# THE CONSTITUTION IN THE CLASSROOM: A HUMAN RIGHTS APPROACH TO SCHOOL RULES AND REGULATIONS

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Declaration

I, SIKANDER AHMED WALIMOHAMED declare that "**THE CONSTITUTION IN THE CLASSROOM: A HUMAN RIGHTS APPROACH TO SCHOOL RULES AND REGULATIONS**" is my own work, that it has not been submitted for any degree or examination in any other university or institution, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

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**Abstract**

The promulgation of the Constitution of Kenya, 2010 (CoK), particularly Chapter IV which encompasses the Bill of Rights, has had far reaching effects on the Kenyan populous as a whole. Children have been brought under the ambit of the CoK by being recognised as persons capable of having the right holder status. Crucially children have found constitutional recognition of the right to education and the best interest of the child doctrine. Almost a decade later and schools have shook these and other rights to their core. The main quasi-legislation that has flown in the face of the rights of children studying in schools is the rules and regulations. These rules and regulations reek of illegality. Despite these laws being void by virtue of Article 2(4) of the CoK as they are inconsistent with the Constitution the position on the ground is somewhat brutal. Students are subjected to disciplinary hearings with no regard to substantive or procedural rights contained in the CoK. This includes the adherence to the principles of natural justice when taking administrative action including the right to a fair hearing.

The punishments meted out to these students are also tainted with illegality. Corporal punishment for instance has long been banned but teachers still employ it mercilessly. Even legislation has failed students in the domain of alternative punishments as the only prescribed punishment is suspension. This has led to the adoption of zero-tolerance policies by schools which is an abuse of its powers. With dress-codes introduced into the fray the matter at hand becomes even more problematic. Female students are not allowed to wear hijabs in schools despite the *Mohamed Fugicha* judgement outlawing such practices. The study ultimately re-aligns school rules and regulations with the CoK.

**Table of abbreviations**

CoK - Constitution of Kenya 2010.

BEA - Basic Education Act 2015.

BER - Basic Education Regulations 2015.

FAAA – Fair Administrative Action Act, 2015

ICESCR - International Covenant on Economic, Social & Cultural Rights.

**Table of Cases**

**National Courts**

*A M v Premier Academy* [2017] eKLR.

*Attorney General v Kituo Cha Sheria & 7 others* [2017] eKLR.

*David Kipruto Cheruiyot v Kenya Fluorspar Co. Limited* [2008] eKLR.

*Dry Associates Limited V Capital Markets Authority & Another Interested Party Crown Berger (K) Ltd* [2012] eKLR.

*Gideon Omare v Machakos University* [2019] eKLR.

*In the matter of E.T.N (suing as the next friend of E.T.K (Minor)* [2014] eKLR.

*Jack Mukhongo Munialo & 12 others v Attorney General & 2 others* [2017] eKLR.

*J.K (Suing on Behalf of CK) v Board of Directors of R School & another* [2014] eKLR.

*J N N, (a Minor) M N M, suing as next friend v Naisula Holdings Limited t/a N School* [2018] eKLR.

*Judicial Service Commission v Mbalu Mutava & another* [2015] eKLR.

*J W M (alias P) v Board of Management O High School & 2 others* [2019] eKLR.

*Kenya Revenue Authority v Menginya Salim Murgani* [2010] eKLR.

*Kipkoech Kangongo& 62 others v Board of Governors Sacho High School & 5 others* [2015] eKLR.

*Mohamed Fugicha v Methodist Church in Kenya (suing through its registered trustees) & 3 others* [2016] eKLR.

*Mohamed Fugicha v Methodist church in Kenya (suing through its registered trustees) & 3 others* [2019] eKLR.

*Methodist Church in Kenya v Mohamed Fugicha & 3 others* [2019] eKLR.

*Omondi Michael Haya & 4 others v University of Nairobi* [2017] eKLR.

*Onjira John Anyul v University of Nairobi* [2019] eKLR.

*Peris Wambogo Nyaga v Kenyatta University* [2014] eKLR.

*Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & another* [2019] eKLR.

*P.P. (a Minor suing through his Father and Next Friend) F W v Board of Management, [Particulars Withheld] High School* [2017] eKLR.

*PO (suing as the next friend of AA, LA, BA, FA, GO, SN, IO, WT, & PS) & another v Board of Management St. A Primary School Ahero& 2 others; Association of Jehovah's Witnesses in East Africa (Interested Party)* [2019] eKLR.

*Republic v Chuka University Ex-Parte Kennedy Omondi Waringa & 16 others* [2018] eKLR.

*Republic v Board of Governors, Our Lady of Victory Girls School Kapnyeberai & another Ex-parte Korir Kipyego Joseph & another* [2015] eKLR.

*Republic v Kenyatta University & another Ex-Parte Wellington Kihato Wamburu* [2018] eKLR.

*Republic v Pwani University College Ex-parte Maina Mbugua James & 2 Others* [2010] eKLR.

*Republic v Speaker of the Senate & another Ex parte Afrison Export Import Limited & another* [2018] eKLR.

*Republic v University of Nairobi Ex-parte Antony Mwambia Thuranira* [2018] eKLR.

*Republic v University of Nairobi Ex-Parte Lazarus Wakoli Kunani & 2 others* [2017] eKLR.

*R. W. T v S. N. S. School* [2012] eKLR.

*Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others* [2016] eKLR.

*SDV Transami Kenya Limited and 19 Others v Attorney General & 2 Others & another* [2016] eKLR.

*Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others* [2017] eKLR.

*The Board of Management [Particulars Withheld] Girls' High School & 3 others Interested Party National Cohesion & Integration Commission* [2016] eKLR.

**South Africa**

*MEC For Education: Kwa Zulu Natal& 3 Others V Navaneethum Pillay & 3 Others* CCT 51 of 2006.

**United Kingdom**

*Enderby Town FC Ltd v The Football Association* [1971] 1 All ER 218.

*R v Home Secretary Ex parte Daly* [2001] 2 AC 532.

*The Queen on the application of Sarika Angel Watkins Singh (A child acting by Sanita Kimari Singh her mother and litigation friend) –VS- The Governing Body of Aberdare Girls' High School And Anor* [2008] EWHC 1865 (Admin).

**U.S.A**

*Gabrilowitz v Newman* 582 F.2d 100 (1st Cir. 1978).

*Goss v. Lopez*, 419 U.S. 565, 581 (1975).

*J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2399 (2011).

*Moore v Willis Independent School District* 233 F.3d 871, 873 (5th Cir. 2000).

*New Jersey v. T.L.O* 469 U.S. 325, 336 (1985).

*Quth v. Strauss* 11 F.3d 488 (5th Cir. 1993).

*Tinker v. Des Moines Indep. Community Sch. Dist.,* 393 U.S. 503, 511 (1969).

## Table of Legal Instruments

### National Legislation

Basic Education Act 2015 (BEA).

Basic Education Regulations 2015 (BER).

### International Instrument

International Covenant on Economic, Social & Cultural Rights (ICESCR).

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## CHAPTER ONE

### 1.1 Background

The right to education was a right first recognised by Article 13 & 14 of the International Covenant on Economic, Social & Cultural Rights (ICESCR). The Commentary on Article 13 of ICESCR states that signatory states are in fulfilment of the Right to Education obliged to make education available accessible acceptable & adaptable. [1] States are also obliged to respect protect and fulfil the right to education. In order for a state to protect the right to education it must take positive measures through legislation to prevent and prohibit third (3rd) parties from interfering with enjoyment of the Right to Education. Kenya has already established a framework which embraces the minimum core obligations with regard to the right to education through the CoK, Basic Education Act (BEA) and regulations (BER) thereunder. That is not to say that these laws are ideal but are a step in the right direction. The problem in Kenya rather is its enforcement. The provision of free education has been the major goal for Kenya with the quality of education always taking a back seat.[2] This has led us to the current crisis as a lack of enforcement from the Ministry of Education has given a carte blanche to schools to act as they please towards students. The result has been a swatting away of the rights of students.

The CoK places an obligation on schools when creating a rules and regulations to involve all relevant stakeholders but despite this obligation the same has been left to the discretion of schools.[3] Rules and regulations are to be drawn by the Board of Management of the school.[4] The requirements for qualification to be a member of the Board of Management are vague with no specific qualifications or requisite experience required thereby placing ill-equipped personnel to be in charge of running schools.[5] This translates to poor rules and procedures that are formulated and implemented in schools.

During disciplinary hearing students are not accorded the same rights expected of a citizen in Kenya. Article 47 of the CoK recognises the right of all persons to administrative action which is fair which extends the right to fair hearing as a core tenet of the principle of natural justice. Despite

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[1] Manisuli Ssenyonyjo, *Economic Social & Cultural Rights in International Law* (Hart Publishing, 2009) 389.
[2] Ben Sihanya, 'Devolution and education law and policy in Kenya' (2013) Law Society of Kenya Journal <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwjRh9uP3ZrkAhU6SxUIHTrPCE8QFjAAegQIABAC&url=http%3A%2F%2Fwww.innovativelawyering.com%2Fattachments%2Farticle%2F19%2FDevolution%2520and%2520education%2520law%2520and%2520policy%2520in%2520Kenya%2520working%2520draft.pdf&usg=AOvVaw37CQ6y323yzBAnizOJ4UEm> accessed 24 August 2019 (forthcoming) 9.
[3] Constitution of Kenya 2010, art 10 on public participation.
[4] Basic Education Regulations 2015, reg 30.
[5] Basic Education Regulations 2015, reg 6.

clear constitutional guidelines on due process, students are still subjected to disciplinary hearings without adequate notice, or a right to respond to the charges.[6]

It is important to appreciate the consequences of the abuse of the rights of students on society as a whole. Despite the ban of corporal punishment in 2001, it is still at the whims of the teacher on how to discipline students, with corporal punishment being the most favoured choice. Studies have shown that corporal punishment negatively affects a child psychologically which leads to lower performance levels and has even been linked to increased violence within schools as students become rogue.[7] Further it has been shown that corporal punishment also increases the level of school absenteeism.[8] All these negative consequences severely dent a student's right to receive compulsory basic education.

The only other legal option available to schools is to suspend children for indiscipline cases.[9] This has however proved counterproductive as it makes students to misbehave in the future, fail the grade that they are in and eventually drop out of school which eventually leads to an early involvement with the juvenile justice system.[10] The push by stakeholders to re-introduce corporal punishment should be seen as a sign of the inefficiencies of the current framework surrounding punishments or rather the lack of it.[11]

Dress codes have not been left out of the mix as schools are still sending home children for wearing hijabs despite the Court of Appeal decision in *Mohamed Fugicha v Methodist Church in Kenya (suing through its registered trustees) & 3 others*[12] outlawing such practices.[13] The same is an infringement on the rights of the student to manifest their religion.

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[6] Caroline Maina, 'Kiambu school ordered to readmit suspended student' *The Star* (Nairobi, 23 May 2017) <https://www.the-star.co.ke/news/2017-05-23-kiambu-school-ordered-to-readmit-suspended-student/> accessed 4 August 2019.

[7] David R. Dupper and Amy E. Montgomery Dingus, 'Corporal Punishment in U.S. Public Schools: A Continuing Challenge for School Social Workers' (2008) 30 Children & Schools <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwj-r-fxlrbjAhWOz4UKHYioC7sQFjAAegQIARAC&url=http%3A%2F%2Fewasteschools.pbworks.com%2Ff%2FCorporal_punishment_2009.pdf&usg=AOvVaw37Xv8beBe6y2saVDM8ytq9> accessed 11 July 2019 243, 245.

[8] ibid 245.

[9] Basic Education Regulations 2015, reg 38.

[10] Joseph Chege Ngunyi, 'Influence of Alternative Disciplinary Measures on Students' Discipline in Public Secondary Schools in Nyandarua South Sub – County, Kenya' (M.Ed thesis, UON 2014) 4.

[11] ibid 24.

[12] [2016] eKLR.

[13] Abdimalik Hajir 'Duale warns teachers against banning Muslim students over Hijab' *Standard Digital* (Nairobi, 23 July 2019) <https://www.standardmedia.co.ke/article/2001335003/duale-warns-teachers-against-banning-muslim-students-over-hijab> accessed 28 July 2019.

The result of the foregoing is the relegation of children's rights to the side-lines which has far reaching consequences on them. These challenges lead to an increase in student indiscipline levels with some students absconding school and others dropping out altogether. The increased dropout's leads to increased gang violence and an earlier association with the juvenile justice system. The Kenyan government has indeed fulfilled its minimum core obligation of enacting legislation to protect the right to education.

On the flip side of the coin however the Government may be accused of aiding and abetting the illegalities meted out to students due to a passive stance on the illegalities meted out to them. These illegalities flow through to the right to receive compulsory and basic education as they have forced students to abandon schools. The right to education is a right that has a direct link with funding from the government and this can be used as a bargaining chip by the Government in the fight to recognise the innate rights of students.[14] This has proved to be the major stumbling block in the actualisation of this right. It is harsh to call for radical changes to the education sector given Kenya's financial challenges but progressive changes are needed to rectify the current state of affairs lest the education system becomes the devils breeding ground.

