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**SOCIAL INCLUSION FOR POVERTY ERADICATION:  
THE ROLE OF LAW AND LEGAL INSTITUTIONS IN  
KENYA**

A Case for the Street Children

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Rikkyo Institute for Peace and Community Studies

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Preface / Geoffrey Oduor Owuor 著「貧困根絶のための社会的包摂—ケニアにおける法の役割と法制度—ストリート・チルドレンの事例」に寄せて

Kenyan Constitution of 2010 contains a comprehensive list of basic human rights. And yet, on the streets of urban cities in Kenya, many children live in extreme poverty and remain marginalized from the mainstream society. What can the law do to bring about the Constitution's guarantees to the street children? What is the role of the advocates, judges and others who have the power to use the law to improve the social conditions? Mr. Owuor confronts these challenges by using two different approaches. One is theoretical. After exploring the notion of social inclusion, he argues that the policy makers should adopt more comprehensive and preventative measures to grapple with the root cause of the phenomena of street children. The other is the approach of more pragmatic lawyers. After reviewing the relevant legislation and legal doctrines, he critically examines some of the important cases in and out of Kenya and proposes a number of reforms to change the way the lawyers, judges and academics work to empower those people who live in poverty.

This working paper is the product of Mr. Owuor's deep studies and thorough thinking while he was a Williams Fund Scholar from September 2017 to March 2018. Throughout, Mr. Owuor was both highly idealistic and strenuously realistic in trying to fill the gap between the lofty constitutional ideal and the harsh reality on the street. Both Mr. Owuor and the supervisors at the College of Law and Politics are grateful to the Williams Fund and its board members for making his studies possible. They are also grateful to Rikkyo Institute for Peace and Community Studies and its board members for providing this venue of publication.

Professor Masayuki Tamaruya and Professor Chiharu Takenaka

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2010年に制定されたケニア憲法は、広範な基本的人権をケニアの人々に保障している。そこには社会権や経済権も含まれるものの、現実にはその実現は容易ではない。その最たる例として、ケニアの都市の路上には、多くの子どもが劣悪な環境で社会から排除されまま暮らしている。憲法が保障する人権を、ストリート・チルドレンが実際に享受できるようにするため、法は何ができるのか？法の運用に関わる弁護士や裁判官はいかなる役割をはたすべきか？この問題に対し、著者ジェフリー・オウオル氏は、理論的アプローチと法律学的アプローチの両面から取り組んでいる。論文の前半では、社会的包摂の考え方を軸に、個々の子どもへの対処に留まらず、その家族やコミュニティを含めた包括的な施策の必要性を説いている。論文の後半では、法律家として、ケニア内外の判決や法律家の議論を批判的に考察し、具体的な改革を提言している。

本論文は、オウオル氏がウィリアムズ主教記念基金研究員として立教大学に滞在した2017年9月から2019年3月までの1年半にわたる調査研究の成果である。こうした研究を可能にして下さったウィリアムズ・ファンド及びその理事の方々、また研究の成果を公表する場を提供して下さった平和・コミュニティ研究機構及びその理事の方々に対し、オウオル氏ともども指導教員として深く感謝申し上げます。

溜箭将之・竹中千春（立教大学法学部教授）

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## Introduction

This paper examines the role of the law in eradication of poverty through social inclusion of the marginalized people into mainstream society. Recognizing that social exclusion and poverty have an egg-chicken relationship, the paper argues that eradication of poverty must entail addressing social exclusion in all its forms. The gist of this paper is the argument for the respect and fulfillment of human rights especially the Kenya's constitutional provisions of socio-economic rights in articles 43 and 53 at the household level as a means of empowering and lifting out of poverty all the vulnerable and marginalized groups of people.

The phenomenon of street children in Kenya has been used in this paper representatively to highlight the extent to which a large segment of the society has been left behind in the country's economic achievements because of their deprivation. The street children represent the squalid conditions, deprivation and dispossession most Kenyans endure in the informal urban settlements and rural areas in Kenya while the minority elites enjoy the country's riches with indifference and shameless opulence. The presence of the children in the street is also a manifestation that poverty cannot be eradicated by sheer economic theories of demand and supply. Instead, decisive, deliberate and targeted, comprehensive and inclusive development programmes must be undertaken by the State to develop the capabilities of the people to make it easy for them to break away from the cycle of poverty. The decades-long prevalence of the phenomenon of the street children is a wakeup call that isolated approaches that have been adopted to deal with the problem have failed and that more inclusive approaches that addresses the root cause, that is, poverty at the family or household level where the street children come should be adopted instead.

The paper, too, acknowledges the role of law as a tool for social engineering in the society and argues that appropriate legal instruments and focused implementation of the same are the single most important mechanism to eradicate poverty in Kenya. The transformative 2010 Constitution of Kenya must be implemented in its letter and spirit in order to realize the aspiration and the visions of Kenyans that it engenders thus; a society of equality, equity, inclusiveness and social justice.

The State, both at the national and county levels, which is the primary duty bearer for the attainment of the fundamental human rights and freedoms under the 2010 Constitution of Kenya must observe, respect, promote and protect them as encapsulated in the bill of rights. The courts and the legal profession which the Constitution consciously put as strategic and key players in the reading and interpretation of the law must rise to the occasion and take advantage of the opportunity presented by the 2010 constitutional dispensation to purposefully, sensitively, and progressively apply the laws to contribute to, and put the country in the appropriate development trajectory.

## Definition of terms

The term “**street children**” is one which is contested as a catch-all term that may refer to an array of children with varied identities and relationships with the streets. A narrow definition may leave out some children who would otherwise fit in the categorization. A far wide a definition may include a category of children who, though needy, do not really fit the identity of street children.

United Nations Children’s Fund (UNICEF) (UNCHS, 2000, p. 90) describes street children as boys and girls under the age of 18 years for whom the “street” (including unoccupied dwellings and wastelands) has become home and source of livelihood, and who are inadequately protected or supervised. Smeaton, on the other hand, uses the phrase ‘*detached children*’ to describe children and young people who are away from home or care for lengthy periods of time; who live outside of key societal institutions, such as the family, education and other statutory services; who do not receive any formal sources of support; and are self-reliant and/or dependent upon informal support networks’ (Smeaton, 2005, p. 6). These two definitions fairly describe the identity of the street children in Kenya.

**Social Exclusion**, too, is a phrase that connote to varied conditions of varied classes of people in a society. The phrase was first used by Rene Lenoir<sup>1</sup> to connote the categories of people like the poor, the mentally and physically handicapped, suicidal people, the aged invalids, abused children, substance abusers and so on.<sup>2</sup> In this sense, social exclusion meant lack of solidarity (rupture of social bonds) and living outside the circles of the normal activities in the society. Through passage of time, the meaning of the phrase has greatly evolved to encompass a lot of different kinds of disadvantages individuals or groups of people experience in the society in which they live.

In the recent times, Social exclusion has been understood in contradistinction with poverty as cause and consequence of each other. Therefore, social exclusion is not merely living in the periphery of a society<sup>3</sup> but a combination of both economic and social deprivation. This view is shared by Amartya Sen<sup>4</sup> who argues that being excluded from social relations may lead to other forms of deprivations as well, and further limit the living opportunities of the excluded. Being excluded from employment

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<sup>1</sup> Lenoir, R. (1974). *Lex Exclus: Un Francias sur Dix*. 2<sup>nd</sup> ed. Paris: Editions de Sueil.

<sup>2</sup> *ibid*,

<sup>3</sup> *ibid*,

<sup>4</sup> Sen, A. (2000). “Social exclusion: Concept, Application and Scrutiny,” Asian Development Bank Paper No 1at pp. 3-49

opportunity or access to credit, for example, may lead to economic impoverishment that may, in turn, lead to other deprivations such as undernourishment or homelessness. Hence besides poverty, lack of employment and income, and poor social relationships, social exclusion may encompass lack of basic needs such housing, health services, education and clean and safe water, and lack of legal redress thereof.

**Social inclusion**, on the other hand, would connote the reversal of social exclusion. Since social exclusion is both structural and social problem, social inclusion would entail removing the all barriers to achieving equality in a society. Policy and program approaches that can contribute to removing these barriers include attention to identifying the excluded, the causes of their exclusion, and appropriate context-specific responses.<sup>5</sup>

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<sup>5</sup> Overview of Gender Equality and Social Inclusion in Nepal. Mandaluyong City, Philippines: Asian Development Bank, 2010. (Wangenge, 2004)



## CHAPTER 1

# THE STREET CHILDREN IN KENYA

### An Overview of the Street Children in Kenya

The street children of Kenya comprise of various categories of children. There are those who live in the streets and those who come to the streets to “work” and go back to their homes in the evening. The major difference between the two categories of children is that the latter still have some form of contact with their families while the former category is homeless. In accordance with the above definitions, the first category of children has been referred to as children ‘of the street’ while the second category has been referred to as children ‘on the street’ (Benitez, 2011, p. 7). The street children consist of both boys and girls of various ages ranging from infancy to 20 years old young adults (although, there are also adults who make up the street families) from different ethnic groups in Kenya. Most of the street children are concentrated in Kenya’s major cities such as Nairobi, Mombasa, Kisumu, Nakuru, Eldoret, Kakamega. A great number of them have either dropped out of school or have never attended any school. The latter category mainly consists of children who live in the street full time and have no family links. There are, among the former category, others who are still schooling but are truants and spend most of their time on the streets.

### Statistics on the Street Children

There is no official number as to the exact population of street children in Kenya. Conflicting figures have emerged since the problem of street children came to the open way back in the colonial period. When the phenomenon first emerged in the 1970s, it is believed that there were some 115 children in the streets of Nairobi (Shorter & Onyancha, 1999). In the same year, another study estimated their number at 40,000 with fairly half of them concentrated in Nairobi (Wangenge, 2004, p. 20). In 1999, it was reported that there were about 50,000 homeless children in the streets of Nairobi alone. In 2001, a report estimated that 300,000 children lived and worked in the streets. Nonetheless, a population of 250,000 -300,000 has been the common currency in the demographic data on street children in Kenya for nearly two decades (Muthoni, 2017). The global figures regarding the population of the street children are likewise problematic – often put at over 100 million (Benitez, 2011, p. 7). The sketchiness of the data on the demography of this section of the population may be explained by the slackness and the indifference with which the society treat the street children. Whatever little attention that they get is often triggered by emotive, but sporadic, reporting of the menace by the media. Be as it may, there is no denying that the numbers of children loitering the streets of Kenya’s cities have been escalating with margins far beyond the coping ability of the government and other stakeholders.

## **The lifestyle of the Street Children**

In the streets, these children engage in a smorgasbord of activities to eke out a living and as a means of survival. *Chokora(s)* or (*grubbing-children*) a derogatory name given to them in Kenya is an apt descriptor of all that is the lifestyle of the street children. The children make their living by scavenging from the garbage, grubbing for scrap and waste paper to sell, begging and soliciting, hawking, carrying loads for business people, fetching water for people with restaurants in exchange for food, washing cars, shining shoes etc. For some girls, survival prostitution is all they can count on. It is important to note that some of the *Chokoras* engage in these activities to supplement their families' income. Many engage in risky behaviour, developing a subculture of their own and adopt street as both a workplace and habitat (Black, 1993). Those without family links sleep in abandoned buildings, under bridges, in doorways, alleys and public parks.

Quite frequently the street children are treated to horrendous and ghastliest experience while in the street; often getting into altercations amongst themselves, get stabbed or beaten up. They are run over by cars, get shot by police while committing or suspected to have committed a crime. In the extreme, some of them are poisoned by hate-filled members of the public (Kilbride, et al., 2000, p. 70). These kinds of reaction and behavior from the members of the public towards the street children are informed and influenced by the stereo-type held against them (Salazar, 2008, p. 39). People, as a matter of course, associate them with criminal activities such as pick-pocketing, theft, robbery and violence. At times, the public expresses fear and shun them whenever they come into contact. When they are caught while committing even the pettiest of crimes the public lynch them. Police and other law enforcement agencies like *Kanjo* (*county/ municipal council security and law enforcement officers*) invariably receive public praise and approval for manhandling and assaulting the street children as they are considered to be reducing crimes.

The need to survive forces even the law-abiding ones to commit felonies or other illegal activities. At the very least, they are forced to leave by deceit, thievery, prostitution and violence (Lusk & Rizzini, 1995, pp. 395-396). However, there is no fast evidence that all street children engage or organize criminal activities. It is therefore wrong, a UNCHS report in 2000 implores, to assume the all of them commit crime all the time (UMP, 2000). The report adds that when such crimes happen, it is often because of opportunity rather than disposition. The extreme deprivation and social exclusion create opportunities for criminal involvement for these children. The street children in Kenya are not only deprived of childhood but also the prospect for a bright future.

### **The reasons why the children join the Streets**

The causes of children taking to the streets are attributable to push and pull factors. Poverty at home, broken families, addicted or alcoholic parents, violence at home and school, and the death of caregivers are some of the factors that push the children into the streets. Poor relations at home leading to frustrations, overcrowding, search for employment as there is no money to continue education, often coupled with encouragement by parents to go to the street in hope of government support makes street life a preference (Black, 1993). Some girls who are sexually abused at home flee to streets while others join the street because they cannot stand the moral decadence in the families like parents brewing illicit brews such as *Chang'aa* (*home-brewed and distilled liquor*) or the mothers bring boyfriends at home (ANPPCAN, 1995). Sometimes, they feel unwanted while in other times, the home is distressing or they are left by themselves without any support and care from adults (Black, 1993). Consequently, the street seems a better option for some of the children.

They are pulled by the prospects of freedom of movement and fairly loose code of conduct in the streets. For some, the streets are chummier than homes because of good fellowship they have with their friends already in the streets with whom they play and share a lot. Drugs such *Miraa* (Khat), Bhang/Marijuana, Glue sniffing has also pulled so many children to the streets. Money earned while at the streets, hand-outs and foodstuffs offered by generous people, too, influence some of the children to go to or remain in the streets.

By and large, the majority of the children find themselves in the streets because of material and moral deprivation at home (Black, 1993).

## The Context of the Phenomenon of the Street Children and Social Exclusion in Kenya

The phenomenon of the street children in Kenya is as much the result of exclusionary practices of the colonial period as it is the present-day social exclusion in the society. Even in contemporary society, the problem of the street children still reflects the pattern of exploitation emanating from the colonial period in the 20<sup>th</sup> century. Child poverty, in Kenya, especially that of the street children, is a product of exclusionary practices that have been propagated and cajoled by the powers that be since colonial time through to post-independence Kenya. It is no wonder there are no European or Asian street children in Kenya (Kilbride, et al., 2000, p. 47), and, in deed a very small number from rich families.

The marginalization, discrimination and unbalanced regional development in Kenya ushered in the era of rural-urban migration giving rise to overcrowding and informal settlements in the urban centres (a fertile breeding ground of street children) and restriction in access to resources and opportunities. The deprivation and lack of social services among the families and households in the informal settlements is a major contributor to the growing numbers of children in the streets. The enduring poverty among the informal settlers has typically driven masses of children from homes to the streets.

