

Constitutional Supremacy over Arbitration in Kenya

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ABSTRACT

The Constitution of Kenya, 2010 is the Supreme law of the land, a principle entrenched under Article 2 thereof. Kenya has in place an Arbitration Act to define the scope, responsibilities and limitations of arbitral tribunals so as to allow parties determine disputes in a manner consistent with law. Arbitration in Kenya must be carried out in a manner consistent with constitutional principles and values and any deviation from such manner would be seen as unconstitutional and thus invalid. This paper examines constitutional supremacy in Kenya in relation to its implication on arbitration law and practice through scrutinizing the existing relationship between the Constitutional Bill of Rights and the rules of Arbitration practice. The paper also identifies possible conflict areas existing between the concept of constitutional supremacy and arbitration law and practice as carried out in Kenya. Also examined by this paper is the interpretation of the concept of constitutional supremacy by Kenyan courts. In this regard, case law has been utilized. The paper argues that there is a growing need to revisit the essentials of the law and practice of arbitration in Kenya so as to enhance conformity with the concept of constitutional supremacy ultimately safeguarding the interests and rights of those who prefer arbitration to settle their arising disputes.

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1. INTRODUCTION

For a long time, though state-sanctioned, Arbitration has generally remained outside the scope of constitutional law.

This paper seeks to examine the effect of the constitution supremacy clause on Arbitration in Kenya. It looks at the relationship between the Constitutional Bill of Rights and the rules of Arbitration practice in Kenya. It identifies possible areas of conflict between the concept of constitutional supremacy and Arbitration and especially with regard to such principles as separation of powers and personal liberties.

2. SUPREMACY OF THE CONSTITUTION

Supremacy of the Constitution is said to refer to a situation where the highest authority in a legal system is conferred on the Constitution.¹ The legal norms and/or statutes, institutional structure of the organs of the State and the legislators all rank lower than the Constitution.

This principle of the supremacy of the constitution is said to have originated from the American jurisdiction. It is believed to have first come up when Alexander Hamilton while writing the *Federalist Papers* argued that there is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void.² He further argued that no legislative act therefore contrary to the constitution can be valid. He posited that to deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorise, but what they forbid.³

His argument was that all exercisable powers vested in leaders originate from the people who by their own volition delegated the same to those in authority. The leaders must therefore exercise their legislative powers in a way that is consistent with the constitution.⁴

This principle of constitutional supremacy later appeared in the American Constitution under Article 6 section 2 which states *inter alia* that the American Constitution shall be the supreme law of the land; that the Judges in every State shall be bound thereby, and anything in the Constitution or Laws of any State to the Contrary notwithstanding.

¹Limbach, J., 'The Concept of the Supremacy of the Constitution' *The Modern Law Review*, Vol. 64, No. 1 (Jan., 2001), pp. 1-10, page 1, Available at <http://www.jstor.org/stable/1097135> Accessed on 15/11/2013

² See Hamilton, A., *The Federalist No. 78*, The Judiciary Department, From McLean's Edition, New York.

³ *ibid*

⁴ *Ibid*

In the American case of *Marbury v. Madison*,⁵ it was held that it was the duty of the Judicial Department to say what the law is. The Court stated that those who apply the rule to particular cases must, of necessity, expound and interpret the rule. If two laws conflict with each other, the Court must decide on the operation of each. If courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

The American Supreme court also *inter alia* held that “...the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection.”⁶ All laws which are repugnant to the Constitution are null and void.⁷

This historic court case reinforced the concept of Judicial Review or the ability of the Judiciary Branch to declare a law unconstitutional. It has been suggested that there exists three notions of the principle of supremacy of the constitution which are: The possibility of distinguishing between constitutional and other laws; the legislator's being bound by the constitutional law, which presupposes special procedures for amending constitutional law; and an institution with the authority in the event of conflict to check the constitutionality of governmental legal acts.⁸

It has been argued that ‘*Constitution Supremacy represents a quality of the constitution being in the top of the juridical system of the society....In this way accomplishment of the objectives of the state of right results especially regarding the citizen’s fundamental freedoms and rights(sic).*’⁹

It has also been posited that "the accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny." To guard against that accumulation of power, the Constitution has built-in protections.¹⁰

The supremacy of the Constitution is thus seen as one of the fundamental pillars that are important for the realisation of the other constitutional guarantees. It is also important for the enjoyment of the Bill of Rights and fundamental freedoms. Laws that purport to infringe on any of the constitutionally guaranteed rights would be defeated by the supremacy clause by being declared unconstitutional and thereby invalid.

⁵ 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803)

⁶ Ibid.

⁷ Ibid, 1803

⁸ Limbach, J., ‘The Concept of the Supremacy of the Constitution’ *The Modern Law Review*, Vol. 64, No. 1 (Jan., 2001), pp. 1-10, *op. cit.* page 3

⁹ Mariana, L., ‘The Constitution Supremacy’ page 1,

Available at http://www.sustz.com/.../Jurj_Liliana_Mariana_2.pdf accessed on 23 November, 2013

¹⁰ Madison, J., *Federalist Papers*, No. 48, From the New York Packet, Friday, February 1, 1788.

3. CONSTITUTION OF KENYA, 2010 AND THE SUPREMACY CLAUSE

Article 1(1) of the *Constitution of Kenya, 2010* (hereinafter the Constitution) provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution. Clause (2) thereof provides that the people may exercise their sovereign power either directly or through their democratically elected representatives. Further, Clause (3) provides that Sovereign power under the Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution: Parliament and the legislative assemblies in the county governments; the national executive and the executive structures in the county governments; and the Judiciary and independent tribunals. Clause (4) is to the effect that the sovereign power of the people is exercised at: the national level; and the county level.