**1.2 Literature Review**

There is a large amount of literature on the role school rules and regulationss play in relation to setting standards and policies to be enforced in schools. A background check in Kenya has revealed a lack of information surrounding the legality/illegality of school rules and regulations chiefly, whether they are in conformity with the Bill of Rights.

Yaghambe notes that a culture of physical punishments may increase aggressiveness as it suggests that aggression is the solution to problems.[15] Some of the aims and objectives of education policy in Tanzania are to instil self-confidence, develop enquiring minds in students and respect for human dignity.[16] The use of physical punishments does not help fulfil these objectives.[17] Corporal punishment according to the author does not guarantee discipline and is ripe for abuse by teachers.

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[14] Yoram Rabin, 'The Many Faces of the Right to Education' in Daphne Barak-Erez and Aeyal M. Gross (eds) *Exploring Social Rights: Between Theory and Practice* (Hart Publishing, 2007) 265.

[15] Regina Slaa Yaghambe, 'Disciplinary Networks in Secondary Schools: Policy dimensions and children's rights in Tanzania' (2013) 3 Journal of Studies in Education <http://www.macrothink.org/journal/index.php/jse/article/view/4167> accessed 12 July 2019 42.

[16] ibid.

[17] Yaghambe (n 15).

The study provides some of justifications for banning corporal punishments and advocates for a more proactive form of punishment rather than the harshness associated with reactive punishments.[18] Yaghambe notes that even the use of suspensions which is a form of reactive punishment has proved to be ineffective. In Kenya the only punishment provided for under the law is suspension.[19] Yaghambe has succeeded in proving the shortcomings to corporal punishment and other forms of reactive punishment but has failed to propose tried and tested forms of reactive punishments.

Dupper & Dingus write a time when the push to end corporal punishment in American schools had just begun.[20] In their study they note that the major cause for not banning corporal punishment in certain states is because it is intertwined with religious beliefs used to justify its implementation.[21] The study seeks to bridge the knowledge gap for those that do now know the physical and psychological effects of corporal punishment.[22] The major stumbling block in Kenya has been that corporal punishment was banned with no substitute proposed neither has there been significant awareness created on its negative effects on children and the justification for its prohibition. The study has suggested counselling as a viable option to corporal punishment, however, this strategy is only effective once a child is mature enough to know what is wrong and right. This study fails in establishing a robust framework as an alternative to corporal punishment and further fails to link the innate human rights of students and how these are infringed by the use of corporal punishment.

Joubert reports on a qualitative research study conducted in South Africa that traces the function of the school governing body with regard to policy-making.[23] The study notes that the values of a community influences the development of school rules.[24] In Kenya like South Africa, the Board of Management is vested with the mandate of formulating school rules.[25] The school's Board of

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[18] ibid.
[19] Basic Education Regulations 2015, reg 38.
[20] David R. Dupper and Amy E. Montgomery Dingus, 'Corporal Punishment in U.S. Public Schools: A Continuing Challenge for School Social Workers' (2008) 30 Children & Schools <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwj-r-fxlrbjAhWOz4UKHYioC7sQFjAAegQIARAC&url=http%3A%2F%2Fewasteschools.pbworks.com%2Ff%2FCorporal_punishment_2009.pdf&usg=AOvVaw37Xv8beBe6y2saVDM8ytq9> accessed 11 July 2019 243.
[21] ibid.
[22] Dupper & Dingus (n 20).
[23] Rika Joubert, 'Policy-making by public school governing bodies: law and practice in Gauteng' (2008) 41 Acta Academica <http://journals.ufs.ac.za/index.php/aa/article/view/1211> accessed 20 July 2019 230.
[24] ibid.
[25] Basic Education Regulations 2015, reg 30.

Management is tasked to align societal values with the Constitution.[26] Joubert notes few Boards of Management have the requisite skills needed to attain this constitutional value.[27] Joubert has not provided a solution to ensure that the Board of Management undertake the performance of their activities in line with the Constitution, which could be through compulsory training and/or attaining certain qualifications or experience.[28]

Mossman's study analyses the right to counsel in school disciplinary hearings in cases where the student is charged with offences which are criminal in nature.[29] The study notes that American courts have recognised that children are more easily coerced as compared to adults, less likely to understand the effects of their confessions and more likely to give false confessions thus emphasizing their right to counsel.[30] The study notes that in the U.S, Supreme Court jurisprudence has held that a person has no right to legal counsel unless he faces potential punishment.[31] This coupled with the famous case of *Goss v Lopez* where the U.S Supreme Court stated that students are to be entitled to minimal due process in disciplinary hearings has proved to be the major stumbling block for limiting the right to counsel.[32] The study limits itself to cases where a student is charged with an act that is criminal in nature and does not examine cases that are more civil in nature. In Kenya the right to a fair hearing is one of the illimitable rights provided under the Constitution which by extension also includes the right to an advocate.[33] Kenyan laws therefore *prima facie* provide for the right to counsel in all disputes where a person is accused and this extends to student disciplinary proceedings.

Black identifies the principles, processes and considerations that are inherent in due process and which school disciplinary committee's cannot override.[34] The study comes at the back of zero tolerance in schools which has arisen after the ban on corporal punishment. Due to a lack of policies outlining the procedures for disciplining students, Head Teachers have resorted to

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[26] Joubert (n 23).
[27] ibid.
[28] Regulation 6 of the Basic Education Regulations does not provide for experience or expertise in a certain calibre of work.
[29] Ellen L. Mossman, 'Navigating a Legal Dilemma: A Student's Right to Legal Counsel in Disciplinary Hearings for Criminal Misbehaviour' (2012) 160 University of Pennsylvania Law Review <https://scholarship.law.upenn.edu/penn_law_review/vol160/iss2/5/> accessed 20 July 2019 585.
[30] See above and *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2399 (2011).
[31] Mossman (n 29).
[32] *Goss v. Lopez*, 419 U.S. 565, 581 (1975).
[33] Constitution of Kenya 2010, art 25 & 50.
[34] Derek W. Black, 'The Constitutional Limit of Zero Tolerance in Schools' (2014) 99 Minn. L. Rev <https://scholarcommons.sc.edu/law_facpub/224/> accessed 20 July 2019 823.

suspending students for trivial matters.[35] The same applies to Kenya whereby following the abolishment of corporal punishment in 2001, clear effective policies have not been formulated that replace the cane contributing to the rising cases of indiscipline in Kenya. Schools have therefore resulted to suspending students for trivial offences thereby ignoring the reasonableness and proportionality of the punishments meted out in disciplinary hearings.[36]

Bray examines the legal standing of rules and regulations in schools in South Africa.[37] Bray states that a rules and regulations must from the onset have a sound legal basis.[38] This is through involving all stakeholders in the drafting of the rules and regulations. These stakeholders are: learners, parents; & educators. This is a resemblance of democracy in action and public participation which are core values entrenched in the Constitution.[39] Further administrative action exercised in accordance with the rules and regulations should be lawful, reasonable and procedurally fair.[40] This earmarks the principles of fair administrative action.[41] In addition to this the study outlines the need for an avenue for appeals of internal decisions made in accordance with the rules and regulations, with the appeal of this decision being judicial review. This process is the same in Kenya. Bray however fails to examine key rights a student should have prior to the institution of disciplinary proceedings against him/her. This includes the right not to self-incriminate themselves.

In the foregoing writings a common trait is evident. Most scholars centre their arguments on theories rarely focusing on the human rights of students in schools and further fail to address possible legal solutions to their sufferings. This is a gap that this work seeks to address and reveal.

### 1.3 Problem Statement

The CoK has elevated the socio-economic right to education and the doctrine of the child's best interest to a constitutional status. This coupled with the recognition of children as persons under

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[35] ibid.

[36] Dr. Briston E. E. Omulema, Esther Wanjiku Maina & Lucy W. Mureithi, 'Effects of Students Suspension on their Psychological well Being in Boarding Secondary Schools in Nakuru County, Kenya' (2015) 3 Journal of Psychology and Behavioral Science <https://www.researchgate.net/publication/281305786_Effects_of_Students_Suspension_on_their_Psychological_well_Being_in_Boarding_Secondary_Schools_in_Nakuru_County_Kenya> accessed 20 July 2019 122.

[37] Elmene Bray 'Rules and regulations in Public Schools: A Legal Perspective' (2005) 25 South African Journal of Education <https://www.ajol.info/index.php/saje/article/view/25028> accessed 14 July 2019 133.

[38] ibid.

[39] Constitution of Kenya 2010, art 10.

[40] Bray (n 37).

[41] Constitution of Kenya 2010, art 47.

the CoK has elevated the rights of students to an unprecedented status. The reality on the ground is however in stark contrast to that found in the Constitution as children's rights have always taken a back seat in the school setting. Children have suffered from the lack of access to this crucial right with those having access cursing their luck, translating to high dropout rates.

Rules and regulations reek of illegality from the very onset as relevant stakeholders are not involved in their formation contrary to the all-inclusive participation advocated for in the Basic Education Regulations 2015 (BER).[42] From procedural unfairness to harsh and illegal punishments these documents have it all. The state a supposed upholder of the rights of children, has acted as a mere bystander to the heinous crimes committed on children by continuously failing to ensure that the rights of children are upheld. School rules and regulations also regulate the school uniform which are insensitive to religion. The implication of the foregoing is that students are forced to stay home due to non-compliance with the school uniform thereby infringing on their right to education. Ideally students at schools should know their rights and have the capability to enforce them. The major stumbling block has been the continuous enforcement of illegal rules and regulations by schools. The current state of affairs is in dire need of change with rules and regulations needing realignment with the CoK.

## 1.4 Theoretical Framework

### 1.4.1 Legal Positivism

Positivism postulates that law is that which is formally laid down.[43] Austin states that law is the command of a sovereign to whom the people owe habitual obedience and that the command is enforced by sanctions.[44] School rules are a prime example of positivism in action. Rules and regulations are made by a School Board of Management (sovereign) to whom the students owe habitual obedience and the rules are enforced by the use of punishments (sanctions). This school of jurisprudence is important to the study as schools do not operate in a legal vacuum but rather within the jurisdiction of the state they are in. In Kenya the supreme law of the land is the CoK with all other laws drawing their validity from it.[45] Rules and regulations should therefore draw their validity from this supreme law and therefore need to be aligned with it as anything inconsistent with the CoK is void to the extent of the inconsistency.[46]

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[42] Basic Education Regulations 2015, reg 30.
[43] L.B. Curzon, *Jurisprudence* (2 Cavendish Publishing Limited 1995) 83.
[44] ibid 101.
[45] Constitution of Kenya 2010, art 2.
[46] Constitution of Kenya 2010, art 2(4).

### 1.4.2 Natural Law

Rawls in his philosophy proposes that children are right holders.[47] Rawls postulates that justice is the governing principle of any political society and that every individual is entitled to equal justice including children.[48] This theory is consistent with most natural law jurists as they posit that the every person has inherent rights that accrue to them through their being human.[49] The same by extension recognises the human rights of children and the notion to ensure that justice is done to them in schools.

## 1.5 Research Questions

i) How and in what ways do provisions of the CoK influence rules and regulations?

ii) How and in what ways do rules and regulations impact students human rights and fundamental freedoms?

iii) How can the breach of rights and fundamental freedoms be remedied?

## 1.6 Research Objectives

i) To identify the ways in which the provisions of the CoK impact rules and regulations;

ii) To examine the means by which rules and regulations impact human rights and fundamental freedoms;

iii) To establish the legal recourse students and their parents have against the school when their rights and fundamental freedoms are infringed.

## 1.7 Justification of the Problem

The law governing rules and regulations in Kenya is substantial however its enforcement is questionable.[50] Schools have blatantly disregarded the rights of children in schools with reports emerging that corporal punishment is still implemented in schools, students are suspended without regard to procedure, and banned from schools because of wearing hijabs.[51] This is however not

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[47] Katherine Hunt Federle, 'Children, Curfews, and the Constitution' (1995) 73 Washington University Law Review 1315, 1316 <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwjGxvP0yuTnAhUHoRQKHec-A34QFjAAegQIBBAB&url=https%3A%2F%2Fpdfs.semanticscholar.org%2F1252%2Fa7fa06fa560800e75977020c0319fc880696.pdf&usg=AOvVaw0MBvdlYSAhsCdD6tIG67qT> accessed 22 February 2020.

[48] Federle (n 47) 1355.

[49] Federle (n 47) 1332

[50] See Constitution of Kenya 2010, Basic Education Act 2013 and Basic Education Regulations 2015.

[51] See Abdimalik Hajir 'Duale warns teachers against banning Muslim students over Hijab' *Standard Digital* (Nairobi, 23 July 2019) <https://www.standardmedia.co.ke/article/2001335003/duale-warns-teachers-against-banning-

the only problem as the law also comes with its fair share of deficiencies. In the famous case of *Goss v Lopez*[52] the Supreme Court of U.S.A argued that minimum procedure is required in school disciplinary hearings. This may be in line with the notion that justice must be efficient but it does not take into consideration the best interests of the child.[53]

This study will impact students around Kenya as it will provide an outline of the rights inherent in every student and how these rights need to be taken into account when implementing the right to education.[54] The notion of illegal rules and regulations has been examined in great detail across the globe, with sufficient studies being carried out in South Africa & the U.S.A, but this is certainly a newbie in Kenya and its carrying out is long overdue.