In order to put this into perspective and to give a clear view of the relationship between social exclusion and poverty and genesis of the problem of the street children, this section will begin with a review of the organization of the traditional African family unit. It will demonstrate that the Traditional African family as a social and economic unit had as part of its structure an informal social protection mechanism which hinged on the integration of every member into its socio-economic organization. However, the disruption of this social set up, induced by the exclusionary practices during the colonial time and carried on in the post-independent Kenya, contributed immensely to the emergence and persistence of the problem of the street children in Kenya.

### **The Traditional African family**

A traditional African family is comprised of the nuclear and the extended family members based on ancestry and other forms of kinship ties such as marriage and adoption. This makes a typical traditional African family to include among others the father, mother, siblings, grandparents, uncles, aunties, cousins, nieces and the in-laws from both sides of one's parents. Hence the social organization in an African conception is premised on an expansive network of kinship groups that creates ties between a person and all those with whom he/she is related to by blood and marriage and, in some cases, through adoption.

The foundational values and principles of this formation among the African traditional communities was the mutual and shared responsibilities, and a collective relationship of the members in terms of

caring and looking out for one another to avoid vulnerability of any of the members (Suda, 1997, p. 200)<sup>6</sup>. There is a sense in which the traditional African communities invested in solidarity and communal life because it provided security to individual members and the community as a whole. There are even some cultural practices in African communities which were intrinsically connected to creation of an internal social support network within the family. The practice of polygamy, for example, ensured large membership in a family which in turn provided some sort of safety net. The dividend in polygamy was that the children of a particular wife would be cared for by her co-wives in the event that she left some behind at her death (Suda, 1997, p. 200). Besides and, perhaps most importantly, children born to family belonged not only to the biological parents alone but also to every member of the community. Hence, caring and upbringing of children was a communal affair. All happiness, successes and woes are shared. This type of organization and shared ownership of children ensured that orphaned children were not neglected at the death of parents.<sup>7</sup>

In the economic sense, the family was a unit of production, consumption, reproduction and accumulation of resources (Chirozva , et al., n.d.; Chirozva , et al., n.d.). The economy of the villages was built on the family farms and off-farm activities which involved members working in concert and together for the subsistence and survival of all of them. Even the practice of polygamy already discussed above had economic consideration, that is the provision of enough labour force to participate in economic activities such as cultivating the land, handicraft, hunting and gathering etc. Land and other properties were owned communally, farms were cultivated and crops harvested communally. Every member of the family would count on the pool of the family and, sometimes, the community resources and wealth to offset social and economic risks.

In general, social responsibility transcended individual relatives and extended to all those who shared a common and traceable ancestry. Besides, this collective responsibility brought about reciprocity which was important in bringing equilibrium in the use of resources by families. The notion of private ownership and individual rights is foreign to African culture. The stability brought to the family

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<sup>6</sup> Collette Suda, remarks that, "...the Traditional African family life depended to a great extent on kinship relationships and support networks across extended family lines. In keeping with the African cultural tradition, close relatives were expected to take the initial responsibility to provide needy children and other poor members of the family with food, clothing, shelter, health care and education... Among the Luo of Western Kenya, for example, if a parent died, the surviving members of the extended family were often close at hand to ensure that the children and other dependants were cared and provided for. Part of the obligation of the extended family system was to assist those who were in need."

<sup>7</sup> Ibid,

institution by this social bond and collective consciousness is very important in absorbing economic shocks that would otherwise tear the families apart. Indeed, Kilbride and Kilbride argues, that family support system in a way forms a barrier against child abuse and neglect. The support system inherent in the African traditional family system, no doubt, reduced the rate of child destitution.

### **The colonial period social exclusion**

The genesis of the problem of street children in Kenya was heralded by the arrival of the British colonialists and their segregative and discriminative policies and practices, which fundamentally and drastically altered the traditional African family organization. The colonial policies which were mainly engineered for economic exploits had, too, the unintended consequences of severing the fabrics of social organization and cohesion. Colonial laws and policies not only exploited the economic and human resources but also created social classes of the privileged whites and Asians viz a vis the underprivileged Africans – who were, for most purposes, discriminated, segregated and barred from economic progress through denial of rights being cut from access to opportunities.

The indigenous people were mainly engaged in the activities of the protectorate in as far as they provided cheap or, as it happened so often, free labour in the White-settler farms. The British colonialists, in 1901, under the pretext of the need to finance the administration of the colony introduced a tax system which required Africans to pay taxes to the colonial government (Kinuthia, 1990, p. 62). The main purpose of taxation, as it turned out, was to draw the Africans out to supply their labour in the white settler farms. The tax policies such as hut tax placed an overbearing financial and labour burden on African households. The African families which hitherto depended and stored their wealth in the form of crop and cattle ranching were forced to work or send their household members to the European plantations to earn money to meet their tax obligations. Where the money earned by the household was not enough to set off the tax obligation, children, too, were sent to supplement the household's capacity. The brunt of the tax burden was exacerbated by the alienation of land. As droves of Europeans came to Kenya, large tracts of land were alienated from the Africans to accommodate and settle the white man. By 1929, well over 7,173,760 acres of land had been alienated from Africans (Kinuthia, 1990, p. 57). Areas skirting Nairobi were the most affected by this policy. Africans were pushed to reserves with little or no land to cultivate.

Consequently, a class of poor wage labourers was created – whose only way of eking a living became patronizing European plantations intermittently for wage labour. Others became squatters – for whom the Europeans emphasized the need for their wives and children to work. Subsequently, out of desperation parents began neglecting their children in the villages or at times had the children accompany and work alongside them. This was unmitigated by the colonial labour laws which did not

prohibit the employment of children. The Master and Servants Ordinance, 1906 (as amended in 1910) permitted employment of children as young as 8-year-olds<sup>8</sup>. This legislation was, mostly, exploited by the missionaries to engage children in domestic labour without pay behind the veil of providing education (Dubow, 1982).

In the 1950s, at the height of resistance and Kenya's independence struggle, the colonial government broke up families by imprisoning men and women, or by taking them away to concentration camps (ANPPCAN, 1995). The children were left helpless and wandered off into the streets of Nairobi hoping to find means of survival.

This far it is apparent that the colonial practices ushered in unequal treatment of Africans which led to the denial of access to opportunities and resources. The impoverishment of the African families and their exposure to vagaries of hardship, in turn, led to the emergence of the street children. This corroborated by the fact that there are no European or Asian street children in Kenya (Kilbride, et al., 2000, pp. 39-93).

### **The post-independence and the present-day exclusion**

The legacy of exploitation of the colonial period has endured in the political, social and economic spheres of Kenya to date. When the British masters yielded to the Africans' demand for self-governance, the Kenyan elites and liberation leaders who took over from them continued the exploitation and the impunity of the former erstwhile exploiters. The only difference is that the exploitation and exclusion have taken the regional, ethnic, nepotistic and elitist face, and then augmented by grand theft and embezzlement of public resources. The *modus operandi* has remained that of favoritism and spatial allocation of the public resources; inequality, inequities and social injustices, discrimination, marginalization and the infamous attitude of "*it is our time to eat*" by those who wield the power, further, leading to the impoverishment of families.<sup>9</sup>

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<sup>8</sup> A new clause was introduced to the Ordinance which referred to apprenticeship. The clause was borrowed from South Africa where it had been used to recruit children into the labour force. Section 12 of the Ordinance stated, "A father or in case of a fatherless child, the guardian of an Arab, or a Native above the age of nine and below the age of sixteen years, may, with the consent of such a child testified by his or her execution of the deed of apprenticeship, apprentice him to a trade or employment in which Art or Skill is required or as domestic servant, for any term not exceeding five years."

<sup>9</sup> Namasaka Martin (2017), explains that development indices in different regions of Kenya rises or falls depending on the region's political relationship who those in power. He gives an account of how Moi's regime, the president and his Tugen tribe '*Kalenjinized*' Kenya's civil service. During Kibaki's regime the Cabinet was stocked by the

Since independence, Kenya has been led through bad governance where the elites and dominant groups mistreat and oppress the minorities and the weaker groups who happen – taken together, to be the majority population. This is epitomized by unequal treatment of men and women; domination by a few ethnic communities in the public service, state corporations and parastatals; the glaring and ever-widening gap between the rich and the poor and, urban and rural poverty,<sup>10</sup> the historical as well as present property and land injustices.

As a result of the foregoing, Kenya has experienced some of the worst ethnic, social and class tension often culminating to violent and fatal conflicts between communities, clans; and forceful and illegal evictions of communities and families from their homes or ancestral lands. These kinds of conflicts have their end result as the displacement of masses of people, loss of property, separation of families and orphanage and neglect of children.<sup>11</sup> Examples can be given of the 1992, 1997, 2003 and 2007 post-elections conflicts and the endemic land-related clashes between ethnic communities, clans and families in different parts of Kenya. The 2007 post-election violence alone led to the death of some 1300 people and displacement and homelessness of about 600,000 people – a great deal of whom were children.

The inequality and uneven distribution of national resources have also led to rural-urban migration thereby outstretching the capacity of major cities like Nairobi, Kisumu, Mombasa, Eldoret, Nakuru and other. Overurbanization and skewed distribution of resources has long been touted as the major cause of poverty and social exclusion (Kenya Social Exclusion Analysis Report, 2014, p. 1). The perception of the availability of better life in urban centers makes hordes of people to migrate from rural areas. This leads to overcrowding and emergence of slum dwellings. The rural-urban migration has been so rapid that government and local authorities have been simply not been able cope up in terms of offering employment and welfare services.

All the poor population in the villages view the thriving urban centers as the alternative for a better life. Parents send their children to live with their relatives who are already in the cities. Upon arrival in the

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Kikuyus, infamously known as '*The Mount Kenya Mafia*'. "*It's our turn to eat: Ethnicity and corruption in Kenya*" LSE International Development. Published 2017/12/05

<sup>10</sup> In *Kenya Social Exclusion Analysis Report, 2014* it argued that in urban areas disposable income is about 10 times higher than in rural areas. VSO Horn and East Africa Region. August 2014.

<sup>11</sup> Kilbride et al, (2000). *Street Children in Kenya: Voice of the Children in Search of Childhood*. Greenwood Publishing Group at page 51



cities, these children are, often times, converted to domestic workers and house helps by their hosts. Confronted with a myriad of challenges and hardships at their hosts, they often flee into the streets to chart an “unencumbered” life for themselves.

The successive governments of Kenya have never been so keen on improving the living conditions of the slum (poor urban) dwellers. For instance, Kenya set its first medium-term strategy 2009-13 for achieving Vision 2030 in which the government promised to increase housing units from 35,000 to 200,000 annually. The government delivered only 3,000 units of houses for whole of this period.<sup>12</sup> The steady rise in the shortage of housing in the country testifies to the level of indifference by the government to address the matter. In 1967 when the government of Kenya first developed its affordable housing plan there was only a shortage of about 7,000 units in the urban areas. The slum settlements face profound unemployment, unstable land tenure system, acute deprivation and they are hardly involved in the decision-making process on issues that affect their lives. At the whims of the powerful citizens, sometimes, in collusion with the government, they are forcefully evicted from their dwellings without any form of compensation and are left exposed to poverty, disease, illiteracy and severe deprivation.<sup>13</sup>

The failure of the government to address the problems of the poor families in the cities has confined them to poverty and made it impossible for them to obtain a livelihood, and care for their children. So many of them end up as squatters in the streets giving rise to street families. Some children run away from home because the home cannot provide shelter and food for them. In other cases, the children end up in the street in an attempt to escape from the abuses of the frustrated parents who deflect their frustrations to the children by mistreating or being violent to them. The presence of children in the street is an indicator as well as an outcome of forces operating high in the economic firmament.

### The Bigger Picture: Street Children as a Manifestation of the General Social Exclusion and Poverty in Kenya

The plight of the street children is not only a child-related issue, but a factual statement about the loose and perilous state of the contemporary familial and societal bonds. Their presence in the streets is one

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<sup>12</sup> Cytoon Report, 2018. “Affordable Housing in Kenya” @ <https://www.cytonn.com/topicals/affordable-housing-in-kenya> accessed on 2018/09/08

<sup>13</sup> *Mitu-Bell Welfare Society vs Attorney General, Kenya Airport Authority and The Commissioner of Lands, Petition No 164 of 2011*, the airport authority used the police to evict and demolish the property of the slum dwellers in Mitumba village in Nairobi.

of the most conspicuous symbols of economic woes and poverty that plague more and more Kenyan families. The household economic woes and poverty are occasioned by historical and persistent marginalization and exclusion of enormous groups of people from the mainstream society, weak and inadequate social protection programmes and policies in the country. Divorced from a stable social environment, the children easily descend or are led into petty thieving, which often develops into serious criminality. This provokes extreme reactions from the rest of the public thus pushing them further from society.

Rather than approaching the problem of the street children from socio-economic vantage point, the society, mostly, view their problem as delinquency and/or psychological. The latter perspectives obscure the fact that the children are victims of exclusion, poverty and human rights violations who require full protection of the law. They are alienated from mainstream life and hardly have a social status in the larger society (Wangenge, 2004, p. 31). They have no access to formal education, basic services like clothing and shelter or family affection, their nutritional and health status is unsatisfactory – they have infrequent medical care, lack bathing and toilet facilities. The children are exposed to health hazards due to unsanitary surroundings and harsh weather conditions. They are not only deprived of childhood but also the prospects of a better future.

The plight of the street children calls for heightened vigilance, greater protection and increased advocacy for constitutional guarantees of inclusion, equality, social justice, and economic and social rights by key players including, but not limited, to the State, legal practitioners, human rights groups and Civil Society Organizations. In the absence of strong and coherent social protection policies and large-scale poverty eradication programmes especially among the poor urban settlements where the majority of the streets children emanate, poverty situation in the country would persist and perhaps, worsen. Needless to say, informal urban settlements have long been ignored in social services provision and the majority of the dwellers in those areas do not have a clear and legally protected land tenure. Their claims to tenure are, often, considered illegal and authorities often resort to forceful evictions and demolition of their property resulting in loss of livelihood, homelessness, community support systems, separation of families which are direct cause of children taking to the streets (see the case of *Mitu-Bell Welfare Society vs Attorney General and 2 others [2011] eKLR*, in which a whole community of Mitumba Village in Nairobi was evicted from their habitat by Kenya Airport Authority in collusion with law enforcement agencies in 2011. The villagers lost their dwellings, business and social amenities like schools and clinics).

The phenomenon of street children in Kenya, I contend, has been the result of social exclusion. Social exclusion in Kenya is variedly present in political and socio-economic spheres whereby so many have

been systemically excluded through deprivation and unequal access to opportunities. The sum effect is that the traditional and, indeed, the ideal family structure and formation that held people together in social networks has been upset. It suffices to mention that the family unit is the most fundamental aspect of social cohesion and integration into the society. Consequently, upsetting the family formation leads to disintegration and ultimately exclusion of people. Needless to say, the major victims of the disintegration are children to whom the life in the family becomes hostile and inhabitable. The home, then, is riddled with inadequacies in terms of space, peace, safety, and perhaps, the livelihood and survival altogether. Inevitably, the children move out of the family fleeing for 'safety', 'protection', 'comfort' in the streets.

