persons the rights to fair trial.

Another challenge needing to be addressed when incorporating the informal tribunals within the State system relates to legal representation in trials undertaken by the informal customary tribunals. The constitutional scope of the rights to fair trial embraces the notion that an accused person is entitled to ‘choose, and be represented by, an advocate; and ... [even] have an advocate assigned ... by the State and at State expense, if substantial injustice would otherwise result.’⁷⁸ The African Commission on its part makes an individual’s ‘entitlement to seek the assistance of and be represented by a representative of the party’s

⁷⁸ Article 50 (2)(g),(h).

choosing in all proceedings before the traditional court' a necessary component for the validation of such trials.⁷⁹

However, it is usually in the nature of proceeding before informal tribunals that advocates are not permitted to represent the parties. Thus, in the Rwandan *Gacaca*, a major concern was that while the people who were deemed to have been most responsible for the genocide were taken to the ICTR, where they were accorded all the safeguards and protections of fair trial including legal representation, those who were in the lower ladder of responsibility went through informal proceeding at the *Gacaca* without legal representation.⁸⁰

Nonetheless we need to note that one of the things that make informal tribunal attractive to most people is the fact that legal experts are not allowed to take part in the proceeding. The advantage of disallowing lawyers to practice before these tribunals is that besides making the process affordable to the poor while placing parties at an equal standing, it takes away the legal *mumbo jumboism* associated with formal trials.

It would therefore seem impossible to reconcile the need for legal representation at criminal trials with the convenience of informality offered by the customary tribunals. On the balance of things, it may be contended that parties would be better off receiving greater safeguards offered by the informal systems even without legal representation.⁸¹ If true equality of arms can be ensured, then the expediency facilitated by the informal customary tribunals would be quite worthwhile for those accused of criminal offences. Also, the accused individual in this case will not be facing a prosecutor but a complainant who stands on equal footing with him.

⁷⁹ Principle Q (b) (viii) of Principles and Guidelines on the Right to a Fair trial and Legal Assistance in Africa.

⁸⁰ Elin Skaar, Siri Gloppen and Astri Suhrke, *Roads to reconciliation* (Lexington Books 2005) 120.

⁸¹ Adam Stapleton, 'Introduction and Overview of Legal Aid in Africa,' in *Access to Justice in Africa and Beyond: Making the Rule of Law a Reality* (PLI and Bluhm Legal Clinic 2007) 3, 6.

Furthermore, to ensure that the accused will not be prejudiced, it is proposed that appeals from the informal customary courts would expressly lie at the formal courts where legal representation would be facilitated. Individuals should also have the alternative to opt for the formal courts, forgoing trial at the local customary tribunals if they feel that representation is critical for the ends of justice.

In conclusion, it is conceded that the suggestions offered above may not completely or effectively address all the problems associated with the merger. Nevertheless, it is still not an option for both systems to continue to run as they currently do. In the formal system, there are violations of the rights to fair trial that may not be appropriately addressed even with improvements made in the new Constitution. Entrenched attitudes and situational factors may prove difficult to eradicate immediately. For example, institutionalised corruption and cronyism will take time to be overcome, while poverty will still constrain effective enjoyment of equality of arms between the State and the accused. It is also not foreseeable that the State economy will in the short run be able to allow for enough courts to be set up and enough qualified manpower employed to man them.

Of an even greater urgency concerning the current continual operation of informal systems is that they are unregulated and do not comply with even the minimum threshold of safeguards to the parties who appear before them. Even after banning of militias and vigilante groups, there is evidence that they still continue to operate without the law, menacingly violating all the rights of individuals with impunity.

8.7. Conclusion

In this chapter, we have reflected on another level of dispute resolution beside the formal courts as an important aspect in the rights to fair trial discourse. What was sought to be conveyed is that in spite of some reluctance to adopt informal modes of dispute resolution in

the criminal sphere, these mechanisms loom large and cannot therefore just be ignored and wished away. In fact, some benefits may be derived from approaching criminal matters with a consciousness that other systems may have something to offer to criminal dispute resolution.