### 1.8 Hypotheses

This research proceeds on 3 assumptions, these are:

i) All actions taken by schools must be in the best interest of the child and promote the right to education;

ii) Schools are operating in a legal vacuum and seek to enforce laws within the school grounds which often contradicts the Constitution; and

iii) Children studying in Kenyan schools are not accorded a fair hearing during disciplinary hearings.

### 1.9 Research Methodology

This study will be conducted by desktop research which includes materials available on the internet or in hard copy through the use of the library. The study will also use doctrinal research in order to engage the different laws on education such as the CoK, various Acts of Parliament, ratified international treaties, & relevant case law. This will establish what has been posited by the legislature and courts on matters surrounding rules and regulations which will prove or disprove the hypotheses.

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muslim-students-over-hijab> accessed 28 July 2019, Benson Matheka, 'Court finds teacher guilty of corporal punishment; *Daily Nation* (Nairobi, 2 July 2018) <https://www.nation.co.ke/news/Teacher-found-guilty-corporal-punishment-/1056-4643014-g7p1v5/index.html> accessed 28 July 2019.

[52] *Goss v. Lopez*, 419 U.S. 565, 581 (1975).

[53] Constitution of Kenya 2010, art 47(1) & 53(2).

[54] The right to a fair hearing, human dignity, and the best interests of the child doctrine are among a few.

The study will also use the comparative method of inquiry in order to examine the trends in South Africa and the U.S.A. The South Africa will be a good starting point for comparison as most Kenyan laws on education have been transplanted from the South Africa and some of the concerns this study seeks to examine have already been examined in South Africa. Policies & studies enacted & adopted in the U.S.A will be examined in order to prove the negative effects of corporal punishment on children and the reforms made in the U.S.A to transform the society.

**1.10 Limitations**

The likely challenge this study will face is in accessing school rules and regulations used in schools in Kenya due to the large number of schools in Kenya. These rules and regulations are to be used to evaluate the laws put in place in schools with a view of examining illegalities. This may negatively affect the findings of the study.

**1.11 Chapter Breakdown**

The following study will be presented in five chapters:

Chapter one: Introduction

This chapter will contain the background and justification of the study and an examination of the existing literature on rules and regulations.

Chapter two: Children and Rights & the Institutions Governing Children in Schools

This chapter will examine whether students bear the right holder status. It proceeds to examine the existing Kenyan laws governing rules and regulations in schools with particular focus on their creation.

Chapter three: The Disciplinary Process

This chapter will scrutinise the disciplinary process in schools as a whole. It shall proceed to draw references where appropriate to the rights students have during the disciplinary process and ultimately show how schools during the disciplinary process infringe on the rights of students.

Chapter four: The Right to Religion and Enforcement Challenges

This chapter shall begin by scrutinising the two pronged right to religion and how school rules and regulations infringe on this right. The chapter will progress to examine possible ways of correcting the infringements of the human rights of students and analyse the shortcomings with the existing legal dispute resolution fora.

Chapter five: Conclusions and Recommendations

This chapter will contain conclusions and recommendations based on answers found to the research questions.

## CHAPTER 2

## 2.0 CHILDREN AND RIGHTS AND THE INSTITUTION GOVERNING CHILDREN IN SCHOOL

The purpose of this chapter is to examine the theoretical and legal underpinnings surrounding the existence and exercise of rights and fundamental freedoms of students in classrooms. The chapter begins by exploring the various theories arguing for and against the existence of student's rights. The chapter proceeds to discuss possible shortcomings to the range of children's rights with a particular focus on the differential treatment provided by American courts to the rights of children vis-a-vis adults. The chapter progresses by scrutinising the position taken by Kenya on children's rights noting the uniqueness of the CoK in bestowing children with rights. Lastly the chapter analyses the institutional framework governing the student-school relationship with an examination of the effects of article 24 and 53(2) of the CoK on the rights children enjoy in school.

### 2.1 The Theoretical Underpinning for According Children Rights

Before we can examine the infringements by schools on students, it is imperative that we establish whether children are right holders and whether they are capable of exercising the rights granted to them. This is crucial because the failure to recognise students' rights will place no corresponding duty on schools. The starting point would therefore entail an analysis of the existing theories surrounding children's rights. This is based on the assumption that most students are minors. This would help determine the position the drafters of the CoK chose.

According to Western theories capacity is the key to individual liberty.[55] This is based on the principle that without the power to obligate others, that being lacks the right-holder status.[56] This presents problems to children. The social contract theory for instance advances that children are excluded from the social contract because they lack capacity for self-preservation which necessitates the original formation of the social contract.[57] This capacity is rather transferred to the children's parents on whom they are dependent until such time that they can care for themselves.[58] This then places a corresponding duty on children to obey their parents.

Parents therefore hold the right of responsibility over their children. When parents send their children to school, they donate some of their parental responsibility to the school. In 1769, Sir

[55] Federle (n 47) 1355.
[56] ibid.
[57] Federle (n 47) 1360.
[58] Federle (n 47) 1362.

William Blackstone coined this delegation of powers the *in loco parentis* doctrine.[59] This has been interpreted by modern jurists and courts in a perverted form. Jurists and courts have therefore viewed it to only delegate the parental right to discipline.[60] In USA for instance the doctrine was shaped as a defence for justification in school disciplinary cases where corporal punishment was involved.[61] Further teachers were interpreted to have a duty of supervision and not a duty to the child's welfare.[62] A literal approach to Blackstone's doctrine would mean that both duties and powers of the parent are placed in the hands of the tutor or schoolmaster and not just a delegation of disciplinary power.[63]

If this doctrine is transplanted to Kenya it certainly is now obsolete. The right of every child to receive compulsory basic education is inherent.[64] The change in status quo has moved education from a privilege to a right and consequently moving from a voluntary delegation of parental rights and obligations to an involuntary one. American courts have sufficiently posited on this matter. In *New Jersey v T.L.O.,*[65] the court noted that school's act in furtherance of publicly mandated education and disciplinary policies and not on delegated authority from parents.

Kenya has however failed to recognise this step away from *in loco parentis* doctrine towards a more constitutional and statutory based obligation. The Teachers Service Commission ("TSC") is a statutory body established under article 237(1) of the CoK which has the function of *inter alia* assigning teachers employed by the Commission to a public school. As recently as 13th June 2018 the TSC sent a circular to all teachers which provided for *inter alia* at paragraph 4 that at all times registered teachers have a duty to act *in loco parentis*. [66]

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59 Todd A. DeMitchell, 'The Duty to Protect: Blackstone's Doctrine of In Loco Parentis: A Lens for Viewing the Sexual Abuse of Students' [2002] 1 Brigham Young University Education and Law Journal, 17, 18 < https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwi0hcCL_OTnAhUHAGMBHb-vDP8QFjAAegQIAxAB&url=https%3A%2F%2Fdigitalcommons.law.byu.edu%2Fcgi%2Fviewcontent.cgi%3Farticle%3D1137%26context%3Delj&usg=AOvVaw3jOdRq5bhgHExbXsMnC7K2> accessed 22 February 2020.
60 Susan Stuart, 'In Loco Parentis in the Public Schools: Abused, Confused, and in Need of Change' (2010) 78 University of Cincinnati Law Review 969 974.
61 Stuart (n 60) 975.
62 Stuart (n 60) 992.
63 Stuart (n 60) 988.
64 Article 53(1)(b) Constitution of Kenya 2010 & Section 28 Basic Education Act 2013.
65 469 U.S. 325, 336 (1985).
66 Circular on Protection of pupil/students dated 13th June 2018 available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=2ahUKEwi_7oOLi_HnAhWxURUIHfH7CyYQFjACegQIBBAB&url=https%3A%2F%2Fwww.tsc.go.ke%2Findex.php%2Fmedia-centre%2Fdownloads%2Fcategory%2F39-old-circulars%3Fdownload%3D483%3Acircular-on-protection-of-pupils-students&usg=AOvVaw2gTJ3U31JRpML6fDAlLhpC accessed 27 February 2020.

If private schools on the other hand are considered the position is somewhat muddled. Private schools unlike public schools do not have the duty to provide the right to education, a position now well settled after the decision of *J.K (Suing on Behalf of CK) v Board of Directors of* R *School & another*.[67] The basis for the relationship between the student acting through her parent/guardian and the school is a contractual one.

The Western theories of capacity have inconsistencies as if the notion of capacity is detached from the rights perspective, immaturity of children is irrelevant to their rights claims.[68] Neither would paternalistic concerns justify the restriction on children's liberties as these are but a façade to control and dictate children. It is not denied that a school is under an obligation to protect children when they are in school, and make decisions that are in their best interests. This would not by any standards be a blatant ignorance of the child's rights.

Rawls differs with Western jurists in his philosophy as he proposes that children are right holders.[69] Rawls postulates that justice is the governing principle of any political society and that every individual is entitled to equal justice including children.[70] This theory is consistent with most natural law jurists as they posit that the every person has inherent rights that accrue to them through their being human.[71] This approach may have influenced the ultimate drafters of the CoK as shall be shown below.

**2.2 International Practice - USA**

Various jurisdictions have qualified the rights children/students have.[72] Children are further overburdened by the notion that children due to their tender age must be protected from the inability to make sound judgments. In the U.S.A for instance in order to shield children from making bad choices the state is justified in imposing restrictions on minors for the safety of the larger community.[73] A number of courts have therefore agreed that the limitations placed on the rights of children if imposed upon adults would be characterised as unconstitutional.[74]

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[67] [2014] eKLR at paragraph 43.
[68] Federle (n 47) 1355.
[69] Federle (n 47) 1321.
[70] Federle (n 47) 1321.
[71] L.B. Curzon, *Jurisprudence* (2 Cavendish Publishing Limited 1995).
[72] Federle (n 47) 1332.
[73] Federle (n 47) 1332.
[74] Federle (n 47) 1332.

In *Quth v Strauss,*[75] the court was asked to assess the constitutionality of a curfew ordinance that prohibited minors under the age of seventeen from remaining in public places during particular hours. The court found that the curfew curtailed a minor's fundamental right to move freely but the court refused to decide whether such a right actually was fundamental. This reasoning is based on the assumption that children do not have certain rights and consequently cannot enforce them. This assumption fails to comprehend that it is on this basis that the child's parent/guardians can exercise the right on their behalf.

This limitation of children's rights as envisaged in USA is a recipe for chaos as schools are given the opportunity to infringe on students' rights without any legal recourse. This variable application of the law to students in contrast to adult's leaves some wiggle room to schools when enforcing law on students through school rules and regulations. Such a narrow operation therefore needs to be avoided. This theory's applicability in the Kenyan legal arena is now examined in the proceeding section.

### 2.3 The Kenyan Position on Children's Rights

In light of the theories and international practices discussed above the stance Kenyan law takes on children's rights is now debated. Article 19(3)(a) provides that the rights and fundamental freedoms in the bill of rights belong to each individual. The key word in this article is 'individual' which has the effect of granting children with rights. Article 20(1) further provides that the Bill of Rights applies to all law and binds all state organs and all persons. All laws are therefore to be read parallel to the Bill of Rights and any inconsistencies will render the law void.

Article 260 defines a person to include a company association or other body of persons whether incorporated or unincorporated. The import of article 260 is that the Bill of Rights binds all persons including natural persons which therefore includes schools. In *Attorney General v Kituo Cha Sheria & 7 others*[76] Waki, Azangalala & Kiage JJ.A were emphatic when interpreting the rights contained in the Bill of Rights and noted that "*They* (rights in the bill of rights) *attach to persons,* ***all persons****, by virtue of their being human…*" The court then stated with regard to the application and interpretation of the Bill of Rights that "*None is exempt from the dictates and commands of the Bill of Rights and it is not open for anyone to exclude them when dealing with all matters legal.*"

[75] 11 F.3d 488 (5th Cir. 1993).
[76] [2017] eKLR.

The position taken by Majanja J, in *R. W. T v S. N. S. School*[77] further ingrains the concept of children's rights in Kenyan jurisprudence. In this case the petitioner was a student at the respondent's school. The petitioner was found guilty of disciplinary violations and was suspended as a result. When examining the best interests of the child doctrine under article 53 of the CoK Majanja J held that "*in a school environment, it is the welfare of all the children that must be taken into account rather than one deviant child who has a disciplinary problem. But there is also a responsibility to be borne in respect of that one child,* ***one that flows from the human rights and fundamental freedoms of each individual****. These cannot be subordinated to others merely because the interests of the other children are greater. There must be a good reason to do so consistent with the values and principles of the Constitution*." Majanja J, certainly interpreted the application of rights in the CoK through the natural law theory lens by positing that human rights are inherent in each individual.

### 2.4 The Institutional Framework Governing Student-School Relationship

This section begins by examining the classification of Kenyan school Boards of Management in light of practice in the USA. The section then progresses to discuss school Boards of Management, their roles and responsibilities which include *inter alia* the formation of rules and regulations. The section further underlines the constitutional obligations placed on Boards of Management when forming rules and regulations including the best interests of the child doctrine and possible limitations to the rights of children imposed by article 24 of the CoK.

In USA there are two schools of thought on the classification of local school boards.[78] These are, legislative organs of the local government or as administrative agencies of the state government. Kenya appears to lean closer to the administrative agencies of the state theory as the school Board of Management is legally mandated to have certain members for constitution, and its powers and functions are determined by statute. It is in this context that public schools through their Board of Management can be qualified as administrative agencies of the state.