Article 159 (1) provides that Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under the Constitution. Regarding Legislature, Article 94(1) provides that the legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament. Further, with reference to the Executive, Article 129(1) provides that the Executive authority derives from the people of Kenya and shall be exercised in accordance with the Constitution. Clause (2) thereof further provides that the Executive authority shall be exercised in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.

The foregoing provisions trace the source of the constitutionally conferred powers from the people. This position is also captured in the Preamble which provides *inter alia* that in exercising the people's sovereign and inalienable right to determine the form of governance of their country and having participated fully in the making of the Constitution, adopt, enact and give the Constitution to themselves and their future generations.¹¹ The fact that the Constitutional powers emanate directly from people has been used to justify the supremacy of the Constitution over every other law or law-making body in the land. It has been argued that the Constitution is 'a charter containing the pact that is the social contract....'¹²

The constituent power is said to be a primordial power, that is, it pre-exists a constitution. The Constitution thus only comes in to delegate such power.¹³ The principle of the supremacy of the Constitution is entrenched in Kenya's Constitution, 2010 under Article 2 thereof.¹⁴ Clause (1) is

¹¹ Preamble, Constitution of Kenya, 2010

¹² Muigai G., "The Judiciary in Kenya and the Search for a Philosophy of Law: The Case of Constitutional Adjudication," *Constitutional Law Case Digest*, Vol. 2, pp. 159-189 at page 160 (2005), International Commission of Jurists (Kenya)

¹³ *Njoya and Others v Attorney-General and Others* (2004) AHRLR 157 (KeHC 2004)

¹⁴ The supremacy clause was captured in the now *repealed Constitution of Kenya* (1963) under section 3 thereof, which was to the effect that 'the Constitution is the Constitution of the Republic of Kenya and shall have the force of

to the effect that *the Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government*. Clause (3) also provides that the validity or legality of the Constitution is not subject to challenge by or before any court or other State organ. Further, clause (4) provides that any law, including customary law, that is inconsistent with the Constitution, is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid. These provisions notably follow Limbach's assertion of the three notions of constitutional supremacy.¹⁵

The various national legal and institutional arrangements are thus bound by the Constitution in their application and functioning. Article 3(1) provides that every person has an obligation to respect, uphold and defend this Constitution. The concept of constitutional supremacy has also been subjected to interpretation by the Kenyan Courts. For instance, in the case of *Githunguri vs Republic*¹⁶ the High Court held *inter alia* that it has inherent powers to exercise jurisdiction over tribunals and individuals acting on administrative or quasi-judicial capacity.

In another Kenyan case of *Albert Ruturi & Others vs A.G & The Central Bank of Kenya*¹⁷ the High Court held that any law that is inconsistent with the Constitution shall to the extent of the inconsistency be void and the Constitution shall prevail (s.3 of the repealed Constitution of Kenya). Supremacy of the Constitution was also discussed in the case of *Kamlesh Mansukhlal Damji Pattni and Goldenberg International Limited vs the Republic*.¹⁸ The Court held that the High Court has the primary responsibility of safeguarding against contravention of the rule of law and the contravention, particularly with regard to fundamental rights and freedoms.

The manner of Constitutional interpretation, being the supreme law of the land, was considered in the east African case of *Republic vs El mann*,¹⁹ where the Court held that the Constitution is not different from any other statute and should be interpreted in the same manner. The Court held that the Constitution has to be interpreted according to the intention expressed in the Constitution itself. The Kenyan Courts however rejected the holding in the *El Mann case*.²⁰ In *Crispus Karanja Njogu vs Attorney General (Unreported)*²¹ the Constitutional Court stated that "the Constitution is not an Act of Parliament but it exists separately and it is supreme. Further, when an Act of Parliament is in any way inconsistent with the Constitution, the Act of

law throughout Kenya and, and subject to section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of inconsistency, be void.'

¹⁵ Limbach, J., *op. cit.* page 3

¹⁶ Criminal Application No. 271 of 1985 (1986)

¹⁷ High Court at Nairobi, Miscellaneous Civil Application No. 905 of 2001

¹⁸ High Court Misc. Application No. 322 of 1999 and No. 810 of 1999

¹⁹ [1969] EA 357

²⁰ For a further discussion on this, see Thiankolu, M., 'Landmarks from El Mann to the Saitoti Ruling; Searching a Philosophy of Constitutional Interpretation in Kenya' *Kenya Law Reports*, January, 2007, Nairobi, Available at http://www.kenyalawreports.or.ke/Downloads/Other/Landmarks_from_El_Mann_to_the_Saitoti_Ruling.pdf

Accessed on 29 November, 2013

²¹ High Court Criminal Application No 39 of 2000

Parliament, to the extent of the inconsistency, becomes void....It is our considered view that, constitutional provisions ought to be interpreted broadly or liberally. Constitutional provisions must be read to give values and aspirations of the people. The Court must appreciate throughout that the Constitution, of necessity, has principles and values embodied in it; that a Constitution is a living piece of legislation. It is a living document.” (Per Oguk, Etyang and Rawal, J.J.J)

The Constitutional court in the *Njogu case* ruled that due to its supremacy over all other written laws, when one interprets an Act of Parliament in the backdrop of the Constitution, the duty of the court is to see whether that Act meets the values embodied in the Constitution. The *El Mann case* position was further challenged and rejected in another Kenyan case of *Njoya & others vs Attorney General & others*,²² where the Court followed the *Njogu case* held that unlike an Act of Parliament which is subordinate, the Constitution should be given a broad liberal and purposive interpretation to give effect to its fundamental values and principles.

