

**HUMAN RIGHTS LAW AND
CONSTITUTIONALISM IN KENYA: A *LAW IN
LITERATURE PERSPECTIVE***



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award of the degree of Master of Laws (LLM) of the University of Nairobi*

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Declaration

I, **PETER ANYANGA WASAMBA** do hereby declare that this is my original work and that it has not been submitted for award of a degree or any other academic credit in any other University.

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This dissertation has been submitted for examination with my approval as a University supervisor

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Contents

Contents

Declaration.....	ii
Dedication	vii
Acknowledgement	viii
Table of Legislation.....	ix
Table of Regional and International Conventions.....	x
List of Cases	xi
List of Abbreviations	xii
Abstract.....	xiii
1 Introduction.....	1
1.1 Background	1
1.2 Problem Statement	4
1.3 Research Questions	5
1.4 The Study Objectives	5
1.5 Hypothesis.....	5
1.6 Theoretical Framework	6
1.6.1 Social-Contract Theory.....	6
1.6.2 Socio-legal Theory.....	7
1.6.3 Critical Legal Realism	9
1.7 Literature Review	10
1.7.1 Literature and the Law	10
1.7.2 Law as Literature	12
1.7.3 Law in Literature.....	14
1.7.4 Literature and the Quest for Justice	15
1.7.5 Evolution of Law in Literature Movement	16
1.7.6 Law in Literature Movement in Europe and America	17
1.7.7 Literature and Human rights	17
1.7.8 Literature and Revolution	19
1.8 Justification of the Study.....	21
1.9 Methodology	21
1.10 Chapter Outline.....	22
1.11 Conclusion	22

2 CARTOGRAPHY OF KENYA’S CONSTITUTIONAL HISTORY (1884-2010) ..23

2.1	Introduction	23
2.2	Kenya’s Constitutional Historiography	23
2.2.1	Pre- and Colonial Constitutional Developments in Kenya	24
2.2.2	Kenya as a British Colony	26
2.3	Key Constitutional Developments in Kenya	27
2.4	A Critique of the Amendments to the Independence Constitution	29
2.5	Legal-literary History of Kenya	32
2.6	Coming to Birth of <i>The Constitution of Kenya 2010</i>	34
2.7	International Human Rights Law Movement and CoK 2010	36
2.8	Conclusion.....	37

CHAPTER THREE

3 FRAMEWORKS FOR HUMAN RIGHTS PROTECTION

3.1	Introduction	38
3.2	International Framework for Human Rights	38
3.2.1	Universal Declaration of Human Rights (UDHR).....	39
3.2.2	International Convention on Civil and Political rights (ICCPR).....	40
3.2.3	Optional Protocols	41
3.2.4	Rights of the Child	43
3.2.5	CEDAW	43
3.2.6	The Convention on the Rights of the Child (CRC) 1989.....	44
3.3	Regional Legislative Framework for Human Rights	44
3.3.1	Organization of African Union (OAU) and Human Rights.....	45
3.3.2	The Banjul Charter, 1981	45
3.3.3	The Maputo Protocol	46
3.3.4	The African Children’s Charter, 1990	46
3.4	Legislative Framework for Human Rights in Kenya	47
3.4.1	<i>The Constitution of Kenya 2010</i>	47
3.4.2	Kenya National Commission on Human Rights	48
3.5	International Institutional Framework for Human Rights Enforcement	49
3.5.1	Limitations of Human Rights under ICCPR	50
3.5.2	African Commission on Human and Peoples’ Right.....	50
3.5.3	African Commission and Enforcement of HR.....	51
3.5.4	Incorporation Regime and Human Rights Law in Kenya.....	52
3.5.5	The Children’s Act, Kenya (2001).....	53

3.6	Analysis of Human Rights Legislation and Frameworks.....	53
3.7	Conclusion.....	55
CHAPTER FOUR.....		56
4	NATURE OF AFRICAN SOCIETY.....	56
4.1	Introduction	56
4.2	Ifeanyi Menkiti’s Conception of African Society	56
4.2.1	Individual in Communitarian African Society.....	56
4.2.2	Personhood in African Society	58
4.2.3	Community in African Society	59
4.3	African Conception of Human Rights.....	61
4.4	Relativism and Universalism	62
4.5	Decoloniality, Literature and African nature	64
4.5.1	Writers and Society.....	65
4.5.2	Chinua Achebe.....	65
4.5.3	Ngugi wa Thiongo	66
4.5.4	Augusto Boal and Theatre of the Oppressed	67
4.5.5	Decoloniality Project and African Nature.....	68
4.6	Conclusion.....	69
CHAPTER FIVE		71
5	LITERATURE AND HUMAN RIGHTS LAW IN AFRICA.....	71
5.1	Introduction	71
5.2	Literary Style and the Law	71
5.2.1	Law, Literature and human rights.....	73
5.2.2	Creative Writers and the Law	74
5.2.3	Rule of Law and Literature	79
5.3	Chinua Achebe and HR.....	81
5.4	Kenyan Writers and Human Rights	84
5.5	Literature and Basic Rights	85
5.6	Literature, Gender and Human Rights Law	87
5.7	Conclusion.....	91
CHAPTER SIX		93

6	CONCLUSION AND RECOMMENDATIONS.....	93
6.1	Conclusion.....	93
6.2	Recommendation.....	101
7	BIBLIOGRAPHY	103
7.1	Books.....	103
7.2	Reports	110
7.3	Theses.....	111
7.4	Websites	111

Dedication

To all women and men who believe in learning as a life-long engagement.

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I appreciate the immeasurable support of my supervisor Dr. Nkatha Kabira. I have never met such a committed supervisor. If this dissertation is solid, it is because of her guidance.

Table of Legislation

Domestic Legislation

The Constitution of Kenya, 2010

Persons with Disability Act 2014

Matrimonial Property Act 2013

Law of Succession Act 2012

Kenya National Commission on Human Rights Act (No. 14) 2011

Sexual Offences Act 2006

The Children's Act, Kenya (2001)

Children's Act 2001

Registration of Births and Deaths Act (1990)

Regional and International Conventions

African Charter on the Rights and Welfare of the Child, 1990

The African Charter on Human and Peoples' Rights, 1981

International Convention on Civil and Political Rights (ICCPR), 1966

The Convention on the Rights of the Child (CRC), 1989

The UN Charter, 1945

Universal declaration of Human Rights, 1948

List of Cases

Criminal Appeal Number 18 Of 2016, KL v Republic [2017] eKLR.

Miscellaneous Criminal Application Number 1 of 2016, KN v Republic [2017] eKLR

L.N.W v Attorney General & 3 others [2016] HC eKLR

Criminal Appeal Number 66 of 2014 [2015] eKLR

Re of the Estate of Joshua Orwa Ojodeh – (Deceased) [2014] eKLR

Republic V Mohamed Abdow Mohamed [2013] Eklr

Peter Mburu Echaria v Priscilla Njeri Echaria [2007] eKLR

Mary Rono v Jane Rono & Another [2005] eKLR

Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) AHRLR

60 (ACHPR 2001). Communication 155/96.

Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another [1987] eKLR.

List of Abbreviations

ACHPR	-	African Charter on Human and Peoples Rights
ACRWC	-	African Charter on Rights and Welfare of the Child
ASEAN	-	Association of South East Asian Nations
AU	-	African Union
BC	-	Before Christ
CKRC	-	Constitution of Kenya Review Commission
CRC	-	Charter on the Rights of the Child
ICESCR	-	International Covenant on Economics Social and Cultural Rights
ICCPR	-	International Covenant on Civil and Political Rights
KANU	-	Kenya African National Union
KLR	-	Kenya Law Reports
LegCo	-	Legislative Council
NCC	-	National Convention Council
NGO	-	Non-Governmental Organization
OAS	-	Organisation of American States
OAU	-	Organisation of African Unity
OP	-	Optional Protocol
UN	-	United Nations
UDHR	-	Universal Declaration on Human Rights
UNGA	-	United Nations General Assembly

Abstract

This study is inspired by the realization that although Kenya has the best Constitution on basic rights and essential freedoms, scrutiny of its implementation reveals inability to adequately respond to the nature of an African society. This study examines the extent to which law in literature embraces African ontology and epistemology to generate critical legal consciousness necessary for indigenous human rights jurisprudence. The dissertation advances three central arguments: The first argument is that though celebrated as a breakthrough, the Constitution fails to respond to the diverse nature of an African society; secondly, this creates a contestation between Western influence on the Constitution and culture as practiced by African communities; and thirdly, that law in literature by bridging the law in action and the law in the books contributes to constitutionalism.

Relying on social contract theory, sociological jurisprudence and critical realist theory, the study establishes that dissonance between the as lived reality and the Law in the books with regards to human rights is real. Case law reviewed reveals that the disjuncture is caused by opposing philosophies. The study demonstrates that while in the African understanding, the human community plays a critical role in the individual's attainment of full personhood, in the Western existentialist conception, individual defines the society. In addition, whereas in African understanding, priority is given to the obligations which individuals owe to the collectivity, in the West, rights of individuals are as antecedent to the organization of society. Can Literature, due to its cultural grounding and communicative flexibility, be the ontological prism and epistemological bridge that connects the law in the books and the law in action to reduce implementation challenges?

We postulate that the written law can be in accord with law in action when African legal scholarship and practice is decolonized as suggested by literary icons like Ngugi wa Thiongo. Of interest to the study is the value that literature adds to human rights jurisprudence. The study asserts that while the law determines and regulates acceptable behavior in society, literature reflects operation of the law in people's daily lives. Literature does not end with imagining possibilities for a just society; it creates critical consciousness, an imperative for culturally informed change in oppressive laws. Grounding the Constitution on African philosophy as encapsulated in African literature has the potential to open up bounties of *The Constitution of Kenya 2010* in terms of fundamental rights and freedoms.

Peter Wasamba

CHAPTER ONE

1 Introduction

1.1 Background

In Kenya, the law has remained a mystery to the majority of its subjects. Educated and illiterate, high and low people in society dread appearing in a court of law. To them, appearing before a court of law is a journey in to the unknown, like death. Esoteric portrayal of law in Africa has created disjuncture between the noble purpose of the law and its manifestation in everyday life. The former is law in the books or black letter law, while the latter is the law as lived reality¹. The Preamble to *The Constitution of Kenya 2010*,² demonstrates the desire of Kenyans to bridge the gap between the black letter law and the law in action. This could be one of the reasons why The Constitution is hailed as the most progressive constitution in recent history.³ Commendation of the constitution is based mainly on its robust chapter on the Bill of Rights.⁴

Ironically, there still exists a gap between the promises of *The Constitution of Kenya 2010* and reality of life under it. Conflict between *The Constitution of Kenya 2010* and law in reality is evidenced in cases such as *Republic V Mohamed Abdow Mohamed [2013] eklr*.⁵ In this matter, Mohamed Abdow Mohamed was charged with the murder of Osman Ali on the 19th day of October 2011 at Eastleigh within Nairobi County. The family of the accused and the family of the deceased met and agreed to resolve the matter out of court. The family of

¹ Roscoe Pound, *Law in Books and Law in Action*, (1910)44AM. L. REV. 12, 12-15.

² *The Constitution of Kenya 2010* was promulgated on the 27th of August 2010 after 20 years of negotiations. It repealed Kenya's independence constitution that had been amended several times in favor of the Executive. The new constitution gives sovereignty to the people and vigorously protects their rights in the Bill of Rights.

³ Morris K Mbondenyi, 'The Bill of Rights' in PLO Lumumba, M. K Mbondenyi and S. O Odero (eds) *The Constitution of Kenya: Contemporary Readings* (LawAfrica 2011) 61-98

⁴ Morris K. Mbondenyi *ibid.* 61

⁵ *Republic V Mohamed Abdow Mohamed [2013] eklr* <http://kenyalaw.org/caselaw/cases/view/88947/>

the deceased accepted compensation in the form of camels, goats and other traditional ornaments as provided for under the Islamic Law and customs. The prosecutor agreed with the parties and petitioned the court to discharge the accused. The accused was discharged. The public and human rights groups were infuriated by this decision as it amounted to downplaying the sanctity of life. The case is a good example of how the constitution is supposed to consider the contexts in which written law is applied. The conflict in this matter was the contestation between African conception of justice for human rights violations and Western perspectives. While the former is restorative, in the case in question, the latter is retributive. Similarly, *L.N.W v Attorney General & 3 others* [2016] eKLR⁶ revealed the same disjuncture on whether a single mother can give a child borne out of wedlock the ‘father’s name, regardless of the man’s concurrence. The petitioner, a single mother of a child born outside marriage filed the petition on her behalf, her child and other children born out of wedlock. She sought a declaration and an order that section 12 of the *Registration of Births and Deaths Act*, is inconsistent with Articles 27, 53 (1) (a) and 53 (2) of the Constitution and is therefore void. She also sought an order that all children born out of wedlock shall have the right to have names of their ‘fathers’ entered in the Births Registers. Mumbi Ngugi J, granted the Petitioner’s prayers.⁷ The conflict in this matter was whether the written law can give you a right that you are not able to enjoy in your community? What then, is the value of that right? The ruling drew celebration and condemnation in equal measure. Okoth Okombo,⁸ a linguist, philosopher and cultural scholar, in an article “*Judge’s verdict on birth records may lead to more abortion cases*,” presented an anthropological critique of the determination. He argued

⁶ *L.N.W v Attorney General & 3 others* [2016] HC eKLR

⁷ Case law in Kenya is replete with examples of controversy between law in books and law as known, believed and practiced in different African communities. The following cases confirm this observation: *Re of the Estate of Joshua OrwaOjodeh – (Deceased)* [2014] eKLR; *Peter MburuEcharia v Priscilla Njeri Echaria* [2007] eKLR; *Mary Rono v Jane Rono& another* [2005] eKLR; *Virginia Edith Wamboi Otieno v Joash Ochieng Ougo& another* [1987] eKLR.

⁸ Okoth Okombo, *Judge’s verdict on birth records may lead to more abortion cases* Daily Nation (20 May 2016). <http://mobile.nation.co.ke/blogs/Verdict-on-birth-records-may-lead-to-more-abortion-cases/1949942-3231518-1503fee/index.html> (Accessed on 6 June 2018)

that the ruling was not implementable in an African society as it ignored cultural reasons for ignoring biological fatherhood as opposed to *de facto* fatherhood. Similar conflicts arise in cases touching on Female Genital Mutilation (FGM) and other sexual offences such as early marriages, defilement and rape. A good example is the case of *K L v Republic*.⁹ This was a case over failure by the Appellant to report the commission of Female Genital Mutilation (FGM) contrary to Section 29 of the Prohibition of Female Genital Mutilation Act. The appeal succeeded, not on the merit of the case, but on technicality. The main conflict in this matter was the provisions of the constitution, especially the right to culture in Article 11 of the Constitution, the repugnancy clause in Article 159(3)(b) and the provisions of the statute prohibiting FGM. The appeal succeeded, not on the merit of the case, but on technicality. The merit of the case could have been decided to develop jurisprudence on the contestation between law in the books and law in action where culture is concerned. In *KN v Republic*¹⁰, a man who married an underage was charged with defilement. In *S M G v R A M*¹¹ a 16 year-old girl confessed to the court that she had not been forced to go through FGM. She had gone through FGM to be a complete woman in the eyes of her society. The conflict in this matter was between the freedom of an individual to practice culture of her community and the demand of the written law not to go through the rite of passage. The matter reveals lack of consonance between a people's way of life and laws written based on Western traditions. The discordance between written law and reality is not limited to sexual violence. Probate and succession matters also bring out conflict between the written law and law as reality. A good example is the *Re Estate of Joshua Orwa Ojodeh – (Deceased) [2014] eKLR*. The mother of the deceased moved to court to be considered as a dependant for the purposes of succession. Culturally, in an African society, the petitioner had a right. But this right was frustrated by the Law of Succession Act which borrows heavily from the UK law. There have also been

⁹ Criminal Appeal Number 18 Of 2016, *KL v Republic* [2017] eKLR.

¹⁰ Miscellaneous Criminal Application Number 1 of 2016, *KN v Republic* [2017] eKLR

¹¹ Criminal Appeal Number 66 of 2014 [2015] eKLR

cases of unlawful eviction that is contrary to Article 28 on the right to human dignity. The African Court on Human and Peoples' Rights in May 2018 ruled that the government of Kenya had illegally evicted Ogiek, an indigenous group from the Mau Forest.¹² This matter revealed dissonance between western conceptions of environmental conservation and the rights of forest communities to livelihood and indigenous conservation methods.

As Okoth correctly observes in *L.N.W v Attorney General & 3 others [2016] eKLR* and supported by the other cases mentioned above, *The Constitution of Kenya 2010* and relevant statutes alone may not demystify and Africanize the law to be in consonance with lived reality. It requires African epistemology to transform the Law from its isolationist colonial posture to a true instrument for decolonization of African jurisprudence. Could it be that *The Constitution of Kenya 2010* is incompatible with Kenya's lived experiences? How then, do we ensure consonance between the written law and law in action? This study endeavors to find answers to these questions.

1.2 Problem Statement

Although it is generally held that Kenya has the best Constitution with elaborate provisions on women's rights, children's rights and general human rights in line with international instruments¹³, scrutiny of its implementation reveals challenges to adequately respond to the nature of an African society. The study therefore investigates the extent to which divergence and convergence of human rights law as envisaged in *The Constitution of Kenya 2010* resonates with African ontology and epistemology. Can Literature, due to its cultural grounding and communicative flexibility, be the ontological prism and epistemological bridge that connects the law in the books and the law in action to ease implementation challenges?

¹²African Commission on Human and People's Rights v Kenya

¹³ Universal Declaration of Human Rights, 1948

1.3 Research Questions

To achieve its objectives, the study responds to the following questions:

1. What is Kenya's constitutional history between 1884 and 2010?
2. What are the Legislative and institutional frameworks for human rights protection in Africa?
3. What is the nature of an African society?
4. What are the points of convergence and divergence between Human rights law as encapsulated in *The Constitution of Kenya 2010* and the lived reality as captured in African literature?

1.4 The Study Objectives

This study:

1. Analyzes Kenya's constitutional history from 1884 to the promulgation of *The Constitution of Kenya 2010*.
2. Discusses frameworks for human rights protection in Africa.
3. Examines the nature of African society
4. Investigates the points of convergence and divergence between human rights as captured in *The Constitution of Kenya 2010* and lived reality as encapsulated in selected African literary texts

1.5 Hypothesis

In our analysis, we posit that:

1. Kenya's constitutional historiography depicts a consistent contestation between the law in reality and the law in the books.
2. Frameworks for human rights protection face implementation challenges in Africa because they lack grounding in African epistemologies

3. Dissonance between the texture of *the Constitution of Kenya 2010* and its application to emergent legal challenges derives from its rigid fidelity to western thought which is in conflict with the nature of African society that it seeks to serve.
4. By espousing humanistic ideals in aesthetically engaging style, literature bridges the gap between the law as reality and the law in the books.

1.6 Theoretical Framework

Any structured academic endeavor is guided by certain basic assumptions that gravitate towards a theory or a combination of theories. A theoretical framework provides tools for data collection, processing, analysis and interpretation. It also illuminates the perspectival lens a researcher employs to discern the subject of research. Often times, a theoretical framework is demanded by the topic of the study and the methodology adopted by a researcher.¹⁴ In this study, we employ social contract theory, socio-legal theory and critical realism. The three theories start from society and its needs. They are premised that laws are not made for society; instead, societies create laws to ensure order, prosperity, security and harmony.

1.6.1 Social-Contract Theory

Human beings have a choice to live solitary lives and face perpetual threats of survival. Alternatively, they can come together through social contract to trade some of their rights for security and predictability of life. The theory is associated with Thomas Hobbes,¹⁵ John Locke¹⁶ and Jean-Jacques Rousseau.¹⁷ Hobbes argues that without society, men live in a state

¹⁴ Peter Wasamba, *Contemporary Oral Literature Fieldwork: A Researcher's Guide*. (University of Nairobi Press, 2015) pp. 300.

¹⁵ Thomas Hobbes (1588-1679). Defines contract as "the mutual transferring of rights." Social contract then, is an agreement by which individuals transfer their natural rights in exchange for some common security.

¹⁶ John Locke, *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press, 2003). He was from the year 1632 up to 1704.

¹⁷ Jean-Jacques Rousseau, *The Basic Political Writings*. (Trans. Donald A. Cress, Hackett Publishing Company, 1987). p.64. He was from the year 1712 up to 1778

of nature in which there is no government, and each person is law unto himself or herself.¹⁸ To avoid this scaring eventuality, men and women enter in to a social contract to trade liberty for safety.¹⁹ The basic principle that underpins social contract theory is that sovereign people donate their power to a collective institution that in return guarantees them their rights.²⁰ The theory is relevant to human rights research as it controls the limits of power. It facilitates understanding of why society is formed, how it is formed, what holds it together and the relationship between the government and its citizens. As we embrace social contract theory, we are alive to some of its limitations, especially inability to deal with dominant and exclusivist social contracts such as racial supremacy and sexual contract as pointed out by Charles Mills²¹ and Carole Pateman²² respectively.

1.6.2 Socio-legal Theory

The study also employs socio-legal theory. Sociology of law popularizes the law as a tool for social ordering. Drawing from Malinowskian²³ functionalist paradigm, the theory makes law responsive to culture, religion, economics, history, art, and technological advancement in society. The foremost advocate of sociological jurisprudence is Roscoe Pound.²⁴ In his seminal treatise on “Scope and Purpose of Sociological Jurisprudence”, the scholar dismisses pedantic adherence to black letter law. He asserts that law is alive and constantly communicates to be of service to society. Law is no longer sacred or mysterious. The theory

¹⁸ Thomas Hobbes, *Leviathan* (first published 1651, Penguin 1985) 268. Thomas Hobbes *ibid.* Hobbes concludes that in the State of Nature there is ‘no place for industry, no commodious building, no account of time, no arts, no letters, no society, and which is worst of all, continual fear and danger of violent death; and the life of man is solitary, poor, nasty, brutish and short.188

¹⁹ Thomas Hobbes *ibid.* 190

²⁰ Thomas Hobbes *ibid.* 201

²¹ Desmond Jagmoham, “Race and the Social Contract: Charles Mills on the consensual foundations of White supremacy” (2015) *Politics, Groups and Identities* Vol. 3 Issue 3 pp.488-503.

²² Joanne Boucher, “Male Power and Contract Theory: Hobbes and Locke in Carole Pateman’s “The Sexual Contract” (2003) *Canadian Journal of political Science* Vol. 36 No. 1 pp. 28-38

²³ Bronislaw Malinowski is a Polish-born British anthropologist remembered as the father of ethnography based on fieldwork. He looked at society from a utilitarian perspective. He observed that society tends towards order and survival. Since law contributes to order and spurs economic growth by protecting property rights while punishing crimes, it is central to the continued survival of society.