#### 2.4.1 The Basic Education Act and Regulations

In order to understand the nuanced structure with regard to public and private schools, it is vital to examine their constituting and governing statute which is the BEA. Section 55(1) of the BEA provides that there shall be a Board of Management for every public pre-primary institution;

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[77] [2012] eKLR.

[78] Stephen R. Goldstein, 'The Scope and Sources of School Board Authority to Regulate Conduct and Status: A Nonconstitutional Analysis' (1969) 117 University of Pennsylvania Law Review 373 384.

primary school; secondary school; adult and continuing education centre; multipurpose development training institute; or middle level institutions of basic education. Every school shall also have a parents' association.[79]

The BEA however does not envisage a similar institutional framework for private schools as it only requires the establishment of a parents' teachers association.[80] This is followed through to the BER whereby school rules may only be implemented where they have been approved by the Board of Management thereby leaving a *lacunae* in the regulation of private schools.[81]

The Basic Education Regulations appreciates the special relationship between the school and its students and the need to regulate it which empowers school Boards of Management to make rules to govern the relationship between the school and its teachers with students.[82]

Some of the shortcomings of the BEA and BER in relation to the institutions put in place to regulate basic education are discussed below. Regulation 6 of the BER provides for the minimum qualifications of the Board of Management. The qualifications are adequate however there is a lack of specialisation within the Board of Management. For instance, how is a person skilled in engineering/medicine capable of forming rules and regulations? This is particularly problematic where the BER specifies that the rules must be in conformity with the BEA and any other relevant written law particularly the national values and principles of governance.[83] Indeed the BEA envisages the need to include specialists in its membership, however these potential members do not have a right to vote at the meetings of the Board.[84] It has already been noted that whole jurisdictions have failed to understand the illegality of their acts/omissions on children.

Section 56(1)(g) of the BEA provides that one of the members of the school Board of Management shall be a representative of the student council who shall be an ex-officio member. A thorough reading of the BEA and BER reveals that there is no obligation on schools to give the opportunity to its students to elect a leader of any sorts. This flies in the face of Regulation 30 of the BER which requires school rules to be subject to public participation and of the national values and

[79] Section 55(2) Basic Education Act, 2013.
[80] Section 55(3) Basic Education Act, 2013.
[81] Regulation 31, Basic Education Regulations, 2015.
[82] See Regulation 30 Basic Education Regulations, 2015.
[83] Regulation 30 Basic Education Regulations 2015 and Article 10 of the Constitution of Kenya, 2010.
[84] Section 56(2) & (3) of the Basic Education Act 2013.

principles of governance under Article 10 of the CoK. The only other form of participation in the making of school rules is through the Parents-Teachers Association. The coining of the law in a way that excludes children's participation could partly be attributed to the misunderstanding of the *in loco parentis* doctrine as it presupposes that parents delegate the parental duty of responsibility to the school. This could also be partly attributed to the non-recognition of the innate rights of children and an approach leaning heavily on children's lack of capacity. This gives room to the school Board of Management to be the legislator, enforcer and adjudicator within the school jurisdiction.

Further Regulation 30 of the BER does not accurately provide for who the responsibility of forming the school rules rests on the use of the word "institution" is likely to be problematic. Further there is no provision for school rules already in force in different schools and how these need to be conformed to the BEA and BER. As has been previously noted private schools are not obligated to have a school Board of Management, there is no provision on which party if any will approve the rules formulated by the school (if any).

### 2.4.2 School Rule Formation and the Constitution and the Public-Private Divide

These rules must now be examined in light of constitutional provisions. Article 2(1) of the Constitution provides that the Constitution is the supreme law of the Republic and binds *inter alia* all persons. Article 2(4) further provides that any law that is inconsistent with the Constitution is void to the extent of the inconsistency. Article 2 of the CoK lays down the general rule on superiority of the Constitution and the effect of laws inconsistent with the CoK.

In *Mohamed Fugicha v Methodist church in Kenya (suing through its registered trustees) & 3 others*[85] the court held that "*In the hierarchy of norms and the relative weight to be attached thereto, school rules rank way below the Constitution and it is incumbent upon those who formulate and enforce them to ensure that they align and accord with the letter and spirit of it, failing which they would be null, void and of no effect whatsoever.*"

Article 22(1) & (2) states that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the BOR has been denied, violated or infringed or is threatened. This court proceedings may be instituted by inter alia a person acting on behalf of another person who cannot act in their own name. The CoK is certainly alive to situations in which

[85] [2016] eKLR.

children among other persons may not be in the position to claim for a breach of their rights but this may be instituted by their parent or guardian. Further article 165(3)(d)(ii) provides that the High Court has jurisdiction to hear any question respecting the interpretation of the CoK including *inter alia* if any law is inconsistent with, or in contravention of the CoK.

In *Gideon Omare v Machakos University*[86] Odunga J, found that "*In my view an action such as a formulation of a rule or regulation whose application, implementation or effect contravenes the Constitution is invalid and this Court not only has the power but the obligation to declare it to be so pursuant to Article 165(3)(d)(ii) of the Constitution*."

Further article 53(2) of the CoK provides that a child's best interest are of paramount importance in every matter concerning the child. The doctrine has its more relevant use in during divorce and custody proceedings, however the CoK has broadened its application. The best interest doctrine is further set out under section 4(2) of the Children's Act which provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.

The court in *A M v Premier Academy*[87] challenged itself to define the best interest of the child doctrine and posited as follows "*the term generally refers to the deliberation that courts undertake when deciding what type of services, actions, and orders will best serve a child*." The court noted that although a number of circumstances must be taken into account when determining the best interests of a child in a school the dominant considerations are the "*child's ultimate safety and well-being the paramount concern and in a school environment the safety and well-being of other pupils*." This position taken by the court broadens the scope of the best interests of the child to include the best interest of all children studying in the school.

Section 4(2) of the Childrens Act has been interpreted by Ibrahim J, in *David Kipruto Cheruiyot v Kenya Fluorspar Co. Limited*[88] to mean "*even a "private school" is bound by law to protect the best interests of the child while carrying out its functions or affairs*." The result of the foregoing is to impose the right on schools when drafting rules to ensure the best interest of all children are taken into consideration.

[86] [2019] eKLR.
[87] [2017] eKLR.
[88] [2008] eKLR.

Despite all the pomp and glamour associated with the CoK's bill of rights, these rights may be curtailed subject to the limitations envisaged under article 24 and 25. Article 24 and 25 of the CoK provide for the limitation of rights and fundamental freedoms and the rights and fundamental freedoms that may not be limited.

Mwita J, in *Jack Mukhongo Munialo & 12 others v Attorney General & 2 others*[89] discussed the effect of article 24 of the CoK. The ingredients of any limitation of a right in the bill of right are "*first that a right or fundamental freedom in the Bill of Rights should only be limited by a law; and second, to the extent only that the limitation is reasonable and justifiable.in an open and democratic society*." The court further noted that since no right in the bill of rights is superior over the other including the need to ensure that the enjoyment of the rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms by others it would call "*for balancing of rights under the principle of proportionality because rights have equal value and therefore maintain the equality of rights*."

The requirement that there must be a law that limits the fundamental rights and freedoms of a person was stated as a mandatory requirement in *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others*[90]. The bench of Makhandia, Ouko & M'inoti, JJ.A. noted in their obiter dicta that "*we repeat that the law must exist first before the question of justification or reasonableness can be inquired into*."

The obiter dictum of Murithii, J in *SDV Transami Kenya Limited and 19 Others v Attorney General & 2 Others & another*[91] places further obligations on a party that seeks to limit the right or fundamental freedoms of a person. The legislation limiting the right "*must expressly state intention to limit a right and the nature and extent of limitation, be clear and specific about the right affected, and the nature and extent of limitation, and the limitation must not go as far as to wholly destroy the essential content of the right, emphasis being on limit rather than derogate*." The court also examined the applicability of article 24 to subsidiary legislation and found that subsidiary legislation is law for the purposes of article 24 of the CoK.

The effect of article 24 of the CoK examined through enacting school rules would mean that school rules in public schools as a form of subsidiary legislation have the power to limit the rights

[89] [2017] eKLR.
[90] [2017] eKLR.
[91] [2016] eKLR.

provided under the bill of rights provided that they pass the test provided under article 24 of the CoK, the proportionality test coined by Mwita, J & the scope of the limitation not to destroy the essential content of the right. Even though article 24 denotes the power to the state or a person to limit the rights of a person, the burden of proving that the requirements of the article have been justified are placed on the state or person limiting the person's rights.[92] In a school setting the burden of proving that the limitation of a right is justifiable would therefore be placed on the school.

There is a major distinction to be drawn at this juncture. Public schools by enacting school rules can limit the rights and fundamental freedoms of students by virtue of Article 24 of the CoK. The same is not true of private schools as school rules in private schools are not subsidiary legislation, as a result private schools cannot limit the rights or fundamental freedoms of students.

The all-encompassing CoK envisaged a situation whereby private persons may be in a position to enact laws and places the obligation of complying with the national values and principles of governance.[93] These values and principles include *inter alia* sharing and devolution of power, democracy and participation of the people, equity, inclusiveness, human rights, protection of the marginalised, accountability among many others.

The obligations schools have as a results of article 10 of the CoK are immense and examining all in turn is not feasible, however a broader examination of the human rights perspective to enacting laws is examined in the next two chapters. This is through the examination of human rights under the scope of a child and how these human rights are infringed by rules and regulations.

### 2.5 Conclusion

This chapter began by examining the length and breadth of the rights of students and found that students by virtue of them being human have been accorded rights under the CoK. The chapter proceeded to scrutinise the institutional framework that regulates public schools and noted key deficiencies in the same. The chapter lastly moved to examine the key differences in proposed limitations of rights and fundamental freedoms by documenting the divide between public and private schools.

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[92] Article 24(3) Constitution of Kenya 2010.

[93] Article 10(1)(b) Constitution of Kenya, 2010.

## CHAPTER 3

## 3.0 THE DISCIPLINARY PROCESS

The previous chapter established that students have rights and fundamental freedoms. Nevertheless, these rights and fundamental freedoms can be limited under article 24 of the CoK through school rules and regulations in public schools. School rules and regulations ordinarily outline prohibited conduct for the students enrolled in the school. A breach of the school rules entitles the school to take disciplinary actions against the infringing student. This is through adjudicating on the matter and passing a punishment. This section examines the disciplinary process as a whole.

This chapter will begin by examining the disciplinary process outlined under the BEA and BER including the constitutional obligations placed on a school Board of Management. The chapter thereafter proceeds to scrutinise the principle of natural justice in school disciplinary processes. The chapter progresses by examining whether students have the right to fair administrative action and or the right to fair hearing. The chapter lastly concludes by examining the potential punishments that can be passed by a school disciplinary body.

The general principle regarding legality of school rules was stated in *J.K (Suing on Behalf of CK) v Board of Directors of R School & another*[94]whereby the court stated as follows "…*it is important to acknowledge the right of educational institutions to set rules of conduct for their students. Courts will not ordinarily interfere with those rules and regulations except in very exceptional circumstances…only if it is demonstrated that such rules or the enforcement thereof violate the rights of those subject to them, or the Constitution, will the court intervene*." The underlining rule established by this judgement is that a Court will only intervene where the rules violate: the rights of students; or the CoK. It is therefore imperative that the human rights and fundamental freedoms of students in disciplinary proceedings are established.

### 3.1 The BEA and BER on School Disciplinary Procedures

This section examines the statutory obligations placed on a Board of Management when conducting a hearing where a student has allegedly broken school rules. Section 35(3) of the BEA provides that the regulations made under the Act may provide for expulsion after corrective measures have been exhausted and only after such parent or guardian has been afforded an

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[94] [2014] eKLR.

opportunity of being heard. This provision of the BEA echoes the principles of natural justice chiefly on the right to be heard.

The BER provides under regulation 32 that a learner is individually undisciplined if he is involved in: physical fights; bullying of other learners; stealing; playing truancy; cheating in examinations; abusing teachers or other persons in authority; defiance of lawful instructions; drug trafficking or substance abuse; or  any other conduct categorized as indiscipline by the Board of Management. The above determinants of indiscipline are conclusive and furthers an objective of a school, which is to maintain discipline. The same do not infringe on the rights of students and it is arguable that they are in the child's best interest.

Regulation 37 of the BER provides for the creation and maintenance of a register of undisciplined learners which includes details of the child including the category of indiscipline and warnings or corrective measures taken by the institution. This regulation is crucial in promoting the rights of students as it ensures accountability in the actions taken by a school against an undisciplined student.

Regulations 38 and 39 of the BER contain the essence of the disciplinary process against an allegedly undisciplined child. Regulation 38 of the BER provides that if the head of the institution is of the opinion that the acts of indiscipline have persisted despite warning or corrective measures and the acts of indiscipline are likely to threaten the safety of other learners at the institution the head of the institution shall issue the learner with a suspension letter. The suspension letter shall be addressed to the parent or guardian of the child and shall contain details of the indiscipline and specifying the date the parent or guardian is required to appear before the Board of Management of the institution. Regulation 38 breathes life into article 53(2) of the CoK as it contemplates a situation when the interests of the school at large outweigh the interests of the one undisciplined child.