The supreme nature of the Constitution was well captured by the Tanzanian Court of Appeal in *Ndyanabo vs Attorney General*²³ where the Court stated that firstly, the Constitution is a living instrument, having a soul and consciousness of its own as reflected in the preamble and fundamental objectives and directive principles of state policy. Courts must, therefore, endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in (tune) with lofty purposes for which its makers framed it. The Court asserted that so construed, the instrument becomes a solid foundation of democracy and the rule of law. Secondly, the provisions touching on fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that the people enjoy their rights, the democracy not only functions but grows, and the will and dominant aspirations of the people prevail. The Court stated that restrictions on fundamental rights must be strictly construed.

The current *Constitution of Kenya, 2010* provides under Article 259(1) the Constitution shall be interpreted in a manner that: promotes its purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good governance.

The Constitution has gone a step further to provide for the general principles and national values of governance which must guide the application of all laws as well as the operation of all state organs and persons. Article 10(1) thereof provides that the national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them: applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions. Clause (2) thereof has laid out such

²² [2004] 1 EA 194

²³ [2001] 2 EA 485, page 493

principles and national values as follows: patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development.²⁴

To promote the observation of such values and principles in the area of human rights, Chapter Four of the Constitution (Articles 19-59) has been dedicated to The Bill of Rights and Fundamental freedoms that must apply to all law and bind all State organs and *all persons*.²⁵ (*Emphasis ours*) Article 19(1) provides that the Bill of Rights and fundamental freedoms is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. This therefore means that all the necessary measures must be put in place to ensure that it is promoted and protected for the wellbeing of general populace.

To protect any interference with constitutional supremacy, the Constitution under Chapter sixteen provides for the procedure to be followed in its amendment.²⁶ Article 255(1) of the Constitution provides that a proposed amendment to the Constitution shall be enacted in accordance with Article 256 or 257, and approved in accordance with clause (2) by a referendum, if the amendment relates to *inter alia* such matters as: the supremacy of the Constitution; the sovereignty of the people; the national values and principles of governance referred to in Article 10 (2) (a) to (d); and the Bill of Rights.

Any law that is inconsistent with the Constitution is void to the extent of the inconsistency and any act or omission in contravention of the Constitution is invalid.²⁷

4. ARBITRATION PRACTICE UNDER THE KENYAN LAW

Kenya has passed an *Arbitration act* to define the scope, responsibilities, and limitations of the arbitral tribunals, to allow parties to determine disputes in a manner consistent with law. The constitutionally contemplated laws include the law of Arbitration in Kenya, which is the main focus of this paper. Arbitration in Kenya is governed by various laws which include the Constitution, *The Arbitration Act 1995*²⁸ (hereinafter the *Arbitration Act*), the *Arbitration Rules, Civil Procedure Act*²⁹ and the *Civil Procedure Rules 2010*³⁰.

Article 159(2) (c) of the Constitution provides that in the exercise of judicial authority, the Courts and tribunals must be guided by the principle of *inter alia* promotion of alternative forms

²⁴ Article 10(2), Constitution of Kenya, 2010, Government Printer, 2010, Nairobi

²⁵ Article 20(1)

²⁶ Articles 255-257

²⁷ Article 2(4)

²⁸ No. 4 of 1995(As amended in 2009)

²⁹ Cap 21, Laws of Kenya

³⁰ Legal Notice No. 151 of 2010, Rules under Section 81, Cap 21

of dispute resolution (ADR) including reconciliation, mediation, Arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3). Notable are the provisions of the Clause (3) which are to the effect that Traditional dispute resolution mechanisms shall not be used in a way that: contravenes the Bill of Rights; is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or is inconsistent with the Constitution or any written law.

Arbitration must be carried out in a way that is consistent with Constitutional principles and values and any derogation thereof would be viewed as unconstitutional and thus invalid. In the Ugandan case (which has been upheld by Kenyan courts) of *Zachary Olum and Anor vs Attorney General*,³¹ it was held that in order to determine the constitutionality of a statute, the Court had to consider the purpose and effect of the impugned statute or section thereof; if the purpose was not to infringe a right guaranteed by the Constitution, the Court had to go further and examine the effect of its implementation. If either the purpose or the effect of its implementation infringed a right guaranteed by the Constitution, the Statute or section in question would be declared unconstitutional.

If the government creates a statutory regime to facilitate Arbitrations, then it has an obligation to ensure that the regime does not violate any of the constitutional principles and values.³² The scope of application of Arbitration has been widening day by day.³³ Article 189 of the Constitution provides for cooperation between national and county governments. Article 189(4) provides that National legislation shall provide procedures for settling inter-governmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and Arbitration.

Section 59 of the *Civil Procedure Act*³⁴ provides that all references to Arbitration by an order in a suit, and all proceedings thereunder, shall be governed in such manner as may be prescribed by rules. Further, Order 46 of the *Civil Procedure Rules* provides *inter alia* that at any time before judgment is pronounced, interested parties in a suit who are not under any disability may apply to the Court for an order of reference wherever there is a difference.

The *Arbitration Act* 1995 generally provides for arbitral proceedings and the enforcement of the arbitral awards by national courts. Section 3(1) of the Act attempts to define the scope of the Act and defines “Arbitration” to mean any Arbitration whether or not administered by a permanent arbitral institution. The Act thus applies to a wide range of Arbitration matters.