²⁴ Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence III*, (25 HARV. L. REV.489 1912).

allows us to interrogate legal principles and doctrines freely regardless of our disciplinary backgrounds as: historians, literary scholars, economists, or sociologists. As James Gardner²⁵ aptly points out, sociology of law democratizes legal reasoning since knowledge of the law is no longer a necessary prerequisite to legislation. Most important, the theory gives credence to cultural relativism as opposed to universalism often times employed to lend credence to Western perspectives. Law in society has been a developing branch of scholarship from the second half of the 20th Century. Malinowski employs participant observation to the study of law in local communities and establishes the existence of a seamless link between communities' activities and customary law.²⁶ The dynamic nature of society and its influence on human rights jurisprudence²⁷ brings Kelsen's thesis on pure theory of law, especially rule of change, in to closer purposive contact with Pound's sociological jurisprudence. Similarly, Oliver Wendell Holmes²⁸ advances sociological jurisprudence akin to Ronald Dworkin's constructivism.²⁹ Rejecting the idea that law can be studied as a science, Holmes emphatically rebuts Langdell's argument that legal systems are based on the rules of logic. In his seminal text, *The Path of the Law*, Holmes disassociates law from morality and logic and focuses on policy.³⁰ He therefore defines the law as a prediction of what the courts would do in a particular situation based on a "bad man" theory of justice.³¹ We concur with Holmes that a bad man in society will always want to know only what the material consequences of his or her conduct will be regardless of whether it is motivated by morality or conscience. Malinowski, Dworkin and Holmes highlight the instrumentality of law in social engineering.

²⁵ James A. Gardner, *The Sociological Jurisprudence of Roscoe Pound* (1961), 7 *Vill. L. Rev.* 1. http://digitalcommons.law.villanova.edu/vlr/vol7/iss1/1_p.11 (accessed on 6th December 2017.)

²⁶ Ledvinka T. Bronislaw Malinowski and the Anthropology of Law. In: Stępień M. (eds) (2016) *Bronislaw Malinowski's Concept of Law*. Springer, Cham, pp. 55-81.

²⁷ Halperin Jean-Louis, 'Law in Books and Law in Action: The Problem of Legal Change' (2011) Vol. 64 No. 1 *Maine Law Review*, 46.

²⁸ Oliver Wendell Holmes Jr., 'The Path of the Law' (10 *Harvard Law Review* 457, 1897)

²⁹ Ronald Dworkin, *How Law is like Literature* (A Matter of Principle 1985) 146

³⁰ Oliver Wendell Holmes *ibid.* 9

³¹ Oliver Wendell Holmes *ibid.* 28

Law is not detached from society. It is the glue that holds society together. Law cannot therefore be studied outside the society that creates and sustains it.

1.6.3 Critical Legal Realism

Critical legal realism strengthens socio-legal jurisprudence by extending theoretical and methodical scholarship towards contextualization. The theory is premised on a realist philosophy that being is distinct from epistemology (knowledge). Realism, in this regard, is distinct from empiricism which considers knowledge as emanating from experience contrary to thought and language.³² Roberto Unger, a leading proponent of critical Legal Studies; contends that the critical legal studies theory undermines the fundamental concepts of modern legal thought and replaces them with another conception of law. This conception implies a view of society and informs a practice of politics.³³ Duncan Kennedy, one of the founders of CLS and Karl Klare, ardent advocates of CLS. They posit that Critical Legal studies focuses on how legal scholarship and practice relates to the struggle to create a more humane, egalitarian, and democratic society.³⁴ The theory is radical in challenging the norm, provoking introspection and advocating for re-visioning philosophies that have been employed to justifying ‘othering’ and exploitation of classes considered inferior in society. As we shall argue in this paper, to locate law in an African society, we must question the philosophies that have been employed to normalize the written law and western jurisprudence. To ground validate law in action, we have to question our colonial heritage and decolonize our thinking to return to the African philosophy of communalism.

³² Marianne Wikgren, “Critical realism as a philosophy and social theory in information science?” *Journal of Documentation* Vol. 61 No. 1, 2005pp. 11-22 (p.12), Finland 2004, <https://pdfs.semanticscholar.org/cdaa/e2cc369eb6b9469b091eb81d2dc52cf59c1d.pdf> (Accessed on 9 July 2018.)

³³ Roberto Unger, *The Critical Legal Studies Movement*, 96 *Harv. L. Rev.* 563 at 563 (1983) [hereafter cited as CLS] . See generally R. Unger, *Knowledge and Politics* (1975); R. Unger, *Law in Modern Society: Toward a Criticism of Social Theory* (1976) [hereafter cited as *Modern Society*]. 2 Some American

³⁴ Duncan Kennedy and K. Klare, *A Bibliography of Critical Legal Studies*, 94 *Yale L.J.* 461 (1984), p. 461.

The social contract theory with an African perspective enables one to critique how the law mirrors the actual will of the people, especially the fundamental rights and freedoms as espoused in the *Constitution of Kenya 2010*. The socio-legal theory also provides the study with tools to demystify the law by opening it up to trans-disciplinary engagement as strongly propounded by Pound. Critical legal studies questions and renders unstable the hitherto presumed constructs that justify oppression, exploitation and valorization of Western legal thought. The three theories provide a confluence for the black letter law and the law in action which is the locus of this study.

1.7 Literature Review

The review of literature relevant to our study looks at the works of selected scholars on law, human rights, and literature. The review investigates the relationship between the black letter law and law in action with a view to enhancing our understanding of African society, the law on human rights and their implementation. This section commences with an examination of the difference between law in literature and law as literature. Further, we review works of European and American writers on law in literature. This is followed by an assessment of African writers on law in Literature. We conclude the chapter by demonstrating that dissonance between the law in the books and law in action in Africa emanates from inability to ground black letter law on African epistemology. In addition, the chapter indicates that literature, due to its aesthetic appeal and cultural grounding has the potential to bridge the law in the books and law in action.

1.7.1 Literature and the Law

Law and Literature are cousins with convergent and divergent intellectual and practical interests. ‘Law in literature’ and ‘Law as Literature’ are terms that often confuse and blur any meaningful discussion on the relationship between law and works of creative expressions.

Catherine Harwood,³⁵ interrogates law and literature in Frank Kafka's oeuvre and construes that law and literature have striking similarities and dissimilarities. The two disciplines exploit the power of language to communicate effectively. By exploiting semantic elasticity and stylistic finesse in fiction, drama and poetry, law addresses legal reasoning in a medium close to people's forms of communication.

It is curious to note that while language cements symbiotic relationship between law and literature, it is also the very medium that sets the two disciplines apart. The significant difference between law and literature is in language-use: while law employs precise language in a reductionist manner for semantic specificity, literature thrives on ambiguity to enhance semantic indeterminacy. Precisely, law strives for exactitude whereas literature deliberately generates multi-layered meanings in a piece of information. Literature, though close to law, has never been a serious field for legal minds, especially in Africa. Recent developments, however, highlight affinity between the two disciplines hence the growth of Law in Literature Movement.³⁶ The movement explores how lay people averse to complicated court procedures can understand the logic of law in theory and practice through fiction, poetry, theatre and essays.

The study brings out complementary relationship between the two disciplines. Literature provides legal scholars with an opportunity to go beyond the mechanical and restricted study of legal rules, and to perceive at law as culture. In this regard, Literature addresses a neglected but important aspect of legal scholarship and practice.³⁷ 'Law in Literature'

³⁵ Harwood C, 'Frank Kafka's Literature and the Law' (LLB Research Paper Victoria University of Wellington 2007).

³⁶ James Seaton, Law and Literature: Works, Criticism, and Theory (Yale Journal of Law & the Humanities, Vol. 11 | Issue 8, 1999) <http://digitalcommons.law.yale.edu/yjlh/vol11/iss2/8>. (Accessed on 6 June 2018)

³⁷ C. R. B. Dunlop, Literature Studies in Law Schools (Cardozo Studies in Law and Literature, Vol. 3, No. 1 (Spring - Summer, 1991), p.64. URL: <http://www.jstor.org/stable/743502> (Accessed on 26 April 2018)

examines how legal institutions and practices are reflected in creative works.³⁸ It studies how law is represented in literature. In contrast, law as literature focuses on how legal minds interpret legal texts using literary style. By applying literary theory to legal texts, Law in Literature scholars end up introducing semantic indeterminacy in legal reasoning. By ‘unfixing the fixities’ of language of the law, such scholars create contested meanings of seemingly settled legal questions. While their interpretive strategies and foci differ, proponents of both the ‘law in literature’ and the ‘law as literature’ concur that studying literature produces not only better lawyers but also opens up the profession to public understanding and engagement.

1.7.2 Law as Literature

Law as literature comprises legal minds that value literary style in writing about law. These are jurists who borrow from literature to extend elastic limits of language to communicate their unique interpretations of the law. This is where we find legal minds such as Benjamin Cardozo, Oliver Wendell Holmes and Ronald Dworkin. Law as literature movement is not recent. Irvin Brown³⁹ addressed the symbiotic connection between Law and creative productions in 1883. John Hursh,⁴⁰ too predates Benjamin Cardozo’s *Law and Literature*.⁴¹ James Boyd White⁴² in *The Legal Imagination* (1973), Catherine Harwood and Dustin Zacks⁴³ belong to the Cardozo school.

³⁸ See <https://legal-dictionary.thefreedictionary.com/Law+and+Literature> for Law in Literature, Law as Literature and Law and Literature. (Accessed on 26 April 2018)

³⁹ Irvin Browne, *A Treatise On The Admissibility of Parol Evidence In Respect To Written Instruments* (1883) and *The Elements of the Law of Bailment and Common Carriers* (1896). Irvin was a New York attorney who practiced law in the late nineteenth century. Browne published several books detailing mundane areas of legal practice. He valued literature, and following his death in 1899, a brief New York Times article celebrated his love of literature and his exceptional book collection.

⁴⁰ Hursh John, *A Historical Reassessment of the Law and Literature Movement in the United States*, GRAAT (2013) <http://www.graat.fr/1hursh.pdf> 30/1/2018. (Accessed on 6 June 2018)

⁴¹ Benjamin Cardozo, *Law and Literature and Other Essays and Addresses*. (Harcourt, Brace & Co., 1931)

⁴² James, Daniel, "Law and Literature, by Benjamin N. Cardozo, (1931) Indiana Law Journal: Vol. 6: Iss. 9, Article 14. <http://www.repository.law.indiana.edu/ilj/vol6/iss9/14> (Accessed on 25 February 2018)

⁴³ Dustin Zacks, ‘A Bend in the Law & Literature: Greed, Anarchy, and Dictatorship in the African Worlds of V.S. Naipaul and Ngugi wa Thiong’o’, (Vol. 34 *Northern Illinois University Law Review*) <http://ssrn.com/abstract=2376542> (Accessed 7 December 2017.)

Benjamin Cardozo had a prolific legal-literary disposition. In his court decisions, he exploits literary style to verify points of law. He argues that however precise a legal mind is, it is still vulnerable to some degrees of misstatement.⁴⁴ Cardozo seems to suggest that contrary to the mantra of jurists that law exploits exactitude in language, words are too slippery to be imprisoned within one objective and permanent meaning. James Boyd White, like Cardozo, approaches law as a constitutive rhetoric which requires a closer textual and contextual analysis of language. Hursh, in a similar fashion, contends that the introduction of technical practice in law causes the divergence between law and society. This study seeks to cure the disjuncture by bringing back complementarities between law and literature. The clear difference then is that while under Law in Literature, non-lawyers write about law, in Law as Literature, the reverse is the case with legal practitioners writing about law using literary style. Literature is a product of life in society. It mirrors the strivings of women and men to make the best out of their situations. Complementarity between law and literature, therefore, creates a fertile ground for socio-legal research.

Oliver Wendell Holmes is one of the ardent advocates for the contextual school in legal research and scholarship. He confirms this shift by asserting that lawyers must discern and respond to social contexts that create the law and to which the law must apply.⁴⁵ Holmes suggests that lawyers must sharpen their faculties of analogy, discrimination, and deduction, to contribute to jurisprudential growth. These capacities are best supported by disciplines complementing legal thought like Literature, Sociology, Philosophy, Philology, History and Anthropology. The new thinking insists that legal research opens up and connects with neighboring disciplinary territories in order to respond to the complexities of modern

⁴⁴ James, Daniel (1931) "Law and Literature, by Benjamin N. Cardozo," (Indiana Law Journal: Vol. 6: Iss. 9, Article 14). <http://www.repository.law.indiana.edu/ilj/vol6/iss9/14> (Accessed on 25 February 2018)

⁴⁵ Oliver Wendell Holmes Jr., 'The Path of the Law' (10 Harvard Law Review 457, 1897)

jurisprudential challenges. The shift from textual to contextual legal research facilitates comprehension of the extent to which non-legal representation enhances conceptualization of the law, especially in areas such as human rights. By embracing legal realism, anthropological-historical jurisprudence, feminist jurisprudence and race theory, sociological jurisprudence affirms the existential bond linking legal scholarship to theoretical developments in linguistics and literature.

1.7.3 Law in Literature

The main focus of this study is 'law in literature' as it allows us to explore how writers demystify law from outside the discipline. Where need be, we venture in to 'Law as Literature' to assess the extent to which literary style is effectively employed in explaining hard decisions. Law in Literature is given credence in works of famous writers such as William Shakespeare,⁴⁶ Charles Dickens,⁴⁷ Fyodor Dostoyevsky,⁴⁸ Grace Ogot,⁴⁹ Ngugi wa Thiongo,⁵⁰ Chinua Achebe⁵¹ and Alex la Guma,⁵² among others. The novels, short stories, drama, essays and poems penned by these creative minds inform, entertain and educate the public on the finer operations of the law.

In Kenya, we have lawyers who belong to the 'Law as Literature' school. Ambreena Manji⁵³ is one such person. Like Cardozo, she has dedicated her research to law in literature and law

⁴⁶ William Shakespeare & Harrison, G. B. *The Tragedy of Macbeth* (18th Edition, Penguin Books 1968)

⁴⁷ Dickens Charles, *Hard Times* (Penguin Books 2003), *Hard Times* (Signet Classic, 1997), *Oliver Twist* (Penguin 2002), *A Tale of Two Cities* (Chelsea House 1987), *David Copperfield* (Penguin 2000)

⁴⁸ Dostoyevsky F, *Crime and Punishment* (Penguin Books 2015)

⁴⁹ Ogot G, *The Land without Thunder* (East African Educational Publishers 1968)

⁵⁰ Ngugi wa Thiongo and Micere Githae Mugo, *Trial of Dedan Kimathi* (Heinemann Educational Books 1976)

⁵¹ Chinua Achebe, *Things Fall Apart* (East African Educational Publishers 1996)

⁵² la Guma A, *In the Fog of the Season's End* (Heinemann 1992)

⁵³ Buss D and Ambreena Manji, 'The Beautiful Ones' of Law and Development,'(eds), *International Law: Modern Feminist Approaches* (Oxford: Hart Publishing, 2005), 159-171.; "Law, Literature and Labour in Sembene Ousmane's 'Les Bouts de Bois de Dieu' (2005) 25 *Legal Studies* 320-336.; 'Of the Laws of Kenya and Burials and All That' (2002) 14 *Law and Literature* 463-487., and 'Like a Mask Dancing': Law and Colonialism in Chinua Achebe's 'Arrow of God' (2000) 27 *Journal of Law and Society* 626-642. These are some

as literature. In one of her articles,⁵⁴ the scholar borrows from Chinua Achebe's *Arrow of God* to argue that legal reasoning is like mask dancing.⁵⁵ Ezeulu in Achebe's novel justifies sending his son to get Whiteman's education thus:

I want one of my sons to join these people and be my eye there. If there is nothing in it you will come back. But if there is something there you will bring home my share. The world is like a mask dancing. If you want to see it well you do not stand in one place. My spirit tells me that those who do not befriend the white man today will be saying had we known tomorrow."

Manji, echoing Achebe intimates that a cogent legal reasoning comes from a scholar with capacity to look at legal issues and other prevailing manifestations from all possible perspectives instead of being theoretically monocle. Apart from addressing points of intersection between law and literature, it is important to examine utility value of the two to the survival and advancement of society.

1.7.4 Literature and the Quest for Justice

Literature is basically functional. It uses imagination to tell the story of human life with fidelity and empathy. It has the capacity to explain legal issues in a way that resonates with a people's temporal conception of fairness. This explains why themes of law, justice and human rights dominate creative writing. Browne Irvin⁵⁶ contends that society seems to attack lawyers because of their esteemed positions. Irvin goes on to argue that lawyers have so much power and status in society that makes them easy targets of satirists. Irvin, apart from being defensive, fails to bring out the symbiotic association concerning literature and law. He considers literature as an instrument of satire and comedy. Our study goes beyond Irvin's

of the seminal publications that Ambreena Manji has done extensive research on the relationship between literature and law.

⁵⁴ Ambreena Manji, 'Like a Mask Dancing': Law and Colonialism in Chinua Achebe's 'Arrow of God' (2000) 27 *Journal of Law and Society* 626-642.

⁵⁵ Chinua Achebe, *Arrow of God*, East African Educational Publishers, 1964. p. 47

⁵⁶ Browne, Irving. *Law and Lawyers in Literature*. (Fred B. Rothman & Co., 1982)

understanding of the relationship between literature and law. We interrogate how literature contributes to our understanding of law in action, especially human rights concerns.

1.7.5 Evolution of Law in Literature Movement

The Law in Literature school stretches back to Greek classical literature. Aristophanes,⁵⁷ the legendary Greek thespian in the genre of comedy is among the earliest writers to use art to illuminate the workings of the law in society. Aristophanes discovered that the law had potential for abuse by those in authority. In the comedy, *Wasps* (422 BC), the thespian satirizes the political leadership of Athens for robbing the poor through heavy fines to bribe court jesters. The play is a satire of injustice on the people of Athens by a corrupt political leadership that has compromised the justice system. William Shakespeare⁵⁸ in his play *Othello*, also addresses various doctrines in law. Though these principles were relevant at the time, they are canons that appeal to all human beings notwithstanding time, geography, sex, gender, religion, jurisdiction, language and legal system. For example, In *Act 3 Scene 3* of *Othello*, Iago pleads for respect of people's good names:

Iago: A good reputation is the most valuable thing we have—men and women alike. If you steal my money, you're just stealing trash. It's something, it's nothing: it's yours, it's mine, and it'll belong to thousands more. But if you steal my reputation, you're robbing me of something that doesn't make you richer but makes me much poorer (Othello Act 3 Scene 3).

In my assessment, no statute or court decision has ever explained the graphic harm of defamation, either through slander or libel, like Shakespeare in *Othello*. Shakespeare demonstrates the compelling power of law in literature. Through Iago, the writer creates awareness on the importance of respecting person's reputation. Defamation destroys a good

⁵⁷ Aristophanes. *Wasps* (Agora Museum. 250 B.C.) <https://classicalwisdom.com/wp-content/uploads/2015/ebooks/Wasps.pdf>. Accessed on 23 February 2018. (Accessed on 26 April 2018)

⁵⁸ William Shakespeare, *The Tragedy of Othello, the Moor of Venice* (Washington Square Press, 1993)

person's intangible treasure with the culprit gaining nothing. The same dexterity of Shakespeare is evidenced in Charles Dickens and Dostoyevsky's oeuvre.

1.7.6 Law in Literature Movement in Europe and America

Charles Dickens writes social commentaries on the vagaries of industrial revolution in England. Through his texts⁵⁹, he reveals that in his era, like in Aristophanes', law served the rich. For example, law did not allow poor people to divorce due to several complicated steps and costly payments. Children worked long hours in mines and textile mills. Men too worked long hours in coal mines and died of respiratory infections. All these are areas that have now been addressed by labor laws.

Fyodor Dostoyevsky⁶⁰ is a celebrated Russian writer on the psychology of crime and the burden of criminal responsibility. His characters are mainly involved in criminal activities like murder and gambling before they are punished by courts. The writer brings out a strong correlation between crime and punishment and the doctrine of proportionality. Paul Squires⁶¹ commenting on Dostoyevsky's doctrine of criminal responsibility correctly observes that Dostoyevsky's characters involved in crime open up and reveal motivating factors behind their deviant behavior. In *Crime and Punishment* by Dostoyevsky, we get in to the mind of criminals to reveal what drives them to crime.

1.7.7 Literature and Human rights

Protecting dignity of human beings is central to human rights discourse. It has no disciplinary boundary.⁶² Literature is moral. The law ensures order in society by upholding justice. Law

⁵⁹ *Hard Times, Oliver Twist, A Tale of Two Cities, and David Copperfield*

⁶⁰ Fyodor Dostoyevsky *ibid*

⁶¹ Paul Quires, Dostoyevsky's Doctrine of Criminal Responsibility (Vol. 27. Issue 6 Journal of Criminal Law and Criminology, 1937)

⁶² Eleni Coundouriotis and Lauren Goodlad observe that "human rights will remain central to many contemporary debates—from the global economy to the environment, gay marriage, human trafficking, and cultural and religious nationalism".

and literature collaborate in protecting human rights. Makau Mutua,⁶³ an internationally renowned Human Rights law scholar calls for indigenization of human rights discourse and application to Third World situations. Makau treats human rights movement as a metaphor with three legs; savages, victims and saviors. An assessment of Makau Mutua's triad of self-reflection questions the assumed universality and cultural neutrality of the human rights project. We concur with Makau Mutua that a truly universal human rights corpus, must be multicultural, inclusive, and deeply political. As Makau correctly asserts; Human rights can play a role in changing the unfair world order and particularly the inequalities between the West and the Third World.... Ultimately, the goal must be for the development of human rights movement that wins for all.⁶⁴ Anna Kula examines human rights in post-independence Kenyan literature. Her study is motivated by a scarcity of critical works on human rights in Kenyan creative productions. The critic observes that the writers' backgrounds influence their presentation of the theme of human rights.⁶⁵ Kula's study though insightful addresses everyday concerns in human rights without focusing on legal principles at play.

Marcel Onyibor⁶⁶ also attempts a study of Achebe's works in terms of human rights jurisprudence. He investigates Igbo universe in Achebe's *Arrow of God* and concludes that Achebe exposes unavoidable repercussions of the situation when those in control and authority forget the foundation of their power (the people) and cling to personal interests. It explains the fall of Ezeulu the chief priest. Other scholars who have studied Achebe's works

⁶³ Mutua, Makau W., *Savages, Victims, and Saviors: The Metaphor of Human Rights* (2001). Harvard International Law Journal, Vol. 42, No. 1, pp. 201-245, 2001. Available at SSRN: <https://ssrn.com/abstract=1525547>

⁶⁴ Makau Mutua *ibid.* 245

⁶⁵ Anna Miti Kula, *The Theme of Human Rights in Selected Post-Independence Kenyan Literary in Text*, PhD Thesis, UoN 2016
<http://erepository.uonbi.ac.ke/bitstream/handle/11295/98861/ANNA%20MITI%20KULA%20FINAL%20COPY.pdf?sequence=1&isAllowed=y> (Accessed on 27 May 2018)

⁶⁶ Marcel Ikechukwu Sunday Onyibor, 'Igbo Cosmology in Chinua Achebe's *Arrow of God*: An Evaluative Analysis' (2016) *Open Journal of Philosophy* <http://www.scirp.org/journal/ojpp>
<http://dx.doi.org/10.4236/ojpp.2016.61011> (accessed 7 December 2017.)

include Olubukola Olugasa,⁶⁷ and Columbus Ogbuja.⁶⁸ These scholars suggest that in his works, Achebe demonstrates an awareness of law in action in a traditional society. These observations have not been subjected to detailed analysis.