Comparing crime rates in Kenya with other neighbouring and regional countries, the Police Commissioner observes that:

One of the most apparent differences is that unlike Kenya, these countries have developed home-grown criminal justice practices while still retaining a significant level of international best practices. In Kenya, we adopted the [common law] adversarial system of criminal justice much as it was in the Commonwealth half a century ago. While we stuck there, other jurisdictions like the UK have evolved the system several times over⁸²

It has been suggested in this chapter that informal dispute resolution systems might indeed be efficacious to criminal dispute resolution because, first, they are accepted by the society as an important part of the social system; secondly, they reduce the burden from the formal system; thirdly they may help in regulating and formalising the problematic aspect of the formal court system already in use; and finally, it is better to have the social groups operating openly and thereby within strict regulation than to allow them to operate adversely to the State system from under the radar.

Of course, there are valid concerns that need to be addressed if the informal systems are to be amalgamated with the formal system. But some suggestions have also been offered of the ways in which these issues may be addressed to show that the problems are not insurmountable. It may therefore be quite worthwhile to explore how the rights to fair trial may be enhanced by the operation of both the formal and informal systems.

⁸² Mathew Itere, 'It is Time we Gave this Country a Home-grown Criminal Justice System, *Daily Nation*, Nairobi, 5 October 2010.

CHAPTER IX:

CONCLUDING REMARKS AND THOUGHTS

Having traced the existence of the right to a fair trial in the Kenyan criminal justice system from the provision of the formal law and identified the shortfalls of the repealed constitution and the improvements that the newly enacted Constitution has made, and having also looked at the contextual factors that are normally never considered in studies on the right to a fair trial, this final chapter gives an overview of the research undertaken by revisiting the research questions and highlighting the approach that has been taken to answer them. It will also serve as an epilogue, pointing out the reforms already commenced in order to actualise what this thesis suggests as well as identifying some areas where further research is warranted if scholarship is to assist in better operationalisation of the right to a fair trial in Kenya.

The chapter consists of five parts. The first part [9.1] reflects generally on the subject matter of the research that was undertaken in the thesis, while the second part [9.2] revisits the research questions and how they have been addressed. The next part [9.3] looks at the structure and themes that are reflected in the thesis, and is followed by some observation about the ongoing reforms in addressing some of the particular aspects discussed in part 9.4. Finally, in part 9.5 concluding remarks are made and suggestions for further research on the subject matter of this thesis given.

9.1. Overview of the Subject of the Research

This research set out to answer some specific questions relating to the conceptual understanding and the operationalisation of the right to a fair trial in criminal justice in Kenya. This was intended to add a novel contribution in the form of knowledge to the debate of how the enjoyment of the right may be optimised in light of the contextual factors surrounding the Kenyan legal system.

Tracing the origin and development of the right to a fair trial within the universal scheme of human rights protection, it was noted that although the values within this right have a long history, even predating the current scheme for protection of human rights, there are some tensions that arise in their implementation and especially in the criminal justice sphere where the end of the process is to punish those found to be guilty.

With the right originating from international human rights instruments, we noted that it is usually sought to be adopted and applied by municipal jurisdictions with vastly varied systems. Thus, although they are usually incorporated through national constitutions and local laws, they have to fit within the particular systems with all their peculiarities.

Furthermore, we saw that the right to a fair trial itself encompasses a number of values which ought to be applied together for it to be said that the right is actually protected. Some of the underlying values even seem to conflict with each other. For instance, the right to a timely trial may be hampered by procedures that give parties a free hand to make their cases without any oversight to prevent time-wasting.

With these concerns in mind, the thesis sought to identify the particular tensions that are experienced within the municipal system in Kenya.

9.2. Revisiting the Research Questions Sought to be Addressed

The research questions that were posed were:

- (1) How has the right to a fair trial fared in the Kenyan Criminal Justice System?
- (2) Why have many difficulties been experienced in the operationalisation of the principles forming part of the right to a fair trial in Kenya? And
- (3) How can we work towards achieving better enforcement of the right to a fair trial in the country's criminal justice system?