The antidote to the phenomenon of street children is the restoration, or rather re-establishment of strong family units – able to support the children through social inclusion, respect and promotion of human rights especially the socio-economic rights.

# SOCIAL INCLUSION FOR POVERTY ERADICATION

## Introduction

In the previous section, it was determined that children move to the streets in response to a variety of social and economic problems which render the homes and the family environment hostile and unconducive to the needs of the children. The reasons are usually varied but the major one is the household poverty which incapacitates the parents—who are the primary caregivers. The social support networks that, hitherto, provided protection to the less privileged within the communities have likewise been ruptured by the ever-worsening economic conditions. The extended family members are no longer willing to assume more responsibilities of caring for their vulnerable or underprivileged kinsmen.

This section proposes that socio-economic empowerment of the parents, families, households and communities is key to integrating the street children back to the society and putting to an end the endemic phenomenon of the street children. This is because children mostly live off their parents' fortunes on whom they depend to provide them with the necessities of life. Destitution at home inhibits the children's ability to enjoy their rights and entitlement, that is, the right to proper upbringing characterized by love and care, safe and sanitary environment, nutritious food, clean water, appropriate education and best attainable standard of health care. As such economic empowerment, especially those which are directed at the households are far more productive and sustainable in the realization of rights of the child. Moreover, empowering the households not only enhances the capacities of the parents, as important actors in the child protection system, to raise children responsibly but also guarantees an all-inclusive benefit to all categories of children. (Kenya, 2013)

## The Relationship between Social Exclusion and Child Poverty

Whereas exclusion and poverty do not, conceptually, mean the same thing, in reality, there is a substantial overlap in the understanding of the two terms. Many a time, they are normally discussed interchangeably.<sup>14</sup> Sometimes, exclusion and poverty have been understood as the cause and effects of one another (Sen, 2000, pp. 3-54). In recent times, poverty has been understood in terms of

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<sup>14</sup> Spicker Paul, 2003. "Exclusion and Rights" points out that exclusion is not poverty. Poverty refers to material circumstances, economic resources and social position. It could refer to material need, standards of living, lack of resource or relative deprivation. Exclusion is primarily understood in terms of social relationships; people being excluded when they are not part of relationship that make up a society. In *"Law and Poverty: The Legal System and Poverty Reduction."* CROP International Studies of Poverty Research. Editors Lucy Williams, Asbjörn Kjonstad & Peter Robson at page 124-136.

deprivation, denial and inability to participate in the day-to-day activities in the society in which one lives. Social exclusion, on the other hand, is seen not just in terms of levels of income but also in terms of such matters as health, education, access to services, housing and debt (Spicker, 2003, pp. 124-131).

As a result of these prevailing circumstances, social exclusion has been, widely, understood as synonymous to poverty and deprivation. Social exclusion also means the inability to exercise social rights of citizenship, including the right to a decent standard of living.<sup>15</sup> Therefore, social exclusion is not merely being cut from the mainstream society or the processes that lead to an individuals or group of individuals being excluded from participating in the activities of the society in which they live. The term connotes, too, to economic and social deprivation. Extermination, exile, abandonment, ostracism, shaming, marginalization, segregation, discrimination among others as some of the mechanism of exclusion (Silver, 2007, p. 4419). The results of social exclusion include the resurgence of homelessness, urban crises, rising long term unemployment and persistently high levels of poverty etc. (Tiemann 1993).<sup>16</sup>

The phenomenon of street children in Kenya emanates mainly from the socio-economic conditions of the people who are tasked with the care and providing for the children. A vast majority of Kenyans are poor and unable to meet their daily needs.<sup>17</sup> The poor in Kenya are, mostly, found in the villages and informal settlements in urban slums like Nairobi's Kibera, Korogocho, Mathare, Kayole among others. In Kisumu, they occupy underdeveloped areas such as Obunga, Nyalenda, Manyatta, Kondele etc. They live in an acute shortage of essential amenities like housing, water, health and sanitation facilities and education opportunities. These are not, particularly, the ideal conditions for bringing up children. The children grow up without care, inadequate nutritious food, no clothing, crowded houses and poor or with no health care services. The children of these families are mostly neglected because the parents are occupied by other economic activities.

As was explained in the previous section, when the children are neglected and not provided with the basic needs they wander off to the streets. Even in the streets the living conditions of the street children is a wretched one. They lack shelter – most of them spend their nights in open spaces such as the

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<sup>15</sup> Silver Hilary, "Social exclusion" Blackwell Encyclopedia of Sociology, 2007. Edited by George Ritzer

<sup>16</sup> Quoted in Spicker (2003), "Exclusion and Rights" in 'Law and Poverty: The Legal Systems and Poverty Reduction.' Crop International Studies of Poverty Research. Editors Lucy Williams, Asbjörn Kjonstad & Peter Robson at pg. 125.

<sup>17</sup> The rate of poverty has been estimated at about 58 percent of the population.

pavements and verandas of city buildings, under the vending stalls, abandoned buildings, on the doorways, under the culverts and bridges etc. which is not only insecure but also horrible during inclement weather. The street children do not have reliable sources of income and, often, go hungry, cannot receive medical services in case of sickness, can't buy clothes and so on.

While in the streets, the children engage in criminal activities such as pick-pocketing, thievery, violence as a means of survival. The practices make them enemies with the public hence excluding them the more. The public scorn, hate and responds to them with violence (ANPPCAN, 1995). Cases have been reported in which the street children have been poisoned, lynched, ran-over by vehicle and police mete violence against them. More often, in urban centers, the attitude towards the street children oscillates between indifference and hate. This type of treatment has worked to push the street children even further from the mainstream society. There is, also, bad blood between the street children and the ordinary people who have labelled them with derogatory names such as "Chokora." Other people have a natural fear for the street kids because of the despicable and criminal labels they have in the public eye. Labelling or "othering" has been recognized as an exclusionary practice with which the dominant groups in society to justify inequities, block access to opportunities, gag voices and break the moral rule of social relationships viz-a-vis the subordinate groups (Eyben 2004, quoted in (Kan, 2012, p. 12)).

Intermittently, the government through the city and municipal council police rounds up the street children and forcefully take them to the detention facilities.<sup>18</sup> In other times, they are arrested and charged in courts of law with offences ranging from petty ones like pick-pocketing, larceny, disorderly conduct to more grievous ones such as robbery and rape. Convictions, usually, land them in the Borstal institutions or prisons. The street children do not have a good rapport with the police or the council askaris. Often, their encounters are a cat and mouse relationship. The law enforcement offices, too, perceive them as delinquents, psychotics and offenders (United Nations, 2007). Sadly, the street children who fall victims of human rights violations cannot report their aggressors.

The conditions of the street children not only deprive them of the opportunities enjoyed by other children from privileged families but also compromises their future access to opportunities. Their conditions exclude and condemn them to joblessness. For instance, the street children and other vulnerable children cannot benefit from the free and compulsory education, or from health care

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<sup>18</sup> Accounts have been documented of the confessions given by the street children that they do not like the rehabilitation centers because the centers are abusive and the conditions are deplorable. Many of the children sneak out of the centers soon after their admission.

services such as vaccinations and immunizations, to which are they equally entitled to like other Kenyan children. The street children do not have the adult supervision and guardianship that is necessary to ensure they attend schools regularly or take them to hospital for medical attention.

### General Poverty Eradication Strategy

In general, several strategies have been advanced in the poverty reduction discourses; for instance, the United Nations Committee for Development Planning declared poverty reduction through '*accelerated development, improved income distribution, and other social changes including employment, education, health and housing as the paramount objective of an appropriate international development strategy*'.<sup>19</sup> The World Development Report of 1990 acknowledged that a successful attack on poverty need simultaneous approaches from three fronts i.e. labor-intensive economic growth that generates employment and income for the poor; development of human capital through education, health and nutrition to allow them to better exploit the opportunities created by economic growth; and social safety nets for those among the poor who cannot benefit from the above two due to their physical and mental disabilities, natural disasters, conflicts and physical isolations.<sup>20</sup> A similar view is expressed by the Asian Development Bank's Poverty Reduction Strategy (Deolalikar & Pernia, 2003, pp. 13-38).<sup>21</sup> The strategy explicitly pinpointed the importance of pro-poor development policies and a requirement of good governance to achieve them. In its World Development Report of 2000, the World Bank put forward a new analytical framework based on empowerment, security and opportunity to attack poverty.<sup>22</sup> The empowerment entails enhancing the capacity of the poor to influence the state's institutions that affect their lives, by strengthening their participation in political processes and local decision making; security entails protection of the poor against adverse shocks through proper management of macroeconomics and more comprehensive safety nets; and opportunity entails

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<sup>19</sup> Cited in Deolalikar Anil B. and Pernia, Ernesto M. (2003) "Poverty Reduction Approaches and the Role of Political Institutions" in Poverty, Growth, and Institutions in Developing Asia. Edited by Ernesto M. Pernia and Anil B. Deolalikar. Asian Development Bank

<sup>20</sup> Ibid,

<sup>21</sup> Deolalikar Anil B. and Pernia, Ernesto M. (2003) "Poverty Reduction Approaches and the Role of Political Institutions" in Poverty, Growth, and Institutions in Developing Asia. Edited by Ernesto M. Pernia and Anil B. Deolalikar. Asian Development Bank.

<sup>22</sup> ibid

improving access of the poor to physical assets and human capital and increasing the rates of returns to these assets.<sup>23</sup>

It is evident that all the strategies highlighted above emphasize the importance of labor-intensive and inclusive growth, good governance and accountability, human and social development, social protection and special poverty alleviation policies. The sum of it all is that poverty eradication efforts can no longer rely on macroeconomics and the interplay between market forces of demand and supply alone. Definitive pro-poor growth programmes, inclusive and right-based affronts on poverty are of absolute necessity in order to ensure that every member of the society enjoys the benefits of economic growth.

In the recent years, it has been reported that Kenya has registered an economic growth rate of about 5.8% per annum.<sup>24</sup> Yet there has neither been any significant decrease in the numbers of the poor people nor has the inequity index reduced. There is still a huge discrepancy in access to social services among the rich and the poor. The poor population lack even the most basic services such as education, water, housing and health care, pointing to the existence of a difference between the effect of economic growth and poverty reduction. Pro-poor growth is possible only under enabling environment in which the poor households can rapidly increase their production, income and earnings.<sup>25</sup> Direct poverty alleviation policies as well as basic social services provision especially in health, housing and education are all too important. It must be noted that these are not only human rights but also important catalysts in poverty reduction as they allow the poor to take advantage of the opportunities created by economic growth.

### Dealing with the problem of Street Children.

As has been mentioned over and over in this paper, the biggest challenge that the vulnerable children such as the ones in the streets have is the exclusion from the housing, health and sanitation and educational services which in turn makes it impossible for them to access future opportunities. Lesser

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<sup>23</sup> ibid

<sup>24</sup> While economic activity faltered following the 2008 global economic recession, growth resumed in the last three years reaching 5.8% in 2016 placing Kenya as one of the fastest growing economies in Sub-Saharan Africa. Looking ahead, near-term GDP growth is expected to decelerate to 5.5% in 2017 because of ongoing drought, weak credit growth, security concerns and the pick-up in oil prices. Medium-term GDP growth should rebound to 5.8% in 2018 and 6.1% in 2019 respectively dependent on completion of ongoing infrastructure projects, resolution of slow credit growth, strengthening of the global economy and tourism. (“Kenya Overview 2013-2018” The world Bank. @ <https://www.worldbank.org/en/country/kenya/overview> Retrieved October 5.)

<sup>25</sup> Supra, at page 18



access to these services results in poor utilization hence worse health and literacy outcomes. A vicious cycle is thus formed leading to ill-health, malnutrition, and illiteracy which in turn perpetuate poverty. The physical remoteness of the poor from public facilities and other monetary costs, say, medicine in hospitals, cost of learning materials and commuting to schools further exacerbate inaccessibility, even, of the free services by the poor as compared to their counterparts from well-to-do families. In other words, the additional out of pocket costs inhibits their reach even if the physical or geographical access to these social services were the same for both the poor and the rich.

Addressing the phenomenon of the street child would require multisectoral approaches which must focus on the alleviation of the immediate risks to the street children as well as tackling the root causes of the problem and developing human and social capital to enable the parents of the street children and the prospective parents to break away from the traps of poverty. Generally, an effective strategy to deal with the issue of the street children should take three-pronged approaches that is to mean preventive, protective and rehabilitative approaches (Leonardos, 1995). The preventive approaches should address the problem at its source in the families and the communities. The protective approaches must be aimed at providing protection to the children against violence, physical or otherwise, health hazards and insecurities that they are exposed to prior to any further action that may be taken towards them. The rehabilitative approach should be geared towards children who are already in the in streets and manifesting some advanced high-risk behavior (Leonardos, 1995).

In Kenya, all the three approaches are being employed but it seems that the child protection system has mainly focused on the protective and rehabilitative approaches through the institutional care models of charitable homes and rehabilitation centres. However, these models have not borne much success in reducing or eradicating the problem. The initial population of the street children was slightly over 115. Sadly, the number of children separating and cutting links with their families and communities to join the streets have been on the steady increase. So much so that the strategies that have been adopted by the State to address the problem have been unable to cope up. This failure may be attributed to the child protection programmes which are mostly inclined and overly oriented towards institutional care models of protection and rehabilitation of the children who have already joined the streets rather than preventing their entry into the street.

With the high prevalence of poverty among the citizens of Kenya, it is foolhardy to expect that the numbers of the children joining the streets would be managed by reliance on establishing Children's homes and Rehabilitation Centers alone. Even if these institutional care models were to be successful, from a critical view, it would need to have the capacity to accommodate as many children as there are households which are incapable of providing the essential needs such as shelter, food, clothes etc.

Hyperbolic as it may seem, housing all the vulnerable children would be akin to migrating them, in their tens of thousands, from their families to care centres. From a fair assessment, this is an attempt to make the Children's Homes and rehabilitation facilities to provide the services which should essentially be in the realms of the families. In other words, the children's homes assume the responsibility of parenting. The shortfall of the Children's Homes and other charitable and care-giving institutions is that they lack the capacity to accommodate the children in their large numbers due to constraints in terms of physical infrastructure and finances. The Children's Homes strategy would be ideal for special and isolated cases, for instance, where a child is separated from family because of death or abandonment by parents.

On the other hand, the rehabilitation centers route assumes that the children in the street are either delinquent or have psychological problems which can be handled through mental therapy and a possible return/reintegration of the children to their families. As with Children's Home, this strategy, too, also has its limitation. They would be quite appropriate and successful if the problem of the street children were, in fact, delinquency and psychological. However, as it has been determined, this is hardly ever the truth. A great majority of the street children are rather victims of economic hardships than character failure. Consequently, though, the emphasis on rehab services helps with the children who may be in the streets because of, say, substance abuse, it does not remedy the real "push factors" such as the economic ones that lead them to the street. It is no wonder that many of the graduates from the rehabilitation centers relapse to the streets shortly after reintegration because they are usually confronted, upon returning to their homes, with the same unpleasant and squalid conditions that led them to the streets.