1.7.8 Literature and Revolution

Literature mirrors life through fiction. Creative works derive their raw material from society which includes historical events. Literature of commitment partners with history to address pertinent issues of the day by relying mainly on poetic license, sarcasm, irony and satire. Creative writers, like legal scholars and practitioners respond to the historical callings of their times. It is curious to note that typology of Literature in Africa, and the world at large, follows historical epochs. For example, we have: pre-colonial literature, colonial literature, post-independence literature, literature of apartheid era, post-apartheid literature, literature of the great depression, and war literature, just to mention a few. Literature, like a royal poet, distills important events in society's life and shares them in an aesthetically engaging way to archive them in the memories of the folk community. Just as we have itemized the occupation of Kenya as a British protectorate, to the declaration of Kenya as a colony in 1920, through colonial constitutions, to independence constitution and the ensuing amendments, there is a genre of literature for every phase. Through poetry (oral or written), fiction, drama and essays, artists are able to articulate the concerns of their societies to contribute to the betterment of the society. For example, colonial literature is generally regarded as creative productions inspired by the colonial period in Africa. This definition means that before independence, there are two categories of colonial literature: literature that defends colonial

⁶⁷ Olugasa Olubukola, 'Interplay of Law and Equity in Chinua Achebe's Arrow of God' (September 2013). <https://ssrn.com/abstract=2326221> or <http://dx.doi.org/10.2139/ssrn.2326221> (Accessed 7 December 2017.)

⁶⁸ Columbus Ogbujah, 'Ethics, Law and Justice in Achebe's *Things Fall Apart*' *IOSR Journal of Humanities and Social Science (IOSR-JHSS) Volume 19, Issue 12, Ver. I (Dec. 2014), PP 42-49 e-ISSN: 2279-0837, p-ISSN: 2279-0845. www.iosrjournals.org* (Accessed 7 December 2017.)

domination by denigrating Africans as inferior⁶⁹ and Literature of resistance that defies domination and celebrates African beauty and vigor. This period is divided into two, pre-colonial literature (Literature before colonization) and post- colonial literature (Literature during or slightly after the colonial period). Leon Trotsky, in *Literature and Revolution* argues that the best creative moment in the history of a people is in the thick of a revolution. Art, as a unique form of culture assumed to be the knowledge and capacity which typifies the entire society at once captures a society's response to the basic problems of human need, production, and distribution.⁷⁰ Trotsky argues further that the best drama, fiction and essays in the history of any nation thrive at the heart of the struggle for freedom because, literature that enhances resistance states how people in oppressive, dehumanizing circumstances utilize imagination to sustain life and maintain critical consciousness. In repressive conditions, the capacity to imaginatively create a reality not present to the senses or perceived might be the only way to hope.⁷¹

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In their different ways, these scholars discuss either literature in law or law as literature. These scholars have not investigated, in a specific fashion, dissonance between the letter of the law and law in action. The selected texts confirm the disjuncture between the written law and law as popular will. Literature reviewed indicates that in as much as there are texts on literature and law, most of them are in the Global North. Even though African writers have also ventured in to the genre, there has been no attempt to investigate the synergistic

⁶⁹ Karen Blixen is a good example of a colonial writer. Read her text *Out of Africa*.

⁷⁰ Leon Trotsky, *Art and Revolution: Writings on Literature, Politics, and Culture*, edited by Paul N. Siegel (New York: Pathfinder Press, 1970), pages 230–32.

⁷² Bell Hooks, 'Narrative of Struggle' in (ed) Philomena Mariani (1991) *Critical Fiction* Conference Proceedings at page 54.

collaboration between law and literature in furtherance of the rights of women and men in Africa. The study attempts this feat.

1.8 Justification of the Study

- *The Constitution of Kenya 2010* is the embodiment of Kenyans' desire of ages. That it is facing challenges in its implementation is a matter of concern that requires urgent attention. This study diagnoses the challenges encountered for requisite corrective action.
- Law remains a mystery to the majority of Kenyans. Complementary relationship between law and literature, can achieve this goal. The study attempts this feat as it requires a scholar grounded in both disciplines.
- This is the first thesis by a scholar grounded in both literature and law. It therefore provides deeper insights from the two disciplines as a process of enhancing access to justice through increased awareness of the law.

1.9 Methodology

Legal scholarship has for years been dominated by doctrinal research, based on the assumption that the law is better studied and understood from within and not without. It concentrates on 'hard law' by analyzing constitutions, statutes, principles and propositions. This approach ignores contexts that shape the law.⁷³ The paradigm is supported by the legal training developed in the middle ages with the monasteries as centers of learning.⁷⁴ Doctrinal research tradition considers law as an insular discipline allergic to inter-disciplinary cross-pollination. This study seeks to debunk this notion. We argue that while doctrinal

⁷³ Desmond Manderson and Richard Mohr, 'From Oxymoron to Intersection: An Epidemiology of Legal Research' (2002) 6(1) *Law Text Culture* 159, 161.

⁷⁴ Oliver Wendell Holmes, 'The Path of the Law' (1897) 10(8) *Harvard Law Review* 457, 465–6.

investigation has dominated the legal research landscape, there is a gradual but consistent shift towards sociological jurisprudence.

The study is mainly documentary. It seeks to compare and contrast the law as depicted in the constitution and relevant statutes (the letter of the law) and the law as "lived reality" in selected creative works in Africa. We proceed by assembling and reviewing literature critical to our understanding of the nexus between law, literature and society. We then interrogate Kenya's constitutional historiography. The study then examines how dissonance between the law in the books and the law in action is treated in creative works. The study concludes by proposing recommendations to optimize law in action for the full realization of the promise of *The Constitution of Kenya 2010*.

1.10 Chapter Outline

Chapter One: Introduction

Chapter Two: Constitutional History of Kenya (1884-2010)

Chapter Three: Legislative and Institutional Framework for Human Rights Protection

Chapter Four: Nature of African Society

Chapter Five: Literature and Human Rights Jurisprudence in Kenya

Chapter Six: Conclusion and Recommendations

1.11 Conclusion

This Chapter has introduced the research project. We have stated the problem of the study, research questions, and objectives of the study, the hypotheses, the literature review, theoretical framework and tentative chapters. The review of literature relevant to this project has indicated the existence of dissonance between the law in books and the law in action. Chapter Two discusses Cartography of Kenya's Constitutional Historiography.

CHAPTER TWO

2 CARTOGRAPHY OF KENYA'S CONSTITUTIONAL HISTORY (1884-2010)

2.1 Introduction

This chapter traces a quest for an indigenous jurisprudential equilibrium in Kenya from 1884 to 2010. The quest is based on an assumption that, the law, discerned through a historical prism, leans towards functionalism. In Kenya, the quest is symbolized in a journey spanning over a century from 1897 Order in Council to the proclamation of *The Constitution of Kenya 2010* on 27th August 2010. The journey echoes Marjorie Oludhe Macgoye's symbolic tome, *Coming to Birth*.⁷⁵ A golden thread that runs through Kenya's constitutional historiography is a resilient commitment to 'come to birth.' We canvass our position in three steps that combine a retrospective and prospective approach to legal-literary history of Kenya. The chapter commences with a discussion of Kenya's constitutional historiography. It then examines the disciplinary connection between the law and history. The last section discusses the role of Kenyan literature in developing an alternative history of the struggle for political, economic and constitutional emancipation. The chapter concludes by creating a context for an examination of the Legislative and Institutional Framework for Human Rights Protection in Africa.

2.2 Kenya's Constitutional Historiography

The story of Kenya's constitutional historiography comes in four parts: The first part discusses Kenya's pre- and colonial constitutional developments; the second part examines key constitutional amendments to the independence constitution; part three gives a critique of

⁷⁵ Marjorie Oludhe Macgoye, *Coming to Birth* (EAEP, 1968).

the amendments to the independence constitution; part four analyses Coming to Birth of *The Constitution of Kenya 2010* while part five discusses the legal-literary history of Kenya. The story of Kenya's constitutional history begins with the Berlin Conference of 1884-5 in Germany. The conference is called to partition Africa among imperial powers to ensure orderly control and regulation of trade in the continent. The meeting is hosted in Berlin by Germany, a rising imperial power under Otto von Bismarck.⁷⁶ At the conference, foreign powers agree to share Africa for profit. Africa is not consulted, except The Sultan of Zanzibar.⁷⁷ Berlin conference transforms Africa into a conceptual *terra nullius*, silences local people's resistance by subordinating their claims to sovereignty. The conference provides an operational philosophy of colonial rule which determines in important ways the future of the continent of Africa.⁷⁸

2.2.1 Pre- and Colonial Constitutional Developments in Kenya

The advances that led to Kenya's present-day Constitution goes back to 1887. At this time, the world witnesses the decline of Portuguese power and the rise of Britain and Germany as colonial powers. The British East African Association (BEAA), later branded the Imperial British East Africa Company (IBEAC), signs a Contract with the Sultan of Zanzibar granting a fifty-year lease over the coastal strip. IBEAC converts the lease to a concession in 1890 and the Corporation is granted power to appoint Commissioners to administer districts, make laws, operate courts of justice and acquire and regulate land.⁷⁹ Upon receiving a Royal Charter as

⁷⁶ Mathew Craven, Between law and history: the Berlin Conference of 1884-1885 and the logic of free trade (*London Review of International Law*, Volume 3, Issue 1, 1 March 2015), Pages 31–59, <https://doi.org/10.1093/lril/lrv002>

⁷⁷ Nazifa Rashid, British colonialism in East-Africa during nineteenth century (*Journal Of Humanities And Social Science (IOSR-JHSS)* Mar. 2014, Volume 19, Issue 3, Ver. I), 9

⁷⁸ A Anglie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge UP, 2004)90-97

⁷⁹ Roland Oliver, 'Some Factors in the British Occupation of East Africa, 1884-1894' (March 1951) *Uganda Journal*. 15 (1): 49–64. <http://ufdc.ufl.edu.uf00080855/0029/1j> (Accessed on 6 June 2018)

Imperial British East African Company (IBEAC) in 1888, the Company becomes the main tool of British imperial policy in East Africa. In 1895, the British government takes over the territory from the IBEAC and declares it a protectorate. The territory assimilated is named East African Protectorate in 1896.⁸⁰

The first major constitutional event in Kenya takes place in 1897 with the declaration of The East African Order in Council. The Order establishes the modern Kenyan legal system. It recognizes African customary law as the law applicable to Africans, but on condition that it must not be repugnant to justice and morality. The Order in Council establishes a judicial system and increases the powers of the Commissioner over the natives.⁸¹ It provides the lawmaking foundation for the exercise of power in the territory, with subsequent Orders increasing jurisdictional powers. The Order allows Kenya to use Indian procedure and Indian codes in settling disputes.

The 1905 Order-in-Council establishes the positions of a Governor, an Executive Council and a Legislative Council. This period witnesses the start of enhanced settlement of whites in the protectorate with the high objective of creating a colony.⁸² Other pre- and colonial laws which significantly affect Kenyans of African origin include the Crown Lands Ordinance (1902, 1915), the Native Lands Trust Lands Ordinance (1938), Crown Lands (Amendment) Ordinance (1938) and the National Parks Ordinance (1945). These laws provide a legal basis for the forceful acquisition of productive land from the African people for exclusive use by the White farmers, thereby dispossessing and marginalizing Africans. The English law introduced into East Africa becomes the ammunition for colonial control. The received law

⁸⁰ Nazifa Rashid, British colonialism in East-Africa during nineteenth century (IOSR Journal Of Humanities And Social Science (IOSR-JHSS) Mar. 2014, Volume 19, Issue 3, Ver. I), 9

⁸¹ Constitution Review Commission of Kenya (CKRC), *Final Report of the Kenya Review Commission* (2005) 18–34.

⁸² C. R. B. Dunlop, Literature Studies in Law Schools (Cardozo Studies in Law and Literature, Vol. 3, No. 1 (Spring - Summer, 1991), p.64. URL: <http://www.jstor.org/stable/743502> (Accessed on 26 April 2018)

from the beginning of the colonial period in Kenya becomes a tool at the disposal of the dominant political and economic groups.⁸³

2.2.2 Kenya as a British Colony

In 1920 Kenya is declared a British colony⁸⁴. The declaration puts Kenya under direct British control. The Legislative Council is controlled by European settler agents with two nominated Indian representatives, one unofficial Arab nominated representative, and no African representatives. Increased activism for direct African representation leads to minimal gains in locally. The predominant view until 1944 is that the African population lacks the requisite capacity to directly participate in the Legislative Council.⁸⁵ Agitations for representation of Africans in decision making organs gain momentum leading to the nomination of Mr. Eliud Mathu as the first African representative to the Legislative Council in 1944. Not satisfied with token representation, the struggle for freedom intensifies under Mau Mau movement leading to the declaration of the State of Emergency in 1952. The number of African members of the LEGCO is increased from 8 to 14 in 1957.⁸⁶ The British government transplants its laws and imposes them on the Kenyan colony as a tool of domination. Transplanted legal systems are not rooted in the norms and values of the people and therefore face a greater challenge in effectively representing the interests and regulating the activities of the population as a whole.⁸⁷

⁸³ Ghai, Y. P. and McAuslan, J. P. W. B. *Public Law and Political Change in Kenya*, (New York: Oxford University Press, 1970). P.34

⁸⁴ Joireman, Sandra F., "The Evolution of the Common Law: Legal Development in Kenya and India" (*Political Science Faculty Publications* 2006) 68

<http://scholarship.richmond.edu/polisci-faculty-publications/68>

⁸⁵ Waruguru Kaguongo. Introductory Note on Kenya http://www.icla.up.ac.za/images/country_reports/kenya_country_report.pdf (Accessed on 25 February 2018.) This article draws on the history of constitutional development in Kenya. It is a critique based on the Constitution Review Commission of Kenya (CKRC), Final Report (2005) 18–34.

⁸⁶ <http://www.kituoachakatiba.org/sites/default/files/legal-resources/kenya%20Key%20Historical%20and%20Constitutional%20Developments.pdf>

⁸⁷ Yandle, B. 'Organic Constitutions and Common Law', *Constitutional Political Economy*, 2(2): 229. (1991)

Colonization not only preserves multiple and distinct bodies of law but promotes their application to different populations within the same country. A British citizen in the colony remains subject to British law with the African natives' subject to customary law or to British law if involved in a conflict with a British citizen. The point of conflict in the dual legal system is that common law, associated with British legal system, valorizes individual rights as opposed to African customary law based on group rights to the extent that individual rights to property in land are not recognized for local people in British African colonies.⁸⁸ Colonial governance through chiefs, native tribunals and local native councils are a mockery of democracy. Chaired by colonial district officers they act as legal and administrative devices to keep Africans in their inferior positions through political maneuvers and imposition of administrative expenses on Africans. Law and order is, therefore, maintained in the interest of British capitalist exploitation.⁸⁹ Similar position is held by Yash Pal Ghai and Patrick McAuslan.⁹⁰ Littleton Constitution attempts to respond to Africans agitation but with little success.⁹¹

2.3 Key Constitutional Developments in Kenya

In 1960, the Kenya African Democratic Union (KANU) is launched and immediately intensifies the clamor for independence. Lancaster House in London hosts three

⁸⁸ Joireman, Sandra F., "The Evolution of the Common Law: Legal Development in Kenya and India" (2006). *Political Science Faculty Publications*.7.<http://scholarship.richmond.edu/polisci-faculty-publications/68> (Accessed on 26 April 2018)

⁸⁹ Mamdani, M. (1996) *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*, Kampala: Fountain Publishers.

⁹⁰ Yash Ghai and Patrick McAuslan, *Public Law and Political Change in Kenya* (Oxford University Press 1970) 536

⁹¹ The 1954 Littleton Constitution responds to the increased agitation for freedom, representation and return of land alienated from Africans. Littleton's intervention seeks to enforce the principle of multi-racialism, correct the anomaly in the powers and composition of the Executive Council and regulate African political participation by providing for separate racial representation. It establishes the Ministerial system by creating the Council of Ministers, of which for the first time, one Minister is an African, in charge of community development.⁹¹ These interventions are based on what the colonizer thinks is good for the colonized. The fatal flaw is in the oppressor purporting to speak and decide for the oppressed who can speak for themselves. It explains why the agitation for independence intensifies with every piecemeal concession from the colonial office.

constitutional conferences in 1960, 1962 and 1963 to come up with Kenya's independence constitution. The independence constitution paves way for the first General Elections based on universal suffrage. KANU secures an overwhelming victory. In June 1963 Kenya attains internal self-government paving the way for the *Jamhuri* (Republic) Day on 12 December 1963. The independence constitution is 'based on two important principles – parliamentary government and 'minority protection.'⁹²

The Independence Constitution comes into force on 12th December 1963. It is amended 38 times before it is replaced with *The Constitution of Kenya 2010*. Exactly one year after independence, the independence constitution suffers the first major amendment on 12 December 1964. Kenya becomes a republic, with the position of prime minister abolished and Kenyatta elevated to president, head of the armed forces and symbol of national identity as well as political leader. The President retains all the functions of the prime minister, including the appointment of the Cabinet.⁹³ Other constitutional amendments end regionalism, abolish the Senate and strengthen the presidency.⁹⁴ The Constitution of Kenya (Amendment) Act No. 38 of 1964 repeals the provision allowing Regions to levy independent regional revenue. This makes the regions fully dependent on grants from the Central Government and weakens the *majimbo* system by centralizing power. Other constitutional amendments follow that totally change the trajectory of Kenya's constitutional aspirations at independence.⁹⁵

⁹² Okoth Okombo, 'Judge's verdict on birth records may lead to more abortion cases' Daily Nation (20 May 2016). p.180. <http://mobile.nation.co.ke/blogs/Verdict-on-birth-records-may-lead-to-more-abortion-cases/1949942-3231518-1503fee/index.html> (Accessed on 6 June 2018)

⁹³ Charles Hornsby, *Kenya: A History Since Independence* (I.B.Tauris & Co Ltd 2012) p.106

⁹⁴ Christina Murray, 'Kenya's 2010 Constitution' (2006) 61 'Neue Folge Band *Jahrbuch des öffentlichen Rechts*' 747.p. 2

⁹⁵ The Constitution of Kenya (Amendment) Act No. 14 of 1965 amends the Parliamentary approval for a state of emergency from a majority (65 % in both houses) to a simple majority. In addition, the majority requirement for amending the Constitution is reduced from 90% in the Senate and 75% in the House of Representatives to 65% in both Houses. The most dramatic constitutional amendment comes in 1966. The Constitution of Kenya (Amendment) Act No. 17 of 1966 requires a Member of Parliament who resigns from the political party that sponsored him or her during the election at a time when that Party is still a parliamentary party, to vacate his seat. This amendment is effected after the ruling party (Kenya African National Union) experiences an outflow

2.4 A Critique of the Amendments to the Independence Constitution

Where do all these amendments leave Kenyan public, especially the women, youth, persons with disability and the elderly? It is apparent on the face of it that a document meant to cement nationhood is gradually cannibalized and used as a weapon to silence descent as exploitation, negative ethnicity and abuse of power take hold. Okoth Ogendo explains this disconnect on the process used to deliver the independence constitution. He contends that at the Lancaster conferences, no one ever gave a serious thought on how the legal document would serve the Kenyan populace. The political parties reach independence as amalgamated ethnic allegiances congregated around specific leaders. Their urgent interest is, for KANU the transfer of power, and for KADU the interests of ethnic minorities. It is for this reason that the KANU government after independence espouses no belief of management by rules as a legitimate system. The administration fails to treat the constitution as a sacred and basic law laying down the major institutions of state and prescribing the norms by and within which they must function.⁹⁶

It should be noted that the amendments made to the constitution of independence from 1964 are mainly focused on creating an all-powerful presidency at the expense of the Legislative and Judicial arms of government. It is only in a few cases that you find amendments addressing people's concerns. There is little or no consultation before amendments are passed.

of sitting Members of Parliament to the Kenya People's Union. The Constitution of Kenya (Amendment) Act No. 18 of 1966 removes the exercise of emergency powers from Parliament and vests the same in the President. The President is allowed by law to order detention without trial at his own discretion. Other amendments made include: removing the powers to appoint the members of the Electoral Commission from the Speaker of the National Assembly and vesting the same on the President. Constitution of Kenya (Amendment) Act No. 14 of 1975 extends the prerogative of mercy, sole power of the President, to include the power to pardon a person found guilty of an elections offence. Constitution of Kenya (Amendment) Act of 1982 introduces Section 2A to the Constitution.⁹⁵ The amendment converts Kenya into a one-party state. The effect of this amendment is that all political power in Kenya becomes vested in the ruling party, the Kenya African National Union ('KANU')

⁹⁶ Hastings Okoth-Ogendo, "The Politics of Constitutional Change in Kenya since Independence, 1963-69" (Jan., 1972), Vol. 71, No. 282 African Affairs 14

The three arms of the government are reduced to the executive with the legislature and judiciary acting as surrogates. In this environment, the law is used to protect and perpetuate power, influence peddling and exploitation of national resources. One can deduce that such regimes rely on the black letter law because the postulates of natural law and sociological jurisprudence respect social contract theory and resist trampling of people's rights. This is not surprising since legal history is replete with cases of dictators (mis)using positive law to 'justify' their unlawful acts. It should be remembered that Adolf Hitler and the Nazi argued that they were enforcing legitimate laws passed by the legislature⁹⁷. The telling signs of the betrayal of the dreams of the founding fathers of the nation are changes to the texture of the independence constitution to sing a different tune from our national anthem.

A scholar of Kenya's legal history keen on assessing the extent to which political leadership has betrayed the people's dreams for a sound constitutional order need not look far. Take any of the amendments between 1964 and 1984 and compare the purpose of each amendment with the aspirations in the country's National Anthem.⁹⁸ You notice a wide gap between the

⁹⁷ It took Gustav Radbruch, a positivist appalled by Nazi atrocities to argue that law cannot be divorced from morality. Law is not just law as argued by legal positivists. Law must, to a given degree conform with higher codes of human behavior – natural law.

⁹⁸ **Kenya National Anthem**

O God of all creation

Bless this our land and nation

Justice be our shield and defender

May we dwell in unity Peace and liberty

Plenty be found within our borders

Let one and all arise

With hearts both strong and true

Service be our earnest endeavor

And our homeland of Kenya Heritage of splendor

Firm may we stand to defend.

Let all with one accord

In common bond united

Build this our nation together

And the glory of Kenya

The fruit of our labor

Fill every heart with thanksgiving.

national prayer as captured in the anthem and the quest for selfish ends documented in the amendments.

Values and principles in the national anthem reveals the Executive's consistent attempt to emasculate the will of the people for political power, wealth and security through amendments. It is our argument that the principles and values engrained in the National Anthem creates a conducive ground for the law that lives in the customs, beliefs and value systems of a people as opposed to written law enforced by police and courts.

A closer assessment of the amendments to the independence constitution reflects a gradual shift from the aspiration at independence to have law in service of all Kenyans and other persons within the Republic, to law as a tool to stifle a people's quest for freedoms. It is an example of how the law in the books can be applied to stifle law in action. It is our argument that Kenya's constitutional journey to a jurisprudential birth is characterized with a tacit contestation between legal positivism, espoused by the political elite and sociological jurisprudence supported by the masses, progressive scholars, civil society organizations and faith-based groups.