In respect of the first question, a number of challenges that constrained the enjoyment of the right to a fair trial were identified. Most of them were universal challenges that are not peculiar to Kenya. For example, having adopted the common law system, the country faced the challenge of ensuring that both parties to criminal proceedings were given equal opportunities to present their cases especially when ‘public interest’ and ‘State security’ were perceived to be under threat. However, Kenya also faced some particular problems in administration of criminal justice which were evidenced by the operation of various militia and vigilante groups that took advantage of the perception that the criminal justice system had failed to safeguard both the accused and to satisfy the society to flagrantly exploit the citizens. It is this state of affair that created a backdrop for the post-election violence in 2008 and gave impetus to the legal reform process.

To answer the second question, why many difficulties were experience in the operationalisation of the principles forming part of the right to a fair trial in Kenya, the main sources of the right – the respective constitutional orders in independent Kenya; Acts of Parliament; statutory instruments; English Common Law; and international law – were looked at. It was noted here that, although there were a number of concerns, such as the existence of wide claw-back clauses in the repealed Constitution which led to the failure of the system to safeguard the right, the overall effect of its articulation was that it provided a good basis for the right to operate much better than it actually did under that system.

It was therefore hypothesised that that the failures by the system were largely the result of contextual factors which we turned to explore. In chapter III, our attention was directed to the historical foundations of the liberal structures of the formal legal system operating in Kenya. This was intended to assist us to identify some of the reasons for the failure of the system to protect the right to a fair trial. From this historical perspective, it was noted that the

colonial attitudes that placed State welfare above individual rights were often exploited to constrain the enjoyment of the right by the State for political reasons. For example, on the pretext that the State was under threat from subversive individuals, successive governments used the criminal process to ensure that they retained power despite a vibrant Bill of Right in the Constitution. Furthermore, an important repercussion to the enforcement of the right to a fair trial arose from the strains in the operation of the formal and informal systems. It was noted that the formal structures established during colonialism had to operate alongside pre-colonial customary structures even though they largely differed. Despite express provisions in the Judicature Act that the customary systems were only to be applied to the resolution of civil disputes, the customary systems continued to be used to settle all manners of legal disputes including those that were of criminal nature.

Moreover, the influence of other contextual factors including corruption, entrenched ethnicity, cronyism, poverty and illiteracy were identified as tending to have an overarching impact on the operation of various values of the right to a fair trial. For instance, the independence of the Judiciary was often curtailed by widespread corruption, cronyism and ethnicity that had created a strong backdrop for biased adjudication. The thesis also highlighted the fact that poverty and illiteracy had diminished equality of arms between the prosecutors and accused individuals besides setting a backdrop for delay in concluding matters under adjudication.

Finally, we approached the third question as to how better enforcement of the right to a fair trial in the country's criminal justice system could be achieved from two dimensions. Firstly, we looked at what the current reforms to the formal law implied. It was noted that indeed, the 2010 Constitution had gone a long way in addressing some major concerns by, for example, recasting the structures of administration of justice to ensure that the independence

of the Judiciary is effectively established. Nonetheless, it was also noted that the contextual factors constraining the right cannot be addressed by reforms in the formal law operating in isolation. Hence, the second approach which was adopted in chapters VII and VIII was to identify how informal customary systems could offer some basis for ensuring better enjoyment of the right despite some notable concerns which were highlighted.

9.3. Revisiting the Themes

Thematically, the following approaches were pursued during this investigation.

9.3.1. Formalist Theme

In chapter II, a formalist investigation of the existing structures for the protection of the right was undertaken on the understanding that this is the predominant approach that is usually taken in such kinds of investigations.

In that chapter, a general introduction of the concept of fair trial as found in both the Kenyan law and the applicable international instruments was given. The operation of the right was traced from the independence Constitution (with a whole chapter dedicated to the right), to the provisions of new Constitution. It emerged from the investigation that the repealed Constitution actually contained a vibrant scheme which was supported by other robust formal sources in the form of statute and various international instruments which could have actually ensured that the system worked better than it did.

This led to the question whether the problems associated with the system leading to the violation of the right were entirely attributable to the failures of the formal system. The fact that the formal expression of the right under the repealed Constitution did not differ much from how the universal norm is expressed elsewhere in the democratised world and in the relevant international instruments begged the question, why that system had failed to adequately accord this right to accused individuals.