The society and those who have the responsibility for the street children should change their perceptions and begin viewing them not as troubled and deviant children but as victims of the weak social protection system and human rights violations. Therefore, the State should adopt preventive measures to empower and provide families with the means of obtaining regular income in order to feed, clothe, shelter and educate their children; and, ultimately, provide training on responsible parenting and family life especially the care and protection of the young ones (Leonardos, 1995). The parents should not be perceived as guilty of their children's fate but rather as victims of local and national inadequate policies on tackling poverty. The State needs to understand the complex causes of urban poverty and address them forthwith. The human needs of the street children and the roots of the problem of these children are so entangled with the issues of community development, health, malnutrition, clothing, lack of educational opportunities, affordable housing and employment that successful programmes will have to be comprehensive and integrated strategies that address each of

these spheres of life in an internally coherent manner. It is necessary to switch from welfare assistance models to those that empower and build the capacity of the communities to take care of their people. This means incorporating the children's right to the legal systems; economic empowerment of the parent to provide for the needs of their children and then changing people's view and attitudes towards the street children to trigger a positive behavioral change.

## CHAPTER 3

# THE ROLE OF LAW AND LEGAL INSTITUTIONS IN POVERTY ERADICATION.

*“We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and quality, lies at the heart of our new constitutional order”. – Arthur Chaskalson, the Former President of the South Africa’s Constitutional Court*

### Introduction

In the previous chapters I examined the relationship between social exclusion and poverty and their interconnectedness with the problem of the street children in Kenya. I determined that, in addition to weak child protection system, the phenomenon of the street children in Kenya is a result of the persistent impoverishing exclusionary practices that have rendered the parents, the families and the communities unable to care of the children. As a result of this failure, children become helpless and wanting for necessities which in turns leads them to run to the streets in the hope of finding a better livelihood or survival.

In this section, the focus will turn to the law and the role it can play, or plays, to improve the conditions of the people, particularly the children. This section would argue that the law has an important role to play in reversing the problem of the street children by alleviating or even eliminating the conditions that deprive them of livelihood and dignity through the remedial framework and mechanism set out by the law. The role of law in alleviating and eliminating poverty is important because it is imperative to view the conditions of poverty not only as the lack of the means of livelihood by the people for whose protections the law exists but also as a form of denial to access to the means of livelihood and a violation of fundamental human rights and freedoms. Numerous human rights, most of which are socio-economic, are integrally connected to poverty eradication. The analysis of the role of law in poverty eradication interrogates the function and power of law as an instrument of ordering the human behavior and social engineering. In addition to rule of law, accountability and transparency, the role of law discussion must, too, focus on examining the substance of the law as contained in the legislations, and find out how their interpretation and implementation can be oriented towards human and social

development in order to lift families and communities out of the poverty trap. This is because the rule of law and accountability, which are major drivers of development, alone cannot guarantee social mobility if the laws themselves or their implementation are not design to achieve the same.

In this regard, the Constitution of Kenya 2010, as the supreme law, will receive particular scrutiny as the main legal framework for enabling the disadvantaged, marginalized and vulnerable groups in the society such as the street children to receive protection, achieve better living conditions and ultimately be included in the socio-economic and cultural affairs of the State. The Constitution of Kenya 2010 has been touted as one of the most progressive constitutions of the world due its robust Bill of Rights, purposeful and visionary reflection of the desires of the ordinary citizens. Most importantly, the Constitution of Kenya 2010 explicitly guarantees to the citizens a livelihood of dignity without deprivation, denial and discrimination; governance on principle of social justice and equality and it clearly identifies the duty-bearer of the same.<sup>26</sup> The focus will be on the bill of rights with specific attention to the socio-economic rights under article 43 of the Constitution and access to court (*locus standi*), as the hallmarks of social inclusion and poverty eradication in Kenya.

Whereas this section acknowledges the power and function of law as an instrument of social engineering, the fact that law in papers is just that, is not lost. It reiterates the view, also held by other scholars,<sup>27</sup> that the law can only achieve its purpose if its implementation and enforcement does not hinge on the whims and good graces of the individuals and institutions who bear the legal duties. The participation of the State institutions from all the branches of the government occupy a central place in the application, interpretation and implementation of the law and ensuring that the law in print is a lived reality<sup>28</sup>. Consequently, for better understanding, I will discuss the roles and responsibilities of the State (in other words the executive), which is the entity primarily obligated to ensure the full realization

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<sup>26</sup> Articles 19 (2), 20 (1), (3), and 21 of the Constitution of Kenya recognizes that respect for human rights is crucial to preservation of dignity and promotion of social justice. All the State organs have the duty to observe and defend the human rights conferred by the constitution.

<sup>27</sup> Charles M. Fomand, for instance, acknowledges that the constitutions do not implement themselves. That without a concerted effort to implement a constitution, what is generally held to be the fundamental law of the land may amount to little more than a printed exercise in futility. See Charles M Fomand, '*Problematizing the Issue of Constitutional Implementation in Africa*' in *The Implementation of the Modern African Constitutions: Challenges and Prospects* (Pretoria University Law Press) Edited by Charles M Fomand at page 4.

<sup>28</sup>Ginsburg, Tom. 2000. "Does Law Matter for Economic Development? Evidence from East Asia Author(s)." *Law & Society Review*, Vol. 34, No. 3 (2000), pp. 829-856. <http://www.jstor.org/stable/3115145?origin=JSTOR-pdf> last accessed: September 2018.

of the human rights<sup>29</sup>. The State is responsible for developing and implementing policies required to address the needs of the vulnerable groups within the society including the children.<sup>30</sup>

This section, too, will examine the role of the legal profession i.e. the judges, the legal practitioners and academia in fostering a legal culture in Kenya that is sensitive to the contemporary phenomena and challenges of the society and its contribution towards social inclusion and pro-poor discourses. The judges and lawyers are crucial enablers in the realization of the aspirations of the law as is in the Kenya's constitutional agenda of poverty eradication because it is they who adjudicate the legal and administrative issues regarding the application, interpretation and implementation of law. Their contribution is quite important. The 2010 Constitution of Kenya already lays a foundation for inclusion, social justice and poverty alleviation through socio-economic empowerment, participation of the people. It is upon the legal profession to seize the opportunity to explore and navigate the law to establish a rich jurisprudence in the virgin areas such as rights of the children, the minorities, the marginalized and other vulnerable members of the communities who are in dire need of the protection of the law.

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<sup>29</sup> Article 21 (1) and (2) of the Constitution of Kenya

<sup>30</sup> article 21 (3)

## The Legislative Framework for Addressing the Problem of the Street Children

The child welfare and protection system in Kenya is regulated by the 2010 Constitution, Acts of Parliament such as the Children's Act, Basic Education Act and the international conventions to which Kenya is a signatory. These legislative instruments are aimed at ensuring the survival, development and protection of every child in Kenya. Despite being a requirement of the Constitution, Kenya is yet to enact laws and policies that comprehensively target and address the needs and the challenges of the vulnerable children such as the street children. It follows, then, that the solution to the problems of the different categories of children, for instance, the street children, have to be addressed within the broader human and children's rights provisions in the aforementioned legislative instruments and the reliance on the judiciary to concretize the rights that relate to the children welfare, specifically, and the social and human development, generally.

### **i. The 2010 Constitution of Kenya**

The relevant provision of the 2010 Constitution of Kenya that address the rights of the children is article 53 which provides for the right to free and compulsory basic education, basic nutrition, shelter and health care and freedom from abuse, neglect, all forms of violence, inhuman treatment and exploitative labour. These rights are further reiterated in article 43 which provides for the socio-economic rights. Under this provision the 2010 Constitution guarantees to everyone the highest attainable standards of health, right to education, accessible and adequate housing, reasonable standards of sanitation, adequate quantities of clean water and food of acceptable quality. These constitutional provisions are an addition to bill of rights because the former Constitution<sup>31</sup> did not explicitly guarantee them. As a result, despite being crucial to the development of the children, the provision of these rights to the deprived children remained in the purview of acts of magnanimity by well-wishers. The 2010 Constitution's provision in article 2(5) and (6) is also very important because it allows the general rule of international law and treaties or convention which have been ratified to form part of the laws of Kenya. This is particularly helpful for setting of standards for the application and implementation of the child-related policies to fill the gaps that may exist in the domestic laws to be in tandem with the international standards.

Article 21 of the Constitution states that it is the fundamental duty of the State and its organs to promote and fulfil the fundamental rights and freedoms in the Bill of Rights, through legislation, policy and other measures to achieve the progressive realization of the rights and its international obligations.

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<sup>31</sup> The Constitution of the Republic of Kenya, 1963.

Importantly, it is the duty of the State to address the need of the vulnerable groups in Kenya including the children. It follows that, unlike the previous constitutional regime, the social services due to the street children and, by extension, their socio-economic deprivations, are capable of being claimed and contested in courts of law as a matter of constitutional and human rights violation.

The Constitution provides, at article 22, the right for any person to institute a court proceeding on a claim that a right or a fundamental freedom has been denied, violated, infringed or threatened. The suit can be instituted in one's own behalf or in the interest of a group or class of people or in the interest of the public.<sup>32</sup> The High Court under article 23 has the jurisdiction to hear and determine the applications for redress of a denial, violation or infringement of, or threat to a right or fundamental freedom in the bill of right. When such applications are filed the High Court is mandated to grant appropriate reliefs to ensure that the person(s) whose rights have been infringed are vindicated.

The foregoing constitutional provisions are important in addressing the street children because they open the gate for them or persons acting on their behalf to seek the court's intervention. The Chief Justice is required to make rules to facilitate access to justice through the courts of law.<sup>33</sup> The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 were enacted to give effect to this provision. The rules have fundamentally made the judicial intervention accessible by relaxing the rules of standing, pleadings and the cost of litigating public interest litigations.

#### **ii. The Children's Act, 2001**

The Children's Act 2001 is the act of parliament which was enacted to domesticate the international treaties such as the United Nations Convention on the Rights of the Child (UNCRC), African Charter on Rights and Welfare of Children (AFCRWC) and other human rights instruments. The Act, though, preceded the 2010 Constitution, was revised in 2012 to bring it in conformity. Besides elaborating on the substantive rights of, and obligations owed to the children<sup>34</sup>, the Act also establishes the National Council for Children Services to administer the planning, coordination and financing the children's rights and welfare activities in the country.<sup>35</sup> The Council is required to design and formulate policies for child welfare activities, ensure enhancement of the best interest of the children and enforcement of the

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<sup>32</sup> Article 22 (2) and 258

<sup>33</sup> Article 22(3)

<sup>34</sup> Part II and III of the Act

<sup>35</sup> Section 37



State's obligations relating to the children. Importantly, they are expected to design programmes for the alleviation of the plights of children with special needs.<sup>36</sup> The children's Act also establishes Area Advisory Councils (AAC) at the county levels to trickle down the child welfare services to the rural areas.

The Children's Act in section 22 confers powers on the High Court to hear and determine applications relating to claims of violation of the provisions on the rights and the welfare of the child under sections 4 to 19 and issue orders, writs or give such directions as may be appropriate to remedy the violations.

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<sup>36</sup> *ibid*

## The State's Obligations and Responsibility Towards the Children

The Kenyan government has the primary obligation to ensure the fulfilment of the rights guaranteed under the Constitution and other relevant laws.<sup>37</sup> In articles 53 and 43, the State has the responsibility and obligation to the children and, indeed, the whole citizenry to ensure the fulfilment and enjoyment of the rights to free and compulsory basic education; highest attainable standard of health care services, clean and sanitary environment; adequate quantities of safe and clean water, adequate food of acceptable quality, and accessible and adequate housing. Moreover, the Constitution requires the children to be protected from neglect, all forms of violence, hazardous and exploitative forms of the labour among others. These are typically the challenges which the street children face. The attainment of these constitutional rights will go a long way to secure and relieve the children of their vulnerability, enhance their ability to access human, physical and social capital thus increasing their productivity which will in turn aid them to break away from the chronic cycles of poverty.

### **i. Situation and problem analysis**

Indeed, the State has made some significant efforts through legislations and policy programmes to ensure that the rights and welfare of all children are protected. It has enacted the Children's Act which domesticated some of the crucial international conventions relating to children's welfare<sup>38</sup>. The government has made some significant achievement at the policy level, too. For instance, the National Plan of Action for Children in Kenya (2015-2022) is a policy document that has been designed to contribute to the realization of the children's rights and welfare in alignment with the Kenya's obligations under Vision 2030 and the 2010 Constitution. This policy document sets out child survival, development, protection and participation as the four pillars that inform the operational framework for the coordination, planning, implementing and monitoring the programmes for the children.

Some of the visible achievements by the State have been, mostly, in the education and health sectors. In regard to child development, the government has also enacted the Basic Education Act 2013 to make education accessible to all children in Kenya by removing the tuition fees and making the attendance of elementary school compulsory. The free and compulsory education, particularly, has seen the rate of enrolment of the school-going age children and the literacy levels drastically increase in Kenya. However, educational attainment still remains a challenge for children from poor families and those who are not under family care such as the street children. The out-of-pocket cost of education such as the costs of buying the learning materials, uniform, and medical services have inhibited these

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<sup>37</sup> Article 21(1) of the constitution, section 3 of the Children's Act.

<sup>38</sup> UN Convention on the Rights of the Child (UNCRC); and African Charter on Rights and Welfare of the Child.

categories of children from fully benefitting from these programmes. The same is true for the health sector in which the government has introduced variety of programmes to improve health services. Apart from making some primary and preventive health services such as malaria and HIV/AIDS treatment free in order to manage rates of child mortality and orphanage, the government has also rolled out policies and programmes to boost maternal health care and improve nutritional values of essential food products. For example, the Breast Milk Substitute (Regulation and Control) Act is a legislation for mandatory fortification of wheat flour, maize flour and oils with vitamins. However, the dire economic conditions of the street children and most households in Kenya has led to differential impact of these policies. The situation has been exacerbated by the weak or non-enforcement of the existing laws and sometimes by the lack of legislation and policies that specifically target the vulnerable children.

The Constitution requires the State to take legislative, policy and other measures, including setting of standards, to achieve the progressive realization of the socio-economic and cultural rights,<sup>39</sup> including affirmative action to redress injustices suffered by the vulnerable groups within the society<sup>40</sup>. These requirements call for more comprehensive and inclusive policies and programmes by the government to ensure that rights of the all children including the street children are realized. However, the State seems to be more inclined to the institutional care such as rehabilitation centers, charitable children's homes and Borstal institutions to care for the welfare of the separated, neglected, abandoned children or those who are in conflict with the law.<sup>41</sup> The State also rely on guardianship, adoption and foster care which are really not absorbing as much children in need of protection.<sup>42</sup> Currently, there are about 700 child care institutions in Kenya which can house approximately 40,000 children. This is a significantly small number compared to the 200,000 to 300,000 children in the streets in Kenya. Besides the infrastructural incapacity of the institutional care system, it has also been proved that the cost of taking care of the children in the institutions are so high compared to family care.<sup>43</sup> Moreover, children

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<sup>39</sup> Article 21(1)

<sup>40</sup> Article 27(6)

<sup>41</sup> Sections 47, 50 and 58 of Children's Act, 2001

<sup>42</sup> See Part XI & XII of the Children's Act.