Our assessment of the constitutional amendments in post-independence Kenya reveals a preference for the law in the books as opposed to the law in action. The gap between the two between the two schools widen in the aftermath of 1982 coup attempt. At the height of political repression, Kenyans take refuge in natural law by arguing that unjust law is not law and should be disobeyed. In the 1990s we see a concerted effort by creative writers, civil society, international community and faith led organizations to return the country to the path of democracy. This is similar to paying attention to the law in action to promote constitutionalism. Kenya's early constitutional history suppresses the movement towards

constitutionalism because the law speaks to subjects and not to power. In an ideal constitutional framework, the law remains supreme. It speaks clearly to power as a refuge for the defenseless. As Makau Mutua explains; ‘It took just six years to dismantle the 1963 Lancaster House Constitution, a process that indigenized executive despotism and tore down the constitutional order imposed on the postcolonial state by the British.’⁹⁹

Cartography of Kenya’s Constitutional history indicates a consistent attempt by the political leadership to ideologically, economically and politically reinstall colonial structures in Kenya such that the difference between colonial and post-colonial government remains only that of race. The attitude and presumptions about the citizens by post-independence leadership betrays the dreams of *Uhuru*. It confirms a perfectly colonized mind in the post-colony. Literature, by opening the past and explaining the present provides a meta-text that facilitates an understanding of the philosophical and ideological forces that influence various constitutional amendments. In Kenya’s constitutional amendments, the seeds of impunity by political leadership in Kenya is planted and watered to maturity. The long, painful struggle for a constitution that returns sovereignty to Kenyan men and women justifies the high expectations that usher in *The Constitution of Kenya 2010*. The stringent controls on how government exercises power and robust Bill of Rights are like cool waters on the feet of tired pilgrims.

2.5 Legal-literary History of Kenya

⁹⁹ Makau Mutua, *Kenya’s Quest for Democracy: Taming Leviathan* (L. Rienner Publishers, 2008), 64.

Ownership and conceptualization of history is a central issue in constructing nations and asserting minority rights.¹⁰⁰ It has been argued that law and history are far apart. That while history records raw facts, literature mirrors possibility of facts happening¹⁰¹ and the law tangentially focuses on jurisprudence. This notion has since changed in favor of inter-textual approach.¹⁰² Savigny, a strong advocate for the historical-anthropological theory of law, asserts that law reflects the people's spirit through time and space.¹⁰³ Charles Hornby, in a remarkable observation on Kenya's history identifies the undying Kenyan spirit akin to Savigny's spirit of the law. He notes that the country's history is a chronology of fortitude against economic and political edifices of unfulfilled promises and serious historical baggage passed down from colonial days. It is a tale that blends economics and politics, a struggle to create and consume resources that involve Western powers and Kenyans in a complex web of relationships; a tale of growth dwarfed by political mischief, of corruption and of money.¹⁰⁴

This chapter confirms that History, contrary to common perception, is not synonymous to antiquity. History is faithful to the epochs that create it while remaining open to new developments.¹⁰⁵ To the extent that the chapter discusses how past constitutional developments have contributed to perceived dissonance between the law in the books and law in action, we are dealing with a living history with the past superimposed on the present. It is our contention that legal historians should adopt an interdisciplinary approach to the subject. They should be informed by creative richness of the epochs under examination. As Muradu Abdou succinctly opines, 'a legal system of any country cannot be fully esteemed if treated independently. Religion disturbs a legal system; politics upsets it and so are economic

¹⁰⁴*Ibid.* note. 12. p. 1.

¹⁰⁵Wasamba, P, *Contemporary Oral Literature Fieldwork: A Researcher's Guide*. University of Nairobi Press, 2015.p.8.

institutions of that country.’¹⁰⁶ It is for the same reason that we examine literary texts to assess the extent to which dissonance between law in the books and law in action are bridged.

Law is historical, present and future at the same time. It is rooted in the past but forward looking in actualization. In organized human society in the past, legal history illustrates how legal concepts, rules, principles, conceptions and standards have met concrete situations of fact.¹⁰⁷ The expectation under common law systems are that as a society changes, the law also changes to correspond with it through the distinguishing of precedents.¹⁰⁸ Law, by relying on the doctrine of *stare decisis*, is historical. To the extent that we use case analysis to determine contemporary disputes, the past is embedded in current legal opinions of judicial officers. Although common law relies on the past, it relies on a past that it constructs, not a contextual, complicated past.¹⁰⁹ Based on the foregoing, we conclude that legal scholars are invariably historians. They must embrace multi-disciplinarity to understand contexts that define the spirit of the law.

2.6 Coming to Birth of *The Constitution of Kenya 2010*

Review of the constitutional amendments sampled, and their inadequacy in responding to Kenyans’ quest for renewal, justifies the new constitution. Not all constitutional amendments in the Repealed Constitution were self-serving. Two constitutional amendments stand out as progressive: Constitution of Kenya (Amendment) Act No. 12 of 1991 that repeals Section 2A allowing the return to multiparty democracy and Constitution of Kenya (Amendment) Act No.

¹⁰⁶ Muradu Abdo, ‘Legal History and Traditions’(2009) Justice and Legal research Institutechilot.wordpress.com

¹⁰⁷ E.P. Bruke, Historical Essay on the Laws of and the Government of Rome, Civil Law, Cambridge Press, London, 1827, (Reprint, W.M. W. Gaunt and Sons Inc. Florida 1994.)

¹⁰⁸ Sandra F. Joireman, ‘The Evolution of the Common Law: Legal Development in Kenya and India’ (2006) 41(2) ‘Commonwealth and Comparative Politics’p.5.

¹⁰⁹ Jim Phillips, ‘Why Legal History Matters’(2010) 41 VUWLR, 305

10 of 1997 that launches the formal process to review the constitution of Kenya. What is unique about these positive amendments is that they are products of mass action by the Kenyan people in which lives are lost, people brutalized by security forces and property of innocent people destroyed in riots. The government is compelled to concede ground to allow for people's voice to determine the life they want. Following the 1997 amendment the Constitution of Kenya Review Commission (CKRC) is constituted with Prof. Yash Pal Ghai as the Chairman. After a decade of myriad achievements and setbacks, the Draft Constitution is produced in 2010. Kenyans vote in a referendum to approve the new constitution. *The Constitution of Kenya 2010* is promulgated on 27th August 2010 at Uhuru Park. The Kenyan Constitution is founded on the basis of people sovereignty as expressed through participatory constitutional making and governance.¹¹⁰ As opposed to the independence constitution and the amendments that follow, *The Constitution of Kenya 2010*¹¹¹ is a product of broad consultation involving a wide section of Kenyans. The justification is to embrace the views of ordinary people while restricting the ability of the political elite to subvert the process. This explains why politicians constitute a minority at the National Convention Council (NCC). It is also important to note that the final adoption of the Constitution lies with the people through a plebiscite and not the parliament.¹¹² Promulgation of the *Constitution of Kenya 2010* acts as an affirmative step by the people of Kenya to reclaim their sovereignty. To use Ngugi wa Thiongo's argument, it contributes to a 're-membering' a people previously dismembered by slavery, colonialism and neocolonialism.

¹¹⁰ The Constitution of Kenya 2010, Article 1(1) http://www.kenyalaw.org/kenyalaw/klr_home/ (Accessed on 29 April 2018)

¹¹¹ Ibid.

¹¹² Waruguru Kaguongo. Introductory Note on Kenya http://www.ica.up.ac.za/images/country_reports/kenya_country_report.pdf (Accessed on 25 February 2018.) This article draws on the history of constitutional development in Kenya. It is a critique based on the Constitution Review Commission of Kenya (CKRC), Final Report (2005) 18–34.

The cartography of Kenya's constitutional history outlined above maps out a struggle to correct the mistakes that started with the Lancaster Conferences, through the first two decades of independence in which the executive emasculated the other arms of government. The discourse confirms that a student of constitutional law must be a student of history and literature since history, literature and law need each other to achieve disciplinary rapprochement.

2.7 International Human Rights Law Movement and CoK 2010

The legal structure for guarding human rights that inspired the Bill of Rights in *The Constitution of Kenya 2010* can be traced to the United Nations Charter (1946) and the enabling human rights mechanisms such as UDHR, ICCPR, ICESCR, ACHPR and their Optional Protocols. The UN Charter was inspired by the atrocities witnessed during the World War II in which over 56 million people perished. The main lesson learnt at the end of the World War II was that it was caused and precipitated mainly by widespread abuse of human rights on both sides of the divide. It is for this reason that the UN Charter¹¹³ mentions protection of human rights as one of its main purposes.¹¹⁴ Articles 2(5) and (6) of the Constitution of Kenya makes international that Kenya has ratified part of our law.¹¹⁵ This includes international human rights conventions including *jus cogens*. It is important to clarify that Kenya is not a strictly monist state because Article 21(4) of the Constitution

¹¹³ The UN Charter, Article 1. Outlines the purpose of the UN to “achieve international cooperation in promoting and encouraging respect for human rights and for the fundamental freedoms for all without distinction as to race, sex, language, or religion.”

¹¹⁴ Article 55(c) of the UN Charter, further, empowers the UN to “promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. The Charter in addition provides for enforcement of human rights through Article 56 in which: “All members pledge themselves to take joint and separate actions in co-operation with the organization for the achievement of the purposes set forth in Article 55” of the UN Charter.

¹¹⁵ Article 2 (5) of *the Constitution of Kenya 2010* states that the general rules of international law shall form part of the law of Kenya. This means that international law, including customary international law, shall be a source of law in Kenya. Article 2(6) states that “any treaty or convention ratified by Kenya shall form part of the law.” This provision converts Kenya from a dualist into a monist State. This is because treaties and conventions no longer have to be domesticated for them to have the force of law in Kenya.

provides: “The State shall enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms.” The claw back facility obliges the State to legislate on international responsibilities in respect of human rights and essential freedoms. Articles 2(5) and (6) read together with Article 21(4) indicate the ‘in-betweenness’ of Kenya approach to incorporation of international provisions on human rights. Kenya therefore is neither a monist nor a dualist state. Philosophically, these seemingly innocent indecision reveals the dilemma of trying to be internationally politically correct by incorporating human rights principles while remaining cognizant of the uniqueness of local contexts and economic limitations to effectuate such human rights provisions.

2.8 Conclusion

We have discussed Kenya’s Constitutional history in this chapter. Using a three-step approach, we have explained that Kenya’s constitutional historiography is dotted with several pitfalls during colonial domination and after independence. Several amendments to the independence constitution only worsen the plight of citizens. Using the law, literature and history triad, we have argued that understanding a constitutional moment in a country’s history requires a multidisciplinary disposition. Borrowing from Macgoye’s famous novel, *Coming to Birth*, we have painted an optimistic picture of Kenya’s constitutional development. Like Paulina, the heroine in Macgoye’s novel, there is a strong optimism that *The Constitution of Kenya 2010* can address the yearnings of all Kenyans for a just, inclusive and equitable society. In these amendments, the seeds of impunity by political leadership in Kenya is planted and watered to maturity. The next chapter discusses Legislative and Institutional Framework for Human Rights Protection.

CHAPTER THREE

3 LEGISLATIVE AND INSTITUTIONAL FRAMEWORK FOR HUMAN RIGHTS PROTECTION

3.1 Introduction

The previous chapter examined Kenya's constitutional historiography that spans over 130 years. It emerges that the desire to assert the peoples' sovereignty is achieved in the promulgation of *The Constitution of Kenya, 2010*. Following this development, the pyramid of power is inverted. Whereas *The Constitution of Republic of Kenya, 1963*, popularly known as the independence constitution, was amended several times to create an all-powerful executive, the 2010 constitution reverses the order. It places the people of Kenya at the top of the pyramid, followed by the constitution and finally the executive.¹¹⁶ Drawing from a rich history on Kenya's constitutional development, this chapter addresses legislative and institutional frameworks on the safeguarding of rights and essential freedoms to discern the interplay between the law in the books and law in action. Specifically, we review human rights law as captured in international conventions, treaties, international customary norms, declarations, guidelines, principles and *The Constitution of Kenya 2010* and the enabling statutes and regulations. We commence our discussion with analysis of human rights; we then proceed to examine human rights legislative frameworks at the global, regional and national level. In section three, we interrogate institutional framework for the protection of human rights and conclude with an analysis of the enforcement mechanism for human rights in Kenya.

3.2 International Framework for Human Rights

¹¹⁶ The Constitution of Kenya 2010, Article 1. It states that: "All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution."

Coined by Eleanor Roosevelt¹¹⁷ to replace ‘Rights of Man’, human rights are the rights that all people have by virtue of being human.¹¹⁸ The innate dignity of the human person results to such rights which are defined universally, regionally, nationally and locally by various law-making organs. Human rights are clustered in to three categories: civil and political rights; economic, social and cultural rights; and the group or peoples’ rights. Independent of their nationality, color, language, gender, language, religion or any other status, these rights are inherent in all human beings. They are all interdependent, interrelated and indivisible.¹¹⁹ Human rights law therefore refers to a body of laws both municipal and international created to promote, protect and enforce human rights at the local, regional, and global levels.

Awareness that human beings have rights which are inviolable did not start with the Universal Declaration of Human Rights in 1948. Precursors to the modern human rights protection can be traced back to protect the rights of minorities in Europe, anti-slavery movement in America, humanitarian law in war situations, women’s suffrage and the League of Nations. In all these noble efforts, the missing link was a framework to rally the international community to speak with one voice in matters concerning dignity of men and women. In this section, we examine frameworks for protection of human rights from international level through to national jurisdiction.

3.2.1 Universal Declaration of Human Rights (UDHR)

The United Nations General Assembly (UNGA) adopted the Universal Declaration of Human Rights (UDHR) in 1948 to further the purposes and principles of the UN. It is a basic document that outlines 30 universally guaranteed human rights. The declaration, celebrated as the international Magna Carta for all humankind, operationalizes Articles 1 and 55 of the

UN Charter. Its doctrines have consequently been enhanced in to a range of international human rights instruments acceptable to most states. These instruments define specific standards for women, children, persons with disabilities, minorities and other vulnerable groups. Closely related to the UDHR is the International Convention on Civil and Political rights (ICCPR).

3.2.2 International Convention on Civil and Political rights (ICCPR)

The International Covenant on Civil and Political Rights (ICCPR) was adopted on December 16th, 1966 by the United Nations General Assembly after 15 years of deliberation. It came into force in 1976 with 76-member States. ICCPR came in to do what UDHR was not capable of achieving – effective enforcement. Whereas the UDHR attained a universal appeal, the document lacked the legal force necessary to deliver on its inspired vision. It was a non-binding declaration only vested with moral and persuasive appeal. This prompted the need for another treaty that would be legally binding to all States and other Non-State Actors, hence ICCPR. The instrument laid down fundamental human rights guarantees for the enjoyment of civil and political rights. These include the right to self-determination, life, family, electoral process, and the right to due process and a fair trial. The treaty also provides for freedoms from torture, slavery, genocide, as well as freedoms of movement, speech, expression, conscience, and religion. The principle of non-discrimination in the explanation and implementation of this treaty provides safeguards for all including women, men, children, and minorities.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted in 1966 complement the effort of ICCPR. It guarantees freedom from hunger, right to shelter, clean water, social security and health among others. The two treaties, ICESCR and ICCPR together with their Optional Protocols collectively form the International Bill of Rights.

These two covenants provide ethical as well as lawful obligation of states to uphold the human rights of persons.

The ICCPR recognizes the inherent dignity of each individual and requires states to allow the enjoyment of civil and political rights. State parties that have ratified the covenant are obligated to protect and preserve basic human rights. Essentially, the state parties are compelled to take administrative, judicial, and legislative measures in order to protect the rights enshrined in the treaty and to provide for effective remedies to rights which are violated, denied, or threatened. The unifying themes and values of the ICCPR are found in Articles 2 and 3. They are based on the notion of non-discrimination.¹²⁰ ICCPR protects rights to: life, not to be enslaved, liberty and security of the person, of detainees, a fair trial, not to be imprisoned merely on the grounds of inability to fulfill a contractual obligation, and the right to freedom of thought, conscience and religion. ICCPR also protects fundamental freedoms such as freedom from torture, of movement and choice of residence, and freedom from arbitrary or unlawful interference. It further guarantees right to political participation, equality before the law and minority protection. The only difference with UDHR is that these rights and fundamental freedoms are justiciable among state parties.

3.2.3 Optional Protocols

An optional protocol is an agreement that enriches an existing covenant. Often times, the language of a treaty is too broad to allow for consensus. The details are left for protocols to capture. For this reason, only States that have agreed to be bound by a parent treaty may choose to be parties to optional protocols. As the name suggests, a protocol is discretionary. A state that has ratified a parent treaty can opt not to ratify the complementary protocol. A state that has not consented to the parent treaty cannot purport to ratify an Optional Protocol.

¹²⁰ Article 2 ensures that rights recognized in the ICCPR are respected and are available to everyone within the territory of the states that have ratified the Covenant. Article 3 ensures that both men and women enjoy all civil and political rights set out in the ICCPR without discrimination.

If a state has ratified the main treaty and not the Optional Protocol, then it is not bound by the provisions of the OP.

There are only two kinds of optional protocols in the UN Human Rights Treaty System: Those that address a new functional area that has not been built-in in the original text of a treaty. For example, the Second Optional Protocol to the International Covenant on Civil and Political Rights which addresses elimination of the death penalty; and those that deal with administrative aspects that may affect enforcement of a treaty. Most optional protocols establish complaint processes by which individuals and groups file formal grievances in cases where States have violated rights recognized in a human rights treaty.¹²¹

The ICCPR has two Optional Protocols which offer additional procedures and substantive provisions to the main treaty. These include OP1 and OP2. The OP1 was passed in 1976. Together with ICCPR, it allows victims of human rights violations to be heard by the Human Rights Committee responsible for monitoring and ensuring compliance with the provisions enshrined in ICCPR. In this regard, the Committee has the jurisdiction to receive, consider and hear communications from victims of such violations. The second Optional Protocol (OP2) came into force on July 11, 1991. The protocol aims at abolishing the death penalty. It is apparent that the more we try to enforce the Bill of rights in a global scale, the more we realize that special categories need special instruments to illuminate their human rights and codify enforcement mechanisms tailor-made to their special circumstances. It is for this

¹²¹ When an optional protocol creates one or more enforcement mechanisms, the monitoring body established by the parent treaty administers these. Through complaints and inquiry procedures, the international bodies in charge of supervising the implementation of a human right treaty can elaborate on the meaning of the rights contained on this treaty and contribute to the development of international jurisprudence. <http://www.iwraw-ap.org/> and a section on the Optional Protocol to CEDAW <https://www.escr-net.org/resources/section-2-improving-supervision-icescr-optional-protocol>, (Accessed on 30 April 2018)

reason that we assess how the provisions of the UN charter, UDHR, ICCPR and ICSECR are concretized in the Convention of the Child.

3.2.4 Rights of the Child

For a long time, the world turned a blind eye to the rights of children. Children suffered untold neglect, abuse, exploitation and death in wars, famine, industries and dysfunctional families. The experiences of children in Europe during industrial revolution document this fact. It is the effect of the World War I (WWI) and World War II (WWII) that shocked the conscience of the world to the neglected suffering of children in society.¹²² This led to the codification of children's rights from the global level at the UN through to the regional level and finally national level. The codification provides for children's special needs and offers greater protection for their well-being and development.

3.2.5 Convention on the Elimination of All forms of Discrimination against Women (CEDAW)

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)¹²³ defines discrimination against women and mandates states in measurable terms to institute administrative, legislative and financial measures to ensure that: the principle of equality between women and men is upheld both in law and practice in the state parties' jurisdiction. Specifically, at Article 3, the convention commits states to institute measures to recognize, protect and promote rights of women in political, social, economic and cultural fields. States are required to take all appropriate measures, including legislation, to ensure the full development and advancement of women to guarantee them the exercise and

¹²² The crimes and atrocities experienced by children, from starvation and assaults, to deaths in concentration camps, revealed to the international community that parents and families could no longer be relied to offer requisite succor and protection to children. It brought to the fore the hard truth that the state, as the final provider and guarantor of its citizens' rights, must take on the responsibility of defending the rights of the child.

¹²³ The Convention on the Elimination of All Forms of Discrimination against Women was adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979. It entered in to force on 3 September 1981 in accordance with article 27(1) which provided that the "Convention shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession."

enjoyment of human rights and fundamental freedoms on a basis of equality with men. In addition, the convention mandates states to support participation of women in decision making structures of the society including political leadership.

3.2.6 The Convention on the Rights of the Child (CRC) 1989

The Convention on the Rights of the Child (CRC)¹²⁴ is the first legally binding international instrument to incorporate the full range of human rights including civil, cultural, economic, political and social rights. The Convention recognizes the human rights of children, with the ultimate goal of realizing all rights of children everywhere. It has been ratified by virtually the entire community of nations. The ratifying States have freely recognized and pledged to transform the provisions of the CRC into reality through administrative, legislative, judicial and other measures. The Convention legally compels States to guarantee that all children without discrimination benefit from special measures and assistance that expands their possibilities and enhances their capacities to grow up in dignified and reassuring communities. The CRC consists of 41 articles, each of which details different types of right. These rights are not ranked in order of importance; instead they interact with one another to form one integrated set of rights.

3.3 Regional Legislative Framework for Human Rights

The UN Charter under Articles 52, 53 and 54 provide for regional arrangements that complement UN effort in the preservation of global peace and security, which essentially

¹²⁴ The Declaration of the Rights of the Child (1923) was adopted by the League of Nations and referred to as the Geneva Declaration of the Rights of the Child (1924). It was later modified and passed as The Declaration of the Rights of the Child in 1959. The United Nations General Assembly adopted the Convention on the Rights of the Child (CRC) in 1989. It entered in to force in 1990 after acquiring the requisite number of signatories. The convention was strengthened by the Optional Protocol on the sale of children, child prostitution and child pornography. The Optional Protocol on the involvement of children in armed conflict became legally binding in 2002. More than 100 countries have signed and ratified both Protocols. In 2011 the third Optional Protocol which allows children whose rights have been violated to complain directly to the UN Committee on the rights of the child was passed.

extends to observance, protection and enforcement of human rights where applicable. The Organization of African Union (O.A.U) that later transformed in to African Union (AU) is one such agency. Other regional agencies are European Union (EU), Association of Southeast Asian Nations (ASEAN), and Organization of America States (OAS).

3.3.1 Organization of African Union (OAU) and Human Rights

The Organization of African Unity (O.A.U) was formed in 1963 in Addis Ababa to safeguard independence for African states through the co-ordination of opposition to colonialism. Initially it did not concern itself with the protection and promotion of human rights until two decades later. The O.A.U remained reluctant to confront human rights concerns on the continent even though the Preamble to its Charter supports the principles enunciated in the United Nations Universal Declaration on Human Rights.¹²⁵ O.A.U's earlier reluctance to embrace human rights agenda with enthusiasm was ironical since human rights discourse played a major role in the struggle for freedom in Africa. It is curious to note that while O.A.U members affirmed adherence to UDHR principles and provisions, their main interest was to keep their young and fragile states together. The principle of protection of state interests covered under the doctrine of non-interference in internal matters of the state ensured that individual rights were rendered secondary to state interests.¹²⁶

3.3.2 The Banjul Charter, 1981

The principles and purposes of the UDHR, ICCPR, ICESCR and CRC that we have discussed are captured in the regional charter known as The African Charter on Human and Peoples' Rights (ACHPR). The charter is divided into three broad sections. Part one spells out the rights and duties of the individual and peoples. Part two deals with the establishment of

¹²⁵ Olusola Ojo and Amadu Sesay, *The O.A.U. and Human Rights: Prospects for the 1980s and Beyond* Human Rights Quarterly, Vol. 8, No. 1 (Feb., 1986), pp. 89. Published by: The Johns Hopkins University Press
Stable URL: <http://www.jstor.org/stable/762047> (Accessed on 29 April 2018)

¹²⁶ Magnus Killander, *African Human Rights Law in Theory and Practice* University of Pretoria Published in Sarah Joseph & Adam Mcbeth (Eds) *Research Handbook On International Human Rights Law* Cheltenham, UK: Edward Elgar (2010) p.14

the African Commission on Human and Peoples' Rights and part three of the Charter sets forth general procedural provisions. Another important treaty that captures the provisions of the Charter on the Rights of the Child (CRC) is ACRWC or Children's' Charter.