³¹ (1) [2002] 2 EA 508

³² Chotalia, S. P., ‘*Arbitration Using Sharia Law in Canada: A Constitutional and Human Rights Perspective*’ page 67. Available at <http://www.ejournals.library.ualberta.ca/.../constitutional.../8499> Accessed on 24 November, 2013

³³ For a detailed discussion on this, see Kariuki, F., ‘Redefining “Arbitrability”’: Assessment of Articles 159 & 189(A) of the Constitution of Kenya’ (2013) 1 *Alternative Dispute Resolution*, Chartered Institute of Arbitrators(Kenya Branch) publication

³⁴ Cap 21, Laws of Kenya

The *Arbitration Act* defines the extent of Arbitration tribunals' operation in Kenya, as well as the point to which courts may intervene in Arbitration.³⁵ Arbitration among parties is instituted by a contractual agreement.³⁶ The parties select one or more neutral, qualified arbitrators to hear the dispute and then agree to be bound by whatever decision is rendered. The arbitrators scrutinize existing evidence and testimony, and then make conclusions based upon legal principles specified in the Arbitration agreement.³⁷

Several benefits have been attributed to Arbitration as an alternative dispute resolution mechanism. Firstly, Arbitration accords the parties a considerable amount of control over the proceedings. Unless parties agree otherwise in an Arbitration agreement or choose later to resort to court, all the aspects of the case are confidential. Secondly, Arbitration is a private and consensual process. For instance, they can select one or more neutral arbiters to hear their dispute.³⁸

For parties who dread humiliation or condemnation or for those who simply do not want sensitive information to be disclosed, Arbitration allows settlement of disputes without exposure. Besides the choice of arbitrators, parties can control aspects of the proceedings as well. In Arbitration agreements, parties can spell out certain procedural changes to the operation of the tribunal, lay down the level of formality of discussion, and most notably, oblige arbitrators to follow their choice of law.³⁹ Thirdly, since parties can exercise control and because proceedings tend to be less formal than in court trials, Arbitration often creates a less tense atmosphere for dispute settlement. Lastly, awards arising out of Arbitration can be binding or nonbinding on the parties, depending on the Arbitration agreement. The *Arbitration Act* allows Arbitration parties to resort to courts only where the parties have agreed that an appeal can be filed.⁴⁰ In the absence of such an agreement the arbitrators' decision will be binding on the parties and enforceable by courts.

Arbitration practice in Kenya has been said to have increasingly become more formal and cumbersome due to lawyers' entry to the practice of Arbitration.⁴¹ This has had the effect of seeing more matters being referred to the national Courts due to the disputants' dissatisfaction. The referrals have been based on matters touching on substantive as well as procedural aspects of the Arbitration. Recourse to Courts may be necessary due to some unique characteristics of Arbitration which, though positive, may also adversely affect the certainty of one party to access

³⁵ S. 10, No. 4 of 1995

³⁶ S. 4, No. 4 of 1995, Arbitration Agreement

³⁷ S. 32, No. 4 of 1995

³⁸ See Muigua K., *Settling Disputes Through Arbitration in Kenya*, pp.3-4, (Glenwood Publishers Ltd, Nairobi, 2012)

³⁹ S. 20

⁴⁰ S. 39

⁴¹ Muigua K., *Settling Disputes Through Arbitration in Kenya*, op. cit. page 10

justice. These include lack of a harmonized framework for supervision or accountability of arbitrators,⁴² a relaxation of evidentiary rules, decreased opportunities for thorough discovery,⁴³ insufficient or nonexistent explanations of arbitrators' reasoning in decisions,⁴⁴ and limited protections for vulnerable parties.

Arbitration tribunals are however subject to certain restrictions imposed by the courts. Further, the court has the power, on application from one or more of the parties, to remove an arbitrator on grounds of bias, lack of qualifications or physical or mental capacity, or a refusal or failure to conduct proceedings properly.⁴⁵

A court may determine a question of law which it finds "substantially affects the rights of one or more of the parties" upon application from a party involved in the Arbitration proceedings and upon the agreement of all parties or the Arbitration tribunal.⁴⁶ A court may also issue orders confirming, varying, or setting aside awards granted by the tribunal, after one party makes an application to the court.⁴⁷

Although the foregoing does not provide the exhaustive list of the ways in which a court can supervise and regulate Arbitration tribunals in the Kenya, it illustrates that courts can keep Arbitration panels in check, and ensure they do not act unconstitutionally.

5. ARBITRATION AND THE CONSTITUTION OF KENYA, 2010

The law of Arbitration in Kenya has also not been without challenge as to its unconstitutionality in its application due to alleged violation of the rules of natural justice. One such instance occurred in the case of *Epcos Builders Limited v Adam S. Marjan-Arbitrator & Another*⁴⁸ where the Appellant had filed a constitutional Application under sections 70 and 77 of the Constitution of Kenya⁴⁹, section 3 of the *Judicature Act* and section 3A of the *Civil Procedure Act*. The Applicant argued that their constitutional right to a fair Arbitration had been violated by a preliminary ruling of the arbitrator. The Applicant argued that it was unlikely to obtain fair adjudication and final settlement of the dispute before the arbitral tribunal due to the arbitrator's "unjustified refusal to issue summons to the Project Architect and Quantity Surveyor" who would have allegedly played an important role as witnesses in ensuring fair and complete settlement of the matters before the Tribunal. Counsel for the Chartered Institute of Arbitrators-Kenya Branch (CIArb), an interested party, submitted that while CIArb did not refute the

⁴² Supervision is mostly Institution-based

⁴³ Limited timeframes are usually allocated for this

⁴⁴ Parties may agree on whether they will expect an award with reasons thereof or otherwise.

⁴⁵ S. 13, No. 4 of 1995

⁴⁶ S. 39(3)(b), No. 4 of 1995

⁴⁷ *Ibid*, s. 39(2)(b)

⁴⁸ Civil appeal No. 248 of 2005 (unreported)

⁴⁹ Repealed by the Constitution of Kenya, 2010

application under section 77(9) of the Constitution, it argued that the procedure laid down under the *Arbitration Act* should be exhausted first before such an application.