Regulation 39 provides that on the specified date where the parents are to meet with the Board of Management of the institution, the particulars of the complaint shall be read out to the parent or guardian of the student and the student shall be asked to defend themselves. The same regulation also recognises the right to adjournment where the parent or guardian fails to appear. The Board of Management will then make a recommendation to the County Director of Education. Once the County Education Director receives such recommendation they shall seek the advice of the

County Education Board on what action to take. Under regulation 41 once a decision is made by the County Education Director any person aggrieved by the decision may apply for an appeal to the Education Appeals Tribunal. The provisions of the BER on school disciplinary processes are parallel to some of the principles of natural justice such as the right to: adequate notice; to be heard; against bias; to appeal.

Though the regulations encapsulate some of the principles of natural justice, not all are sufficiently catered for as the next section shall examine.

**3.2 The Principle of Natural Justice**

This section examines the principle of natural justice and its implications for the disciplinary process in schools. In *Republic v Board of Governors, Our Lady of Victory Girls School Kapnyeberai & another Ex-parte Korir Kipyego Joseph & another*[95] the court in discussing the principle of natural justice stated that "*the principle of natural justice…encompasses two rules: One,* ***nemo judex in causa sua*** *that is to say, no one should be a judge in his own cause or the rule against bias and two,* ***audi alteram partem*** *that is, hear the other party or the rule of fair hearing or the rule that no one should be condemned unheard*." There are therefore two sub-rules of the general overarching principle of natural justice which are: the rule against bias; and the right to be heard. This section proceeds to examine each one in turn and paying particular attention to the right to legal representation of a student in a disciplinary case. The section concludes by examining the disciplinary process adopted by schools in U.S.A.

It is apt at this turn to consider the provisions of the Fair Administrative Action Act (FAAA). The FAAA was enacted to give effect to article 47 of the CoK. Under section 2 of the FAAA administrative action includes the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates. The effect of section 2 of the FAAA is therefore to bring school disciplinary committees under the ambit of the FAAA due to their quasi-judicial nature. If the same were not clear section 3(1) of the FAAA further embeds the principle.

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[95] [2015] eKLR.

### 3.2.1 The Rule against Bias

In *Republic v Speaker of the Senate & another Ex parte Afrison Export Import Limited & another*[96] the court defined bias as "*an operative prejudice, whether conscious or unconscious, as result of some preconceived opinion or predisposition, in relation to a party or an issue. Dictionary meaning of the term "bias" suggests anything which tends a person to decide a case other than on the basis of evidences*." The rule against bias has been captured under Article 50(1) of the CoK which provides that every person has the right to have any dispute that can be resolved by the application of law decided…or if appropriate another **independent and impartial tribunal or body**. Section 7(2)(a)(iv) of the FAAA further provides that a court or tribunal may review an administrative action or decision if the person who made the decision was biased or may reasonably be suspected of bias.

In *Kipkoech Kangongo& 62 others v Board of Governors Sacho High School & 5 others*[97] Karanja, Warsame, Gatembu, JJ.A laid down the test for determining whether or not there has been bias as "…*the test to be applied is that of a reasonable person, fully apprised of the circumstances of the case would hold that there has been an appearance of bias*." *In the matter of E.T.N (suing as the next friend of E.T.K (Minor)*[98] the court examined the test of whether or not there has been bias and stated that "*a hearing cannot be said to be fair where a complainant also sits as a judge in the same proceedings*." The effect of this rule is that the members of the Board of Management of a school should withdraw themselves from hearing of a disciplinary case when they are directly involved in the case either as witnesses or complainants.

### 3.2.2 The Right to be Heard

Section 4 of the FAAA sets out the rights of a person to administrative action. These rights include the right to be given written reasons against any action taken against the person. Further that where an administrative action will adversely affect the rights or fundamental freedoms of a person the administrator will give the person: prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations in that regard; notice of a right to a review or internal appeal against an administrative decision, where applicable; a statement of reasons which may include the reasons for which the action was taken and any relevant documents relating to that matter; notice of the right to legal representation, where applicable; notice of the right to cross-examine where applicable; or information, materials and evidence to be relied upon in making the decision or taking the administrative action.

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96 [2018] eKLR.
97 [2015] eKLR.
98 [2014] eKLR.

These rights are similar to those accorded to accused persons under article 50(2) of the CoK, save for certain rights that lean heavily towards criminal proceedings such as: the right to a public trial; to have an advocate assigned to the accused person at the state's expense; to remain silent during proceedings; to refuse to give self-incriminating evidence; to have the assistance of an interpreter if the accused person cannot understand the language used at trial; not to be convicted of a crime that was not an offence in Kenya or a crime under international law; the right against double jeopardy; to the benefit of the least severe of the prescribed punishments for an offence.

In *Republic v University of Nairobi Ex-Parte Lazarus Wakoli Kunani & 2 others*[99] the court upon examining section 4 & 7 of the FAAA stated that "*one must however appreciate that what the law requires is a right to be afforded an opportunity of being heard as opposed to the right to be heard*." In examining the right of the applicant in the case to be given adequate notice to prepare for his case the court stated that "…*where an opportunity of being heard has been afforded it is upon the applicant to bring to the notice of the Tribunal that the time given to him does not accord him time of adequately preparing for his case and to seek more time to do so and it is only when the Tribunal declines to afford him adequate time to properly present his case that the discretion may be faulted*." The above wording of the court transfers the right to be heard in the strict sense, to the right to being afforded an opportunity to be heard.

In *Republic v Board of Governors, Our Lady of Victory Girls School Kapnyeberai & another Ex-parte Korir Kipyego Joseph & another*[100]the court made reference to the Court of Appeal judgment in *Kenya Revenue Authority v Menginya Salim Murgani*[101] which reiterated that "…*a hearing does not necessarily have to be an oral hearing in all cases and that there is ample authority that decision-making bodies, other than courts and bodies whose procedures are laid down by statute are masters of their own procedure, provided that they achieve the degree of fairness appropriate to their task. It is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing*." This is further reinforced by section 4(6) of the FAAA which allows administrators to use a different procedure where one is provided for. The court then made reference to *Peris Wambogo Nyaga v Kenyatta University*[102], which stated that "…*there are some situations where a hearing would be unnecessary and even obstructive, each case must therefore be put on the scales by a court and there cannot be a general requirement for a hearing in all situations*." Hence, the right to be heard would

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[99] [2017] eKLR.
[100] [2015] eKLR.
[101] [2010] eKLR.
[102] [2014] eKLR.

be subject to the offence that a student is charged with. For offences where punishments are minimal or non-existent then a formal hearing would not be required.

The proceeding sub-section discusses the right to legal representation of students in disciplinary hearings in greater detail.

#### 3.2.2.1 The Right to Legal Representation

Section 4(3)(e) of the FAAA provides that where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person the administrator shall give the persons affected by the decision notice of the right to legal representation where applicable. Section 4(5) of the FAAA further provides that nothing in section (4) shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings. From the foregoing section the right to legal representation is accorded to every person in judicial or quasi-judicial proceedings. Student disciplinary hearings are quasi-judicial proceedings and therefore the right to legal representation is a right of every accused student before a disciplinary committee.

In *Republic v Chuka University Ex-Parte Kennedy Omondi Waringa & 16 others*[103] Aburili, J examined section 4 of the FAAA and posited as follows "*it follows that the right to legal representation cannot be limited and is not limited by statute as it complements the right to a fair hearing. And it is the duty of the administrative or quasi- judicial body ortribunal to notify the person accused or against whom administrative proceedings are being conducted, of that right to legal representation, and not to wait and see whether the person shall request for such legal representation*." When considering the import of article 24 of the CoK on limiting the rights and fundamental freedoms under the CoK with regard to the right to fair administrative action the court stated that "i*t is trite law that Rules and Regulations of an administrative body exercising either administrative or quasi-judicial authority cannot be permitted to limit fundamental rights guaranteed by the Constitution, as they are not substantive legislation contemplated in Article 24 of the Constitution*".

As the case before Aburili, J was of a University student it may not be a direct transplantation for the rights of a student in a school. This is because school rules and regulations are law under article 24 of the CoK and can therefore limit the rights and fundamental freedoms of a student.

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[103] [2018] eKLR.

A better interpretation of section 4 of the FAAA was given in *Republic v University of Nairobi Ex-Parte Lazarus Wakoli Kunani& 2 others*[104] where Odunga J interpreted the wording of section 4(3)(e) specifically with regard to the terms "where applicable" to mean "*in other words the right to legal representation only applies where permitted under the relevant procedure*." He further endorsed the case of *Enderby Town FC Ltd vs. The Football Association*[105]where it was held that "*it is a matter of discretion of the tribunal. It is master of its own procedure; and if it, in the proper exercise of its discretion declines to allow legal representation, the courts will not interfere....in many cases it may be a good thing for the proceedings of a domestic tribunal to be conducted informally without legal representation. Justice can often be done in them better by a good layman than a bad lawyer...But I would emphasise that the discretion must be properly exercised. The tribunal must not fetter its discretion by rigid bonds. A domestic tribunal is not at liberty to lay down an absolute rule*". This position is more in line with article 24(2)(c) of the CoK which states that a provision limiting a right or fundamental freedom so far as to derogate from its core or essential content.

Further the FAAA under section 4(6) states that where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the CoK, the administrator may act in accordance with that different procedure. Odunga J stated in reference to section 4(6) of the FAAA that "*in other words an administrator may be empowered by a written law to follow a procedure other than the one prescribed under the Fair Administrative Action Act and such a procedure will not faulted as long as it does not derogate from the provisions of Article 47 of the Constitution*."

Further in *Republic v Kenyatta University & another Ex-Parte Wellington Kihato Wamburu*[106] Odunga J stated that "*unless the rules of the disciplinary procedure expressly exclude the right to legal representation, that right is presumed to be applicable to such proceedings and the applicant is entitled to be informed of such a right*". Odunga J further endorsed the case of *Republic v Pwani University College Ex-parte Maina Mbugua James & 2 Others*[107] where the court stated that "*if an individual requests for legal representation, then he should be entitled to such representation*."

The position taken by Odunga, J carries more weight, irrespective of the same, in the context of students and the best interest of the child doctrine under section 53(2) the obiter dicta in the above cases may not be a direct transplant to schools. Children are more easily coerced and impulsive in comparison to adults, they are less likely to see the consequences of their actions and are more

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[104] [2017] eKLR.
[105] [1971] 1 All ER 218.
[106] [2018] eKLR.
[107] [2010] eKLR.

likely to make false confessions.[108] If the above rationale is linked to the best interest of the child doctrine it presents the following drawback. Whether it is in the best interest of the child to be afforded legal representation in a school disciplinary process especially where the consequences of the dispute could lead to suspension or expulsion? The above question would be answered in the affirmative as noted by the preceding line of the gullibility of children they are likely to make false confessions and therefore resign their fate to the Board of Management. Further children are by their youthful nature not in a position to understand the technicalities of legal rules such as the rule against bias and are not likely to notice such matters.

### 3.2.3 Comparative Analysis on the Disciplinary Process - U.S.A

U.S.A like Kenya recognise that students in and out of school are persons under the American Constitution.[109] In *Goss v Lopez*[110] the Supreme Court ruled that "*due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story*." The Supreme Court therefore endorsed the principles of due process including the right to notice; presented with evidence; and the right to be heard.

The court in *Goss* had sought reliance on the children's statutory entitlement to compulsory education, and the legitimate expectation the students had to education which may only be deprived by adherence to due process of the law.[111] Further the court in *Goss* stated that due process clauses disproves any concept of unbending rules/procedures that are of universal application.[112] Though the court in *Goss* did not interpret due process to include the right to counsel, cross-examine witnesses or the opportunity to call witnesses.[113]

In the U.S.A there is only a right to counsel in school disciplinary actions for criminal misbehaviour.[114] School disciplinary proceedings are classified as civil proceedings in the U.S.A, as a student is likely to be expelled or suspended and not imprisoned.[115] Further the right to counsel

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[108] Ellen L Mossman, 'Navigating a Legal Dilemma: A Student's Right to Legal Counsel in Disciplinary Hearings for Criminal Misbehavior' (2011) 160 University of Pennsylvania Law Review 585, 588.
[109] *Tinker v. Des Moines Indep. Community Sch. Dist.,* 393 U.S. 503, 511 (1969).
[110] 419 U.S. 565, 576 (1975).
[111] R Lawrence Dessem, 'Student Due Process Rights in Academic Dismissals from the Public Schools Student Due Process Rights in Academic Dismissals from the Public Schools' (1976) 277 Journal of Law and Education 277, 284.
[112] Dessem (n 111) 293.
[113] Mossman (n 108) 593.
[114] Mossman (n 108) 587.
[115] Ibid.

is based on whether the applicable school rules allow it or forbid it.[116] Though this distinction now has an exception via the decision in *Gabrilowitz v Newman*[117]. The court made a distinction in cases where the student has been charged with a parallel criminal proceeding, noticing the unique challenges presented by a criminal case and finally positing that it is only a lawyer that is competent to cope with the demands of an adversary proceeding.[118]

**3.3 Fair Administrative Action v Fair Hearing**

The proceeding subsection discusses the application of the principles of natural justice in school disciplinary hearings. The principle has now received constitutional codification through articles 47 and 50 of the CoK. The application of these rights is however somewhat muddled. This section conducts an inquiry into which part of the principle of natural justice has received abode in the CoK and can be applicable to students in schools.