3.3.3 The Maputo Protocol¹²⁷

This is the Optional Protocol to the ACHPR on the rights of women in Africa. It combines and domesticates the provisions of CEADAW and ACHPR to the situation of women in Africa. The Protocol commits the AU members to eliminate all forms of discrimination against women in the continent, promote women's rights to dignity, rights to life, security and integrity of persons, and access to justice and equal protection before the law among other provisions. The provisions of Maputo Protocol have been incorporated in our constitution and enabling legislations.

3.3.4 The African Children's Charter, 1990

The Children's Charter was adopted on July 01, 1990. The state parties recognized among other things that the child occupies a unique and privileged position in the African society. As a consequence, the child should grow up in an environment of happiness, love and understanding. Further that the child, due to the needs of his or her physical and mental development requires particular care with regard to health, physical, mental, moral and social development and requires legal protection in conditions of freedom, dignity and security. Article 4 in particular asserts the principle of the best interest of the child: "In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration."¹²⁸ Apart from the regional frameworks for the protection of rights, there are national frameworks in individual countries to ensure that human rights principles adopted at the international and regional levels are realized at the local level.

¹²⁷ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (The Maputo Protocol). http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf

¹²⁸ African Charter on the Rights and Welfare of the Child 1990, Article 4

3.4 Legislative Framework for Human Rights in Kenya

Kenya has been active in human rights discourse since independence. On December 16th, 1966, the Republic of Kenya signed ICCPR and ratified it on June 8th, 1992. Kenya also ratified the ICCPR Optional Protocol 1 (OP1) in 1966 and Optional Protocol 2 (OP2) in 1989.”¹²⁹ Kenya further ratified ACHPR in 1992, the OP1 to ACHPR establishing the African Court for Human and People’s Rights in 2004. In addition, Kenya ratified the Maputo 2010, and the Children’s Charter in 2000. Kenya has not ratified United Nations Convention against Torture and other Cruel and Degrading Treatment or Punishment adopted in 1997. How are these international commitments captured in Kenya’s domestic laws such as *The Constitution of Kenya 2010*, relevant to the Kenyan situation? Are we incorporating international treaties for diplomatic expediency or practical exigencies?

3.4.1 *The Constitution of Kenya 2010*

The Constitution has been hailed as one of the most progressive documents in the recent history. The praise is based on the robust Bill of Rights that incorporates the international instruments on basic rights and freedoms. Fundamental and essential human rights in Kenya are covered in Chapter 4 of the Kenyan constitution that came into effect on 27 August 2010. For instance, even though Kenya has not ratified the UN Charter against torture, the Bill of Rights, especially Articles 47, 48, 49, 50 and 51 make any form of torture or cruel and inhuman treatment unlawful. The bill of rights is one of the most comprehensive in the world covering basic, social-political and economic rights. Part 2 of Chapter 4 covers rights and fundamental freedoms.

¹²⁹ Davis Malombe, Martin Mavunjina, MedikaMedi and Sylvia Mbataru, Kenya’s Regional and International Human Rights Obligations.

3.4.2 Kenya National Commission on Human Rights

The Constitution of Kenya 2010 under Article 59(1) forms the Kenya National Human Rights and Equality Commission.¹³⁰ It is one of the successor commissions to the Kenya National Human Rights and Equality Commission. KNCHR is constituted under the Kenya National Commission on *Human Rights Act (No. 14) of 2011*. This statute succeeded the now repealed Kenya National Commission on Human Rights Act (No. 9) of 2002. The mandate of the Commission is to enhance the protection and promotion of human rights in Kenya.¹³¹ The functions of the commission are clearly stipulated in the Act.¹³² Every person has the right to complain to the Commission alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Other pieces of legislation geared towards protecting human rights include: *Matrimonial Property Act 2013*; *Sexual Offences Act 2006*, *Law of Succession Act 2012*, *Children's Act 2001*; and *Persons with Disability Act 2014*. A close scrutiny of these pieces of legislation indicates the affinity to the law in the books. This creates conflict when it comes to implementation in a communitarian cultural environment.

¹³⁰ The Constitution of Kenya 2010, Article 59(1). The mandate of the commission in Sub-Article (2) to include: promotion of respect for human rights and development a culture of human rights in the Republic; promotion of gender equality and equity generally and to coordinate and facilitate gender mainstreaming in national development; promotion of the protection, and observance of human rights in public and private institutions; monitoring, investigation and reporting on the observance of human rights in all spheres of life in the Republic, including observance by the national security organs; receiving and investigating complaints about alleged abuses of human rights and to take steps to secure appropriate redress where human rights have been violated; on its own initiative or on the basis of complaints, to investigate or research a matter in respect of human rights, and make recommendations to improve the functioning of State organ.

¹³¹ *Kenya National Commission on Human Rights Act (No. 14) 2011*. Sec 8

¹³² The Commission is an independent agency whose operations are guided by the United Nations approved Paris Principles on the establishment and functioning of national human rights institutions. It executes its mandate through advocacy, investigations, visits to places of detention, research and human rights education, among other strategies. The Commission is also mandated to advise the Government on how to enhance protection and promotion of human rights. The National Commission is the national focal point for reliable and current information on human rights. It conducts research on emerging and key human rights issues with a view to catalyze policy and legislative reforms or to inform and precipitate debate on key human rights issues. Towards this end, the Commission issues authoritative, occasional issue-based human rights reports. Accessed at, Kenya National Commission on Human Rights, Making the Bill of Rights Operational: Policy, Legal and Administrative Priorities and Considerations (KNCHR, 2011) at <http://www.knchr.org/Portals/0/Reports/MAKING THE BILL OF RIGHTS Operational.pdf>

3.5 International Institutional Framework for Human Rights Enforcement

The United Nations Human Rights Council (HRC) established under Article 28 of ICCPR, is the monitoring body responsible for ensuring State Parties' compliance with the letter and spirit of the provisions of the ICCPR. Article 2(2) of ICCPR obligates State Parties to take the "necessary steps to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant." The HRC may issue recommendations regarding the implementation of human rights. Such recommendations are, however, not legally binding on States. In addition, the HRC may also offer General Comments, which provides interpretation of the content of human rights, setting benchmarks in regards to specific rights. These are important summaries regarding observance and fulfillment of human rights. For instance, the committee has issued 2 General Comments, the most recent one being the "General Comment no 34" issued in 2013. This gives a normative understanding of the freedom of expression. It states that, "Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions."

ICCPR is also enforceable through OP1; a mechanism that provides for individuals to directly file complaints against their own States whenever human rights violations occur. This has helped to set standards that have influenced many regional and domestic courts. Article 41 of ICCPR empowers a State Party that claims another State Party is not fulfilling its obligations to ICCPR, to make written submissions to the Committee for consideration. Non-governmental organizations (NGOs) may also participate in ensuring that values under the ICCPR are protected by submitting 'shadow reports' and highlight areas for consideration

by the Committee. Ideally, State Parties are required to submit reports to the Committee for review on measures used to adopt and give effect to the rights enshrined in the ICCPR.¹³³

3.5.1 Limitations of Human Rights under ICCPR

Human rights under ICCPR are not absolute. They may be derogated under special circumstances. Article 4 of ICCPR permits State Parties to derogate from their responsibilities under the Covenant, for instance during public emergencies. Such derogations, however, may not include Articles 6, 7, 8, 11, 15, 16 and 18. Restriction on Civil and Political rights may only be imposed if the limitation is determined by law and only for the purpose of securing due recognition of the rights of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. Such derogation must be reported to the treaty body for monitoring purposes.

3.5.2 African Commission on Human and Peoples' Right

The supervisory bodies of ACHPR include the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples Rights. The commission is mandated to interpret the Charter by looking at the provisions of the Charter of African Union, and the Universal Declaration of Human Rights. The African court is established by the African Human Rights Court Protocol.¹³⁴ The Protocol came into force 2004. The court supports the

¹³³ The ICCPR is monitored by the Human Rights Committee. The Committee is composed of 18 independent members experienced in the areas of human rights covered under the ICCPR. Although nominated by their country, Committee members serve in their individual capacities, not as representatives of their countries. The Committee meets three (3) times per year to review periodic reports from countries that have ratified the ICCPR. In these meetings, governments must provide an accounting of how they are implementing human rights standards under the treaty. Governments must report initially one year after acceding to the Covenant and then whenever the Committee requests, which is usually every four (4) years.

¹³⁴ The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights was adopted in June 1998. The Protocol entered into force in January 2004, but the 11 judges were only sworn in in July 2006. The Court has its seat in Arusha, Tanzania. Procedures for Communications to the ACHPR must pass the test of jurisdiction, admissibility, provisional measures, friendly settlement, hearing merits, decisions and enforcement. Under Article 56 of ACHPR, local remedies must be exhausted in respect of a complaint in order for a case to be admissible, unless such remedies are unduly prolonged or unavailable.

work of the Commission by issuing legally binding and enforceable decisions. ACHPR under Art 18 (3) addresses the elimination of discrimination against women scantily. The Protocol on women's rights, which entered into force in 2005, addressed the inadequacy in the charter. The rights guaranteed in the Protocol address issues related to abortion, female genital mutilation, and vulnerable groups such as the elderly and the widowed. Some of the provisions in the Protocol deal only with specific issues affecting women.¹³⁵

3.5.3 African Commission and Enforcement of HR

According to ACHPR, the organ mandated with the enforcement of the provisions of the charter is the African Commission. The African Charter further creates the African Commission on Human and Peoples' Rights, "to promote human and peoples' rights and ensure their protection in Africa" (Art. 30). Commission's major function is to promote and protect human and peoples' rights in Africa.¹³⁶ The African Commission can undertake studies and public enlightenment exercises and can lay down principles to guide member states in legislating on human and peoples' rights. In addition, the Commission is empowered to interact with international institutions from member states, and work towards resolving disputes. The Commission, composed of 11 independent part-time personalities, nominated by State parties and elected by the Assembly with expertise in human rights, was established directly by the ACHPR. It is composed of 11 independent part-time personalities, nominated by State parties and elected by the Assembly with expertise in human rights. Art. 45 of the Charter mandates of the Commission to: promote and protect human rights, interpret the Charter and perform any other tasks which might be entrusted to the Commission by the OAU/AU Assembly of Heads of State and Government.

¹³⁵ Sepulveda, M. (eds.) et al., Human Rights Reference Handbook, University for Peace, San José, 2004, p. 167

Art. 55(1)) outlines certain criteria that must be met to make communication or complaints to the commission: the communication must indicate the author; it must be compatible both with the Charter of the OAU and with the African Charter on Human and Peoples' Rights; it must not be written in disparaging or insulting language; it must not be based exclusively on news disseminated through the mass media; it must be submitted only after all domestic remedies have been exhausted, unless it is obvious that this procedure is unduly prolonged; it must be submitted within a reasonable period from the time local remedies are exhausted; and, finally the communications must not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations.

3.5.4 Incorporation Regime and Human Rights Law in Kenya

Our discussion of the Bill of Rights in the Constitution of Kenya 2010 reveals a glowing picture of a country committed to the protection of rights of women, men, children, the elderly, prisoners, and other minorities. *The Constitution of Kenya 2010* through Article 2(6) automatically incorporates international laws, treaties and conventions into domestic law.¹³⁷ This has created an incorporation regime. Change in the reception of international law in the Kenyan legal system from transformation to incorporation was confirmed by Justice Martha Koome in the High Court case of *Re the Matter of Zipporah Wambui Mathara*, concerning article 11 of the International Covenant on Civil and Political Rights (ICCPR). She held that article 2(6) imported the provisions of international treaties and conventions that Kenya has ratified into Kenyan law as part of the sources of Kenyan law. This was similarly affirmed in the High Court case of *Beatrice Wanjiku & Another v The Attorney-General & Another* where the Court stated that: “Before the promulgation of *The Constitution of Kenya 2010*,

¹³⁷ Article 2(6) provides that all international laws, treaties and conventions, among other instruments which Kenya has ratified, form part of Kenya's laws. Previously Kenya had to domesticate the treaties and conventions ratified. Article 2(6) of the constitution allows Kenya to simply incorporate international law instead of domestication.

Kenya took a dualist approach to the application of international law. A treaty or international convention which Kenya had ratified would only apply nationally if parliament domesticated the particular treaty or convention by passing the relevant legislation. The Constitution and in particular articles 2(5) and 2(6) gave new color to the relationship between international law and international instruments and national law.”¹³⁸

3.5.5 The Children’s Act, Kenya (2001)

The act came into force in 2002. It consolidates the previous laws dealing with childcare, protection, maintenance, guardianship and adoption and to give effect to certain international instruments which Kenya had ratified on the rights of children. Whereas the Children’s Act and Convention on the Rights of the Child are complementary, they have similarities and differences. The two documents provide for independent bodies to monitor and implement the rights and wellbeing of the child. Both agree on the minimum age of a child as 18 years. Kenya’s Children’s Act differs with CRC in that it prohibits the recruitment of children into armed conflict under section 10(2) whereas article 38 of the CRC allows recruitment of children who are above 15 years of age. CRC provides for freedom of expression under article 13 whereas the act has no provision for that.¹³⁹

3.6 Analysis of Human Rights Legislation and Frameworks

Our discussion on the provisions for human rights in the UN Charter, ICCPR, ICSECR, ACHPR, the Constitution of Kenya 2010 and various protocols reveals that there is no dearth

¹³⁸ The Constitution of Kenya 2010, Articles 2(5) and (6). The 2010 Kenyan Constitution and the hierarchical place of international law in the Kenyan domestic legal system: A comparative perspective, AHRLJ Vol 13 No 2 2013

¹³⁹ Section 21 of the Children’s Act provides for duties and responsibilities of the child which is not included in the CRC.

for instruments to recognize, promote and enforce human rights locally and internationally. Yet we still have violations of rights of vulnerable members of society. Some of the hidden challenges to the realization of human rights for all in Kenya as enshrined in the national and international law include corruption, politicization of ethnicity and gross inequality. Kenya can ratify all the international treaties on human rights and pass all the correct laws to enforce the provisions on human rights, but if such laws are not grounded on norms and customs of a people, nothing much may be achieved.¹⁴⁰ The question we ask is: why is abuse or neglect of human rights prevalent in Kenya in spite of all these treaties, covenants, The Constitution and legislations? Could it be due to disconnect between the law in books and law in action?

Is *The Constitution of Kenya 2010* too utopian as regards protection of human rights? A reflection on occurrences in the recent past, especially during the 2017 elections challenges the promise of the Bill of Rights in the constitution. Cases of police brutality, murder of innocent people including children by security agencies, ethnic profiling, looting, riots, rape, destruction of property and communal abuse of rights of other minorities were documented.¹⁴¹ It is important to note that human rights abuses have been perpetrated by citizens as well as government agencies. Not one case of these human rights abuses has been successfully prosecuted. This observation responds to the concern of this project which is the dissonance between the black letter law and the law as lived reality. It reveals that law in the books alone may not deliver on the quest for human rights awareness, practice and enforcement. It requires law as lived reality. Other attempts to legislate on the rights of children as witnessed in *L.N.W v Attorney General & 3 others [2016] eKLR* may also not be implementable because the Kenyan society has not reached that stage.

¹⁴⁰ Human rights and corruption 2009 International Council on Human Rights

¹⁴¹ Kenya National Commission of Human Rights Report, "A Human Rights Monitoring Report on the 2017 Repeat Presidential Elections." <http://knchr.org/.../civilandpoliticalreports>. (Accessed on 10 July 2018)

3.7 Conclusion

This chapter has analyzed human rights from international law perspective to regional frameworks and Kenyan legislation. Since it is not possible to review all instruments in all sectors, we have selected human rights instruments that on women and children for illustration purposes. We have established that tremendous work has been done by the UN, AU and other agencies to create mechanisms that protect dignity of women and men by upholding their rights and essential freedoms. This is evidenced in the ratification of various treaties and optional protocols. These instruments have influenced regional charters like the ACHPR, Maputo Protocol on Women's Rights and the Children's Charter. Locally, Kenya has robust human rights system as captured in the Bill of Rights, The Kenya Human Rights Commission and other supporting organs. The Constitution of Kenya 2010 through Article 2(5) and (6) has made Kenya, to a large extent a monist state with capacity to incorporate law of nations on rights subject to Article 24. The concern of this study is that with the promising provisions in the international instruments and Kenya's constitution, there implementation challenges still abound. The question we still ask is: what makes the human rights provisions clearly documented challenging to operationalize in Kenyan everyday life? Is it because our *incorporation* approach allows us to borrow human rights ideas from the West without assessing their compatibility with our ethos? The next chapter investigates the Nature of African Society as the locus of dissonance between the law *as assumed* and *the law as is*.¹⁴²

¹⁴² Italics are mine for emphasis

CHAPTER FOUR

4 NATURE OF AFRICAN SOCIETY

4.1 Introduction

This chapter interrogates the nature of African society as a critical foundation for understanding the disjuncture between the law in the books and the law in reality. The chapter problematizes epistemic assumptions and about knowledge, consciousness and praxis in African world view. It further interrogates ontological prism in the postcolony before advocating for decoloniality through epistemic disobedience to Western universalism. This exposition of the nature of an African society helps us understand some of the incompatibilities between the law in the books and the law in action? We further argue that dissonance between the texture of *the Constitution of Kenya 2010* and its application to emergent legal challenges derives from its rigid fidelity to western thought which is in conflict with the nature of African society that it seeks to serve. The chapter develops in four parts: part one discusses Ifeanyi Menkiti's¹⁴³ philosophical interrogation of African and Western understanding of self-hood, personhood and community. Part two discusses African conception of human rights. Part three examines principles of universalism and relativism and their application to human rights law in Africa. Part four concludes the chapter with a discussion of decoloniality, literature and African reality.

4.2 Ifeanyi Menkiti's Conception of African Society

4.2.1 Individual in Communitarian African Society

As a starting point, it is not contested that laws in Kenya mirrors Western philosophies and jurisprudence. This is explained by our colonial history. Yet the same laws with foreign

¹⁴³ Menkiti, Alfeanyi, "Person and Community in African Traditional Thought," in *African Philosophy: An Introduction* Richard A. Wright (ed) 1984, University Press of America. 174.

cultural orientation are expected to address legal issues grounded on African culture and experience. The divide is epitomized in the antagonistic standpoints of Rene Descartes and John S. Mbiti. Descartes, considered as the father of western philosophy, argues that “Cogito ergo sum. *I think, therefore I am.*”¹⁴⁴ Mbiti, a distinguished African thinker, disagreed with Descartes’ conception of an individual as the universal standard. He offers an African conception of an individual by asserting that “I am because we are, and since we are, therefore I am.”¹⁴⁵ Mbiti suggests that in Africa, social contract is demanded by African ethos since an individual is subservient to the community. As we shall demonstrate shortly, Mbiti’s conception of “we” as used in the dictum is not numerical. It is organic as it emanates from the cultural superstructure of society. Descartes maxim mirrors Existentialist philosophy associated with Jean Paul Sartre. Existentialism as a philosophy and theory celebrates the existence of the individual person as an autonomous being, independent, free and responsible agent in society. Existentialists consider an individual as an atomic molecule bouncing in the space of existence without central control by any authority. The existentialist danger is that while an individual celebrates freedom unbound, it also subjects the individual to the enormous danger of unrestrained freedom close to Hobbesian state of nature. Mbiti’s argument challenges the notion of universality often employed to depict Western thought and practices as indisputable reference points to be emulated.

In order to bridge the gap between the law in the books and the law in action, it is imperative that we understand the nature of African society. While the law in the books is linked to Western jurisprudence, law in action finds support in African traditional conception of law, justice and fairness. Menkiti in his discussion on “Person and Community in the Traditional African Thought,” points out substantial dissimilarities between African idea of the person

¹⁴⁴ https://www.goodreads.com/author/quotes/36556.Ren_Descartes

¹⁴⁵ John Mbiti, *African Religions and Philosophies* (Doubleday and Company, 1970), 141 .

and various other notions found in Western thought. He identifies major characteristics that distinguish African thought system from Western philosophies. Whereas Western thought valorizes individual as a defining characteristic of society, African philosophy starts with the society as the defining characteristic of individuals. Menkiti correctly construes that based on Mbiti's dictum, the actuality of the collective world takes priority over the certainty of individual life. This primacy applies not only ontologically, but also in regard to epistemic comprehension for Africans.¹⁴⁶ Menkiti is signifying a critical peculiarity between African and Western views about personhood. In the African view, community makes a person and not the other way round.¹⁴⁷

4.2.2 Personhood in African Society

A key distinction between Western and African philosophy is in personhood. In the West, personhood is acquired by being born of a human being. In African worldview, personhood is achieved through a regulated system of socialization or acculturation. A human being, new-born or an adult is inducted in to personhood within a given society by inculcating societal values to make the being a person. Our argument, which concurs with Menkiti, is that in Africa, being male or female person, young or adult does not confer one the status of a person in the eyes of a community. Personhood is earned by meeting stipulated requirements and expectations on ethos that society extends to young members or visitors to the society. Some of the values that socialization process imparts in a human being to become a person include; cultural, moral, religious, aesthetic, political, personal and economic values. It implies that in Africa, a human being can exist in a society without necessarily being a considered complete by members of the society. The various societies in Africa customarily accept that personhood is achieved by participation in communal life through performance of a number

¹⁴⁶ Menkiti *ibi.* 171.

¹⁴⁷ Menkiti *ibi.* 172

of tasks assigned by one's community. It is the discharge of these obligations that graduates one from the 'it-status' of early childhood, into the person-status discernible by a noticeable development of ethical sense.¹⁴⁸

4.2.3 Community in African Society

Language is so slippery that we tend to conflate terms that at the lexical level seem to mean the one thing until they are subjected to contextual test. It is then that we realize that the meanings are far apart within a shared semantic neighborhood. One such term is 'community' in identity discourse. In African view, community has a different meaning to what the West takes it to be. In the African understanding *human community* determines the individual's acquisition of personhood. In Western existentialist philosophy, the individual defines the self and not community.¹⁴⁹ What then is community? Western conception of human community is antithetical to African conceptualization. Menkiti opines that when Mbiti as an African philosopher contends that; "I am because we are," his understanding of 'community' is not the same as that of Europeans or Americans. Mbiti is not referring to an extra 'we' but a systematically glued communal 'we'¹⁵⁰. Menkiti aptly argues that the first 'we' refers to "collectivities in the truest sense; the second 'we' might be called *constituted* human groups; and the third 'we' is *random* collections of individuals."¹⁵¹

The African conceptualization of human society refers to collectivities in the truest sense, whereas the Western understanding falls closer to community as constituted human groups with shared interests. African conception of community assumes an *organic* facet to the association between individuals, whereas the Western conception of community as *constituted* considers a conglomeration of diverse individuals in to an association for specific

¹⁴⁸ Menkiti *ibid.* 176.