Justice Deverell, while supporting the view of the majority stated:

If it were allowed to become common practice for parties dissatisfied with the procedure adopted by the arbitrator(s) to make constitutional applications during the currency of the Arbitration hearing, resulting in lengthy delays in the Arbitration process, the use of alternative dispute resolution, whether Arbitration or mediation would dwindle with adverse effects on the pressure on the courts. This does not mean that recourse to a constitutional court during Arbitration will never be appropriate. Equally it does not mean that a party wishing to delay an Arbitration (and there is usually one side that is not in a hurry) should be able to achieve this too easily by raising a constitutional issue as to fairness of the “trial” when the *Arbitration Act* 1995 itself has a specific provision in section 19 stipulating that “the parties shall be treated with equality and each party shall be given full opportunity of presenting his case,” in order to secure substantial delay. If it were to become common, commercial parties would be discouraged from using ADR.⁵⁰

Justice Deverell’s assertion was therefore that Alternative Dispute Resolution should be encouraged while reducing the instances where disputants sought court’s intervention. This was supposedly to make the process ‘expedient’. The dissenting judge, Justice Githinji, was however of the opinion that Arbitration disputes are governed by private law and not public law and by invoking section 84(1) of the constitution, the Appellant was seeking a public remedy for a dispute in private law.⁵¹

The foregoing argument may however not be compelling under the current *Constitution of Kenya* 2010. The repealed Constitution is fundamentally different from the current Constitution of Kenya with regard to such matters as fundamental rights and freedoms with the latter having substantive and elaborate provisions on the same.

Justice Githinji’s opinion that private matters cannot be decided in the sphere of public law would probably not hold under the current Constitution of Kenya. For instance, Article 10(1) provides that the national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them *inert alia*: enacts, applies or interprets *any* (emphasis ours) law; or makes or implements public policy decisions. This clause binds all persons and demands that any law (including private law) must be consistent with its provisions. The Bill of Rights and Fundamental Freedoms binds all persons

⁵⁰ Ibid

⁵¹ Ibid

and applies to all law⁵² and requires equal treatment of every person⁵³ including *persons/parties to a private law governed dispute settlement process. (Emphasis ours)*

The law cannot restrict itself to those disputes that only involve public law but must also protect the constitutionally guaranteed rights of even those transacting under the sphere of private law.⁵⁴ Apart from facilitating and giving effect to private choice, the law must also protect the interests of the members of the society.⁵⁵ Failure to do so would create the impression of selective application of such law.

With regard to the *Arbitration Act*, section 5 provides that a party who *knows* that any provision of this Act from which the parties may derogate or any requirement under the Arbitration agreement has not been complied with and yet proceeds with the Arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is prescribed, within such period of time, is deemed to have waived the right to object. This provision is well meant for ensuring expediency and fair play in an Arbitration. However, the wording of the section has not ousted the jurisdiction of the constitutional Court. It deals with situations where such an aggrieved party was reasonably expected to have known or was well aware of such derogation or statutory requirements under the Act. Where does that leave those who were genuinely ignorant of the foregoing?⁵⁶ They could justifiably raise objections especially where fundamental rights and freedoms are concerned, notwithstanding the time limit prescription.

Article 22(1) provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Further, Article 23(1) provides that the High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Notably, clause (3) thereof further provides that in any proceedings brought under Article 22, a court may grant appropriate relief, including: a declaration of rights; an injunction; a conservatory order; a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24; an order for compensation; and an order of judicial review.

⁵² Article 20(1), See also Article 2(4) of the Constitution

⁵³ Article 27 on Equality and freedom from discrimination

⁵⁴ See Cherednychenko. O.O., 'Fundamental rights and private law: A relationship of subordination or Complementarity?' *Utrecht Law Review*, Volume 3, Issue 2 (December, 2007), Available at <http://www.utrechtlawreview.org/> Accessed on 29 November, 2013

⁵⁵ See Burnett, H., *Introduction to the legal system in East Africa*, East African Literature Bureau, Kampala, 1975, pp267-412

⁵⁶ Though ignorance of the law is no defence (*Ignorantia juris non excusat or Ignorantia legis neminem excusat*)

5.1 Natural Justice

In the English case of *Ridge v Baldwin*,⁵⁷ the watch committee had sacked Ridge the chief constable of Brighton after he had been acquitted on charges relating to corruption. On appeal, he won since Police Regulations had set down a procedure that should have been followed and the fact that there was lack of natural justice; he had neither been told of the reasons for dismissal nor given the opportunity to put his case to the watch committee. The House of Lords held that the decision to dismiss Ridge was void because the watch committee had not observed the principles of natural justice. The court of appeal had held that the committee was acting merely in an administrative capacity but, the House of Lords differed by holding that the committee had not wholly observed the rules of natural justice and therefore its decision was void.

In the case of *Breen Vs Amalgamated Engineering Union*⁵⁸ the court noted that ‘as regards the right to a hearing, the crucial question seems to be not whether a person is or is not an office holder but whether a statutory or other requirement provides or is to be interpreted as providing the elementary safeguard of a right to a hearing.’ It held that ‘...[I]f he is a man who has some right or interest, or some legitimate expectation, of which it would not be fair to deprive without a hearing, or reasons given, then these should be afforded him according as the case may demand.’

The principles of natural justice entail the right to be heard (*Audi alteram partem*)⁵⁹ and the right to a fair and unbiased administrative process (*Nemo iudex in re causa sua*).⁶⁰ The common law rules of natural justice or procedural fairness ensures that administrative decision makers follow a fair and unbiased procedure when making decisions.

Natural justice requires that the decision maker must provide sufficient opportunity for the affected person to present their case and respond to the evidence and arguments being advanced by other side or in the knowledge of the decision maker.