Secondly, the spotlight was shone on the values of independence and impartiality of criminal justice institutions, timely trials, and equality of arms; and the implication that the new constitutional framework had on them. Here also, it was concluded that although there were fundamental improvements on the constitutional protection of the right, not all the concerns that had led to an almost total breakdown of the legal system would be addressed. There was therefore a need to reflect on other factors that may have hindered the optimal operation of the right in the Country to better understand how it operated.

9.3.2. Historical Theme and Legal Pluralism

On the premise that the formalistic approach to the investigation did not give the complete picture of what actually affected the operation of the right to a fair trial, chapter III ventured to unpack the structure of Kenyan law against the backdrop of legal pluralism emanating from the country's historical as well as statutory contexts. It emerged firstly that the post-colonial system was greatly influenced by the colonial attitude that put more emphasis on the protection of the State over the rights of individuals. Even though there were robust safeguards for the right to a fair trial contained in the letter of the independence Constitution, in reality, the system did not put much value on the individuals' rights but was actually aimed at protecting the State and the government. This characterised the attitudes that successive governments adopted leading to a failure to secure the protection of individuals charged with criminal offences.

Secondly, it was seen that the pre-colonial African customary system of conflict resolution had retained an important role in adjudication of all manners of disputes notwithstanding that it was supposed to be used only in civil disputes. Thus, it continued to influence how the operation of the right to a fair trial in criminal justice was perceived and offered an important context for legal reforms as chapters VII and VIII sought to highlight.

9.3.3. Institutional Structures

The overarching question of the independence and impartiality of institutions of administration of justice as cornerstones of the protection of individuals accused of criminal offences was highlighted in chapter IV and V. In respect of the Judiciary, for a long time, the organ had operated as an appendage of the Executive. Its budget was channelled through a line ministry which also had the department of the public prosecutions under it. The manner in which the judicial officers were appointed and removed was also antithetical to the independence of that institution. The President had the ultimate power to unilaterally get an individual appointed or removed from office which meant that the officers could be coerced, especially in politically sensitive matters, to arrive at a conclusion that favoured the State.

With regard to prosecution, the Attorney General was vested with the power to institute and withdraw all cases under the repealed Constitution. Thus, he wielded a lethal weapon in the government's repertoire which could easily be used to ensure that individuals involved in sensitive political cases never benefited from the available constitutional safeguards. The repealed Constitution envisaged an independent and impartial organ which operated without political interference. However, this was negated by how the institution was cast. For example, the Attorney General was himself a member of both the Executive and Legislature and was answerable to these organs and could therefore be dictated to on whom to prosecute. The police as delegates of the powers to prosecute, for their part, bore multiple roles. They were responsible for investigating crimes and arresting suspected perpetrators. They could also not be expected to have the requisite independence as they were also required to account to their superiors in the police service.

Even as the new Constitution has sought to address these institutional problems, it was seen that some fundamental concerns in the operationalisation of the right may still persist.

For instance, public perception that it is impossible to completely dissociate these institutions from State control may still persist. Even with the devolved budgetary process established under the new Constitution granting each arm of government the autonomy to make its own budget, it is the National Assembly that has the final say. The politics revolving around budgetary process may be viewed as evidence of the intricate link between the Judiciary and the other arms of government.

9.3.4. Social Context to the Research

A social context to the enforcement of the right to a fair trial in Kenya was seen in chapters VI, which looked at the influence of poverty and illiteracy to the enjoyment of the right. It was seen that poverty and illiteracy still provided a strong backdrop for the operation of the right with substantive values such as the right to be represented by an advocate of one's choice being dependent on the ability of the individual to retain an advocate.

In an environment characterised by rampant poverty, it is almost impossible for the right to a fair trial to be given effect. For example, while poor individuals cannot afford to hire advocates, the State cannot establish and operate an effective legal aid programme with a limited budget. When compounded with illiteracy, it is almost impossible to establish equality of arms for individuals who are unrepresented and do not understand the trial process.

9.3.5. Cultural Theme

Seeing that there existed some difficulties in addressing some of the core concerns that had limited the capacity of the State to ensure that the right was enjoyed to the greatest possible extent, this research drew from the informal customary dispute resolution mechanisms to suggest that the contextual factors could be better addressed by incorporating cultural values of the people in administration of criminal justice. Thus, chapter VII and VIII concentrated on cultural influences to the enforcement of the right by addressing the existence of informal

customary dispute resolution modes which were utilised to settle criminal disputes in spite of a lack of legal basis in the formal law.