<sup>43</sup> Guide on Alternative Care of Children in Kenya points out that in South Africa, it has been discovered that institutional care can be 10 times higher than if the finances were redirected to family care.

institutions are not the best place to raise children. For instance, Juvenile Remand Homes in Kenya do not offer education services to children under their custody.

**ii. The solution to the problem**

From the foregoing, it is pertinent for the State to change its approach to more proactive measures if it hopes for the realization of children's rights. The State must purpose to reduce and/or eliminate poverty among its citizens in order to enable the communities to have the capacity of establishing social protection and support networks within themselves. Economic empowerment would encourage family care, foster care, adoption and guardianship for the needy children and thereby prevent and/or reduce the number of children joining the streets because of separation, neglect, abandonment or orphanage. This is because poverty, as was discussed elsewhere, has led to the breakdown of African social support system which has in turn led to family disintegration and exposed children to economic and social risks. In the 1970s and 1980s, when the economic conditions were still bearable in Kenya, 35 -40% of the households provided informal alternative care arrangements. This proportion drastically decreased due to social and economic factors and rapid urban migration<sup>44</sup>. Therefore, supporting and strengthening families would reduce social exclusion and lower the risk of separation, violence and exploitation.

This the government can achieve through resolute enforcement of the existing legislations on, and progressive realization of socio-economic rights in article 43 of the Constitution. I say resolute because anything short, the socio-economic rights would remain mere abstractions. The East African Center for Human Rights (EACHR, 2010) emphasizes that ESCRs in the Bill of Rights is one of the major tools entrenched in the constitution for the amelioration of the dire poverty, inequality and socio-economic marginalization of the many Kenyans and to enhance social justice and the egalitarian transformation. The realization of a generation free of deprivation of socio-economic rights depend on their full implementation and a failure by the State to ensure the citizens have access to the rights, as has been seen in the case of the street children, impacts on their ability to enjoy all other rights in the Constitution and excludes and marginalizes them further.

The government has been trying to meet the socio-economic needs of the people through cash transfer programmes targeting the elderly, women and the youths. The Orphan and Vulnerable Children (OVC) cash transfer programmes was, for example, rolled out in the early 2000s for children who lost one or both parents. In 2004, during the first phase of the pilot Programme, the affected children through their guardians would receive 500 shillings (USD 6.5) a month to help in the purchase of basic

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<sup>44</sup> National Plan of Action for Children in Kenya 2015-2022

necessities such as food. Later the amount was increased to 3000 shillings and by 2015 about 36% of the families had transitioned from absolute poverty. Whereas the Programme demonstrated success and prospect of driving economic development as it increased the purchasing power of the recipients, the amount itself was quite insufficient, the threshold too low and, therefore, left many deserving people out of its coverage. Besides the Programme proved to be very expensive, too, for the government. The disbursement of the money was on many occasions delayed for up to six months. As such, the government must, if it intends to continue with such cash transfer programmes, increase their budgetary allocation. The government should also boost the alternative family care models such as adoption and foster parenting by, say, giving conditional grants to illegible families and enforce parental responsibility in child protection.

However, to achieve better results the State has to consider designing extensive low-cost community-based programmes. The programmes, for example, could target boosting the community's participation in agricultural activities or irrigation projects by funding them directly or subsidizing the farm implements. This would build the capacity of the communities to care for themselves and the children. Promotion of community-based economic empowerment programmes would go a long way to ensure inclusive growths, nurture and improve social support system within the community hence reducing the risk of separation.

Last but not least, the government must revise the land policy and faithfully enforce the existing property rights in the country. There is a huge failure in the enforcement of property rights more so with regard to inheritance and succession among women. The government can resolve the problem of the street children by protecting the weak families whose land and property are illegally taken away by powerful relatives and individuals in the society who exploit discriminative cultural practices or loose-ends in the law enforcement mechanisms. The State must address the historical land questions in Kenya, allocate and bestow land rights to people who do not have land. It must be recalled that the phenomenon of the street children originated from British colonial practices of the alienation of land and the forcible deportation of masses to Detention and Concentration Camps. After the Kenya's independence, instead of resolving the land question, the successive governments have presided over massive land grabbing and displacement of people. The 2010 Constitution provides the principles of land policy as equitable, efficient, productive and sustainable use<sup>45</sup>. It is, therefore, unconstitutional for individuals or groups of people to be discriminated against through law or customs regulating land.

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<sup>45</sup> Article 60

Most importantly, it is not only unconstitutional but also unconscionable for some individuals and families (including absentee landlords) to own thousands of hectares of land lying idle in Kenya while many are left squatting. According to the 2010 Constitution, all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals<sup>46</sup>. To ensure the equitable access to, the productive, and the sustainable use of land in Kenya, the government must seriously consider redistribution of land and setting a limit on the minimum size of land that everybody must own in order to assist the homeless and street families to have access to homes and a factor of production.

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<sup>46</sup> Article 61(1)

## The Role of the Judiciary.

### Introduction

Traditionally, the role of the court is usually limited to interpretation and application of the law in accordance with its letter. Judicial activism has, often, been criticized in relation to matters that touch on the allocation of resources which is believed to be the province of the policy-making arms of the government i.e. the executive and legislature. However, this view is gradually diminishing. The social and economic conditions of our times call for a conscious and sensitive judicial intervention which would help in steering the social and economic progress in the society. This is particularly true in light of the modern constitutions which have committed to socio-economic transformation by incorporating the economic, social and cultural rights in the bill of rights and entrusted the courts with the obligation of adjudicating their contestations. The judicial officers can no longer be fence-sitters or hold to the old relics of separation of power, parliamentary supremacy and the political questions doctrine to be complicit or excuse their complacency to the violations of the constitutionally recognized rights and socio-economic problems. In other words, the judiciary must not remain detached from the social and economic needs of the vulnerable and the impoverished. It has to shy away from legal formalism and be forwarding looking and position itself as the gatekeeper of Constitutionalism.

### **The role of the courts in social inclusion and poverty eradication in the context of street children in Kenya.**

The transformation agenda of the 2010 Constitution of creating a society in which there is inclusion, equity, equality, human dignity and social justices will be meaningless if the judiciary does not firmly assert its constitutional authority as the guardian and custodian of the law especially with regard to the observation, respect, protection, promotion and fulfilment of the socio-economic rights. The architects of the new constitutions of Kenya deliberately enhanced the role of the Judiciary to a more prominent one in driving the country's development agenda.<sup>47</sup> "The 2010 Constitution of Kenya, Justice Alnashir Visram says, gives the Judiciary an extensive mandate against the renewed aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice, and the rule of law."<sup>48</sup> Chief Justice David Maraga,<sup>49</sup> while speaking at the African Bar

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<sup>47</sup> For instance, the Constitution of Kenya Review Commission, Professor Yash Pal Ghai says, was conscious of the fact that a major cause of our problems -including particularly massive impunity that defines Kenya's political system, and the poverty and oppression that so many millions of Kenyans faced, was the failing of government lawyers and judges.

<sup>48</sup> Alnashir Visram, 2011. "Role and responsibility of the Courts under the Constitution of Kenya, 2010". Alnashir Visram is a Judge of the Court of Appeal of Kenya.

<sup>49</sup> Justice David Maraga is the Current Chief Justice of Kenya and President of the Judiciary.

Association Conference held in Nairobi in July 2018, reiterated that in its Constitution, Kenya adopted a progressive bill of rights comprising of the economic, social and cultural Rights (ESCRs) with the Judiciary as a critical organ in their realization. The role of the judiciary in the new constitutional dispensation is an invitation for the court to engage in the agenda of the constitution of transforming Kenya from “a society of based on socio-economic deprivation to one based on equal and equitable distribution of resources.”<sup>50</sup> The Judiciary should, therefore, play an activist role in the transformation of the society.

The role of the judiciary may be discussed under three broad headings thus; its role in the development of a progressive and pro-poor jurisprudence; facilitation of access to justice and; enforcement of the rights guaranteed under the constitution.

i. **Development of a robust and progressive legal jurisprudence in adjudicating children’s right.**

As has been discussed previously, one of the challenges to the realization of the rights of the street children is the non-implementation of the laws and policies relating to the welfare of the children and differential impact of the law due to the poverty. The justiciability of the children’s rights and the socio-economic rights will most likely lead the contestation of the violation of these rights to the courts of law. The judiciary, hence, has a crucial role under the 2010 constitution to assist the State and its organs in the interpretation, application, implementation of the Constitution.<sup>51</sup> It must help the government to understand its obligations to the citizens especially in regard to socio-economic rights in article 43.

Article 23 confers upon the High Court of Kenya the power to hear and determine the applications for the redress of a denial, violation or infringement of, or threat to, a right under in the bill of rights. It also empowers the court, upon entertaining such applications, to grant **appropriate** reliefs including the declaration of rights, injunctions, conservatory orders, declaration of invalidity of a law,<sup>52</sup> order for compensation and/or judicial review. The court has already pronounced itself regarding the children rights to education and on the questions of forceful and illegal evictions which render masses of people homeless especially the children. In the case of **MMM v Permanent Secretary, Ministry of Education and 2 others**,<sup>53</sup> the court reiterated that all children in Kenya have the right basic education. In this case, a

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<sup>50</sup> Per the High Court of Kenya in the case of *John Kabui Mwai & others vs A.G & 2 others* Petition No 15 of 2011

<sup>51</sup> See the powers of the High Court under articles 23 and 165

<sup>52</sup> If not justified under article 24

<sup>53</sup> Petition No 133 of 2013



student had obtained placement for Form One but the school declined to admit him for lack of fund required on admission. He had applied for the Constituency Development Fund (CDF) Bursary to allay the bill but the help wasn't forthcoming. He, then, petitioned the High Court alleging violation of his right to education. Judge Lenaola Isaac (as he then was) found in his favour and ordered the school to reserve a slot for him while he figured out how to find the fees. He further asked the government to demonstrate the measures it is putting in place to assist the student within 30 days. The case of *Mitu-Bell Welfare Society v Kenya Airports Authority and 2 others*,<sup>54</sup> involved forceful eviction of the residents of the Mitumba Village in Nairobi in which the police destroyed schools, health facilities and dwellings belonging the villagers. Mumbi Ngugi, J held that it was illegal and against the Constitution for the government to render people, especially the children homeless through eviction without giving them an alternative accommodation or compensation.

The reason why the courts are very important in the realization of the rights under the constitution is that in some cases the 2010 Constitution and legislations do not stipulate precisely the process of achieving the rights, the nature of the rights and the scope of obligation they impose. For instance, the constitutional rights to education, housing, medical care, food, clean water and environment are guaranteed in a generic term, that is, to all children, persons and so on. Yet there are categories of children such as the ones in the streets with peculiar conditions which prevent them from enjoying these rights. For these categories of children, Constitution does not provide a precise mechanism or even the scope of the government's obligation towards them. In such cases, the courts have to assume the task of policing the boundaries of actions taken by the political branches of government to ensure their actions are consistent and within the parameters of the law.<sup>55</sup> It has to seize the opportunity to develop a jurisprudence which engages seriously with the content of these rights<sup>56</sup>.

The 2010 Constitution of Kenya mandates the State, for example, to take legislative, policy and other measures to ensure the progressive realization of socio-economic rights, to meet the needs of the vulnerable groups within the society, enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms etc. And cases have arisen where the content, nature and scope of these obligation have been contested between the citizens and the

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<sup>54</sup> Petition No. 164 of 2011, (2013) eKLR

<sup>55</sup> Ndhlovu N, 2015. The Role of the Courts in Enforcing Socio-Economic Rights under the 2013 Constitution of Zimbabwe. In *Africa's Public Service Delivery & Performance Review*. Vol 3 No 4(2015) at page 31.

<sup>56</sup> Ibid

government. There are two areas which have been very contentious. That is the fulfilment of the rights of children and the socio-economic rights under articles 43 and 53 respectively. The bone of contention has been the question about when they are due (whether they should be provided on demand) having regard to limited resources available to the government and also how to balance the provision of the socio-economic rights with the protection of the right to property. These are weighty legal issues that directly affect child welfare and causes child poverty with its attendant misfortunes such as the phenomenon of the street children which the courts must address.

Firstly, in relation to children right under article 53, many legal scholars have maintained that the rights are immediately due to the children's because they are not qualified by internal limitations like the socio-economic rights in article 43.<sup>57</sup> The courts, too, have also added their voice to the debate and held that the children rights under article 53 are to be realized immediately.<sup>58</sup> Such a pronouncement by the court is crucial for the vulnerable children such as the street children who have continued to live in deprivation 9 years after the promulgation of the Constitution. For instance, *Erick Githua Kiarie v A.G and Cabinet Secretaries for Education and Labour, Social Security and Services*<sup>59</sup>, is a case in which the petitioner filed on behalf of minors held at Kapsoya Juvenile Remand Home (KJRH) and other children in detention facilities because the government was not providing educational services at the facilities which was a violation of the constitutional rights of the juveniles. The government contended that the right to basic education was not absolute and that it was subject to limitation under article 24 of the constitution. The court disagreed and declared that the children in remand homes and detention facilities controlled by the government have a constitutional right to basic education. C.W. Githua J, further, ordered the State to make available to all children in such facilities educational programmes which are integrated with the public education system.

Secondly, in relation in socio-economic rights under article 43, the court must be innovative and creative in order to establish a progressive jurisprudence that would lead their actualization. Taking cognizance of the Constitution's grand agenda to achieve inclusion, social justice, eradicate poverty and restore human dignity to the downtrodden, and given the obscure and the controversial nature of these

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<sup>57</sup> Read generally Geoffrey Odongo's. (2012) Caught Between Progress, Stagnation and A Reversal of Some Gains: Reflections on Kenya's Record in Implementing Children's Rights Norms. In AFRICAN HUMAN RIGHTS LAW JOURNAL (AHRJ) Vol 12 No. 1 2012 (pp 112-141)

<sup>58</sup> Erick Githua Kiarie v Attorney General and Cabinet Secretary for Education; Labour, Social Security and Services Petition No. 19 of 2014

<sup>59</sup> *ibid*

rights, the court must not only be independent and impartial but also be active participants in driving this transformation. The High Court has had several cases (some of which have been discussed above) filed under the auspices of article 43 of the constitution and have made rulings that are very important in delineating the scope of the socio-economic rights and the obligations of the State towards their fulfilment. The court have maintained that the government must observe, promote, protect and respect the rights guaranteed under the constitution. Perhaps, the two most important pronouncements that have been made by courts are; that the State, at the very least, must not interfere with the enjoyment of the existing rights; and that the State must take step, or demonstrate that it is taking the step, in order to ensure the progressive realization of the socio-economic rights.<sup>60</sup> The ratio decidendi in *Mitu-Bell Welfare Society Case* is that a person cannot evict or interfere with current occupation of land by persons, even if they have no legal title to land, without a court order is very crucial in arresting the problem of street families since illegal and forceful evictions and displacement of people has been a major cause of it especially in the cities like Nairobi.