A number of disadvantages justify the need for constitutional regulation of administrative tribunals. These are: they are at times held in private so the basic requirements for justice may be ignored; parties are sometimes not permitted to be represented by lawyers; rights of appeal are sometimes limited; there is a wide discretion of a tribunal at times, which may lead to inconsistent and illogical decisions; and the officials do not act impartially in most of the cases.⁶¹

⁵⁷ [1964] AC 40; (1964) HL

⁵⁸ (1971) 2 QB 175

⁵⁹ Latin for ‘hear the other side; hear both sides’

⁶⁰ Latin for ‘no man should be a judge in his own cause’

⁶¹ ICJ Kenya, ‘Strengthening Judicial Reforms in Kenya: Public Perceptions of the Administrative Tribunals in Kenya’ Vol. VI, page 6 (2003)

In the case of *David Onyango Oloo vs The Attorney general*,⁶² it was held *inter alia* that rules of natural justice apply to an administrative act in so far as it affects the rights of the appellant and the appellant's legitimate expectation to benefit application of a law.

A decision maker must also discharge their administrative duties in an independent and unbiased manner.

Lord Hewart, in *Rex v Sussex Justices; Ex parte McCarthy* had earlier expanded the scope of natural justice by holding that "... *it is not merely of some importance but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done.*"⁶³

The current Constitution of Kenya has taken the foregoing standards a notch higher by incorporating natural justice principles into the constitutional rights. Article 47 deals with fair administrative action. Clause (1) thereof provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Article 48 provides that the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice. This provision is not biased towards people dealing with public law only but also protects those dealing with private law.

5.2 Fairness

Article 50 of the Constitution provides for the right to a fair hearing. Clause (1) provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. Such persons or parties to a dispute also have a right to *inter alia* have adequate time and facilities to prepare a defence and to adduce and challenge evidence. The information disclosed to the person must be satisfactorily accurate to facilitate the person to properly present his or her case.

Section 19 of the *Arbitration Act*, dealing with equal treatment of parties, provides that the parties shall be treated with equality and each party shall subject to section 20, be given a fair and reasonable opportunity to present their case. This provision would be subject to Articles 27 and 50 of the Constitution on equality and fair hearing respectively. Justice Deverrel's argument in the *Epcos case* that the *Arbitration Act* conclusively provides that 'parties shall be treated with equality and each party shall be given full opportunity of presenting his case' and thus application for upholding of constitutionally guaranteed rights should not be 'easily' allowed

⁶² [1987] K.L.R 711

⁶³ ([1924] 1 KB 256, [1923] All ER Rep 233)

could be challenged. It is noteworthy that the *Arbitration Act*'s provision on fair trial does not in itself suffice to guarantee this right. Any provision on fair and/or equal treatment that apparently contradicts other provisions therein renders it ineffective in realisation of justice. The Constitution requires that such a hearing must be guided by *inter alia* transparency, rule of law, inclusion, human rights and non-discrimination.⁶⁴ Any deviation from such would make it unconstitutional.

One cannot give up their constitutionally guaranteed rights and fundamental freedoms. If Arbitration is to be regarded as one of the options or means to access justice as guaranteed under Article 48 and 159 of the Constitution, then it must conform to the general principles of fairness, impartiality and equality, to mention but a few. Justice requires that both substantive and procedural aspects of the administrative process demonstrate fairness. Granting arbitrators the right to choose unconstitutional laws to govern the proceedings is similar to delegation of legislative authority, something that would normally be subject to Constitutional scrutiny.

Arbitration statutes generally provide for limited rights of review by superior courts from arbitral awards. For instance, the Kenyan *Arbitration Act*, 1995 provides for court intervention through on limited grounds. One such possibility is where the *Arbitration Act* expressly provides for intervention of the court under section 10.⁶⁵ The other instance is where the Court intervenes on grounds of public interest if substantial injustice is likely to be occasioned. While the State should continue to respect the role of private Arbitration and the need to avoid recourse to the courts in private dispute settlement, they must not permit private arbitrators to use laws that are likely to violate constitutional principles. The Rule of law is the foundation of democracy in Kenya.⁶⁶

In the case of *Sadrudin Kurji & another v. Shalimar Limited & 2 Others* the Court held *inter alia* that:

"...Arbitration process as provided for by the *Arbitration Act* is intended to facilitate a quicker method of settling disputes without undue regard to technicalities. This however, does not mean that the courts will stand and watch helplessly where cardinal rules of natural justice are being breached by the process of Arbitration.

Hence, in exceptional cases in which the rules are not adhered to, the courts will be perfectly entitled to set in and correct obvious errors."⁶⁷

Law making bodies must set reasonably clear and specific standards in circumstances where the grant of an unfettered discretion would lead to arbitrary, discriminatory, or otherwise unconstitutional restrictions. A limit on Constitutional rights must be clearly determinable. A

⁶⁴ Article 10, Constitution of Kenya 2010

⁶⁵ S. 10, 'Except as provided in this Act, no court shall intervene in matters governed by this Act'

⁶⁶ Preamble, Constitution of Kenya, 2010

⁶⁷ [2006] eKLR

limit must set an intelligible standard. Limitations on rights cannot be left to the unregulated discretion of administrative bodies, in this case arbitral tribunals.⁶⁸ Indeed, Article 24(1) of the Constitution provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including *inter alia*: the nature of the right or fundamental freedom; the importance of the purpose of the limitation; the nature and extent of the limitation;...and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

It is however important to note that Article 25 provides for those rights and freedoms that may not be limited under any circumstances. These are: freedom from torture and cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude; the right to a fair trial; and the right to an order of *habeas corpus*. It therefore follows that the rights contemplated under Article 25 must be upheld and promoted in all proceedings and instances including Arbitration.