¹⁴⁹ Menkiti *ibid.* 179.

¹⁵⁰ Menkiti *ibid.* 179.

¹⁵¹ Menkiti *ibid.* 180.

needs. Essentially, the African view of community asserts ontological dependence of individuals on society, whereas the Western view is the reverse where community is ontologically dependent on individuals.

4.3 African Conception of Human Rights

The distinctions identified between African and Western conceptions of individual, personhood and community, explains why African people tend to be structured around the necessities of duty while Western societies tend to be organized about the theory of individual freedoms. In African understanding, priority is given to the duties which individuals owe to the collectivity, and their rights are considered secondary to their exercise of their duties. In the West, certain specified rights of individuals, especially those touching on civil and political rights are seen as antecedent to the organization of society. They are referred to negative rights. They require the government, which is the primary duty bearer to keep off the rights holders. Instead the government is required to protect and defend such individual rights, sometimes at the expense of common good.¹⁵² On the contrary, African nature values collective interests as opposed to individual rights.

The Banjul Charter departs from other international human rights instruments by insisting that those who enjoy rights must also have corresponding duties.¹⁵³ The provisions on duties make the African charter respond to the local situations because rights must have corresponding duties in an African setting. The provisions in terms of language reveal that AU is yet to mainstream gender in the language it uses in the instruments despite adopting the Maputo Protocol.

¹⁵² Menkiti *ibid.* 180.

¹⁵³ Article 29 of ACHPR is unique in that it highlights duties of individuals such as:

1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need;
2. To serve his national community by placing his physical and intellectual abilities at its service;
3. Not to compromise the security of the State whose national or resident he is;
4. To preserve and strengthen social and national solidarity, particularly when the latter is threatened;
5. To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defense in accordance with the law;
6. To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society;

4.4 Relativism and Universalism

In discussing the nature of African society within the realm of human rights, it is important to revisit the examination of universalism and relativism as theoretical pedestals of human rights law. Indeed, it can be argued that discordance between the law in the books and the law in reality results from conflation of the two paradigms as if they are in harmony. Universalism and relativism represent two conflicting geo-pedagogical philosophical strands. The doctrine of relativism is premised on the idea that knowledge, truth and morality do not exist in space. They occur in relation to culture, history or social contexts and are therefore not absolute. Relativism is the opposite of essentialism and rationalism which aver that things have a set of features that style them what they are and that the duty of science and philosophy is to determine and express them. The doctrine of essentialism presumes that essence exists prior to existence. Rationalism is associated with Descartes, Leibniz and Spinoza. It holds that some intentions are comprehensible by perception alone, while others are knowable by being reasoned through valid arguments from intuited propositions. It relies on the idea that reality has a rational structure in that all aspects of it can be grasped through mathematical and logical principles, and not simply through sensory experience¹⁵⁴.

Relativism is culturally constructivist. It argues that truth is neither universal nor absolute. Truth is shaped by the environment. This implies that meaning is not uniform; it is negotiated based on culture, history, geography, race, language, gender, and other distinctions.

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7. To preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well-being of society
 8. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

¹⁵⁴ The Basics of Philosophy accessed at https://www.philosophybasics.com/movements_rationalism.html on 28/3/2018

Relativism refutes the notion that societies are universal and have the same path to development. It also strives to protect autonomy of communities to chart their destiny without undue pressure from the world economic superpowers like the USA, Europe and China. Relativism, as opposed to universalism, accounts for diversity of knowledge, their distribution and the manner of their change¹⁵⁵. Relativism is theoretically aligned to sociological jurisprudence of Roscoe Pound¹⁵⁶, legal realism of Oliver Wendell Holmes Jr.¹⁵⁷, Critical Legal Studies (CLS) of Bell¹⁵⁸ and constructivist jurisprudence of Dworkin.

It is our argument that the disjuncture in Human Rights discourse between African philosophy and Western thought is that of essentialism and relativism. The West, driven by essentialism, believes that they have monopoly of values and civilization. They take Western values as the benchmark for human rights that deserve recognition, promotion, protection and fulfillment. The West fails to appreciate that their values are based on philosophical precepts of essentialism that may not be applicable to other cultures like Africa. It is equally important to note that Western philosophy promotes the theory of individualism and wealth creation through exploitation of labor as opposed to communalism that is the defining spirit of African ethos.

It is therefore not surprising that Human Rights concern of the West center on civil and political rights that protect individual autonomy at the expense of society. This belief in individual autonomy only fits within Western thinking. However, The UN agencies and other International Civil Society Organizations have attempted, through the doctrine of

¹⁵⁵ Barry Barnes and David Bloor, 'Relativism, Rationalism and the sociology of Knowledge' In Martin Hollis & Steven Lukes (eds.), *Rationality and Relativism* (Blackwell 1982)

¹⁵⁶ Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence III*, 25 HARV. L. REV.489 (1912) 514.

¹⁵⁷ Holmes O W, 'The Path of the Law' 10 Harvard Law Review 457 (1897)

¹⁵⁸ (Alan Hunt, "The Theory of Critical Legal Studies," Oxford Journal of Legal Studies, Vol. 6, No. 1 (1986): p5)

universalism to impose the same standards on Africa countries with different history, culture and economic formations. This misconception and misapplication of universality creates tensions between African notion of human rights and western view of human freedoms which are both enshrined in the constitution of Kenya 2010. Such tensions results in disjuncture between the law as it is in the books and the law as people know and live it in Africa. It is such tensions that the current project seeks to unravel and address.

4.5 Decoloniality, Literature and African nature

How then do we cure the damage of universalism in African conception of being, knowledge production and human rights protection? We must start from where, as Chinua Achebe would put it; ‘where the rain began to beat us.’ We must reflect on slavery, colonialism and neo-colonialism. The colonizer, as Peter Nazareth observes, deprives the oppressed of history to make domination and exploitation easier. Colonizers rip-off not only labor and assets, they also steal the past of the colonised. If a people believe they had no history before the coming of colonizers, they can be exploited more easily.¹⁵⁹ It is understandable that Western thought system has dominated African philosophy from the years of missionary work, imperialist commercial forays in to Africa and colonial occupation. What requires attention is why after over 6 decades of independence, Africa is still tied to imperialist theories, philosophies and jurisprudence. We argue that the end of colonialism did not remove alienation and psychological colonialism of the mind. One strategy through which we can reconstruct African nature is decoloniality. Sabelo-Gatsheni¹⁶⁰ observes that decoloniality can be construed as an all-encompassing project of re-visioning aimed at addressing glitches of colonization of the mind, alienation and fragmentation. At the center of the re-membering

¹⁵⁹Peter Nazareth, ‘Out of Darkness-Conrad and Other third World Writers’ [1982] *Conradiana* 14(3), 122.

¹⁶⁰Ndlovu Sebelo-Gatsheni, ‘The Imperative of Decolonizing the Modern Westernized University Carolina Academic Press 2015) 27-43 accessed at <https://cap-press.com/pdf/9781611638332.pdf> on 13/8/2018.

process is a restorative project to salvage African tenets threatened with dismemberment and Europhonism.

4.5.1 Writers and Society

To appreciate the nature of African society, we have to interrogate the role of a writer a cultural patriot. In this context, patriotism stands for a writer's unwavering love and loyalty to his or her motherland – Africa. We argue that the role of a writer in a changing society is shaped by exigencies of the time which are historically, ideologically, politically, economically and culturally conditioned. Creative writers do not only write about human rights struggles in society, some live the struggle and pay the ultimate price. Ngugi wa Thiongo, Ken Saro-Wiwa, Wole Soyinka and Christopher Okigbo are notable examples. It should be noted that even though writers may be oblivious of various legal doctrines and principles, the way they mirror the working of the law in society enables them, in a subtle way, to explain these principles as if they know about their existence. What we make out of this observation is that, ideally, in a well-functioning society, law is not removed from any rational being.

4.5.2 Chinua Achebe

Achebe, in his creative works and essays concurs with Menkiti's analysis of Africa-West dichotomy. The writer argues that in African society, individual is insubordinate to society regardless of his position in society. For instance, when Ezeulu the Chief Priest goes against the wishes of the community to testify in land dispute in favor of their adversary Okperi, he is reminded by elders: "...no man however great can win judgment against a clan. You may think you did in that land dispute but you are wrong. Umuaro will always say that you betrayed them before the white man."¹⁶¹ Achebe further argues that a writer in an African

¹⁶¹ Chinua Achebe, *Arrow of God* p.134

society, is a mouthpiece of that society. He is cannot therefore be “indifferent to the monumental injustice which his people suffer.”¹⁶² Achebe correctly observes that colonialism introduces alien culture in Africa and alienates African through colonial education and Christian religion. The school and the church are two agents of socialization used to colonize the thinking of Africans. Alienation perpetuates self-hate in the colonized long after independence. This leads to downgrading of African culture and customary law. The worst experience that any people can go through is the forfeiture of their pride and self-confidence. The novelist’s obligation is to assist them re-claim it by displaying to them in real terms what transpired, what they lost.¹⁶³ Apart from nostalgically celebrating black aesthetics, Achebe wants the African writer to be the vanguard in restoring the African personality and dignity. He considers the recovery of the lost self-respect and dignity as the fundamental task that an African writer must accomplish for his or her community. The writer laments that African writers, in the aftermath of independence, were drawn overwhelmingly to lamenting about the doom of the black people in a world increasingly reconstructed by white men in their own liking and for their benefit. The Africa was reduced to a desolate orphan resigned to blues.¹⁶⁴ Rediscovery of Africans’ self-pride, knowledge systems and practices restores personhood in African community that Menkiti advocates. Achebe advocates for decoloniality that Ngugi promotes in his works.

4.5.3 Ngugi wa Thiongo

Ngugi wa Thiongo is Achebe’s contemporary. Ngugi comes out strongly as a cultural activist keen to ensure that decoloniality as a theory and philosophy restores African values, history and self-image destroyed by colonialism. He is in agreement with Menkiti that in Africa, the fulcrum of existence and thought starts with the society as the defining characteristic of

¹⁶² Kolawole Ogungbesan, “Politics and the African Writer”, *African Studies Review*, Vol. 17, No. 1(April, 1974), P. 46.

¹⁶³ Chinua Achebe, “The Role of the Writer in a New Nation.” *Nigeria Magazine*, No.81 (June 1964), p. 157.

¹⁶⁴ Chinua Achebe, “The Burden of the Black Writer”, *Presence Africaine*, Vol. XXXI, No. 59 (1966), p. 135.

individuals and not the western mode where society defers to the individual. Ngugi's main concern is that the political elite have embraced Western concepts of individualism and which they use to disposes the poor of their land and labor. He is among the early East African writers to venture in to the quest for justice using literature as a medium of communication. Through his novels, essays and plays such as *Ngaahika Ndenda*,¹⁶⁵ *Devil on the Cross*,¹⁶⁶ *Trial of Dedan Kimathi*,¹⁶⁷ *Writers in Politics*,¹⁶⁸ *Detained: A Writer's Prison Diary*,¹⁶⁹ and *Decolonizing the Mind*,¹⁷⁰ the writer addresses the relationship between popular will of the people, abuse of power and the law".

Through his writing, Ngugi discusses the nature of African society in the postcolony and addresses the relationship between popular will of the people and the law in the books. In *Secure the Base: Making Africa Visible in the Globe*¹⁷¹, wa Thiongo argues that writers from Africa "must reconnect with the buried alluvium of African memory that must become the base for planting African memory a new in the continent and the world". In Ngugi's thinking, a return to the base implies using African languages.

4.5.4 Augusto Boal and Theatre of the Oppressed

In *Matigari*, wa Thiongo looks for where truth and justice can be found. *Matigari*¹⁷² leads the struggle against oppression and exploitation in all its manifestations. Augusto Boal¹⁷³, a Brazilian chemical engineering student turned theater artist attempts to decolonize dismembered thinking through theatre. He is inspired by Ngugi's quest for humane laws that respect African dignity. Like Ngugi's Kamirithu Arts and Cultural Center, Boal starts Arena

¹⁶⁵ Ngugi wa Thiongo and Ngugi wa Mirii, *Ngaahika Ndenda* (Heinemann Educational Books 1980)

¹⁶⁶Ngugi wa Thiongo, *Devil on the Cross* (Heinemann 1987)

¹⁶⁷Ngugi wa Thiongo and Micere Githae Mugo, *Trial of Dedan Kimathi* (Heinemann Educational Books 1976)

¹⁶⁸Ngugi wa Thiongo, *Writers in Politics* (Heinemann Educational Books 1981)

¹⁶⁹Ngugi wa Thiongo, *Detained: A Writer's Prison Diary* (Heinemann Educational Books 1981)

¹⁷⁰Ngugi wa Thiongo, *Decolonizing the Mind: the Politics of Language in African Literature* (Heinemann 1986)

¹⁷¹ Ngugi wa Thiongo, *Secure the Base: Making Africa Visible in the Globe* (The University of Chicago Press, 2016)

¹⁷² Ngugi wa Thiongo, *Matigari* (Africa World Press, 1986)

¹⁷³ Augusto Boal, *Theatre of the Oppressed* (Pluto Press 1979), 26)

Theatre of Sao Paulo to restore democracy in the country through theatre. After detention and torture, he moves to Argentina where he develops theater of the oppressed. The theatre of the oppressed agitates for the restoration of the dignity of the oppressed by recognizing, promoting, protecting and fulfilling their fundamental rights and freedoms.

4.5.5 Decoloniality Project and African Nature

Understanding African nature in the postcolony has been problematic due to the history of slavery, colonialism, freedom and coloniality. Anibal Quijano¹⁷⁴ is correct in discussing colonialism as perpetuating itself in the post-colony through the coloniality of knowledge. *Arrow of God*,¹⁷⁵ recognized as Achebe's masterpiece, delves deeper into philosophical questions of law with regards to stable functioning of society. It argues that rigid adherence to the law defeats the purpose of the law in ensuring order and survival of society. It emerges that society and its survival is supreme to the law and its purveyors. The law is supposed to aid social engineering and not social disintegration. Ezeulu, the protagonist in the novel, is the Principal Celebrant of Ulu. He is mandated to perform rituals that promote food security and survival in the society. Feeling offended by some members of the society, he decides to be the arrow used by god to punish the entire community. He refuses to eat the sacred yam to allow the community to harvest crops going to waste in the farms.¹⁷⁶ Ezeulu sticks to the letter of the law. He ignores pleas from elders of the community that he applies equity to tamper the rigidity of the law with justice. The fall of Ezeulu from the Chief Priest

¹⁷⁴ Anibal Quijano. Colonialism of Power, Eurocentricism and Latin America (Nepantla: Views from South, 1, (3): 533-580.

¹⁷⁵ Chinua Achebe, *Arrow of God* (East African Educational Publishers 1996)

¹⁷⁶ "The news of Ezeulu's refusal to call the New Yam Feast spread through Umuaro as rapidly as if it had been beaten out on the ikolo. At first people were completely stunned by it; they only began to grasp its full meaning slowly because it's like had never happened before. Two days later ten men of high titles came to see him" ... "Umuaro is now asking you to go and eat those remaining yams today and name the day of the next harvest. Do you hear me well? I said go and eat those yams today, not tomorrow; and if Ulu says we have committed an abomination let it be on the heads of the ten of us here. You will be free because we have sent you to do it, and the person who sets a child to catch a shrew should also find him water to wash the dour from his hand."

demonstrates two important principles in an African society: No matter how powerful one is, he or she cannot be bigger than his or her community.¹⁷⁷

Achebe, unlike Ngugi supports controlled cultural hybridity. He is aware of dynamism in society that makes any attempt to discard all colonial heritage ludicrous. Achebe therefore creates a middle-ground between Descartes philosophy of personhood and Mbiti's communitarian thinking. The new creation is a modification of Menkiti's thinking as it creates a third category for Afropolitans who are multicultural. The term Afropolitanism¹⁷⁸ is associated with Achille Mbembe¹⁷⁹ and Taiye Selasi.¹⁸⁰ It is an attempt at redefining African phenomena by placing emphasis on ordinary women and men's experiences. For Mbembe, Afropolitanism, is a way of imagining an African identity which has left its constitutive elements open-ended. It is about Africa that is conservative, cosmopolitan and global at the same time. At another level, Afropolitanism elevates voices of common people in national and international discourses as evidenced at the nation-wide consultations during the making of Kenya's second constitution.

4.6 Conclusion

This chapter has discussed African nature. We have demonstrated that African nature is distinct from the west. This is evidenced in the philosophical conception of individual, personhood and community. We have established that disjuncture between the law as written and the law as lived comes in to play when we try to impose western jurisprudence on African issues that demand a cultural approach. A number of writers propose decoloniality as

¹⁷⁷Ibid. p. 134.

¹⁷⁸ The term Afropolitanism is attributed to Achille Mbembe and Taiye Selase. For Mbembe, Afropolitanism, is a way of imagining an African identity which has left its constitutive elements open-ended. It is about Africa that is conservative, cosmopolitan and global at the same time. At another level, Afropolitanism elevates voices of common people in national discourse as evidenced at the nation-wide consultations during the making of Kenya's second constitution.

¹⁷⁹ Mbembe, A., 'Afropolitanism', in Simon Njami and Lucy Durán (eds.), *Africa Remix: Contemporary Art of a Continent* (Johannesburg: Jacana Media, 2007): 26–30.

¹⁸⁰ Selasi, T., 'Bye-Bye Babar', in *The Lip*, (March 3, 2005) <http://thelip.robertsharp.co.uk/?p=76>. (Accessed on 10 July 2018)

a theory of curing the disease of alienation that afflicts the colonized even after flag independence. Decoloniality is premised on the understanding that African legal system cannot respond to African jurisprudential demands by borrowing from the west. It must decolonize the thinking of African people to celebrate the gem that lies untapped in African thought and practice. We argue that decoloniality must be tempered with pragmatism. Africa cannot be rolled back to pre-colonial times. Afropolitanism, with trichotomy, which embraces African culture, Western and a hybrid through cosmopolitanism, is an improvement to Menkiti's dichotomy. The next chapter proposes an intervention through literature. It discusses how law in literature synergize in creating awareness on rights and fundamental freedoms and galvanize stakeholders to take corrective interventions to reclaim rights deprived.

CHAPTER FIVE

5 LITERATURE AND HUMAN RIGHTS LAW IN AFRICA

5.1 Introduction

This chapter discusses the contribution of literature to human rights jurisprudence. Specifically, we examine the extent to which literature enhances recognition and fulfillment of human rights in Kenya. Literature on Human Rights is a genre of literature that mirrors the dark side of life in society. It speaks to power and condemns violation of essential rights of women and men. What is of interest to us is how literature employs style in terms of narrativity, performativity and paratextuality to give life to these lofty ideals. Narrativity refers to style of telling a story for maximum effect. It denotes utterances that constitute artistic performances for persuasive effect. Paratextuality is a term coined by Gérard Genette, the French literary theorist, in 1987. In literary criticism it refers to meanings that are alluded to, above or beyond the printed text such as interpretations.

5.2 Literary Style and the Law

To bring out the convergence and divergence between law and literature in the treatment of human rights, we examine the selected oeuvres in African Literature to identify how dialogic relationships between human rights discourse and creative fecundity of a given epoch facilitate awareness and consequential support for legal reforms targeting Human Rights. There is a strong indication that reformist development in human rights jurisprudence in Africa is swayed by vibrant illustration of human rights violations in creative works of well-known writers through novels, short stories, essays, poetry and artistic performances. Such writers include Ngugi wa Thiongo, Chinua Achebe, Margaret Ogola, Wole Soyinka and Ken Saro-Wiwa. By analyzing the convergence of human rights law and creative productions in Africa, this chapter suggests possibilities for making written law to be in accord with African ethos.

Literature employs style to open up the law to public engagement. It employs literary style in terms of choice of words, descriptions, and other creative devices to communicate effectively depending on the audience. Literature and law share in careful use language to inform or persuade audience to share in the speaker's perspective. Law has been known to use language in a conservative way which renders it opaque to lay persons. Creative writers are masters at the use of words. Literature lifts the veil of opacity by expanding semantic limits of words and human experiences to make law accessible to its subjects. They do not just use words, like craftsmen and women, they choose them meticulously; arrange them in a special way to communicate effectively with their audiences. Some of the techniques employed by creative writers include metaphors, personification, similes, imagery, alliteration, hyperbole, flashback and foreshadowing. In addition, writers often exploit techniques of poetic license¹⁸¹ and aesthetic distance with empathy to capture unique human experiences that language cannot describe in legal jargon. These literary techniques are appropriate in speaking to power more so under dictatorship when all voices are silenced through imprisonment, assassinations and forced exiles.

Literature, like law, is a tool for social engineering. Through its creative productions, a society radiates not only its incandescent beauty, resilient history and profound philosophy, but most importantly, its inner humanity.¹⁸² Literature uses beautifully woven words as a vehicle to convey the deepest thoughts about society to a wider audience.¹⁸³ Kerry Bystrom correctly points out that imaginative literature has the power to “create bonds of empathy and

¹⁸¹ Poetic license is a right or liberty granted mainly to creative writers and artists to depart from the norm of communication in order to effectively reach out to their intended audience.

¹⁸² Molvaer, Reidulf, *Tradition and Change in Ethiopia: Social and Cultural Life as Reflected in Amharic Fictional Literature (1930 – 1975)*. Addis Ababa: Tsehai, 2008. p ix.

¹⁸³ Ogunyemi, Christopher Babatunde, Salient Themes as Voices in African Poetry. *Venets: The Belogradchik Journal for Local History, Cultural Heritage and Folk Studies*. (2011) University of Sofia, Bulgaria. Volume 2, Number 2, pp. 227-251 <http://www.venets.org/getfile.php?id=103>. (Accessed on 30 June 2018)

connection, draw national and international attention to human rights abuses, and denounce the exclusion of certain individuals and groups from the protections afforded by international human rights law.”¹⁸⁴

In any oppressive environment, literature is an effective tool for communicating to the masses. Through songs, plays and novels, writers are able to celebrate society’s achievements and point out the failings for improvement. The major difference is in audience in a courtroom and audience that literature commands. The former is small, sophisticated, highly formal and tense while the latter is global in reach, highly informal and combines information with entertainment. By speaking for the devoiced victims of liberties deprivations, creative writers are invariably change agents in society. As the embodiment of society’s conscience, artists reflect with empathy the struggles of a people for a life of dignity, happiness and hope. This expectation entails projecting a vision for a culture that observes rights and ultimate choices of all persons. It is our argument that a deeper understanding of human rights situation in a given society can be understood by analyzing the literature of that period since it survives as the living archive of the people’s struggle for dignified existence.