Nonetheless, the Court still needs to expand the scope and obligation of the State towards the citizens especially the children and other vulnerable groups. The Constitution obliges the State to set standards in order to ensure progressive realization of socio-economic rights<sup>61</sup>. This is an obligation whose fulfilment the government has really performed dismally and an intervention of the courts could, properly speaking, help to jumpstart. The entry point being that the functions of the courts of law is not limited to interpretation and application of the law but includes developing it, too. Ndhlovu M. argues that the effectiveness of the constitutionally protected rights is dependent on the strength of the judiciary. The judiciary can even legislate, if it must, where there is need to align the laws and the government's conduct to the Constitution.<sup>62</sup> The deference of the court would definitely not help the situation of the children in imminent danger of being rendered homeless, for example, were it to

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<sup>60</sup> *Mitu-Bell Welfare Society v Kenya airports Authority & 2 others*; *Satrose Ayuma & 11 others v Registered Trustees of Kenya Railways Staffs Retirement Benefit Scheme and 2 others* Petition 65/2010; *Susan Waithera Karuiki & 4 others v Town Clerk Nairobi City Council & 2 others* Petition 66/2011; *Ibrahim Sangor Osman v Minister of State for Provincial Administration and Internal Security & 3 others*, Embu HCCC No. 2/2011.

<sup>61</sup> Article 21 (2)

<sup>62</sup> *Supra*,

uphold property rights in the face of eviction of a whole village of squatters. In such cases, it is necessary for the court to reengineer property rights relationship though such function be legislative.<sup>63</sup>

Lastly, even though the full realization of the socio-economic rights can occur overtime, certain minimum essential levels of realization have to be provided immediately. The courts have, indeed, been useful in elucidating the threshold with the “reasonableness of the State policy” and “minimum core” as the tests for standards of government’s obligation in the progressive realization of these rights.<sup>64</sup> With such standards set for reference, it follows that when a significant group of individuals within a State is deprived of essential basic foodstuffs, primary health care, shelter, as street children are, for instance, then the State would prima facie be in violation of the rights of under article 43 even though, generally, it has only to realize these rights progressively.

**ii. Facilitating access to justice for the vulnerable groups**

When the people have exhausted all the avenues for the protection of their rights, they will turn to courts to act as their institutional voice and last resort. The judiciary should, therefore, facilitate access to justice by removing the unnecessary and inhibitive, formalistic and legalistic procedures and technicalities. Articles 22 and 258 of the Constitution opens the door of the courts to persons acting in their own behalf, or in the stead of others, or in the public interest to institute court proceedings claiming a violation, denial or infringement of rights. Article 22 (3) instructs the Chief Justice to make rules to facilitate the access to courts by removing barriers and restrictions such as rights of standing, procedural technicalities and costs to public interest litigation.<sup>65</sup> Principally, what the Constitution offers the court is the opportunity to stand up for the little and meek guy who cannot confront the government by himself. It is an opportunity for the court to amplify the voice of the dispossessed and marginalized who have been consigned to lack of clean water, inadequate housing, lack of access to health services and educational opportunities – leading to their exclusion from the mainstream society. As Professor J Oloka-Onyango correctly observes:

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<sup>63</sup> Contrast the approaches taken by High Court and Court of appeal in Mitu-Bell Welfare Society case regarding the relationship between rights to property and right to housing.

<sup>64</sup> See Irene Grootboom & other v Government of South Africa (2001) 1 SA 46 (CC) and Thiagray Soobramoney v Minister for Health, Kwa-Zulu Natal (1998) 1 SA.

<sup>65</sup> In Consumer Confederation of Kenya v Attorney General & 4 Others (High Court Petition No. 88 of 2011)

*“the rich people rarely need to fret about access to health care, adequate shelter or sufficient food and they do not require an instrument of the State to guarantee their rights to these social goods; they will simply purchase or use their political clout to access these goods<sup>66</sup>”*

In other words, the courts ought to be receptive of the claims that seek redress to claims of human violations such as experienced by the street children. Indeed, to echo the words of Professor Oloka-Onyango, access to courts through public interest litigation is a useful tool for moving people out of poverty and into the realization of their economic, social and cultural rights.<sup>67</sup>

Kenya has an adversarial legal system where the role of the court is primarily that of an impartial referee between the litigants. A suit whether private rights or public interest in nature has to be commenced by somebody independent from the court. This type of legal system poses two problems to the advancement of the rights of vulnerable groups such as street children. First, if the group of people suffering violation lack awareness about their rights and/or finances to pursue their rights the court cannot do anything to assist them. Secondly, their case can be jeopardized by an uninterested or an incompetent legal practitioner were they to hire one at all. In fact, lack of interest among the legal professionals and the public has been a major setback in the protection of rights of children in Kenya. There are extremely few civil society organizations working with or for the children especially in advocacy and legal aid. The apathy is worse on the part of individual lawyers. For most times the vulnerable and marginalized groups in Kenya are usually on their own. This challenge is discussed in detail in the next section.

While the disinterest or rather the indifference among the individual legal practitioners and organizations to act for the street children is beyond the court’s power, the incompetence of litigants to argue their case may be remedied by a sensitive, liberal and dutiful Bench. The adversarial nature of the Kenyan legal system would not, say, hinder a judge from inquiring and investigating facts in order to prepare a well-informed, thought-out and forward-thinking judgment. Conversely, an overly conservative judges have been an impediment to the advancement of human rights in Kenya. Again, to quote the accurate observation of Professor J Oloka-Onyango,

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<sup>66</sup> J Oloka-Onyango, 2017. “Poverty and Resources: What Have the Courts to Do with It?” Politics, Public Interest Law and Litigation in East Africa. Cornell Institute of Africa Development Series: Cambridge Scholars Publishing, at pages 160-215.

<sup>67</sup> *ibid*

*“It is no good asking an elite judge, through elite lawyers, to do something truly egalitarian, His (and it is still usually his) class and other social prejudices will interfere. Even if they don’t, strong traditions of judicial restraint will.”*<sup>68</sup>

Perhaps, the **Mitu-bell Welfare Society** is an appropriate case study to offer an insight and put Professor Oloka-Onyango’s remark into perspective. Mitu-Bell Welfare Society is a classic case study of how the judiciary in Kenya is still nostalgic of the past. It presents a juxtaposition of one set of judges, sitting at the High Court, which is attuned to egalitarianism and another set, sitting at the Court of Appeal, which is highly conservative to the levels of insensitivity.

In this case, the High Court of Kenya, presided over by Judge Mumbi Ngugi, determined that the demolition of Mitumba Village and the eviction of its residents was illegal because they were not given an alternative accommodation – a situation which exposed them to vagaries of inclement weather. The judge was particularly concerned about the children who were now exposed to cold nights and denied access to schools and health centres because of the illegal demolitions. Recognizing the lack of a national law regulating evictions she turned to international law and found that the manner in which these villagers were evicted did not meet the UN Guidelines on Evictions General Comment No. 7 by the Committee on Economic, Social and Cultural Rights (CESCR). She consequently ordered that the evictees be resettled within 60 days and that the government should report to the court on the steps it is taking to implement the right to housing<sup>69</sup>. From the judgment, it is easy to see the level of awareness, consciousness and the grasp the judge has with the reality of the Kenyan society and the ideals of the 2010 Constitution; and how she marries the two. She pointed to the apparent ‘lack of appreciation by the State of its obligation under the new Constitution 2 years after promulgation’ and urged the State to rise above the standard objection that the petitioners have not demonstrated the right to the land in question. Instead, the State should assist the court by showing if, and how, it is addressing or intends to address the rights of the citizens’ attainment of ESCRs and the policies in place for the progressive realization of the rights.”<sup>70</sup>

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<sup>68</sup> J Oloka-Onyango, 2017. *“Locus Standi in Post-Colonial East Africa”* in *“When Courts Do Politics: Public Interest Law and Litigation in East Africa.”* At page 12.

<sup>69</sup> Article 2(5) of the Constitution of Kenya is the receptive clause by which all international covenant to which Kenya is a signatory are part of the Laws of Kenya.

<sup>70</sup> Mitu-Bell Welfare Society v Kenya Airport Authority and 2 others, Petition 164 of 2011 at paragraph 77-79.

On the other hand, at the Court of Appeal,<sup>71</sup> “Judge Erastus M. Githinji and company, as Dr Steve Ouma Akoth observed, displayed an amazing lack of self-awareness, nay, ignorance of the current jurisprudence. But much more worrying is that the decision negates article 43 of the Constitution of Kenya and is deleterious to the transformative intention of the constitution of Kenya<sup>72</sup>. The Court of Appeal threatened to plunge the country back into the dark ages where the realization of socio-economic rights was subject to the whims of the state.”<sup>73</sup>

While the High Court, inspired by progressive legal authorities on socio-economic rights, ruled in favour of the inhabitants, the Court of Appeal reversed the High Court’s holding, thereby rubbishing the jurisprudence that is so critical in the realization of constitutional aspirations hitherto developed by the High Court.<sup>74</sup> The Court of Appeal Judges’ decision does not reflect a commitment to the realization, justiciability and enforcement of socio-economic rights.<sup>75</sup> Even though the court of appeal acknowledged the significance of socio-economic rights and the fact that they “not mere aspirational rights” the final determination of the court didn’t speak as much. The court overturned all the trial courts orders thereby leaving the victims of illegal demolitions and evictions without any remedy. This was quite unfortunate because the judgment has the possibility of exposing people to future illegal demolitions and evictions.

### iii. Enforcement of the socio-economic rights

The competence of the courts to enforce judgments on socio-economic rights against the government has, perhaps, been the most controversial issues the courts have had to deal with lately. Before long, the economic, social and cultural rights were not considered rights capable of being adjudicated upon by the courts. They were left in the realm of the political wing of the government to address them as matters of policy. However, the elevation of these rights to the same level as civil and political rights

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<sup>71</sup> Kenya Airport Authority V Mitu-Bell Welfare Society & 2 others Civil Appeal No 218 of 2014

<sup>72</sup> Dr. Steve Ouma Akoth, 2016. “Court of Appeal Should Be Pro Socio-Economic Rights in Kenya”. Dr. Steve Ouma Akoth is an anthropologist and Executive Director of Pamoja Trust Kenya.

<sup>73</sup> Alvin Attalo, 2016. “Turning back the clock on Socio -Economic Rights: Kenya’s Court of Appeal decision in the Mitu-Bell Case.” Can be accessed at <http://ohrh.law.ox.ac.uk/turning-back-the-clock-on-socio-economic-rights-kenyas-court-of-appeal-decision-in-the-mitu-bell-case/> September 13 2018

<sup>74</sup> Andrew Barney Khakulal, 2018. “Embracing Structural Interdicts in the Enforcement of Socio-Economic Rights in Kenya: Analysis of the Court of Appeal Decision in the Mitu-Bell Case.” Jomo Kenyatta University of Agriculture and Technology Law Journal. Vol 2 (2018)

<sup>75</sup> Ibid,

brought about a paradigm shift on the relationship between the courts and the arms of the government. The judiciary has found itself invited into the arena which was an exclusive territory of political players – an uncharted region, so to speak. Most States often decry the shortage of resources to implement these rights while in other times they just ignore the court orders to act.

When the individuals come to court alleging infringement of their rights, it is important for them to get redress for the violations they have suffered. In relation to the enforcement of the socio-economic rights, it behooves courts to use their powers and explore ways of expanding their reach within the law in order to serve justice to the poor and economically disadvantaged. Otherwise, law will act in vain. The 2010 Constitution permits the court to be creative to redress human rights violations, that is to say, apart from the conventional remedies such as injunctions, conservatory orders, a declaration of rights, order for compensation, judicial review and so on, the Constitution, too, permits the High Court to grant “*appropriate*” relief.<sup>76</sup> The judiciary must use these powers to ensure that there is an actual realization of the constitutional provisions. It has to use these powers to supervise the State and other administrative bodies to ensure that they understand and discharge their constitutional obligations.

One important instrument which the courts can use to ensure the realization of the provisions and values of the 2010 Constitution and transform the society is the manner in which they fashion and structure the remedies for violations of the constitutional provisions so as to give effect to the intentions of the framers of the Constitution. The courts in Kenya and other jurisdictions have used structural interdicts as part of appropriate remedies in order to address a demonstrated inaction by the government. Through the structural interdicts, the courts are able to remedy violations by retaining post-judgment powers and requiring government’s compliance with its obligations under the supervision of the courts. The orders direct a person what he must or must not do and when he must change an ongoing constitutional violation. In the case of *Eric Githua Kiarie*<sup>77</sup>, the court ordered the Ministry of Education to develop a policy within 120 days clearly setting out a comprehensive framework through which basic education will be provided to the children in detention facilities. Within a similar period, the Ministry had to file an affidavit detailing the policy measures put in place to offer basic education to children held at K J R H and other detention facilities in the country. Likewise, in

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<sup>76</sup> Article 23

<sup>77</sup> *supra*



*Mitu-Bell Welfare Society*<sup>78</sup> and *Muthurwa Case*,<sup>79</sup> the High Court invoked its powers to put up a stop to the systematic violation of constitutional rights through forceful and illegal evictions which are rampant in Kenya. The court asked the State to report on its current policies and programmes on the provision of shelter and access to housing.

Without this level of court involvement, most of the constitutional provisions may remain idle for eternity. Moreover, it is not unlike the governments to frustrate the law through dalliance and/or inaction. Take the right to housing, for example. The first housing policy in Kenya was enacted in 1966 when the annual housing shortage was only 7,600 and 37,000 in urban and rural areas respectively.<sup>80</sup> The policy was revised in 2004 and significantly little has been done to achieve its objective and goals.<sup>81</sup> Today, the national annual housing shortage stands at 200,000 units and the government has only managed to put up 2000 new units since 2004.<sup>82</sup> The number of street children has similarly increased from 115 in 1970s to over 300,000.<sup>83</sup> Clearly, this is a demonstration that the government might have to use some prodding and nudging to change its behaviour.

While this level of intervention may be very effective in addressing the causes of poverty and exclusion in society, it is noteworthy to highlight the discomfort that has been expressed from some quarters towards the exercise of post-judgement supervisory powers by the court. Some critics argue that it is an intrusion by the court into the policy matters which should be left to the executive and the legislature. Others argue that when a court has issued judgment it cannot reserve any powers over the matter on account of the principle of *functus officio*<sup>84</sup>. However, M Wesson suggests that the more objective way to look at the structural interdicts is that of “collaboration and synergy” between the Judicial and

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<sup>78</sup> *supra*

<sup>79</sup> *Satrose Ayuma and others v Registered Trustees of Kenya Railways Staff Retirement Benefits Scheme and 3 others* (2013) eKLR

<sup>80</sup> See 1966/67 Sessional Paper No. 5

<sup>81</sup> National Housing Policy Sessional Paper No 4/2004

<sup>82</sup> Cytton Research, April 22, 2018. “Affordable Housing in Kenya” available at <https://www.cyttonn.com/topicals/affordable-housing-in-kenya> last accessed 2018/12/07

<sup>83</sup> Ayward Shorter and Edwin Onyancha, 1999. “Street Children in Africa — A Nairobi Case Study.” Paulines Publications Africa, Nairobi, Kenya.