It has been said that one of the advantages of Arbitration is that private parties are entitled to choose the Arbitration law to govern their private relationships. The Act assumes that the parties have equal bargaining power and therefore disregards the likelihood of violation of any constitutional rights in the process. However, it is already settled law that persons cannot contract out of constitutional and human rights protections.⁶⁹

5.3 Fundamental Freedoms

The Bill of Rights and fundamental freedoms applies to all irrespective of status and thus, and no one, unless clearly authorized by law to do so, may contractually consent to shelve its operation and in so doing put oneself beyond the scope of its protection. The Bill of Rights and fundamental freedoms must therefore be observed and promoted in all situations and by all persons.⁷⁰

⁶⁸ Chotalia, S. P., ‘*Arbitration Using Sharia Law in Canada: A Constitutional and Human Rights Perspective*’ op. cit. at page 68

⁶⁹ Article 19(2) provides that ‘the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individual and communities and to promote social justice and the realisation of the potential of all human beings.’ Clause (3) further provides that ‘the rights and fundamental freedoms in the Bill of Rights: belong to each individual and are not granted by the State;...and are subject only to the limitations contemplated in this constitution.’

⁷⁰ See Chapter 4 (Arts. 19-59)

6. ARBITRATOR'S NOTES AND ACCESS TO INFORMATION

Generally, arbitrators are not under legal obligation to supply their arbitrator's notes to the parties. Any party who wishes to have the proceedings of the Arbitration must hire a stenographer at their own cost. The constitutional question that arises here is the right of the parties to obtain information necessary for realization of justice. Article 48 of the Constitution obligates the State to ensure that justice is done and the same is not defeated by a requirement for any fee to be paid. Article 35(1) of the constitution provides that every citizen has the right of access to: information held by the State; and information held by another person and required for the exercise or protection of any right or fundamental freedom. Would the arbitrator be thus compelled under this constitutional provision to provide a copy of the arbitrator's notes to any party who insists of his or her right to access information as a constitutionally guaranteed right?

Article 165(3) of the Constitution defines the High Court's jurisdiction and provides that subject to clause (5),⁷¹ the High Court shall have *inter alia*: jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;⁷² and jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of— (i) the question whether any law is inconsistent with or in contravention of this Constitution; (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution.⁷³

Article 165(6) further provides that the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court. Clause (7) thereof is to the effect that for the purposes of clause (6), the High Court may call for the *record of any proceedings* (emphasis ours) before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice. Going by the wording of clause (7), the record of proceedings would probably include the arbitrator's notes.

Arbitration and ADR generally, has undoubtedly been gaining popularity especially the court-annexed Arbitration. Arbitration has been recognised under various statutes and most importantly under the Constitution as a viable option for settlement of disputes. Its higher degree of formality as compared to other mechanisms under the ADR makes it closely resemble litigation and thus requires law's intervention to ensure that the rights of all parties are not only

⁷¹ Art. 165(5) 'The High Court shall not have jurisdiction in respect of matters— (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (b) falling within the jurisdiction of the courts contemplated in Article 162 (2)'

⁷² Art. 165(3)(b)

⁷³ Art. 165(3)(d)

upheld but also promoted. This is because it is susceptible to the procedural rules and technicalities that are synonymous with courts. Indeed, Arbitration is not merely a mechanism to provide for private dispute settlement, but rather, is a means of providing quasi-judicial, comprehensive dispute management.⁷⁴ Arbitration proceedings are subject to the foregoing provisions particularly Article 165.

7. ARBITRATOR'S FEES AND ACCESS TO JUSTICE

Section 32B of the *Arbitration Act* 1995 provides for the Arbitration Costs and expenses in an Arbitration proceeding. Subsection (1) is to the effect that unless otherwise agreed by the parties, the costs and expenses of an Arbitration, being the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal and any other expenses related to the Arbitration, shall be as determined and apportioned by the arbitral tribunal in its award under this section, or any additional award under section 34(5). The arbitral tribunal is thus mandated to determine their fees.

Arbitration fees are mostly determined by the arbitral tribunal and where the Arbitration is institutional, there exist institutional guidelines on how this should be done. The parties thus have little if any say on the amount to be charged. Lately, there have been concerns on the actual cost effectiveness of Arbitration with some arguing that Arbitration is becoming more expensive than litigation.⁷⁵

The *Constitution of Kenya* 2010 provides under Article 48 that in accessing justice, if any fee is required, it shall be reasonable and shall not impede access to justice. The problem comes in when Arbitration involves persons who do not have the financial muscle as against a party who would not have any problem settling their share of the fees charged as the Act requires. A good example is where an individual person enters into Arbitration with a body corporate. There is the risk of one party failing to access justice due to lack of finances. Indeed, section 32B (3) provides that (3) the arbitral tribunal may withhold the delivery of an award to the parties until full payment of the fees and expenses of the arbitral tribunal is received. The question that arises is whether Article 48 applies selectively and who determine the reasonableness of the arbitrator's

⁷⁴ See *Bremer (Handelsgesellschaft mbH) vs. EtsSoules* [1985] 1 Lloyd's Rep160; [1985] 2 Lloyd's Rep 199. Sir Nicolas Browne-Wilkinson V-C *inter alia* stated: "...On appointment, the arbitrator becomes a third party to that Arbitration agreement, which becomes a trilateral contract....Under that trilateral contract, the arbitrator undertakes his quasi-judicial functions in consideration of the parties agreeing to pay him remuneration. By accepting appointment, the arbitrator assumes the status of a quasi-judicial adjudicator, together with all the duties and disabilities inherent in that status."