At the end, it was suggested that, although there existed valid concerns for the operationalisation of the informal African customary systems, in light of the historical, political, social and cultural factors in play, these systems may have a role to play in enhancing the protection of the right to a fair trial in the criminal justice in Kenya under the current Constitution, if a place for them could be found. That base may be found in the new Constitution in article 159(2)(c) which provides that ‘in exercising judicial authority, the courts and tribunals shall be guided by the [...] principle [that] alternative forms of dispute resolution including [...] traditional dispute resolution mechanisms shall be promoted.’

9.4. Recent Reforms and Emerging Challenges

The subject of this research is quite dynamic. Even as the thesis was being written, major changes were being made to the Kenyan legal system which affected the underpinnings of the right to a fair trial. Indeed, at the beginning of the research, the country was being governed under the Lancaster House Constitution but the process for its repeal was gaining momentum. The investigation at that time was therefore intended to contribute to the debate on the requisite constitutional reforms in the criminal justice system from the perspective of the right to a fair trial. That thought was however extinguished midway by the enactment of a new Constitution in August 2010. Some modifications were therefore made to the research to incorporate what the new Constitution provided.

Further changes with major repercussions to the enforcement of the right were to follow the enactment of that Constitution. For instance, various implementing pieces of legislation by Parliament were envisaged to harmonise the legal system. These included the enactment of the framework to oversee the hiring of additional judges and magistrates, the vetting of

judicial officers who were in office before the new Constitution had come into force, and the restructuring of the prosecution system by establishing it as an autonomous State organ.

In July 2012, the Judicature Act was amended to increase the number of Judges of the Court of Appeal to a maximum of 30 from the previous 14, and for the High Court to 150 from the previous maximum of 70. At that time, the Vetting Board established under the Vetting of Judges and Magistrates Act 2011, had finished vetting the judges of Supreme Court and Court of Appeal and had started on High Court Judges. At that stage, it had already recommended the removal of one Judge of the Supreme Court and five judges of the Court of Appeal.

The new-look Judiciary under Chief Justice Dr. Willy Mutunga took the cue to implement far reaching reforms to ensure that the peoples' confidence in the institution is restored. It started compiling data in a central database of the number of pending cases in the registries to assist in fast-tracking those cases that have been pending for long. Measures have now been taken towards simplifying court cases and procedures; automating and digitalising court processes to ensure that they are well documented. Service desks have also been set up to assist the litigants. For instance, these desks are used to identify cases that deserve to be fast-tracked – like where the parties are elderly with some of them even deceased.¹ Legal researchers have also been recruited to assist the Judges in research in order to ensure expeditious administration of justice. It is envisaged that when the money is made available by the treasury, there will be at least a researcher attached to each Judge to enable them to work more efficiently. But this still remains dependent on the availability of money.

The full impact of the changes that the new system has ushered will take some time to be known. However, some of them are beginning to be felt. For example, although the vetting

¹ Judiciary Transformation Framework 2012-2016, 11.

process was a positive step to restore confidence in the Judiciary, it has not been without challenges. Already, the removal of judges from office has been blamed for an increase in the backlog of cases that the new-look Judiciary had endeavoured to reduce as matters that were being handled by the removed judges are being transferred to other judges. Most of these matters will now have to be restarted, a situation that may require that they be heard *de novo*.² There are also further concerns that old cases that had already been concluded by those judges who had been removed through vetting will have to be reopened for review if the parties request so.³ If this is done, then the workload of the Judiciary will again be increased thereby precipitating the problem of backlogs.

It is moreover notable that despite the amendment in the Judicature Act to increase the number of judges, the ratio of four (4) judges to 1,000,000 people in the country will still be quite low. For example, compared with Australia, which by 1996, had a ratio of 41 judges to the population 1,000,000 people; Canada where currently there are about 75 judges 1,000,000 persons;⁴ England, with at least 51 judges for 1,000,000; and the US, where there are 107 judges for every 1,000,000 persons, Kenya still fares quite poorly.