<sup>84</sup> See the decision of Court of Appeal in *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others* [2016] eKLR at paragraphs 66-73

Executive arms of government 'in terms of which branch of government brings its particular skill to bear on the problems of realizing the socio-economic rights.<sup>85</sup> Structural interdicts also contribute to the better understanding by public authorities of their constitutional obligations in particular areas whilst also assisting the judiciary in gaining the valuable insight into the difficulties that these authorities encounter.<sup>86</sup>

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<sup>85</sup> Wesson, Murray, "Grootboom and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court" (January 30, 2004). (2004) 20 South African Journal on Human Rights 284. Available at SSRN: <https://ssrn.com/abstract=2223911> at page 307

<sup>86</sup> Andrew Barney Khakulal, 2018. ""Embracing Structural Interdicts in the Enforcement of Socio-Economic Rights in Kenya: Analysis of the Court of Appeal Decision in the Mitu-Bell Case." Jomo Kenyatta University of Agriculture and Technology Law Journal. Vol 2 (2018) at page 178

## The Role of the Legal Profession and Practitioners

### Introduction

This section argues for the need for the acceptance of the connection between poverty, law and the correlative responsibility of lawyers. That the link between law and poverty, too, has an implication for what the law firms and other legal organizations do as business enterprises in their own rights and as the advisors of other business entities as well. The main challenges to the attainment of social justice in Kenya are poverty, illiteracy and ignorance of the citizens of their rights and entitlements under the law. The poor cannot stand up on their own to protest the violation of their rights by the rich and powerful aggressors because of the tedious and legalistic procedures of seeking justice and the high cost of engaging attorneys. The situation is worse for the class of people such as the street children who are marginalized and victims of public spite who may have to suffer the transgression in docility.

The members of the society hope to approach the instruments of law which are vindictive and responsive to their grievances. The members of society, underprivileged or otherwise, can only benefit from the laws and the legal system if both are capable of holding the public and private entities accountable for the conducts which offend their rights. This section contends that the lawyers, in whichever capacity they serve across the branches of legal profession whether in the government, in the courtrooms, at the Bar and law firms, and in businesses and organizations, must fully embrace their role and responsibilities to their societies, especially the service to the poor, the homeless and other needy people at all levels that matter in the legal system. This is because action or inaction of the legal professionals in their respective areas of practice and multi-dimensional role and responsibilities makes a difference, for better or for worse, to what happens to people afflicted by poverty and its ravages.<sup>87</sup>

With a huge percentage of Kenyans living in poverty, the lawyers ought to re-evaluate their responsibility and contribution, as professionals, towards the poverty alleviation. They are needed to make the law more workable, to assert the rights which the poor always have in theory but have never been able to assert by themselves on their own behalf, to practice preventive law through legal aid and

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<sup>87</sup> Horrigan, B. T. (2013). The roles of lawyers in steering corporate governance and responsibility towards addressing social injustice and inequality. In P. D. Maynard, & N. Gold (Eds.), *Poverty, Justice and the Rule of Law: Report of the Second Phase of the IBA Presidential Task Force on the Financial Crisis* (pp. 139 - 159). London UK: International Bar Association.

counselling on a variety of common arrangements where the poor may be exploited, and to develop the law to create new kinds of rights that are, now, not perceived as involving legal issues.<sup>88</sup>

**i. Promotion of progressive jurisprudence on the rights of the poor.**

The Bar has to complement the role of courts in the realization of the 2010 Constitution's aspirations and ideals of creating an inclusive, equal and just society that takes care of its vulnerable members such as the street children. As I pointed out earlier, the judges have a very prominent role in developing and midwifing the implementation of the 2010 Constitution in order to crystallize and operationalize rights guaranteed therein. The lawyers, too, are a very critical players of this role. The nature of the relationship between the Bench and the Bar is, perhaps, best captured in the words of the former Chief Justice of Kenya Dr. Willy Mutunga thus;

*“the bench and the bar are allies at a distance, each fighting from a different front as champions of justice.” They have a joint responsibility to set the foundations of a jurisprudence of social justice and human rights.”<sup>89</sup>*

Whereas the Bar and the Bench jointly occupy this privileged position, the duty is even more compelling for the advocates who appear before the judges to litigate the rights and claims as contested by their clients. This is so because the judges, who must be impartial arbiters, largely rely on their submissions.

The advocates in their capacity as State or public officers or private practitioners must help the courts of law, and indeed the State, to develop a progressive legal jurisprudence in order to actualize the realization of the rights of the citizens in the bill of rights as required in article 21 of the Constitution. The lawyers must participate in the standard-setting initiatives that address poverty particularly the areas in which the law is not yet fully developed. They have to do these under the contemporary conditions of governance.<sup>90</sup> For example, the child protection system in Kenya is still weak and, in a way, the vulnerable children such as the ones in the streets suffer violence, exploitation, deprivation as a matter of course. The conditions of the households where the children come have also their share of rights violation. To this end, the legal profession should assist by undertaking thorough research that is

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<sup>88</sup> A. K. Pye & Raymond F. Garraty. (1966). “Involvement of the Bar in the War against Poverty,” 41 Notre Dame L. Rev. 860 Available at: <http://scholarship.law.nd.edu/ndlr/vol41/iss6/4> (Pye & Raymond, 1966)

<sup>89</sup>Mutunga, W. (2014). A New Bench-Bar Relationship: The Vision of the 2010 Constitution of Kenya.” In Yash Pal Ghai and Jill Cottrell Ghai (Eds.). The Legal Profession and the New Constitutional Order in Kenya (Pp 59-75) International Commission of Jurist Kenya Section. Strathmore University Press at page 67.

<sup>90</sup> Horrigan, supra

necessary to investigate and address the links between law, human rights and these challenges. The legal practitioners, Mutunga says, should critique the law based not only on the letter of the law but also non-legal phenomena in order to breathe life into the Constitutional agenda of transformation.<sup>91</sup>

The constitution of Kenya is quite receptive of international law and borrowed jurisprudence.<sup>92</sup> Consequently, the legal practitioners should exploit this window of opportunity to enrich the domestic legislations and jurisprudence through cross-disciplinary and cross-jurisdictional theory building to bring about reforms. The Guatemalan case of *Villagran Morales*<sup>93</sup> is especially important as it specifically concerns the rights of the street children. In this case, some five street children had been rounded-up, assaulted and murdered by the National Police and Security officers in Guatemala City. The case was brought before the Guatemalan court but the police officers were acquitted for lack of evidence. The decision was challenged by two non-governmental organizations – Center for Justice and International Law (CEJIL) and Asociación Casa Alianza in the Inter-American Court under the America Human Rights Convention. The Inter-American Court faulted the Guatemalan Court for failing to hold the police offices accountable for their actions despite the overwhelming evidence against them. The officers had kidnapped the boys in broad daylight, tortured and murdered them before abandoning their bodies. The court ordered the State to make reparation to the victims' families and further made several recommendations to the State including the requirement that the State builds a school with a plaque in memory of the victims and bring the perpetrators to book.

The case is undoubtedly huge and should be a yardstick for Kenya's legal practitioners and rights advocates. Firstly, it offers a very helpful authority for pursuing the rights of street children and other classes of people whose rights are usually violated because of their marginalized status in society. Secondly, it speaks to the lengths the practitioners and organizations committed to human rights should be willing to go to vindicate the victims of the State abuse and excesses and enforce the rule of law at the domestic institutions. Lastly, as adversarial as the Kenyan litigation system may be the practitioners must remain committed to the higher ideals of protecting the dignity of the victims of the infractions by the State agencies or private entities. The attorneys from both sides must be forthcoming with facts and material relevant for the determination by the court. For the moral foundation of the

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<sup>91</sup> Supra, at page 66

<sup>92</sup> International law instruments such as the UN Convention of the Rights of Child; African Charter on the Rights and Welfare of the Child among others would be very effective.

<sup>93</sup> Street Children" (Villagrán-Morales et-al.) v. Guatemala (1999) IACtHR Guatemala

lawyer's profession lies in the defence of human dignity. Conversely, the chief moral dangers facing the profession arises when lawyers assault human dignity rather than defend it.<sup>94</sup>

**ii. Embracing Public Interest Litigation, Legal aid & Pro bono services.**

Traditionally, assisting the disadvantaged members of the society has been dependent on the philanthropy, magnanimity and the social conscience of individual members of the society. It may seem inappropriate, on the face of it, to admonish legal practitioners for their failure to, say, render pro bono and legal aid services to the disadvantaged members of their community like the street children. Yet such admonition is not unrealistic! In the 21<sup>st</sup> Century, legal profession owes fidelity to a high-order ideal i.e. taking seriously the implicit commitment to the public good of law-making, law reforms and social justice under the rule of law.<sup>95</sup>

The majority of Kenyans have only attained minimal literacy levels and are poor. Thus, in most instances, they are unaware of the existence of their constitutional rights and/or are incapable of affording the cost of claiming those rights whether through advocacy or litigation in the courts of law. The legal profession, as one of the principal gatekeepers of justice, have a duty, at least a negative one, to stand up, facilitate and ensure that the justice is accessible even to the poorest and lowliest life in the society.

Lawyers can promote access to justice through advocacy and public interest litigation in collaboration with social workers and civil society organizations. Through such collaborations, the lawyers can protect and promote the rights of the street children, say, at subsidized cost or pro bono through public interest litigation. The Constitution has tremendously relaxed the rule of standing – what used to be the barrier for public interest litigation.<sup>96</sup> The usefulness of public interest litigation as a tool for moving people out of poverty and realization of their economic, social and cultural rights has been widely acclaimed.<sup>97</sup> It is my inclination that poverty being a “fundamental access to justice” issue, the Kenyan lawyers should embrace service to the disadvantaged members of the community as clients even on a pro bono basis. There are members of the bar who have taken pro bono services and public interest litigation

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<sup>94</sup> Luban David. (2005). “Lawyers as Upholders of Human Dignity (When They Aren’t Busy Assaulting It)” *Georgetown Law Faculty Publications and Other Works*. 147. <https://scholarship.law.georgetown.edu/facpub/147/>

<sup>95</sup> *ibid*

<sup>96</sup> See articles 22 and 258

<sup>97</sup> J Oloka-Onyango. (2017). Poverty and Resources: What Have the Courts to Do with It? In J. Oloka-Onyango. *Politics, Public Interest Law and Litigation in East Africa* (pp 160-125). Cornell Institute of Africa Development Series: Cambridge Scholars Publishing.

seriously and have actually contributed to the establishment of fundamental jurisprudence. For instance, the case of *Erick Githua Kiarie v A.G and 2 others*<sup>98</sup> was a glorious initiative taken by the petitioner (a legal aid service provider attached to Moi University Legal Aid Clinic) acting on behalf of the children at the detention camps in which he succeeded in asserting and securing the children's rights to education. Some laymen such as Okiya Omutatah Okoiti (Mr.) have also been outstandingly committed to fight on behalf of the meek masses. Okiya Omutatah has filed a number of public interest suits which have contributed to significant pronouncements by the court on constitutionalism and governance in Kenya.<sup>99</sup>

However, the apathy of public interest litigation from individual lawyers is still glaring notwithstanding the fact the 2010 Constitution has significantly relaxed the rule of standing and the cost of litigation.<sup>100</sup> The challenge is that it still remains a prerogative of the individual legal practitioner or civil society organization to exploit article 258 to bring a representative suit or public interest litigation so as to vindicate this class of people. In the face of this apathy, the professional associations and regulatory bodies, in the instant case the Law Society of Kenya (LSK), the Judicial Service Commission (JSC) and the Council of Legal Education (CLE), should be at the forefront in encouraging their members to actively participate the protection and promotion of human rights and social change struggles. The LSK and the JSC must, if necessary, require mandatory pro bono or legal aid services from the Kenyan legal practitioners as part of the qualification for good standing. Without a structured persuasion and prodding by the regulatory bodies or professional association of lawyers it seems that it would take a combination of so many factors such a commitment and fidelity to the Constitutionalism together with a pro-poor orientation, compassion and, perhaps, empathy from each lawyer for public interest litigation to take root and deliver results in Kenya.

Presently, most law practitioners are interested and pre-occupied with more the profitable areas of practice such as real estate (conveyancing); intellectual property; commercial contracts; family; personal injuries and criminal defense. Areas such constitutionalism and governance are conspicuously

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<sup>98</sup> *Supra*,

<sup>99</sup> Here are some petitions that have been filed by Okiya Omutata through Public interest litigation; Okiya Omutatah Okoiti v Cabinet Secretary, National Treasury and 3 others Petition No 253/2018; Okiya Omutatah Okoiti v Joseph Kinyua and 3 others Petition No 51/2018; Okiya Omutatah Okoiti v Communication Authority of Kenya and 5 others Petition No 45/2016; Okiya Omutatah Okoiti v Attorney General and 5 others Petition No 70/2014 among others.

<sup>100</sup> See Articles 22, and 258 of the Constitution; the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

missing against the backdrop of many cases of abuse of office, corruption and bad governance in general that has riddled the country for a long period of time.<sup>101</sup> Nonetheless, the practice in many jurisdictions is moving towards more prodding of the practitioners by their professional associations to engage more in pro bono services to the less fortunate members of the society. For instance, the Legal Practice Council in South Africa has implemented a mandatory requirement for pro bono work which requires attorneys and advocates to do a minimum of 20-24 hours of pro bono work each year. The Law Society of Kenya should put more emphasis on legal aid clinics and pro bono work as part of a broader strategy to expand access to justice to the citizens of Kenya. This will not only create awareness but also to build capacity among the ordinary people who, often, are not well versed with the law, to protest and fight injustice. This is a view also shared by (Amondi, 2014) who emphasizes the necessity of legal aid (a system of providing free or inexpensive legal services) as an essential condition to safeguarding and protection of the poor's social-economic rights and the development of the country. That the poor people often are not aware of their rights or even how to protect them. Because of poverty and other disadvantages, the poor find it difficult to understand and cope with the law<sup>102</sup>

Relatedly, the students in the various institutions of learning that offer courses in legal studies must also be so trained and conditioned to embrace legal aid and pro poor causes. The focus of the educational institutions should not be in producing the classical lawyers instead they ought to design their courses to produce a new brand of lawyers with the skills aligned and oriented to offer solutions to the current socio-economic challenges of the society. The Council for Legal Education (CLE) should appreciate the role and power of law in ordering the society, discover the transformational objectives of the new constitution of Kenya and then align the syllabus and teaching methods to produce practitioners with broad vision and reflection of this purpose of law in the society. The legal academies should inculcate ethics of social, business and professional responsibility in law and business school courses, public advocacy and thought leadership.<sup>103</sup> Patricia Kameri-Mbote expresses her skepticism about the likelihood that the current system of legal education would achieve this objective.<sup>104</sup> She

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<sup>101</sup> Yash Pal Ghai. 2014. Legal Profession: Themes and Issues. In Yash Pal Ghai and Jill Cottrell Ghai (Eds.) Legal Profession and the New Constitutional Order in Kenya. Strathmore University Press. Page 14

<sup>102</sup> Amondi, Caroline. "Legal Aid in Kenya: Building a Fort for Wanjiku." In Ghai, Yash and Ghai, Jill "The Legal Profession and the new Constitutional order." Strathmore University Press. Nairobi. 2014

<sup>103</sup> Horrigan supra,

<sup>104</sup> Patricia Kameri-Mbote, "Legal Education and Lawyers" in "The Legal Profession and the New Constitutional Order in Kenya." 2014. International Commission of Jurist Kenya Section. Strathmore University Press. Edited by Yash Pal Ghai and Jill Cottrell Ghai. Page 121-138



explains that the legal education, as currently is, does not offer enough latitude for research, specialization, hands-on lawyering and pursuit for interest.