⁷⁵Daily Nation, *Business Daily*, "Is Arbitration of disputes better than litigation?" Sunday, March 24 2013, Available at <http://www.businessdailyafrica.com/Is-Arbitration-of-disputes-better-than-litigation/-/539546/1729318/-/rm6n5az/-/index.html> Accessed on 25 November, 2013; See also International law Office, *Arbitration may no longer be viable as an ADR method*, August 09 2012, Available at <http://www.internationallawoffice.com/newsletters/detail.aspx?g=70d89bd9-87cc-45e4-a73d-b740f96797d0> Accessed on 25 November, 2013

fees as some of them are fixed by the particular institutions involved. It is noteworthy that arbitrators are paid on hourly basis and according to their level of experience and/or expertise.

Would withholding of the award in absence of proper determination of the ‘reasonableness’ of the fees charged amount to violation of the constitutional right of access to justice? Subsection (4) thereof provides that if the arbitral tribunal has, under subsection (3), withheld the delivery of an award, a party to the Arbitration may, upon notice to the other party and to the arbitral tribunal, and after payment into court of the fees and expenses demanded by the arbitral tribunal, apply to the High Court for an order directing the manner in which the fees and expenses properly payable to the arbitral tribunal shall be determined. This provision makes it even harder for the aggrieved/affected party to access justice if the Court comes in *after* payment into court of the fees and expenses demanded by the arbitral tribunal. What if a party failed to pay the moneys due to lack of the same? Arbitration then becomes expensive and violates the right of access to justice since such a person, if litigating in courts, would probably have access to pauper brief scheme.⁷⁶

This remains a contentious issue as to how it should be approached since it seems to be beyond the parties’ autonomy in the process if section 32B (7) is anything to go by. The provisions of this section are to the effect that the provisions of subsections (3) to (6) have effect notwithstanding any agreement to the contrary made between the parties.

Would a group/class of persons be allowed to join forces and enter into Arbitration especially where corporations are involved so as to do cost sharing? If not, how is the power imbalance to be handled in order to facilitate access to justice for the weaker party? In the American case of *American Express Co. et al. v. Italian Colors Restaurant et al.*,⁷⁷ it was held that The *Federal Arbitration Act* (FAA) does not permit courts to invalidate a contractual waiver of class Arbitration on the ground that the plaintiff’s cost of individually arbitrating a federal statutory claim exceeds the potential recovery.⁷⁸ The plaintiffs in *American Express* had claimed that American Express used monopoly power in the market for charge cards to extract higher rates for processing American Express credit cards. When American Express moved to compel individual Arbitration pursuant to the Arbitration agreement, plaintiffs had protested, alleging that a class action was essential because the costs of their expert reports alone would run into the hundreds of thousands of dollars, and each individual merchant could hope to recover only a fraction of that amount. A class action thus was essential, plaintiffs argued, to “effectively vindicate” their claims. This argument was rejected by the Supreme Court and had observed that one could not be coerced into class litigation in absence of agreement to that effect.

⁷⁶ No legal aid scheme is available in Arbitration

⁷⁷ Certiorari to the United States Court Of Appeals for the Second Circuit, No. 12–133, Argued February 27, 2013—Decided June 20, 2013

⁷⁸ *Ibid.*, Pp. 3–10.

The effect of such a decision, though in foreign jurisdiction would be incapacitation of vulnerable persons to access justice especially where they would be seeking justice against large corporations or companies. It is therefore unlikely that an individual would afford the costs of Arbitration with companies and especially where purportedly ‘estopped’ from seeking justice through courts due to an Arbitration clause in a contractual agreement.⁷⁹

8. CONCLUSION

There is need to ensure that even as parties enjoy autonomy and other advantages that are associated with Arbitration, the ‘weaker’ party’s interests in the process are protected. Anything less would only delay the process, the very problem that ADR seeks to cure, as the party would resort to constitutional court to seek justice. The *Arbitration Act* needs to be reviewed to seal such loopholes and/or vacuum as relating to the procedural fairness and the manner of conducting the Arbitration process. It is important to note that in this era of human rights as well as the supreme constitution of Kenya 2010, any law, practice, or conduct including *Arbitration Act* which does not reflect the gains made in the constitution would easily be challenged in Court as being unconstitutional. In a society that is increasingly becoming litigious, it is important that such concerns be addressed. Otherwise, references from Arbitration would not only be on the now common ground of public policy but would perhaps see new cases being based on the Bill of rights and alleged violation of fundamental freedoms.

Arbitrators and ADR Practitioners must be cognizant of the constitutional rights of the parties that appear before them. The Constitution of Kenya reigns supreme over Arbitration and its practice. The *Arbitration Act* does not have satisfactory procedural and substantive safeguards against violation of the constitutional Bill of rights and fundamental freedoms. The Supremacy clause in Article 2 of the Constitution means that application of any law in violation of the national values and principles of governance as well as the Bill of Rights and fundamental freedoms would be challenged in Court and even held unconstitutional.

The constitution of a nation state has been said to be the Supreme Act within the hierarchy of regulatory instruments and must thus reign over all other laws.⁸⁰

Arbitrators must be fair, observe the rules of natural justice and comply with Constitutional provisions that guarantee parties rights.

Constitutional supremacy over arbitration in Kenya is a reality that cannot be wished away.

⁷⁹ Ibid. ‘An agreement between American Express and merchants who accept American Express cards, demands that all of their disputes be resolved by Arbitration and provides that there “shall be no right or authority for any Claims to be arbitrated on a class action basis.”

⁸⁰Tanchev, E., ‘Supremacy of Constitutions in the Context of Constitutional Pluralism’ page 1, available at <http://www.enelsyn.gr/papers/w4/Paper%20by%20Prof.%20Evgeni%20Tanchev.pdf> Accessed on 14/11/2013

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