Article 50(1) of the CoK 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.

In *Onjira John Anyul v University of Nairobi*[119] the court was tasked with determining whether the suspension and expulsion of the petitioner by the respondent was lawful. In the case the petitioner had been suspended from the respondent's university for three years on the grounds that he solicited one of his fellow university students to attack another and thereafter hid the attacked in his room. The court in examining possible breaches of the right to fair hearing stated that "*I find that* (article 50) *is applicable to the disciplinary proceedings that were initiated against the petitioner considering the same were in the nature of quasi-criminal proceedings. I further find that the petitioner was entitled to a right to a fair hearing as provided under Article 50(1) of the Constitution that deals with "any dispute that can be resolved by application of law*." The court further went on to state that since the proceedings were of a criminal nature the "…*respondent ought to have ensured that the allegations were proved to the standards expected in a criminal case*." The court also took notice that the petitioner was asked to present his case before the evidence of his accuser was taken and that this "…*was taken contrary to the known procedure in all cases and trials that requires the complainant to present his case before the accused is called upon to give his defence*."

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116 Mossman (n 108) 596.
117 582 F.2d 100 (1st Cir. 1978).
118 Mossman (n 108) 601.
119 [2019] eKLR.

A cross-relation to the school paradigm would entitle students to all the rights that accused persons have under article 50(2) of the CoK. Further that the procedure to be followed must also resemble that of a criminal proceeding including the burden of proof that needs to be discharged before a person may be found guilty of such an offence and that the complainant must first present their case.

Article 47(1) of the CoK provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

The court in *Dry Associates Limited V Capital Markets Authority & Another Interested Party Crown Berger (K) Ltd*[120] takes the position that article 47 and article 50(1) protect separate and distinct rights which should not be intertwined. Further that "*article 50(1) applies to a court, impartial tribunal or a body established to resolve a dispute while Article 47 applies administrative action generally. Article 50(1) deals with matters of a civil nature while the rest of the Article deals with criminal trials. Article 47 is intended to subject administrative processes to constitutional discipline…*"

In *Judicial Service Commission v Mbalu Mutava & another*[121] the court grappled with the two conflicting rights and coined the rights in a better format. Githinji, Nambuye, Karanja, Mwera & Ouko, JJ.A. pronounced that "*fair administrative action on the other hand refers broadly to administrative justice in public administration. It is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations. The right to fair administrative action, though a fundamental right, is contextual and flexible in its application and as article 24(1) provides, can be limited by law. 'Fair hearing' in article 50(1) as the text stipulates applies where any dispute can be resolved by the application of the law and applies to proceedings before a court or, if appropriate, another independent and impartial tribunal or body. It is clear that fair hearing as employed in article 50(1) is a term of art which exclusively applies to trial or inquiries in judicial proceedings where a final decision is to be made through the application of law to facts. By article 25 that right cannot be limited by law or otherwise.*"

The court also noted in relation to the doctrine of fair administrative action that "*article 47(1) does not exclude the application of common law particularly the common law right to fair hearing.*" Further that the right to fair hearing is narrower as compared to the right to fair administrative action, which

[120] [2012] eKLR.
[121] [2015] eKLR.

encompasses the – "*duty to act expeditiously, fairly, lawfully, reasonably and, in the special case mentioned in article 47(2), duty to give written reasons for the administrative action. The duty to act lawfully and reasonably refers to the substantive justice of the decision whereas the duty to act expeditiously, efficiently and by fair procedure refers, to procedural justice*."

In *J N N, (a Minor) M N M, suing as next friend v Naisula Holdings Limited t/a N School*[122]the court took a somewhat contrary approach. The court noted that school disciplinary proceedings are more a kin to administrative action as contrasted with proceedings before a court of law or independent and impartial tribunals or bodies. The court therefore held that article 50 was wrongfully pleaded by the petitioner and only article 47 of the CoK applied. The court cited the case of *Judicial Service Commission v Mbalu Mutava* though wrongfully misapplied it. The court noted that the above case made a clear distinction between the application of the two rights, however it failed to realise that a disciplinary proceeding was officiated by a body/tribunal formed for the sole purpose of deciding the disciplinary issue. This body/tribunal therefore makes it fall under the ambit of article 50 which applies to a "…*hearing before a court or, if appropriate, another independent and impartial tribunal or body*." The court understood the wording of article 50 to refer to it solely as judicial proceedings however the word "independent" is a resemblance of the principles of natural justice on bias. The inclusion of the word "body" increases the scope of application of the article to even include administrative bodies. This therefore places school bodies or any other body tasked with deciding a disciplinary issue within a school under the ambit of article 50.

In *Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & another*[123]the court posited that "*while the wording of Article 50 of the Constitution on the right to a fair hearing prima facie seems to focus on criminal trials it's not lost that fair trial in civil cases includes: the right of access to a court, the right to be heard by a competent, independent and impartial tribunal, the right to equality of arms, the right to adduce and challenge evidence, the right to legal representation, the right to be informed of the claim in advance before the suit is filed, the right to a public hearing and the right to be heard within a reasonable time*."

For quasi-criminal proceedings it has already been established that students will be entitled to the applicable rights under article 50(2). There are however, other indiscipline issues that are not criminal in nature such as disobedience. The response to the above problem would be that under all proceedings before a body where the law is applied the rights under article 50(2) apply.

[122] [2018] eKLR.
[123] [2019] eKLR.

Nevertheless, even if one tends to prefer the civil-criminal separation it is well established that article 50(2) would be applicable to criminal and quasi-criminal proceedings.

With the import of the FAAA it is important to comprehend that students' rights under article 47 are similar to those under article 50(2). The distinction however lies in the limitation of these rights. Whereas rights under article 47 may be limited as long as the preconditions under article 24 are met the right to a fair hearing may not be limited by law or otherwise by virtue of article 25 of the CoK which classifies the right to a fair hearing as an illimitable right.

### 3.4 Potential Punishments that may be passed by Public Schools

This section examines the potential punishments that may be passed by a school disciplinary tribunal at the end of the process once a finding has been made that the student has broken a school rule/rules. It begins by examining the statutory and constitutional parameter of punishments that may be passed by schools. It then proceeds to briefly discuss the requirement that all punishments must meet the test of reasonableness and proportionality. The section concludes by briefly delving into the practice in U.S.A and South African on punishments being passed on students.

#### 3.4.1 Statutory and Constitutional Outline for Punishments

Section 35(2) of the BEA provides that no child shall be held back in any class or expelled from school. Section 35(3) of the BEA thereafter states that the regulations made may provide for expulsion or the discipline of a delinquent pupil for whom all other corrective measures have been exhausted and only after the child and parent or guardian have been afforded an opportunity of being heard. Such child may only be admitted to an institution that focuses on correction in the context of education.

A reading of regulation 39 and 40 of the BER provides that the Board of Management may make a recommendation to the County Director of Education. The County Director of Education shall then seek the advice of the County Education Board as to whether to order for conditional or unconditional re-admission of the learner; transfer the learner to an alternative institution; or transfer the learner to a corrective centre in the context of education. Further regulation 42 provides that no school shall withdraw the registration of a learner as a candidate in a national examination as a form of punishment.

A reading of the BEA and BER shows that corrective measures have not been defined under either Act or Regulation. A skimpy attempt is made under regulation 65(1)(b) of the BER which provides that all institutions shall provide counselling services as an essential corrective measure. The lack of a list of adequate corrective measures leaves the punishments rolled out at the whims of the teacher. The court in *P.P. (a Minor suing through his Father and Next Friend) F W v Board of Management, [Particulars Withheld] High School*[124]noted this *lacunae* and stated that "*the term, "corrective measures" is not defined in the Regulations but evidently, warnings, and punishment including suspension, subject to Section 36 of the Act are part of corrective measures (Implied in regulation 37, 38 and 42).*"

Due to the lack of a framework on the punishments that may be passed by schools it is important to examine the human rights and fundamental freedoms that a school must adhere to when passing out punishments. These are: the right to human dignity;[125] the right to freedom and security of the person – including the right to not be subjected to any form of violence, or corporal punishment and not to be treated and punished in a cruel, inhuman or degrading manner;[126] right to freedom from forced labour;[127] the right to education;[128] the right of a child to be protected from abuse, all forms of violence, inhuman treatment and punishment and hazardous or exploitative labour.[129] The overarching principle again that needs to be considered in imposing punishments against children is the best interest of the child.[130]

Corporal punishment was banned in Kenya via a gazette notice in March 13 2001.[131] Section 4(p) of the BEA under the guiding principles of basic education states *inter alia* that elimination of corporal punishment or any form of cruel and inhuman treatment or torture. Section 36(1) of the BEA further provides that no student shall be subjected to torture and cruel or inhuman or degrading treatment or punishment in any manner whether physical or psychological and thereafter imposes a fine for any person who contravenes the section.

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124 [2017] eKLR.
125 Article 28, Constitution of Kenya 2010.
126 Article 29, Constitution of Kenya 2010.
127 Article 31, Constitution of Kenya 2010.
128 Article 43(1)(f) Constitution of Kenya 2010.
129 Article 53(1)(d) Constitution of Kenya 2010.
130 Article 53(2) Constitution of Kenya 2010.
131 Samuel Siringi, 'Ban followed pressure from parents and rights lobbies' (*Daily Nation*) https://www.nation.co.ke/lifestyle/1190-116632-gkb6faz/index.html accessed 5 April 2020.

### 3.4.2 Reasonable and Proportionality Tests

In *Republic v University of Nairobi Ex-parte Antony Mwambia Thuranira*[132] the court considered the test of reasonableness in the decision making process and stated *"…such that no reasonable tribunal properly applying its mind to the law and the material before it could arrive at such a decision. The test of unreasonableness was set out in* ***Associated Provincial Picture Houses Ltd vs Wednesbury Corporation****. The law places the onus on the Petitioner to demonstrate that the decision was so absurd that no sensible person could ever dream that it lays within the powers of the Respondent.*"

The test of proportionality was discussed by the Court of Appeal in *Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others*[133]where the court posited as follows, "*…section 7 (2) (l) of the Fair Administrative Action Act provides proportionality as a ground for statutory judicial review. Proportionality was first adopted in England as an independent ground of judicial review in* ***R v Home Secretary Ex parte Daly*** *[2001] 2 AC 532… Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in Article 24 (1) (b) and (e) of the Constitution* ***to wit*** *that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications*."

Though courts have been quick to state that the legitimate aim being pursued could be upholding disciplines in institutions of learning.[134] In light of the foregoing the test of reasonableness and proportionality have the effect of imposing an obligation on Boards of Management on considering what punishment to enforce on students where they break school rules and where applicable how severe the punishment may be.

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[132] [2018] eKLR.
[133] [2016] eKLR.
[134] *Omondi Michael Haya & 4 others v University of Nairobi* [2017] eKLR

### 3.4.3 Comparative Analysis on Punishments passed on Students in U.S.A and South Africa

This section examines what American and South African legislature, judicature and scholars have identified as lawful punishment as an alternative to corporal punishments. Under section 10 of the South African Schools Act corporal punishment is prohibited. In South Africa like Kenya there are no prescribed alternatives to corporal punishment.[135]Some schools have therefore rolled out strategies like asking students to kneel down; forcing them to take part in physical tasks like 'picking papers (sic)' & inviting the children's parents to school.[136]Others have resolved to ask students to leave the classrooms or resolve to suspend the undisciplined child.[137]

American jurisprudence on corporal punishment is rather unique. Some American statutes have defined corporal punishment as "the use of physical force with the intention of causing a child to experience pain, but not injury, for the purpose of correction or control of the child's behaviour."[138] Further corporal punishment includes a variety of methods including *inter alia* excessive exercise drills.[139]The Court in *Moore v Willis Independent School District*[140]found that the students' rights to bodily integrity had been infringed by the school when the gym class teacher forced Moore to do one hundred squat thrusts.[141]

### 3.5 Conclusion

The disciplinary process in Kenya is scantily regulated in Kenya. There is a lack of imposition of the principles of natural justice in Kenya due to the lack of acknowledgment and implementation of the right to fair hearing. In addition to the same there is the absence of a framework on the punishments passed out by students, thereby giving schools a carte blanche to impose punishments as they deem fit. Moreover, the lack of a firm judicial pronouncement on whether the right to fair hearing is applicable to students in schools muddles the position even further.

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[135] Cosmas Maphosa and Almon Shumba, 'Educators' Disciplinary Capabilities after the Banning of Corporal Punishment in South African Schools' (2010) 30 South African Journal of Education 387 389.
[136] Maphosa and Shumba (n 135) 392.
[137] Maphosa and Shumba (n 135) 395.
[138] K Rico, 'Excessive Exercise as Corporal Punishment in Moore v. Willis Independent School District - Has the Fifth Circuit "Totally Isolated" Itself in Its Position?' (2002) 9 Villanova Sports & Entertainment Law Journal 351 <http://articles.sirc.ca/search.cfm?id=S-861748%0Ahttp://search.ebscohost.com/login.aspx?direct=true&db=s3h&AN=SPHS-861748&site=ehost-live%0Ahttp://www.law.villanova.edu/students/orgs/sports/index> accessed 8 April 2020.
[139] David R Dupper and Amy E Montgomery Dingus, 'Corporal Punishment in U.S. Public Schools: A Continuing Challenge for School Social Workers' (2008) 30 Children and Schools 243.
[140] 233 F.3d 871, 873 (5th Cir. 2000).
[141] Rico (n 138) 372.