From my own experience as an undergraduate student of law at Makerere University, I am inclined to agree with her. The syllabus had so many compulsory courses until the fourth year when it offered elective courses including research project. Makerere University's School of Law, however, established a Public Interest Law Clinic (PILAC)<sup>105</sup> in 2012. PILAC – though could only train a very limited number of students, probably, due to constraints in resources and staffing – was a hands-on Programme intended to equip the students with public interest lawyering skills. It has played a monumental role in promoting a culture of social justice lawyering in Uganda by developing consciousness amongst law students on the importance of role public interest lawyering play in the protection of human rights.<sup>106</sup> The clinic, too, exposed the students to live cases of rights abuses and organized numerous seminars, conferences and dialogues within and without Makerere University to bolster the awareness, advocacy and provoke candid discussion about human right issues.

### **iii. The legal profession's corporate social responsibility to the society**

Corporate Social Responsibility (CSR) obligation has been part of business operational strategy for a very long period of time. In fact, the concept of CSR obligations of the business organization is traceable back to the 1700 BC polities like the ancient Mesopotamia and while others connect the practice to the scriptures and traditional philosophies like Confucianism.<sup>107</sup> The ultimate deduction from these studies suggest that the CSR obligations were linked to what activities the businesses could not morally do having consideration to their effects on the values of the societies within which they operated. Consequently, the CSR obligations were thought of as a response to moral or ethical imperatives<sup>108</sup>.

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<sup>105</sup> PILAC is headed by among others Professors, J Oloka-Onyango and Christopher Mbazira. The two are acclaimed scholars, authors Constitutional Law and Human Rights. They have written extensively on rights issues, and have taught in various universities around the world. They, too, are renowned activists of constitutionalism, minority and socio-economic rights in Africa.

<sup>106</sup> For the highlights of some of the milestones that the clinic has achieved since its establishment see <http://law.mak.ac.ug/news/public-interest-law-clinic-pilac-celebrates-five-years>

<sup>107</sup> Park, Patricia. (2009). Perspective of Lawyers in Practice on CSR. In Samuel O. Idowu and Walter Leah Filho (Eds.), Professionals' Perspectives of Corporate Social Responsibility. Springer. At page 33

<sup>108</sup> Ibid,

However, today, many of the significant social obligations are imposed on business organizations as a direct result of the application of environmental and public international law principles<sup>109</sup>. Park, while interrogating what the law has to do with CSR, states the baseline thus, “the very fundamental of a sound CSR policy is legal compliance with international law minimum standards for environmental and labour protection.<sup>110</sup> Whereas the truth in this assertion still holds, the global expectations for the business organizations have really augmented to cover issues that are not merely environmental and labour relations. Today, confronting the underlying causes and effects of poverty in communities across the globe, as an aspect of fundamental human rights, is also an issue of societal responsibility for business enterprises of all kinds. The question then arises, Professor Horrigan quips, whether the legal profession can embrace action against poverty as an integral aspect of its socio-ethical, professional and even legal responsibilities.<sup>111</sup>

I agree that it is necessary and long overdue. If the companies which manufacture goods say, pharmaceutical products are under obligation to mind about the sustainability and the impact of their activities to the people and their surroundings, it seems, Professor Horrigan adds, there is a good reason to expect the same level of care from companies which provide services, too.<sup>112</sup> Moreover, the systems that result in the denial, violations of human rights and access to justice to poor operate in the same environment in which the legal profession exist. The members of the legal professions advise the very businesses and organizations regarding compliance and regulatory systems in place. It follows then that actions or inaction of the lawyers in whichever capacity they are engaged makes a difference to what happens to the people afflicted by poverty and it ravages i.e. hunger, disease, homelessness and so on.<sup>113</sup>

There are two ways to look at the corporate social responsibility of the legal profession. First, the legal profession as a business entity in its own rights, for example, in the case of law firms, and secondly, the legal professionals as advisors of corporate entities and organizations whose actions affect the poor

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<sup>109</sup> *Ibid*,

<sup>110</sup> *Ibid*, at page 35

<sup>111</sup> Horrigan, *supra*,

<sup>112</sup> *ibid*,

<sup>113</sup> *Ibid*,

people for better or for worse. In all these spheres, the legal profession should embrace the grand global agenda of fighting poverty and be active participants in designing poverty alleviation strategies.

As a profession<sup>114</sup> and a business entity, the legal profession must have a sense of purpose that transcends self-interest and pecuniary success. The members of a profession, as opposed to trade or business, have to pursue ideals and service to the public.<sup>115</sup> A country like Kenya which is struggling to emancipate its masses from the hold of chronic poverty could use every effort and support it could get, including from the legal profession, in poverty alleviation strategies. Surely, there is a connecting thread between what lawyers and their businesses do or do not do, including the legal profession in such capacity as a business enterprise, and the endgame of alleviating or even eradicating poverty. The assumption of this role by the legal profession is very critical for the sustainability of the fight against poverty and universalization of human rights, both of which cannot be achieved without the realization of the human rights denied to the masses of the population worldwide by the conditions of poverty.<sup>116</sup> For a long time, lawyers, their firms and, to a large extent, big corporations have made charitable contributions and set up Foundations for philanthropic and social causes in the communities. But Chris Marshall challenges the legal fraternity that it is particularly relevant for the to realize that it is not enough for them to make these kinds of gestures. Today, what is expected of a corporation is a CSR policy which demonstrates volunteerism.<sup>117</sup> Lawyers should participate in schemes that ensure the

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<sup>114</sup> Here are some of the definitions of “profession as adopted from P.L.O Lumumba’s article “The Legal Profession and the Crisis of Ethics”; Roscoe Pound’s defines profession as, “...A group pursuing a learned art as a common calling in the spirit of public service- no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art is in the spirit of public service is the primary purpose”; while the British Royal Commission on Legal Services Reports of 1979 defines profession as “...a body of men and women (a) identifiable by reference with some registered record (b) recognized as having some special skill and learning in the same field of activity in which the public needs protection against incompetence, the standards of skill and learning being prescribed by the profession itself (c) holding themselves out as willing to serve the public (d) voluntarily submitting themselves to standards of ethical conduct beyond those required of the ordinary citizen by law (e) undertaking to accept responsibility...”

<sup>115</sup> P.L.O Lumumba, “The Legal Profession and the Crisis of Ethics” 2014 in *The Legal Profession and the New Constitutional Order in Kenya.* 2014. International Commission of Jurist Kenya Section. Strathmore University Press. Edited by Yash Pal Ghai and Jill Cottrell Ghai. Pages 77-99

<sup>116</sup> Ibid,

<sup>117</sup> Marshall C. 2011. *Corporate Social Responsibility in Lawyers’ Firms.* In Ramon Mullerat (Ed.), *Corporate Social Responsibility: The Corporate Governance of the 21<sup>st</sup> Century.* 2<sup>nd</sup> Ed. International Bar Association Series. Walter Kluwer. Netherlands.

access to justice of persons in an economically weak positions, in particular, through the provision of legal aid and advice.

Perhaps, the area in which the relationship between the lawyers and CSR has been greatly discussed is in relation to the level of involvement of lawyers in CSR discussions and formulations in the corporations. Most of the commentators seems to agree that the lawyers are the best suited for CSR policy discussions in the corporations. Patricia Park, for instance, says that the responsibility for advising on CSR does not automatically fallen to lawyers. However, CSR is developed within a legal framework and no other professional than the in-house lawyers has such ready access to boardroom and also enjoys legal privilege to discuss them.<sup>118</sup> And many other writers have put forward the argument for the suitability of the lawyer's involvement in CSR formulations by the corporations.

However, the exact obligations and scope of the advice that a lawyer, whether in-house or independent firm, engaged in a company's CSR strategy formulation can provide is still hazy. Strong consensus seems to be that the role of the legal practitioner, whether in-house or from independent, is to help the company identify risks and understand the implications of the wide range of international guidelines and standards.<sup>119</sup> This view seems to give the lawyers only a limited latitude of focusing on the bare minimums of requirements of the local laws or international standards. However, to be truly a CSR and not merely public relations exercise – and, in this regard, I am having reference to moral values, professional ethics and the responsibility of the lawyers towards the public good – the lawyers should do more than just comply with the bare minimums even if it eats into the profits of the corporations. Like I pointed out earlier, the societal ideals have changed and the stakeholders do not merely expect the businesses to extract profits but also to be good corporate citizens who are contributing in solving the societal problems of the day. The law reflects the morals and values of the society, Patricia says, and the values change so should the interpretation of the law change to mirror that shift.<sup>120</sup> Lawyers, accordingly, should take in the responsibility of not only advising on the “black letter” law but of the

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<sup>118</sup> Park, *Supra*, at page 34

<sup>119</sup> *ibid*

<sup>120</sup> *Ibid*,

changing interpretation of the legal instruments.<sup>121</sup> The law firms should have their own CSR policies and insist that the clients they represent or advise have the same standards of the CSR policies.

Most importantly, the lawyers even while advising businesses and organizations should embrace the disadvantaged members of the community;

- i. as their clients owed the professional obligation within the professions own corporate social responsibility;
- ii. as stakeholders whose lives are affected by the actions of the businesses advised by lawyers; and
- iii. as citizens whose denial of access to justice and basic rights enjoyed by the middle class and the rich citizens put the administration of justice and the rule of law seriously to test.<sup>122</sup>

The lawyers should, hence, embrace service to the poor, the homeless, the street children and other needy groups of people on all levels that matter in a functional legal system. While they render services in businesses whose operation directly or indirectly affect the life of the poor they must not consciously or subconsciously remain complicit to or exacerbate the conditions surrounding the suffering of the disadvantaged in the communities. They should foster responsible corporate client behavior.

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<sup>121</sup> *ibid*

<sup>122</sup> Horrigan, *supra*

## Conclusion

Poverty affects the people's ability to participate in the day-to-day activities in the societies in which they live. The affected people usually live in the margins of the societies hence are cut out from the benefits and entitlements to which belong to them together with the rest of the members. Consequently, their exclusion establishes a chronic cycle of poverty thereby making it impossible for the affected class of people to break away from their social and economic conditions. For instance, an individual who is born of a street family could live in the streets their entire lifetime if they are not assisted. The same is true to other groups of individuals whose economic conditions and marginalization inhibits their access to services and participation in the activities of their communities.

It is not possible to achieve economic growth and development when large sections of the members of the community are not involved in the economic and socio-political activities that affect their life because, then, only a few individuals would have access to the means of productions while the rest live as dependents. This is all too apparent in Kenya where the economy boasts of a 6.0 percent year-on-year GDP annual growth rate yet more than half of its population are living in dire deprivation, exclusion and marginalization. The majority of the affected are mostly children from poor household and communities. The current numbers of the children living in the street should be a serious cause of concern for the society. There is an urgent need to review the current development policies and strategies in order to make them more inclusive and comprehensive.

The phenomenon of the street children and families is just but one of the many faces of the effects of the inequality, discrimination and poor governance in Kenya. To solve the problem of the street children the society will have to address the social exclusion and injustice that has marginalized large sections of its members, deprived them of access to opportunities to enhance their livelihoods and confined them to chronic poverty. The government has not been quite successful in putting in place comprehensive systems and mechanisms that ensure proper management of resources and efficient delivery of social services aimed at holistically addressing poverty and its consequences at the household level. Instead, there seems to be a sense in which poverty in Kenya has, in a variety of ways, been addressed on quicksand and fragmented approaches. Such approaches have not only failed to reduce poverty but also led to wastage of resources.

Devising approaches that target households and families will create and develop capabilities within the communities to take care and protect their vulnerable members. The organization traditional African family, discussed in this paper, demonstrates how the collective ownership, equitable sharing and distribution of resources and inclusiveness is capable to build support networks within a community to relieve the weak and vulnerable members from economic and natural shocks. Equitable distribution of

resources and inclusive policies will go a long way to reinvigorate the social bonds that hitherto held and enabled communities to provide for themselves rather dependent to charity and reliefs from the State. Ultimately, this will stop the flow of children into the streets.

The 2010 Constitution of Kenya is a major legal tool to drive the country towards an equitable, accountable and transformative development. It emphasizes sharing, inclusion, social justice, and good governance as some of the key pillars upon which public policy decision have to be based. The enactment and adoption of the 2010 Constitution was an attempt by the Kenyan people to institutionalize good governance, efficient delivery of social services and progressive and incremental standards and conditions of living. Yet, if the 2010 Constitution is faithfully applied, interpreted and implemented by the duty-bearers all the aspirations and hopes it contains for a better society will remain a mirage.

Hence there is the need for all the stakeholders, both in the public and private sector, to embrace the transformative agenda of the current constitutional regime in order to reduce and, ultimately, eliminate poverty among the people. The State and its agencies, on the one hand, must conscientiously and dutifully discharge their mandate as per provisions of the constitution to ensure their realization. Much emphasis and resources must be redirected towards the attainment of the socio-economic rights under articles 43 and 53 of the 2010 Constitution so as to prevent the neglect, separation and inflow of the children into the streets because the war against poverty has to begin with the children.

On the other hand, the legal professionals in Kenya in whichever capacity they serve must actively participate in the promotion, protection and defence of the constitution and the human rights guaranteed therein. The profession has to be a vigilant gatekeeper of the rule of law and must always encourage and demand constitutional accountability for all the State organs and officers in the exercise of their duties. The judges together with lawyers must patriotically embrace their role while applying and interpreting the 2010 Constitution so as to help with the illumination of the law, concretize its provisions and the rights under them. Importantly, the Bench and the Bar must never lose sight of the fact that the attainment of social justice, inclusiveness and human dignity is at the heart of the present legal regime in Kenya. The two bodies must work in synergy and collaboration in order to conduct a thorough intellectual inquiries and critique on the fundamental rights and freedoms guaranteed by the 2010 constitution. This will not only develop a legal system which is rich in human rights jurisprudence but will also assist the State, its organs, officers and all other people who apply the 2010 Constitution to understand the scope of its contents and the obligations it bestows upon them especially in the areas which are yet to be fully explored such as the rights of the minorities and other classes of vulnerable people.

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