Secondly, with the rigid vetting process that was used to hire new Judges to the Supreme Court and to fill the vacancies at the Court of Appeal and the High Court after the new Constitution had come into force, it has become a challenge to find interested individuals to fill up all the vacancies that have been created in the Judiciary. Only recently, the Judiciary advertised and interviewed applicants for various judicial offices. At the end of the process, not all the vacancies had been filled. With very few advocates in Kenya being qualified to apply for these vacancies, it may take a very long time for the reforms to be fully effected.

² Under CrPC s 200.

³ This possibility arises from the Supreme Court Act s 14 which empowers the Supreme Court to review the judgements and decisions of any judge removed through vetting.

⁴ 'Judiciary Works to Avert Staffing Crisis As Purge Claims Officers', *Standard*, Nairobi, 5 August 2012.

These challenges have forced the Judiciary to rethink its strategies and there has been a move towards adopting informal system to help in the administration of justice. For example, it was reported in July 2012 that the High Court in Nyeri was ‘developing a concept paper on the application of traditional dispute resolution as a means of clearing the backlog of cases.’⁵ This is quite in line with the proposals that have been made in this thesis.

9.5. Concluding Remarks and Suggestion for Further Research

It was the aim of this thesis to create a better understanding of the concept of the right to a fair trial by investigating the major factors that have had a bearing on its operation in Kenya. Although the right has formally been recognised as a legal norm in the country since a formal legal system was established (with its norms having been in operation even prior to that), recent upheavals in the country have cast the spotlight on the criminal justice system’s ability to safeguard accused persons’ rights during trial, leading the country to undertake critical reforms aimed at its transformation.

Indeed, it was the view in this investigation that the attempt by the new Constitution to ensure that there are better mechanisms for the enforcement of the right to a fair trial will go a long way to ensuring that the underlying values of the right are protected and enforced. For example, the express autonomy given to the Judiciary and the Directorate of Public Prosecutions have been backed by structures that will ensure that this is realised. That judges and the Director of Public Prosecutor now enjoy real independence from the other State organs (by the manner of their appointment and the budgetary autonomy they have been granted) will definitely impact positively on the ability of the system to ensure that individuals facing trial are not prejudiced.

⁵ Marion Ndun’gu, ‘Court forms team to explore traditional dispute resolution’, *The Standard*, Nairobi, 26 July 2012.

However, we have also seen that many of the underlying problems do not arise entirely from the shortcomings of the formal system; but are of contextual nature. For example, social factors such as poverty, illiteracy and corruption will continue to play a big role in constraining the enjoyment of the right. Such factors cannot be entirely attributed to the shortfall in the formal system and cannot be wholly addressed through reforming the formal law. Indeed, the formal law may serve to underscore the relationship between customs and State laws, but may not fully articulate how the tensions that arise from their interaction are to be resolved. Thus, the mandate of the courts in Kenya to promote alternative forms of dispute resolution under the 2010 Constitution, can only take their full shape in practice outside the statutory framework through the informal customary systems. If these customary systems are totally regularised through the law, it may even take us back to the same concerns that have existed within the formal system.

We have therefore attempted in this thesis to provide various versions of incorporating the informal customary dispute resolution systems into the formal State system and suggestions were made as to how the informal systems could be implemented with regard to both minor cases (as exemplified by the way the Local Council Courts operate in Uganda) and also on major cases in which safeguards to the accused individuals are critical (as it happened with *Gacaca* in Rwanda).

It must however be appreciated that this was not an attempt to investigate fully the role of informal customary system in the criminal justice system. The aim here was only to highlight that there exists a basis for informal systems to provide a strong underpinnings for addressing the problems associated with the enjoyment of the right to a fair trial in the Country. The key details to be addressed is how best the formal and informal systems can be

married in Kenya to achieve better enjoyment which will need a comprehensive investigation that will help to identify the kind of structures to be adopted.

Nonetheless, this thesis has made significant progress in understanding the operation of the right to a fair trial in criminal justice in Kenya and it is hoped that this will be reflected more and more in the on-going reforms to ensure that human rights and particularly the right to a fair trial are optimally enjoyed.

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