## CHAPTER 4

## 4.0 RELIGION IN THE CLASSROOM AND ENFORCEMENT CHALLENGES UNDER SCHOOL RULES AND REGULATIONS

The previous chapter outlined the procedure that is used to discipline students when they break school rules and regulations. The first part of the chapter examines the right to religion and how the same is infringed by schools. The second branch of the chapter discusses the legal recourse available to students when their rights and fundamental freedoms are violated and or infringed.

### 4.1 Religion in the Classroom

Although there are a plethora of rights capable of being discussed in the human rights analysis of school rules and regulations, the right to religion in schools has been a scorching topic in recent years. This section begins by addressing the constitutional foundation of the right to religion. The section proceeds to examine the little or no regulation of the right to religion in the classroom under the BEA and BER. The section concludes by examining the stance of Kenyan courts on the sensitive topic. This chapter unlike others does not have a comparative study as heavily reliance has already been sought by Kenyan courts from its South-African and British counterparts.

#### 4.1.1 The Constitutional Underpinning

Article 32 of the CoK lays down the right to freedom of conscience, religion, thought, belief and opinion.[142] The article goes on to state that every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief through worship, practice, teaching or observance of a day of worship. Moreover the article states that a person may not be denied access to any institution, employment or facility, or the enjoyment of any right because of that person's belief or religion. Lastly the article states that a person shall not be compelled to act or engage in any act that is contrary to the person's belief or religion. The right to religion as per the CoK through article 32 therefore encompasses two sub-rights i.e. the right to freedom of religion and the right to manifest that religion, these two shall broadly be referred to in this paper as the right to religion.

#### 4.1.2 The failure by the Legislature

In a school setting there are likely to be students who follow religions that are unique and distinct from each other. Further in Kenya there are a number of schools whose sponsor (a person or

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[142] Article 32, Constitution of Kenya, 2010.

institution who makes a significant contribution and impact on the academic, financial, infrastructural and spiritual development of an institution of basic education[143]) is from a religious background or is a religious institution. For instance in the case of *The Board of Management [Particulars Withheld] Girls' High School & 3 others Interested Party National Cohesion & Integration Commission*[144] where the respondent school was sponsored by the Catholic Church. The court noted that there is an obligation placed on the sponsor of a school as one imposed by law, to wit, section 27(d) of the BEA which provides that one of the roles of the sponsor is to maintain spiritual development safeguarding the denomination of religious adherence of others. Though this is a role of a sponsor, school rules and regulations are drafted in ways that infringe the right to religion of students, which is the niche of this section.

### 4.1.3 The Kenyan Judicature's stance on the Right to Religion

Four cases are of particular importance to this discussion: the Court of Appeal decision pronounced by the bench of Makhandia, Ouko & M'inoti, JJ.A. in *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others*[145], the High Court judgment by Mwita, J in *J W M (alias P) v Board of Management O High School & 2 others*[146], the Supreme Court dissenting judgment by Ojwang, SCJ in *Methodist Church in Kenya v Mohamed Fugicha & 3 others*[147]. The final judgment as pronounced by the bench of Waki, Nambuye and Kiage, JJ.A in *Mohamed Fugicha v Methodist church in Kenya (suing through its registered trustees) & 3 others*[148] which was overturned by the Supreme Court in third case cited herein, but whose *obiter dictum* is crucial in the discussion of the right to religion of students in schools.

In *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others*[149] case students from eighteen different schools including those of the Seventh Day Adventist ("SDA") faith were required to attend compulsory Saturday classes and on certain occasions undertake examinations on Saturday. The students in these schools are also to be involved in general cleaning. Students who failed to attend classes on Saturday and instead choose to observe the Sabbath were suspended from school or given an election to either remain in school and attend all classes including Saturday classes or leave the school. The case for the appellant was that the Church holds

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143 See definition of 'sponsor', section 2 Basic Education Act 2013.
144 [2016] eKLR.
145 [2017] eKLR.
146 [2019] eKLR.
147 [2019] eKLR.
148 [2016] eKLR.
149 [2017] eKLR.

certain beliefs, which are derived from the bible one of which is the obligation to respect and observe the Sabbath and as such not to work on the day of the Sabbath. A belief that was infringed by the various schools by refusing to accord the opportunity to students who are believers of the SDA faith.

The third (3rd) respondent in this case which was Alliance High School asserted that all students are made aware of the school's rules and regulation upon admission to the school. Further that those rules and regulations mandate students to attend all classes on Saturday up to 11a.m. The bench on reviewing the evidence placed before it, the grounds of appeal and the judgment given by Lenaola J (as he then was) in the High Court phrased one broad issue for determination. The issue was whether failure to accord SDA students a day of worship in accordance with their faith was justifiable and reasonable under article 24 of the CoK or whether it infringed their rights guaranteed by article 32.

The bench understood that freedom of religion is a complex issue and this case required a delicate balance. This is primarily because the right to freedom of religion protects both the right to conscience of both believers and non-believers and finally the minority whose religious beliefs differ from the beliefs which are being observed in schools by the majority. The bench also noted that the diminishing of the right to religion by acts or measures could be through "*the prohibition of Muslims from wearing hijab (headscarf) or hijab and trousers or full-length Islamic dress (jilbab) in schools, colleges or workplace, the requirement for compulsory attendance of Christian Sunday worship by Muslim and SDA students, the banning of carrying to school of a kirpan (a small sword) or wearing of turban(headdress for men) by Sikh students (or Akorino) the objection, on account of religion to the banning of corporal punishment in schools, prohibition of nose stud worn by Tamil-Hindu girls, the banning of Sikh girls from wearing kara (a plain steel bangle)to school, the prohibition of dreadlocks in schools or work place for the Rastafarian faith, among several instances(sic).*"

The bench found that the wording of article 32 of the CoK bestowed the right on persons of the right to freedom of religion and belief and the right to manifest those freedoms through worship, practice, teaching, or observance. Further that both the right to freedom of religious belief and the right to manifest that belief are subject to the general limitation found under article 24 of the CoK and therefore is subject to the ordinary conditions imposed by article 24 under limiting a right or fundamental freedom. The first and most primary condition is the existence of a law limiting the right or fundamental freedom and thereafter the conditions under article 24(1) (a) to (e).

The court thereafter states that for one's right to freedom of religion and belief to be protected under article 32 of the CoK, "*one's religious belief or practice must be genuine and sincere and not spontaneous, isolated or occasional*". The court thereafter examined what had been posited by Langa C.J in *MEC For Education: Kwa Zulu Natal& 3 Others V Navaneethum Pillay & 3 Others*[150]where it was held that "…*the practice must be peculiar and particularly significant manifestation of a person's faith and identity; that the practice has to be a person's way of expressing his or her roots and faith; and that what is important is the meaning of the practice and belief to the person involved*." The belief of the SDA followers in the Sabbath is not disputed.

The court therefore embarked on a study to establish whether the actions of the schools in not permitting the SDA students to observe the Sabbath was discriminatory, and whether the accommodation albeit limited accorded by Alliance High School was sufficient. The court endorsed the finding in *Mohamed Fugicha v Methodist church in Kenya (suing through its registered trustees) & 3 others*[151] where it was found that "…*equality before the law must never be confused with uniformity. Equality does not presuppose the elimination of differences. It does not imply leveling or homogenization of behaviour, but an acknowledgement and acceptance of difference. And difference cannot and should not be the basis for exclusion, marginalization, stigma or punishment*." The bench found that forcing students who were SDA followers to attend classes and perform other activities on Saturday was a clear violation of article 32(4) of the CoK.

The bench examined the BEA and concluded that there was no law limiting the right to religion of the students who were believers of the Sabbath. There was therefore no way in the judge's opinion that the right to freedom of religion could be limited.

This decision however failed to recognise the validity of school rules as laws that are capable of limiting rights and fundamental freedoms. An examination of the limitations tests under article 24(1)(a) to (e) is therefore in order, since the first requirement for limiting a right i.e. the existence of a law has been met through enactment of school rules and regulations.

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[150] CCT 51 of 2006.
[151] [2016] eKLR.

The court in *Mohamed Fugicha v Methodist church in Kenya (suing through its registered trustees) & 3 others*[152] adopted a similar approach. In *Mohamed Fugicha* the court did recognise the validity of school rules as laws albeit in an implied manner by noting that "i*n the hierarchy of norms and the relative weight to be attached thereto, school rules rank way below the Constitution and it is incumbent upon those who formulate and enforce them to ensure that they align and accord with the letter and spirit of it, failing which they would be null, void and of no effect whatsoever*." The court proceeded to state that school rules do not accord with the principles for limiting fundamental rights and freedoms under article 24.

An examination of the approach of limiting the right to religion albeit brief was made in *J W M (alias P) v Board of Management O High School & 2 others*[153].The court in this case was tasked with determining whether the limiting of a student's rights to have rastas which was a manifestation of her belief in the Rastafarian religion was in accordance with the law. The court examined the requirements of article 24(1) of the CoK and stated that the most important rule is that the "…*limitation is acceptable if there is no less restrictive means of achieving the intended limitation*." The court proceeded to state that it is not persuaded that the rule demanding that the student cuts her hair which is a manifestation of her religious belief is a reasonable limitation. The court further stated that "*it is intrusive and invasive of her right to religion and to manifest that religion*."

Further and more specifically article 24(2)(c) states that a provision limiting a right or fundamental freedom shall not limit the right or fundamental freedom so far as to derogate from its core or essential content. This position presents problems from a school limiting the manifestation of student to their religion. The donning of the hijab for instance, the matter for determination in the *Mohamed Fugicha v Methodist church in Kenya (suing through its registered trustees) & 3 others*[154] case. The Chief Kadhi of Kenya ordained an affidavit in support of the case of the appellant stating that "…*he (Chief Kadhi) asserted the obligatory nature of the hijab confirmed by notable Islamic jurists and ordained in the Quran. He (Chief Kadhi) swore that the hijab is not a matter of choice but a religious obligation which should not be hindered. He (Chief Kadhi) made the distinction that "***Indeed the hijab is a concept that seeks to maintain chastity and modesty and not merely a code of dress***" and proceeded to state that it is the instrument by which women are able to effectively participate in society as supported by Islam*." A decision to limit the right of female Muslim students from wearing the hijab would therefore derogate the right to manifest the student's religion from its essential core.

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[152] [2016] eKLR.
[153] [2019] eKLR.
[154] [2016] eKLR.

Though the lens through which the court has been examining school rules and the right to religion is by an examination of other rights linked to the right to religion. This is primarily the right to freedom of discrimination both direct and indirect under article 27 of the CoK. Article 27 of the CoK provides *inter alia* that the state or a person may not discriminate directly or indirectly against any person on any ground, including *inter alia* religion, conscience and belief. Discrimination was fittingly discussed in the *Mohamed Fugicha*[155] case. The court began by addressing concerns put to it that by allowing female Muslim students to wear a hijab they would be treating the female Muslim students differently. The court noted that courts have previously held that unequal treatment does not amount to inequality. The court proceeded to examine whether not allowing female Muslim students to wear the hijab would be indirectly discriminatory. A court must when investigating whether a case of discrimination has been made out a court must enquire "…*whether a rule, policy or action that appears neutral and inoffensive on the face of it does nonetheless become discriminatory in effect or operation*."

The court thereafter endorsed the English case of *The Queen on the application of Sarika Angel Watkins Singh (A child acting by Sanita Kimari Singh her mother and litigation friend) –VS- The Governing Body of Aberdare Girls' High School And Anor*[156]where the court established steps to be taken in determining whether a relevant provision directly discriminates against a person. The steps are as follows: "*first to identify the relevant 'provision, criterion or practice' which is applicable* (the school rule)*; second to determine the issue of disparate impact which entails identifying a pool for the purpose of making a comparison of the relevant disadvantages* (the female Muslim students)*; third to ascertain if the provision, criterion or practice also disadvantages the claimant personally*(wearing the hijab is a religious requirement and not merely for fashion)*; and fourth whether this policy is objectively justified by a legitimate aim; and to consider, if the above requirements are satisfied, whether this is a proportionate means of achieving a legitimate aim*." To the last point the court adopted the doctrine of accommodation. The actualising of the doctrine of accommodation would be through the court upholding the adherence to the school uniform (or law/policy) but permitting exceptions and exemptions where permitted.

The court lastly examined article 32 of the CoK and stated that "*the text (article 32) goes beyond stating a person's right to '**manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship**' to also state at sub-article (4) that '**a person***

[155] *Mohamed Fugicha v Methodist church in Kenya (suing through its registered trustees) & 3 others* [2016] eKLR.
[156] [2008]EWHC 1865 (Admin).