5.2.1 Law, Literature and human rights

Law and Literature are utilitarian. Whereas the law determines and regulates acceptable behavior in society by establishing standards, maintaining order, resolving disputes, and protecting liberties and rights, literature reflects operation of the law in people’s daily lives. Jennifer Rickel in “Narrative States: Human Rights Discourse in Contemporary Literature” asserts that the potential of post-colonial literature is not in staging humanitarian resolutions but in interrogating the frameworks that sustain imperialism. She contends that literature facilitates critical analysis of structural inequalities and imagines new possibilities for the

¹⁸⁴ Kerry Bystrom, *The Novel and Human Rights*, *Journal of Human Rights* (2008) 7:4, 388.

humankind.”¹⁸⁵ While we concur with Rickel, we add that literature does not end with imagining possibilities; it creates critical consciousness which is a prerequisite for change in oppressive laws. It should be noted that even though writers may be oblivious of various legal doctrines and principles, the way they mirror the working of the law in society enables them, in a subtle way, to explain these principles as if they know about their existence. Ideally, in a well-functioning society, law is common sense. It is not removed from any rational being. After all, as Achebe argues, the novelist’s obligation is to search in-depth the human situation by having an appropriate logic of African history.¹⁸⁶

5.2.2 Creative Writers and the Law

African literature is replete with works that champion the cause of peace, justice, progress and good governance in society. It is therefore not surprising that a study of selected texts by African writers reveals a keen interest in law and its actualization in people’s lives. In this section, we examine how creative writers demystify law and contribute to human rights jurisprudence. We examine the contribution of Okot p’Bitek, Ngugi wa Thiongo, Chinua Achebe, Meja Mwangi, Ken Saro-Wiwa, Grace Ogot, Margaret Ogola, Marjorie Oludhe Macgoye, Wanjiku Kabira and Micere Mugo. Okot p’Bitek, is important to the study of Law in Literature because he is among the few African writers trained as a lawyer and a creative writer. The author is able to use literature deftly to debate the place of law in a changing African society. Through *Song of Lawino and Song of Ocol*,¹⁸⁷ the protagonist takes Ocol, alienated African elite to the customary court to plead for intervention. In her lament and based on Ocol’s response, p’Bitek is able to compare and contrast the African and the Western aesthetics, democracy and rule of law. Through Lawino, a proud African woman,

¹⁸⁵ Jennifer Rickel, Narrative States: Human Rights Discourse in Contemporary Literature. Rice University, PhD Thesis (2012). p. 201.

¹⁸⁶ Achebe, *Hopes and Impediments: Selected Essays 1965-87* (London: Heinemann, 1988), p. 27.

¹⁸⁷ Okot p’Bitek, *Song of Lawino and Song of Ocol* (Heinemann 1984)

p'Bitek celebrates African ethos, judicial system, sense of history and respect for human rights as opposed to foreign culture and judicial system that Ocol values. Lawino laments:

My Clansmen, I cry
Listen to my voice
The insults of my man
Are painful beyond hearing.... (37)

In the above excerpt, Lawino presents her side of the story to the 'judge' who is her clansmen. She accuses her husband to her clansmen for the insults she is going through. It is important to note that Lawino does not just accuse Ocol. Rather, she testifies on her defense:

Ocol tells me
That I like dirt
He says
He says that I make
His bed sheets dirty
And his bed smelly..... (70)

Lawino finally confronts the accused, Ocol, and appeals with him to appreciate black aesthetics:

Ocol, my friend
Look at my skin
It is smooth and black..... (74)

Song of Ocol is a response to Lawino's lamentations. It is an apology for modernity, its white aesthetics and alien legal system. Ocol refers to a form of law that is unjust, where he intends to have all the advocates of African history hanged:

To the gallows
With all the professors

Of Anthropology
 And teachers of African History
 A bonfire
 We'll make their works
 We'll destroy all the anthropology
 Of African Literature..... (214)

In *Song of Ocol*, the police force is depicted as an instrument of authoritarianism.¹⁸⁸

p'Bitek uses satire to poke fun at a westernized African man, formal judicial system and the police force. In spite of his education, Ocol is culturally rootless and a caricature of an African person. The poetic piece ends with a major warning to alienated African elite:¹⁸⁹

The long-necked and graceful giraffe
 Cannot become a monkey
 Let no one
 Uproot the pumpkin.

This is a powerful philosophical statement in p'Bitek's entire oeuvre. It summarizes his thesis by celebrating the need to reclaim, reconstruct, preserve, protect and nurture Africa's distorted and derided culture. In African ethos, pumpkin in the old homestead is never uprooted. Africans are free to embrace other cultures, but Africa's cultural heritage must

¹⁸⁸ We will arrest
 All the elders
 The tutors of the young
 During circumcision....
 The council of elders will
 Will be abolished

 The blowing of war horns
 Will be punished
 With twelve strokes
 Of the cane
 For each blast..... (228)
 Spear-makers and black smiths
 Will be jailed..... (229)

¹⁸⁹Okot p'Bitek, *Song of Lawino* and *Song of Ocol* (Heinemann 1984) p.56

remain the center of reference. p'Bitek is echoing Franz Fanon and Ngugi in calling on African elite to decolonize their minds and celebrate the rich African culture.

p'Bitek's dramatization of the dialogue between Lawino and Ocol is similar to Achebe's depiction of peaceful settlement of disputes in a traditional court. In Achebe's *Arrow of God*, a marital dispute touching on gender-based violence is heard and ably determined in an open court by elders:

Petitioner: "That woman standing there is my wife, Mgbafo. I married her with my money and my yams. I do not owe my in-laws anything. I owe them no yams. I owe them no coco yams. One morning three of them came to my house, beat me up and took my wife and children away. This happened in the rainy season. I have waited in vain for my wife to return. At last I went to my in-laws and said to them, 'You have taken back your sister. I did not send her away. You yourselves took her. The law of the clan is that you should return her bride-price.' But my wife's brothers said they had nothing to tell me. So, I have brought the matter to the fathers of the clan. My case is finished. I salute you."

Leader of Egwgu (Judge): "Your words are good, let us hear Odukwe. His words may also be good."

Respondent: "My in-law has told you that we went to his house, beat him up and took our sister and her children away. All that is true. He told you that he came to take back her bride price and we refused to give it him. That also is true. My in-law, Uzowulu, is a beast. My sister lived with him for nine years. During those years no, single day passed in the sky without his beating the woman. We have tried to settle their quarrels time without number and on each occasion Uzowulu was guilty--

Petitioner: "It is a lie!" (Uzowulu shouts).

Respondent: "Two years ago, when she was pregnant, he beat her until she miscarried."

Petitioner: "It is a lie. She miscarried after she had gone to sleep with her lover."

Leader of Egwguu (Judge): "Uzowulu's body, I salute you, what kind of lover sleeps with a pregnant woman?" (a loud murmur of approbation from the crowd).

Petitioner: "The law of Umuofia is that if a woman runs away from her husband her bride-price is returned. But in this case, she ran away to save her life. Her two children belong to Uzowulu. We do not dispute it, but they are too young to leave their mother. If, in the other hand, Uzowulu should recover from his madness and come in the proper way to beg his wife to return she will do so on the understanding that if he ever beats her again we shall cut off his genitals for him."

Leader of Egwguu (Judge): "I am Evil Forest. I kill a man on the day that his life is sweetest to him."

Petitioner: "That is true".

Leader of Egwguu (Judge): "Go to your in-laws with a pot of wine and beg your wife to return to you. It is not bravery when a man fights with a woman.""

Achebe and p'Bitek demonstrate that contrary to perceptions that human rights is an invention from the West, African societies have for generations recognized and protected human rights including matters touching on gender-based violence. The observance of court etiquette, the use of respectful references, and the desire to remain diplomatic however disturbing the matter may be makes this excerpt a classic piece on trial advocacy in an African setting.

Achebe suggests that not all African men abuse women. Society is protective of women though with challenges that cannot be denied. The Ibo have a revered word Nneka, or

"Mother is Supreme" because "a man belongs to his fatherland when things are good and life is sweet. But when there is sorrow and bitterness he finds refuge in his motherland".¹⁹⁰

5.2.3 Rule of Law and Literature

In line with African nature, Achebe indicates that rule of law is also not an invention from the west. It exists in African customary law. Even before colonial intrusion, African judicial systems are independent, impartial and enjoy respect from members of society. The law applies equally to the low and mighty. In *Things Fall Apart*, Okonkwo, a respected elder, is punished severely for breaking the week of peace by assaulting his wife.¹⁹¹

Okonkwo is punished again for accidentally shooting a kinsman at a funeral. It is the offence of manslaughter classified as a female crime. He is banished to Mbanta the village of his late mother for seven years.¹⁹² He willingly takes these punishments because "the law of the land must be obeyed".¹⁹³

In 1977, Ngugi wa Thiongo's play *Ngaahika Ndenda* is performed at the Kamirithu Arts and Cultural Center in Limuru. The play criticizes inequality and injustices in Kenya's political system. Ngugi is arrested on 31 December 1977 and detained at Kamiti Maximum Prison. He is not charged in a court of law. His experiences of human rights violations inspire him to write, *Detained: A Writers Prison Diary* (1981). Following his detention, Ngugi is named a prisoner of conscience by Amnesty International. Ngugi is released by President Moi in

¹⁹⁰ Chinua Achebe, *Things Fall Apart* 94

¹⁹¹ Ezeani, the priest of the earth goddess tells Okonkwo: "You know as well as I do that our forefathers ordained that before we plant any crops in the earth we should observe a week in which a man does not say a harsh word to his neighbour. We live in peace with our fellows to honour our great goddess of the earth without whose blessing our crops will not grow. You have committed a great evil." ... "Your wife was at fault, but even if you came into your obi and found her lover on top of her, you would still have committed a great evil to beat her."... "You will bring to the shrine of Ani tomorrow one she-goat, one hen, a length of cloth and a hundred cowries" Okonkwo did as the priest said. He also took with him a pot of palm-wine." (TFA 22)

¹⁹² Chinua Achebe, *Things Fall Apart*. p. 87

¹⁹³ Chinua Achebe, *Things Fall Apart*. P. 48

December 1978 and goes in to exile shortly thereafter. In exile, Ngugi works with committee for the release of Kenyan prisoners conscience based in London. The committee, at the time, is active in championing the cause of political reforms and protection of human rights in Kenya. In *Secure the Base: Making Africa Visible in the Globe*¹⁹⁴, wa Thiongo argues that writers from Africa “must reconnect with the buried alluvium of African memory that must become the base for planting African memory a new in the continent and the world”. The writer vivifies human rights abuses during the state of emergency in Kenya through Kiguunda in *I Will Marry When I Want*.¹⁹⁵

This study posits that while human rights have been taken as a great inheritance from the west, a standard narrative has attempted to downplay human rights awareness in Africa while at the same time amplifying human rights standards of the west. Ngugi invites us to question this lopsided approach to human rights. According to Ngugi, human rights abuses perpetrated by colonial regimes in Africa are worse than what Africa is accused of. In *Dedan Kimathi*, the freedom fighter is guilty even before his trial because there In a courtroom exchange between Judge Henderson and Dedan Kimathi, Judge Henderson explains to Kimathi that colonial laws are just. The prisoner challenges the white lie that there is only one law, one justice. He tells the white judge that there are two laws and two justices. One law and one justice protect the man of property, the man of wealth, the foreign exploiter. Another law, another justice, silences the poor, the hungry, our people:

Judge: Dedan Kimathi s/o Wachiuri, alias Prime minister, or Field Marshall, of no fixed address, you are charged that on the night of Sunday, October the 21st,1956, at or near Ihururu in Nyeri district, you were found in possession of a firearm, namely a

¹⁹⁴ Ngugi wa Thiongo, *Secure the Base: Making Africa Visible in the Globe* (The University of Chicago Press, 2016)

¹⁹⁵ *The emergency laws became very oppressive. Our homes were burnt down. We were jailed, we were taken to detention camps, some of us were crippled through beatings. Others were castrated. Our women were raped with bottles. Our wives and daughters raped before our eyes* (Ngugi wa Thiongo and Ngugi wa Mirii, *I will Marry when I Want* (Heinemann Educational Books 1980) p. 27.)

revolver, without a license, contrary to section 89 of the penal code..... Guilty or not guilty?

Kimathi: By what right dare you, a colonial, sit in judgment over me?...an imperialist court of law.....to a criminal judge, in a criminal court, set up by criminal law..... I will not plead to a law which we had no part in the making.... (p.24-25)

.....

Kimathi: Have they released our people from concentration camps? Have they released Jomo Kenyatta? Paul Ngei? Fred Kubai? Where is Achieng Oneko?..... (p.46)

Judge: Kimathi s/o Wachiuri, you are sentenced to die, by hanging. You will be hanged by the rope until you are dead.¹⁹⁶

The Play is used by Ngugi and Micere Mugo to justify armed resistance against oppression and exploitation to regain lost freedoms and rights. In the above excerpt, the playwrights are not only able to articulate strong justification for armed struggle, but also to demystify the court formalities at the same time. Kimathi challenges the white judge and accepts the capital punishment.

5.3 Chinua Achebe and HR

Achebe uses the novel form as mirror that reflects the working of the law in society. *Things Fall Apart*¹⁹⁷ by Chinua Achebe is a good example of how art if deftly deployed can vivify legal principles in society. The author seems to suggest that before the intervention by Europeans, African legal systems were clear and consistent in dispensing justice. Colonialism with its formal judicial system and alien culture introduces corruption in Africa. The author seems to suggest that Okonkwo, the protagonist in *Things Fall Apart*, fails not only because

¹⁹⁶ Ngugi wa Thiongo and Micere Githae Mugo, Trial of Dedan Kimathi (Heinemann Educational Books 1976) p.84

¹⁹⁷ Chinua Achebe, Things Fall Apart (East African Educational Publishers 1996)

of being rash, rigid and fearful of failure, but most importantly, flagrant abuse of rights of others, especially women, children, and men less endowed materially, like his father Unoka. Olubukola Olugasa,¹⁹⁸ and Columbus Ogbuja,¹⁹⁹ in their respective works also affirm that, Achebe consciously deals with human rights concerns in pre-colonial, colonial, and contemporary societies. Example of human rights abuses Achebe addresses are the right to life, property, dignity and right to fair hearing.

Any law that negates the basic interests of a society is not law and is bound to be disregarded. Marcel Onyibor²⁰⁰ investigates Igbo world-view in Achebe's *Arrow of God* and concludes that the author exposes unavoidable repercussions when those in authority forget the source of their power and focus on individual satisfaction. The subtle message from Onyibor is that sovereignty belongs to the people and leaders. Awareness of this fundamental principle can serve to restrain dictators who presume that their power is supreme. *The Constitution of Kenya 2010* captures this principle succinctly Art. 1: "All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this constitution."

The Whiteman imposes colonial courts on the people. The new court system introduces corruption in the administration of justice that widens the gap between the black letter law and law in action. When the colonial police are sent to take Ezeulu to see the Whiteman, they demand bribe so that they expedite the appointment.²⁰¹

¹⁹⁸ Olugasa Olubukola, 'Interplay of Law and Equity in Chinua Achebe's *Arrow of God*' (September 2013). <https://ssrn.com/abstract=2326221> or <http://dx.doi.org/10.2139/ssrn.2326221> (Accessed on 7 December 2017.)

¹⁹⁹ Columbus Ogbujah, 'Ethics, Law and Justice in Achebe's *Things Fall Apart*' *IOSR Journal of Humanities and Social Science (IOSR-JHSS) Volume 19, Issue 12, Ver. I (Dec. 2014), PP 42-49 e-ISSN: 2279-0837, p-ISSN: 2279-0845. www.iosrjournals.org* (Accessed on 7 December 2017.)

²⁰⁰ Marcel Ikechukwu Sunday Onyibor, 'Igbo Cosmology in Chinua Achebe's *Arrow of God*: An Evaluative Analysis' (2016) *Open Journal of Philosophy* <http://www.scirp.org/journal/ojpp> <http://dx.doi.org/10.4236/ojpp.2016.61011> (Accessed 7 December 2017.)

²⁰¹ *There are many people waiting to see the white man and you may have to wait in Okperi for three or four days before your turn comes. But I know that a man like you would not want to spend many days outside his village. If you do me well I shall arrange for you to see him tomorrow. Everything is in*

Achebe is also adept at the use of proverbs as *obiter* in settling disputes between parties. *Obiter* is a judge's communication of a decision in court or in a written determination, but not essential to the decision and therefore not legally requisite as a legal standard. It is the persuasive element of a judge's determination. *Ratio* is the rule of law applied to the facts of the case and upon which a judge makes his decision. *Ratio* is the legal pillar for the judgment. It is common practice for the bench to start with *ratio* and then proceed to fortify the position using *obiter* to make the rule understandable to the public through application. The concepts are not new to African customary justice system. In Achebe's works, proverbs are *obiter* in many settlements. For instance, in encouraging human rights consciousness the author says that: "But let the slave who sees another cast into a shallow grave know that he will be buried in the same way when his day comes."²⁰² The proverb suggests that in a state of anarchy, no one is safe.

Achebe and Ngugi strive to decolonize the African mind. Tendaye Sithole, for instance, opines that a writer's vocation in Africa is to decolonize the thinking of the subaltern. This can be achieved by valorizing epistemologies once distorted, bastardized, ignored, and rendered irrelevant by Western epistemologies.²⁰³ In concurrence, Maldonado-Torres eloquently elucidates the link between coloniality and colonialism. She contends that colonialism bestows political and economic sovereignty of a nation on the dominant empire. Coloniality, instead, refers to the enduring arrangements of power that arise due to colonialism. Such patterns define culture, labor, and knowledge production well beyond the

my hands; if I say that the white man will see this person, he will see him. Your kinsman will tell you what I eat." He smiled and put his fez back on the head." (AOG 142)

²⁰² Chinua Achebe, *Arrow of God* (East African Educational Publishers 1996) p.27.

²⁰³ Tendaye Sithole, "Achille Mbembe: Subject, Subjection and Subjectivity" (PhD Thesis, University of South Africa, 2014), vi

strict limits of colonial administrations. Coloniality therefore survives colonialism. It is maintained alive in books, in the criteria for academic performance, in cultural patterns, in common sense, in the self-image of people, in aspiration of self, and so many aspects of our modern experience. In a way, as modern subjects we breathe coloniality, all the time and every day²⁰⁴.

Dani Wadada Nabudere²⁰⁵, a Ugandan scholar, lawyer, writer and Pan-Africanist introduces the concept of Afrikology of knowledge production and regeneration based on the African philosophy of communalism as a cure to coloniality of knowledge. Nabudere bases his theory on Mbiti's maxim. Coloniality of knowledge or Afrikology supports African conceptualization of law that Ifeanyi Menkiti refers eloquently explains in his article.²⁰⁶ Ndulo advocates for contextualization of law to avoid the risk of law becoming irrelevant or disruptive to people's lives. Relying on coloniality of knowledge and Afrikology, Okoth Okombo's argument that fatherhood in many African societies may not be effectively enforced by courts using western generated laws sounds valid.²⁰⁷

5.4 Kenyan Writers and Human Rights

Kinyanjui and Wahome Mutahi also contribute to human rights awareness in their works. Kombani Kinyanjui in *The Last Villains of Molo*²⁰⁸ addresses human rights abuses in Kenya's recent history. The abuses are realized in politically instigated clashes with ethnic militias and government forces abusing rights of women, children and other members of society in

²⁰⁴ Maldorado-Torres, N, "On the Coloniality of Being: Contributions to the Development of a Concept. (Cultural Studies, 21. 2-3) 243.

²⁰⁵ Dani Wadada Nabudere (2006) Towards an Afrokology of knowledge production and African regeneration, International Journal of African Renaissance Studies - Multi-, Inter- and Transdisciplinarity, 1:1, 7-32, DOI: [10.1080/18186870608529704](https://doi.org/10.1080/18186870608529704)

²⁰⁶ Menkiti, Alfeanyi, "Person and Community in African Traditional Thought," in African *Philosophy: An Introduction* Richard A. Wright (ed) 1984, University Press of America. 174.

²⁰⁷ Okoth Okombo, 'Judge's verdict on birth records may lead to more abortion cases' Daily Nation (20 May 2016). <http://mobile.nation.co.ke/blogs/Verdict-on-birth-records-may-lead-to-more-abortion-cases/1949942-3231518-1503fee/index.html> (Accessed on 6 June 2018)

²⁰⁸ Kombani, Kinyanjui, *The Last Villains of Molo*. Nairobi: Acacia, 2004.

equal measure. The novel is an indictment of Kenya's ethicized politics that fuels human rights violations during elections for political offices. Wahome Mutahi in *Three Days on the Cross*, addresses the history of political oppression in Kenya of the 1980s. The period is characterized with random arrests, incarcerations and cruelty of suspected members of the underground *Mwakenya* Movement in police custody or in prison. For instance, Mutahi is charged with sedition and supposed link with the subversive *Mwakenya* Movement. He is relocated to the Kamiti Maximum Security Prison. Mutahi and his brother are both freed after fifteen months without trial. In prison, Mutahi suffers human rights abuses that stimulate him to pen *Three Days on the Cross* and *Jail Bugs*.

5.5 Literature and Basic Rights

Literature has not only been concerned with civil and political rights. There is also a concerted effort to promote economic and social rights, also referred to as, the second-generation rights. We do not subscribe to the categorization of rights as first, second, and third generations because human rights are universal, indivisible, interdependent and interrelated. Meja Mwangi and Ken Saro-Wiwa attend to economic, social and cultural rights. Major Mwangi, also known for his masterpiece, *Carcass for Hounds*,²⁰⁹ is more concerned with social and economic rights of the urban poor in Kenya. The vagaries of poverty, ill health, misery, illiteracy, unemployment, lack of food and shelter are portrayed by Meja Mwangi in *Kill Me Quick*.²¹⁰ The persona is on the verge of giving up the struggle for freedom. He is succumbing to despair and death because he cannot get the basic requirements of life in the city.²¹¹

²⁰⁹ Meja Mwangi, *Carcass for Hounds*. London: Heinemann, 1974

²¹⁰ Meja Mwangi, *Kill Me Quick*. London: Heinemann, 1973. p. 9

²¹¹ Days run out for me,

Life goes from bad to worse,

Very soon, very much soon, time will lead me to the end.

Very well. So be it.

Kill Me Quick shows how characters' rights to basic necessities of life are unfulfilled. It is also curious to note that while many writers have focused on civil and political rights, popularly referred to as the first-generation rights, Meja Mwangi, focuses on lack of economic and social rights in Kenya like the right to food and shelter. How else can society be made aware of human rights concerns if it is not through popular books, songs and plays? It is our argument that public awareness on lack of rights disseminated through creative works galvanizes the public to agitate for the realization of these rights. The agitation finds fulfillment in the endorsement of *The Constitution of Kenya 2010*.

Ken Saro-Wiwa, another notable African writer, also contributes significantly to the realization of social and economic rights of the underprivileged in Africa through art. Saro-Wiwa was an outspoken critic of the despotic Nigerian military regime of Sani Abacha and international oil companies, notably Shell, which was responsible for the destruction of the economic, social and cultural fabric of his homeland. Through his plays, novels and public advocacy on behalf of the Ogoni people, the world came to know of the complicity of dictatorships in Africa and multinational companies from the North in the plunder of natural resources in Africa. Saro-Wiwa stands out among African writers as a symbol of creativity, human rights activism and sacrifice. In *A Month & A Day*, the author, in a moving narrative, gives voice to the campaign for the basic rights of the Ogoni people of Nigeria. Despite brutal government's paramilitary expeditions against the Ogoni, Saro-Wiwa advocates for peaceful and non-violent protest. The book lays out both the experience of detention and the story of

But one thing I beg of you.
If the sun must set for me,
If all must come to end, if you must rid of me,
The way you have done with all my friends,
If you must kill me,
 Do so fast.
 KILL ME QUICK. (9)

his involvement with the Ogoni cause. Saro-Wiwa was executed in a Nigerian prison in spite of the provisional orders that had been issued by the African Court for Human and People's Rights.²¹² The world was outraged when the government of Nigeria hanged the voice of the voiceless and the hope of dispossessed Ogoni people. As a lasting tribute to his life, the international community forced the government of Nigeria to engage in the economic reconstruction of Ogoni land, institute environmental conservation programmes, stop forced evictions and initiate legal reforms to expand freedoms and rights of the Ogoni.

5.6 Literature, Gender and Human Rights Law

Women have not been left behind in the quest for a just and humane society through literature. The discussion we have had so far may paint a misleading picture that only male writers are concerned with human rights concerns in their works. This is not true. It is our contention that human rights discourse is gendered. This is because women and men are socialized differently, are exposed to human rights violations in different ways and at times employ gendered responses to human rights abuses. It cannot be denied that in conflicts such as Mau Mau war of liberation and the dark years under president Moi, women in Kenya suffered considerably. The gendered experiences indicate why women writers like Margaret Ogola and Marjorie Oludhe Macgoye genderize human rights discourse through literature.

Grace Ogot, is one of the pioneer women writers to provide a gender perspective to the struggle for human rights in Kenya. In her creative works, Ogot attempts to reflect a traditional Luo society grappling with myriad challenges, chief among them is the rights of women. In *Land without Thunder and Other Stories*,²¹³ the writer questions why society makes decisions that affect girls and women without involving them. The writer does not call

²¹² Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) AHRLR 60 (ACHPR 2001). Communication 155/96.

²¹³ Grace Ogot, *The Land without Thunder* (East African Educational Publishers 1968)

it injustice, but the subtext is clear that she is blaming patriarchy for keeping women and girls down. In “Rain Came”, the narrator asks why Oganda, the only daughter of the Chief, and the only child of her mother, must be sacrificed for the rain to come. She questions the fairness of such a decision and whether it values the rights of the girl-child.

Margaret Ogola relies on the historical novel to address human rights concerns in the post-independence Kenya close to Lukacs’ theory of the historical novel. Georg Lukacs, a Hungarian Marxist philosopher, literary historian, and critic develops the notion of literature as a symbol of the economic, social and political confrontation between the lower and upper classes, the colonizer and the colonized. Lukacs’ historical novel requires that writers reveal the process of a nation’s becoming. Relying on Lukacs’ approach, we argue that the Mau Mau war of liberation in Kenya brought communities together and cemented a defined quest for freedom as Kenyan nation.²¹⁴ In the same way, women writers with human rights consciousness employ historical novel.

Ogola and Macgoye write historical novels that reveal a resilient quest for becoming as a nation. *The River and the Source* traverses the pre-colonial, colonial and post-colonial period in Kenya. Thematically, the novel celebrates the rise of the woman in Kenyan society and the emergence of cosmopolitan culture that collapses hitherto rigid ethnic boundaries. The social setting focuses mainly on the Luo and partly the Kikuyu communities. Akoko, the protagonist grows up to be a matriarch capable of asserting her humanity and creating space in which women and men can enjoy their rights and freedoms. What is interesting in Ogola’s approach to law in society is her ability to find points of convergence between customary law and formal law, and between feminist and patriarchal extremes. The author seems to suggest

²¹⁴ Michael E Farquhar, Kenya from Mau Mau to Independence, MA thesis, Columbia University 1963 p.39

that not all customary laws in Africa are retrogressive; equally not all western laws inherited from colonial period are oppressive.

MacGoye's *Coming to Birth* tells the history of Kenya's struggle for rebirth through literature. The title of the novel is symbolic. It refers to several levels of birth. Literally, 'Coming to Birth' is about the struggle of Paulina, the protagonist, to give birth to a child to escape the stigma of childlessness in a society that believes that giving birth makes a woman complete. Paulina arrives in Nairobi during the state of emergency and encounters barbed wire everywhere. Draconian colonial laws are meant to stop members of GEMA community from joining Mau Mau fighters in the forest. Out of frustration, Pauline engages in an extramarital affair and conceives. The baby boy unfortunately dies in a shoot-out after a political event in Kisumu in 1969. This is the period of significant constitutional amendments to the independence constitution to create an all-powerful presidency. Through satire, the writer condemns the mysterious death of Argwings Kodhek and the assassination of Tom Mboya. These are senior politicians in the government of the time. Chaos and deaths the author enumerates in the novel suggest that a section of Kenyans is disenchanted with *uhuru* (freedom). When the novel ends, Paulina is once again expecting a child and there are strong indications that her ultimate coming to birth is imminent, real and unstoppable. Through this novel, Macgoye tells the story of Kenya in a compelling feminist perspective. She corroborates the argument by legal scholars like Okoth Ogendo that Kenya suffers several setbacks during and after independence. Macgoye is optimistic that in spite of several false starts after independence, the country is ready for self-redemption. The novel is prophetic. Self-redemption symbolized in Paulina's 'coming to birth' is realized on 27th August 2010 when the popular constitution is promulgated to defend Wanjiku.

Women who liberate society like Paulina, Akoko, Nyabera, and Wandia are depicted by Macgoye and Ogola as having historical sense, daring, hardworking and go-getters not inhibited by culture, ethnicity, geography, politics or men. It is apparent from the discussion that women writers with Lukacs' historical sense capture experiences marginalized in male works. Marginalization is the practice through which people peripheralized based on their individualities, relations, experiences, and surroundings.²¹⁵ This process involves pushing people to the edge of a group and according them lesser importance than others. Such exclusionary forms of discrimination may be based on gender, race, skin color, age, ethnic origin, social class, educational status, economic background, physical appearance, religious or political affiliation, and may also apply to people with disability. Article 27 of *The Constitution of Kenya 2010* insists on equality and freedom from nondiscrimination. Women writers address discrimination as a form of human rights violation because they are immediate victims alongside children, persons with disabilities and the LGBTI. As Eustace Palmer correctly observes, a historical novel enriches our empathetic appreciation of life, extends our sympathies, develops our thoughts, satisfies our inquisitiveness and even deepens our understanding of the social, political, and historical issues that African countries and universities seem to be preoccupied with.²¹⁶ Our discussion of women writers' contribution to human rights discourse reveals that the role of literature in Africa is three-fold: to confront and break retrogressive patriarchal chains, deflate colonialist historiography and to suggest positive African alternatives as Wandia and Paulina do. It is our argument that gendered approach to human rights concerns calls for problematization of terms that sound positive but end up concealing marginalization in society. One of such terms is the subaltern. The subaltern refers to anyone who has in the past been 'otherized' or inferiorized' as

²¹⁵ Hall Joanne M., et. al. "Marginalization: A Guiding Concept for Valuing Diversity in Nursing Knowledge and Development." *Advances in Nursing Science*, Vol. 16, no. 4, 1994, p 25.

²¹⁶ Eustace Palmer, *Studies of the English Novel*, African University Press. *The Growth of the African Novel*. (1986) Heinemann, 1979.

insignificant either because of gender, race, physical appearance, age, ethnic origin, and other forms of discrimination. The subaltern is representative of marginalization. Are we witnessing the rise of trans-subalternity, inter-subalternity and intra-subalternity? Are these the new configurations of the subaltern? What happens when the subaltern turns back to valorize the very forms of otherness that they had fought against? Is the subaltern a universal, homogenous and constant category? Is subaltern going back to hi-subaltern? For literature to promote recognition, promotion, protection and fulfillment of human rights, it has to see through the technical terms that may conceal disconnect between the elite and the common men and women who bear the brunt of human rights abuses.

5.7 Conclusion

Writers discussed in this chapter use art to address human rights violations in society so that laws can be reformed to expand spaces for women and men. Literature is moral in nature and theory. It advances the quest for human dignity, happiness and progress. Through Ngugi, Achebe, Saro-Wiwa, Meja Mwangi, Ogola, Macgoye and Ogot, we have demonstrated that writers champion the quest for human rights. The quest in Kenya is fulfilled in the promulgation of *The Constitution of Kenya 2010*. Ngugi, due to his Marxist ideology treats human rights in a selective manner. While he succeeds in condemning human rights abuses on Kenyan freedom fighters, he gives flippant attention to African and European women, men and children who are killed, raped, maimed because they are suspected of being collaborators or sympathizers with the colonial regime. Ngugi's ideological monocle denies him a golden opportunity to rise above the limitations of sectarianism to illuminate human rights abuses on all sides of the struggle.

By ignoring human rights abuses on the side of the victims, the writer betrays his role as a visionary. Achebe, Ogot, Ogola, Okot, Saro-Wiwa and Soyinka all look at human rights

broadly. Human rights are universal, indivisible, interdependent, interrelated and must be addressed in that manner. This observation does not deny the fact the human rights must be relevant to ethos of a geo-cultural space. Relativism has its limits in human rights. Murder of twins in Achebe's works, domestic terrorism against women in Okonkwo's household, the grotesque murder of Ikemefuna as human sacrifice are condemned as inhuman and repellent. The next chapter is the conclusion. It addresses how the abuses captured in the literary texts are responded to in the Constitution of Kenya 2010.

CHAPTER SIX

6 CONCLUSION AND RECOMMENDATIONS

6.1 Conclusion

This study was premised on the understanding that whereas there is a robust body of international covenants and domestic laws to promote and enforce human rights, the goal still remains a pipedream in Kenya. We noted that while it is generally held that *The Constitution of Kenya 2010* has elaborate provisions on fundamental rights and basic freedoms, a closer scrutiny reveals that the document still fails to truly capture the nature of an African society and thus continues to face implementation challenges. Our interest in this project has been to diagnose the problem that creates a gap between the law in the books and its reflection on the lives of the people it is supposed to benefit. We have demonstrated that the disjuncture between the Black letter law and law in reality is, in part, exacerbated by insularity of legal research as opposed inter- and trans-disciplinary cross-pollination. We have argued that piercing the veil of disciplinary insularity can popularize legal conceptions among the people.

We have challenged the conception of human rights law as Western and asserted that Africa has its own concepts of freedoms. Such rights are mainly group rights, socio-economic and cultural rights and civil and political rights in that order. We have argued that in as much as we may have group rights in our constitution, they are undermined by Western influenced individualistic ethos which relegate group rights to secondary status in terms of seriousness. It is our argument that scholarship in human rights has failed to benefit from African philosophy and thought system. Human rights agenda is still promoted with a colonial notion that it is not African but good for Africa. Colonial governments in Africa focus on what they refer to as the 1st generation rights on civil and political liberties. The very notion of first,

second and third generation rights is anomalous in discussing human rights law in Africa. It relegates Africa's conception of human rights to the footnote of human rights discourse. It is an attempt to re-colonialize and dominate human rights agenda with alien perspectives treated as the norm. A human rights framework grounded in African history and culture must retreat from Western individualism and reclaim African communitarian moral belief where basic rights and essential freedoms are protected through a prism of societal stability, progress and prosperity for all.

We argue further that the west is yet to understand how African communities comprehend phenomena and apply the same to life situations. Ontologically, African thinkers identify and name reality and then proceed to apply it to practice. African thinkers do not invest effort in defining and classifying terms for ownership. This is due to the fact that definitions of concepts go together with individuation and ownership of knowledge. Western scholars define reality that is common knowledge to Africa and claim epistemological breakthrough. To correct what amounts to intellectual neo-colonialism in production, control and application of knowledge, this study has rooted for understanding the nature of African society and using the same as a point of departure in discussing law in society.

We have demonstrated that for the law to be effective in social ordering, it must be understood, owned and applied by the people it is meant to serve. To construe the constitution as demanded by the law, we cannot rely on technical pronouncements by judicial officers alone; there is a need to communicate the spirit of the law as understood and lived by the people. This explains why we are interested in responding to questions such as: How do we discuss human rights law from an African perspective? Do we use the paradigms imposed by our former colonial masters or do we adopt new perspectives that resonate with African conception of rights? Where then do we place repugnancy principle when dealing with

African customary law? Can literature help to shed light on African society from the past and present? The study has been guided by social contract theory, socio-legal theory and critical realist theory. These theories drawn from the broader sociological jurisprudence allows for the understanding of the law within a given social milieu. The theories allow us to understand that good laws in books or tough enforcement regimes are not adequate for the realization of a just society for all. Laws are effective when they live in the hearts, minds and culture of a people.

In Chapter Two, we have demonstrated that Law is historical but not antiquity. Although common law rests on the past in terms of precedence, it is a past that it creates, not a circumstantial, complicated past. It is rooted in the past but forward looking in actualization. The constitutional historiography of Kenya has illustrated that legal rules, principles, conceptions and standards are created by concrete situations in organized human society. Tracing Kenya's constitutional development from 1884 to 2010 has confirmed that as a society changes, the law also changes to respond to changing demands. Using a three-step approach, we have explained that Kenya's constitutional historiography is dotted with several pitfalls during colonial domination and after independence. Several amendments to the independence constitution only worsen the plight of citizens. Using the law, literature and history triad, we have argued that understanding a constitutional moment in a country's history requires a multidisciplinary disposition. The best creative epochs in the history of a people, as Trotsky observed, is in the thick of a revolution. The best drama, fiction and essays in the history of any nation bloom in the heat of the struggle for freedom. Creative works that enrich resistance speak about the way individuals in oppressive, brutalizing situations use imagination to sustain life and maintain critical consciousness. In tyrannical situations, the capacity to imaginatively fashion actuality not present to the senses or observed may be the

only means to hope. Borrowing from Macgoye's famous novel, *Coming to Birth*, we have painted an optimistic picture of Kenya's constitutional development. Like Paulina, the heroine in Macgoye's novel, there is a strong optimism that *The Constitution of Kenya 2010* can address the yearnings of all Kenyans for a just, inclusive and equitable society. Our main concern has been that the promise of the new constitution may not be realized soon due to the disjuncture between the written law and the lived experiences.

Chapter Three has analyzed human rights from international law perspective to regional frameworks and Kenyan legislation. We have established that tremendous work has been done by the UN General Assembly and other agencies to put the human rights agenda at the top. This has seen the ratification of various treaties and optional protocols. These instruments have influenced regional charters like the ACHPR, Maputo Protocol on Women's Rights and the Children's Charter. We have also demonstrated that Kenya has borrowed heavily from the international law regime to firm its domestic human rights jurisprudence. Kenya has a robust human rights system as captured in the Bill of Rights, The Kenya Human Rights Commission and other supporting organs. The concern of this study is that in practice, the picture is not as promising as it is in the books. We argue that Kenya must now go beyond multiplication of treaties to internalization of human rights principles for expanded ownership. Most important, we suggest grounding human rights jurisprudence on African culture and Kenya's history as a way of capturing the spirit of the law. Culture is dynamic. It grows with society. Communities must participate in sieving out retrogressive practices and incorporating what works for them without undue influence, threat of force or misinformation by media. It is our view that human rights of Kenyans can effectively be protected by Kenyans using Kenyan laws that are firmly grounded on Kenya's history and

culture and not impositions by international organizations reluctant to embrace Africa's realities and knowledge systems.

Chapter Four has discussed the nature of African society. It has demonstrated that the disjuncture between the law in the books and the law in reality is occasioned by conflict of epistemologies and ontological frameworks that are employed to create legal doctrines. We have argued that slavery, colonialism and neocolonialism affects the oppressed long after political freedom. The west supports universalism to impose their ethos on the formerly colonized. Such laws create challenges in implementation. It is for that reason that Ngugi and other writers propose decoloniality as a philosophy and theory to correct insubordination of African thought and practice. We argue that situating African epistemology and ontology at the core of human rights jurisprudence can bridge the gap between the law in the books and the law in action. Chapter Five is the thrust of this project. It has demonstrated that Literature is a major player in the struggle for a new constitutional dispensation. This study has argued that literature has a major role to play in popularizing the spirit of the law. It has the capacity to explain legal issues in a way that resonates with a people's temporal conception of fairness. Writers, as poet-philosophers, are the tip of societies' conscience. They consider the recovery of the lost self-respect and dignity as the fundamental task that they must accomplish for their communities. They are women and men endowed with heightened sensitivities and acute awareness of the faintest nuances of injustice in human relations. Our analysis has revealed that, historically, African writers have been the vanguard in the struggle to restore African personality and dignity.

The proclamation of *The Constitution of Kenya 2010* had long been envisioned by writers such as Ngugi, wa Thiongo, Margaret Ogola and Marjorie Oludhe Macgoye in their oeuvres. Key provisions that protect human rights in the new constitution are a response to the quest

for a just and inclusive society that these writers have championed for decades. Of interest to us is the value that literature adds to human rights jurisprudence. We have established that while the law determines and regulates acceptable behavior in society by establishing standards, maintaining order, resolving disputes, and protecting liberties and rights, literature reflects operation of the law in people's daily lives. It mirrors law in reality. Furthermore, Literature is not just a mirror of law in society. It is an ultrasound system. It goes beyond reflecting law to interrogate the frameworks that sustain abuse of rights. Further, Literature facilitates critical analysis of structural inequalities and imagines new possibilities for the humankind. Literature does not end with imagining possibilities; it creates critical consciousness which is a prerequisite for change in oppressive laws.

Ironically, there still exists a gap between the promises of *The Constitution of Kenya 2010* and reality of life under it. Conflict between *the Constitution of Kenya 2010* and law in action is evidenced in *Republic V Mohamed Abdow Mohamed [2013] eklr*²¹⁷ where the person accused of murder was acquitted after his family approached the family of the deceased and reached an out of court settlement based on Islamic law and customs. This was a bold attempt by the court to make the law in the books speak to the law in action. We have also established that Mumbi Ngugi J. ruling in *L.N.W v Attorney General & 3 others [2016] eKLR*²¹⁸ fails to appreciate the cultural contexts in which children born out of wedlock may have the names of their 'fathers'. Whereas the ruling can apply with easy in a cosmopolitan environment, it would receive reverse effect in rural areas as such children would be stigmatized, especially where incest is involved. Similar conflicts arise in cases touching on Female Genital Mutilation (FGM) and other sexual offences such as early marriages, defilement and rape as

²¹⁷ *Republic V Mohamed Abdow Mohamed [2013] Eklr* <http://kenyalaw.org/caselaw/cases/view/88947/>

²¹⁸ *L.N.W v Attorney General & 3 others [2016] HC eKLR*

proved in case of *KL v Republic*.²¹⁹ Relying on *SMG v RAM*²²⁰ the study has shown how it is difficult to enforce the law prohibiting FGM in communities where girls still believe it is a rite of passage to womanhood. In this case, a 16 year-old girl confessed to the court that she had not been forced to go through FGM. She had gone through FGM to be a complete woman in the eyes of her society that valued circumcised women. The matter reveals lack of consonance between a people's way of life based on collectivism and laws written based on Western individualism. The discordance between written law and reality is not limited to sexual offences, probate and succession matters also bring out similar conflicts as witnessed in the *Re Estate of Joshua Orwa Ojodeh – (Deceased) [2014] eKLR*. There have also been cases of unlawful eviction contrary to Article 28 on the right to human dignity and Article 43(1)(b) on the right to accessible and adequate housing. Eviction of communities that have lived in forests under the pretext of environmental protection is a violation of rights enshrined in the international covenants and the constitution. The African Court on Human and Peoples' Rights had to intervene in 2018 to protect the rights of the Ogiek living in Mau forest. In May 2018 ACrtHPR ruled that the government of Kenya had illegally evicted Ogiek, an indigenous group from the Mau Forest and called for the protection of the rights of forest dwellers.²²¹

Our discussion of women writers' contribution to human rights discourse reveals that the role of literature in Africa is three-fold: to confront and break retrogressive patriarchal chains, deflate colonialist historiography and to suggest positive African alternatives as Wandia and Paulina do in *The River and the Source* and *Coming to Birth* respectively. It is our argument that gendered approach to human rights concerns calls for problematization of terms that sound positive but end up concealing marginalization in society.

²¹⁹ Criminal Appeal Number 18 of 2016, *KL v Republic* [2017] eKLR.

²²⁰ Criminal Appeal Number 66 of 2014 [2015] eKLR

²²¹ African Commission on Human and People's Rights v Kenya

We have also established that Ngugi's ideological stand point inhibits his ability to confront human rights violations objectively. Due to his Marxist ideology, Ngugi treats human rights in a selective manner. While he succeeds in condemning human rights abuses on Kenyan freedom fighters, he gives no or flippant attention to African and European women, men and children who are killed, raped, maimed because they are suspected of being collaborators or sympathizers with the colonial regime or comprador bourgeoisie. Ngugi's ideological monocle denies him a golden opportunity to rise above the limitations of sectarianism to illuminate human rights abuses on all sides of the struggle. By ignoring human rights abuses on the side of the victims, the writer betrays his role as a visionary.

This project has confirmed that law is not able to explain itself well to non-lawyers. Even when it employs simple English, it is not able effectively open itself up due to its long history of insularity. Law in literature, by illuminating violations of people's rights, creates awareness against injustices which, in turn, gives impetus to the struggle for freedom. Literature removes legal discourse from the scaring courtroom drama and the legalese to ordinary communication by ordinary people addressing ordinary conflicts affecting their interests. Literature opens the law for scrutiny and enrichment. Literature takes the justice system to the people, lays it bare, humanizes it, and enables people to understand its working in order to improve it. Literature aids legal theory and practice by simplifying legal issues and packaging them in simple language that people understand and associate with.

Dissonance between Law in books and Law in action is real. It is inspired by distinct and opposing philosophies, epistemologies, ontologies and humanistic ideals in the Kenyan society. It is a clash between a strong desire to borrow from the European and American legal systems and traditions while at the same time striving to maintain fidelity to African

ethos and communal ecosystem. The disjuncture is exacerbated by the fact that the law in the books rests on colonial and neocolonial superstructure of Western universalism while law in action derives its impetus and raison dieter from critical realism fed by the pedagogy of decoloniality. The elite and the wealthy are the main defenders of the law in the books school. They are tied to the colonial empire to protect status quo and property. The masses, popularly known in Kenya as Wanjiku, are keen to embrace new epistemologies of disobedience to the Euro-American ontological prism. They find refuge in critical realism as it supports law as lived experience.

6.2 Recommendation

The law is instrumental to peace, progress and prosperity. To uphold justice and defend dignity of human beings, it must be open to scrutiny and continuous enrichment by the common subjects of law. The study recommends that Kenya's human rights jurisprudence be grounded on African ethos to remain relevant. Lawyers and the public must also be grounded in Africa's history. Historical sense enables lawyers, elite, and the public to learn from the past in engaging the present. Kenya's constitutional history should be mandatory at the undergraduate level to equip students with the basic knowledge they need to know about Kenya. Legislation based on international law cannot change the trends in human rights development locally. We need to ground our laws in our culture, history and languages. Literature holds the key to the revival of interest in law and lawyers. It explains legal doctrines using narrative techniques that make technical terms simple, understandable and entertaining. Legal scholars should exploit the stylistic richness of language. To optimize the promise of *The Constitution of Kenya 2010* the law must open itself up to trans-disciplinary collaboration. Lawyers too, must interpret the law based both on the text and context. In that

way, it is possible to bridge the gap between Black letter law and law in action. This will allow Kenyans to benefit from the bounties of the Constitution of Kenya 2010.

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