***shall not be compelled to act, or engage in any act; that is contrary to the persons' belief or religion**.' Taken together, the two sub articles create a double duty to accommodate in the form of allowance or accommodation of practice, manifestation or observance that may be different from the majoritarian norm and an exemption from any act which may impinge on and violate the person's belief or religion*."

The court went on to refer to the *Pillay*[157] case where the court stated that "*Two factors seem particularly relevant. First, a reasonable accommodation is most appropriate where, as in this case, discrimination arises from a rule or practice that is neutral on its face and is designed to serve a valuable purpose, but which nevertheless has a marginalizing effect on certain portions of society. Second, the principle is particularly appropriate in specific localized contexts such as an individual workplace or school, where a reasonable balance between conflicting interests may more easily be struck*."

The court went on to dismiss the respondent's arguments that the parents of the student signed the letter of admission which enjoined their children to follow the rules and regulations. The court more emphatically held that "*we are not prepared to hold that, by merely signing the admission letter or the school rules, a student and/or her parent or guardian is thereby estopped from raising a complaint or seeking exemptions* ***ex post facto***. *Where, as here, the exemptions or accommodation sought are on clear constitutional grounds, it would be escapist even surreal, for a court to point at the signed letter of admission as a bar to assertion of fundamental rights and freedoms. We do not accept that schools are enclaves that are outside the reach of the sunshine of liberty and freedom that the Constitution sheds. Students do not abandon their constitutional rights when they enter the school gate to regain them when they leave. Nor can fundamental rights and freedoms be contracted away in the name and at the altar of education. Schools cannot raise an estoppel against the Constitution. No one can. We are firm in our assessment that students in Kenya are bearers and exercisers of the full panoply guarantees in our Bill of Rights and they are no less entitled to those rights by reason only of being within school gates*."

Despite the judgments pronounced by the Court of Appeal, subsequent decisions from the High Court have still had a false interpretation of the right to religion, one such case is *PO (suing as the next friend of AA, LA, BA, FA, GO, SN, IO, WT, & PS) & another v Board of Management St. A Primary School Ahero & 2 others; Association of Jehovah's Witnesses in East Africa (Interested Party)*[158].The petitioners were students of the respondent school and were all devotees to the Jehovah Witnesses. One of the nine petitioners refused to attend a compulsory Catholic Church Mass which was held every Friday morning at the respondent school. The student was subsequently expelled from the

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157 *MEC For Education: Kwa Zulu Natal& 3 Others V Navaneethum Pillay & 3 Others* CCT 51 of 2006.
158 [2019] eKLR.

school following her refusal. The Board of Management intervened and allowed the student to be re-admitted to school if she and her father agreed to abide by the school routine, specifically attending Friday mass. The petitioner moved to court alleging infringement of her right to freedom from indirect discrimination.

The respondents argued that at the time of gaining admission into the school the petitioners and their parents signed school rules and regulations which provided for the Friday mass, and therefore seeking an exemption afterwards was an afterthought. The court proceeded cite the *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others*[159] case to wit the provision on the freedom of manifesting religion and how *a* "…*believer will not be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice*." The court proceeded to find that the petitioners had not asserted there was any attempt to adopt a religion or belief that was not of their choice. The Judge despite previously underscoring that the petitioners were adherents of the Jehovah Witness belief and the respondent was a Catholic school which obligated its students to attend Friday mass made the above holding.

Nevertheless the court acknowledged that if attending the Holy Catholic Mass is contrary to the beliefs or religion of the petitioners it would be unconstitutional to compel their attendance. The court understood the law but misdirected itself by stating that the petitioners had signed the school rules and regulations which showed readiness to comply with the school rules. The court misdirected itself by finding an estoppel against the CoK, quite contrary to the finding in the *Mohamed Fugicha* case and article 2(4) of the CoK.[160]

### 4.2 Enforcement of Fundamental Rights and Freedoms

The foregoing and current chapters have established that: students have rights and fundamental freedoms that are enshrined in the CoK; and that schools have the potential of potentially infringing on these rights and fundamental freedoms. This sub-chapter attempts to examine the legal recourse available to students when these rights and fundamental freedoms are infringed. This is through the examination of the existing structures and recourse available under the BEA and BER, FAAA & the CoK.

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[159] [2017] eKLR.

[160] Article 2(4) of the Constitution of Kenya, 2010 provides that any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency…

### 4.2.1 Education Appeals Tribunal

Under the BER any person aggrieved by a decision of the Tribunal may appeal to the Education Appeals Tribunal (Tribunal). This tribunal is established under section 93 of the BEA. This however only applies to decisions made by the County Education Board, which could only be made in public schools.

### 4.2.2 Judicial Review

Since private schools do not fall under the ambit of regulation of dispute resolution under the BEA, it has to be examined whether the provisions of judicial review could apply. The same would involve much of a rehash of what Chapter III has discussed. Students through their parents may therefore use this fora of dispute resolution, however, the grounds under which the judicial review may be brought would be limited to the grounds found under the FAAA which though similar to the rights under article 50(2) of the CoK are used in a different context.

### 4.2.3 Constitutional Petitions

A more direct recourse available to students would be through constitutional petitions. Article 22(1) & (2) of the CoK states that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the BOR has been denied, violated or infringed or is threatened. Thus court proceedings may be instituted by *inter alia* a person acting on behalf of another person where the party whose rights are infringed cannot act in their own name. The CoK is certainly alive to situations in which children among other persons may not be in the position to claim for a breach of their rights and thus the same may be instituted by their parent or guardian.

The CoK is also alive to instances where the rules may be declared void for inconsistency with the CoK. This is through article 165(3)(d)(ii) of the CoK which provides that the High Court has jurisdiction to hear any question respecting the interpretation of the CoK including *inter alia* if any law is inconsistent with, or in contravention of the CoK.

In *Gideon Omare v Machakos University*[161] Odunga J, found that "*In my view an action such as a formulation of a rule or regulation whose application, implementation or effect contravenes the Constitution is invalid and this Court not only has the power but the obligation to declare it to be so pursuant to Article 165(3)(d)(ii) of the Constitution.*"

[161] [2019] eKLR.

Judicial review and constitutional petitions may thus be avenues for the rectification of infringements of the rights of students but does not present a long term solution. This is due to the cost associated with the filing of cases and the time it takes to conclude them, notwithstanding that may students do not know that they are right holders.

### 4.3 Conclusion

In the cosmopolitan nature of Kenya as a Republic there are in existence students from different religions and faiths. The beliefs held by these students have come into conflict with school rules and regulations with the latter playing 'God' within the school grounds, in blatant disregard of the rights accorded to students under the CoK. This conflict has given birth to the principle of reasonable accommodation which has been up taken albeit slowly by schools so that the impasse between religion and schools is breached. The preceding and current chapter have outlined instances where schools through their rules and regulations have infringed on the rights of students and the current legal dispute resolution fora for correcting the same has been found to be through a constitutional petition.

## CHAPTER 5

## 5.0 CONCLUSIONS AND RECOMMENDATIONS

The previous Chapters have set out how school rules and regulations are formed, how they infringe on students' rights and fundamental freedoms and lastly what remedies are available to students for the infringements, which is what the first part of this Chapter sets to address and reveal in greater detail. The second part of the Chapter will provide recommendations on how to re-align school rules and regulations with the CoK.

### 5.1 Conclusions

This section will establish what has been deduced from the previous Chapters. The paper begun at Chapter I by identifying the ambit of this paper as setting out to establish whether students' rights and fundamental freedoms are infringed by school rules and regulations.

#### 5.1.1 The Right Holder Status

Chapter II begun by examining whether students bear the right holder status and whether they are able to exercise the rights granted to them. The paper examined the CoK specifically at articles 19(3)(a) and 20(1) and concluded that students are indeed right holders a position that has now received judicial recognition through the *obiter dictum* of Majanja, J in *R. W. T v S. N. S. School*[162].[163] The paper also examined the *in loco parentis* doctrine in light of article 53(1)(b) of the CoK whose effect was the constitutionalisation of the Right to Education and found the former doctrine to be obsolete.[164]

The Chapter proceeded to examine the institutional framework that governs the student – school relationship. This was through a thorough examination of the BEA and BER. It was found that there is little or no regulation for private schools but public schools are directed to form a Board of Management. The Board of Management is in turn mandated to form school rules and regulations.

The Chapter progressed to examine the hierarchy of the Laws of Kenya with regard to school rules and regulations and the CoK and found that by virtue of article 2(1) of the CoK, the CoK is

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[162] [2012] eKLR.
[163] Article 19(3)(a) and 20(1), Constitution of Kenya, 2010.
[164] Article 53(1)(b) Constitution of Kenya, 2010.

the supreme law of the land. The same was also found to be indoctrinated in case law through the case of *Mohamed Fugicha v Methodist church in Kenya (suing through its registered trustees) & 3 others*[165].

The chapter moved forth and noted that despite the bearing of the right holder status of students their rights like the rights of all persons are capable of being limited by school rules and regulations under article 24 of the CoK.[166] The same is however only applicable to public schools as the rules formed in private schools can be baptised as an ordinary contract whereas rules and regulations in public schools are subsidiary legislation.

### 5.1.2 The Human Rights – School Rules Clash

Chapter III and the first part of Chapter IV set out instances where school rules and regulations are found to be in infringement of a student's human rights and fundamental freedoms.

Chapter III set the tone by scrutinising the disciplinary process as a whole where a majority of the illegalities are meted out. The Chapter begins by examining the disciplinary process as per the provisions of the BER which provide for: when a student is said to be undisciplined; the procedural requirements for the hearing of the student when a charge is pressed against them; and finally the potential punishments that may be passed on the student when the student has been found to have breached the school rules and regulations.

The Chapter proceeds to conduct a constitutional examination on whether a student has any rights during the disciplinary process. This it does through an examination of articles 47 and 50 of the CoK, which provide for the right to fair administrative action and the right to fair hearing respectively.[167] The Chapter notes that the Kenyan judicature has not as yet pronounced a conclusive answer on whether the right to fair hearing under article 50 applies outside the criminal courts but notes that a majority of these rights are available to a student when charged with an offence that is criminal in nature.

The punishments that may be passed after a student is found in breach of school rules and regulations is thereafter discussed. These punishments it is noted under the BER are limited *to wit*: corrective measures (which are not defined); and suspension (which is abused). The chapter

[165] [2016] eKLR.
[166] Article 24 of the Constitution of Kenya, 2010.
[167] Article 47 and 50 of the Constitution of Kenya, 2010.

however notes that regardless of the same the CoK provides for the Constitutional rights of students and the reasonable and proportionality tests which must be adhered to before a sentence can be meted out on a student.

The first part of Chapter IV examines the conflict between the right to religion and school rules and regulations. This it carries out through an examination of various judgments pronounced by the High Court, Court of Appeal and Supreme Court on the same matter. The chapter finds that the constitutional court has been willing to allow students to deviate from school rules and regulations through the implementation of the doctrine of reasonable accommodation.

#### 5.1.3 The Existing Solutions

The second part of Chapter IV briefly examines the remedies available to students' when their rights and fundamental freedoms are infringed. The first point of call is through the Educations Appeal Tribunal which is an internal mechanism under the BER. An alternative to the same would be through judicial review if the requirements of the FAAA have been breached. Nevertheless, the out-and-out remedy is through a Constitutional Petition. The paper has noted that though this remedy exists and constitutional courts' have been ready, willing and able to remedy an infringement of the CoK the time constraints associated with this particular remedy have made it less popular, hence the paper finds that the burden of correcting the infringement should be placed in the hands of the legislature.

### 5.2 Recommendations

This paper established its niche by conducting an examination of the intersect between the CoK and school rules and regulations. The paper has in the preceding sub-section concluded that the laws as posited in the CoK through the Bill of Rights chapter are in existence however there is a tendency to abuse the same by schools.[168] A solution as identified in the preceding sub-section will have to come from the legislature and will have to do more with administration and putting into place measures to curb the abuse.

#### 5.2.1 Restructuring the Management

The laws are in existence yet their implementation remains a challenge. The Board of Management which is tasked with the role of formulating rules and regulations therefore needs to be

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[168] Chapter IV, Constitution of Kenya, 2010.

restructured to curb the abuse at its source. An introduction to the Board of Management of the post of an Advocate with a minimum seven years working experience can curb the abuse as an Advocate is more likely to be aware of how to draft the school rules and regulations to avoid infringing the human rights and fundamental freedoms of students.

In addition to the same there has to be the inclusion of a representative from the student-council that is an ex-officio member of the Board of Management in order to relate the grievances of students and further to implement the national values and principles of governance particularly public participation.

Section 55(1) of the BEA should also be amended to mandate private schools to form a Board of Management, to introduce greater accountability and ensure uniformity of regulation.

### 5.2.2 Remedies in the Disciplinary Process

The paper has already found that the right to fair administrative action through article 47 and article 50 where the proceedings before a student are quasi-criminal in nature are applicable in disciplinary proceedings against a student. Regulations 32 to 41 of the BER have succinctly captured a majority of the same, though there remains room for addition.

The additions can be through the incorporation of the rule against bias in the BER. As teachers often sit in disciplinary proceedings and the same will weed out situations where teachers are complainants, witnesses and adjudicators against students. Further to the same students should be given an opportunity to seek legal advice and appear before the disciplinary tribunal with an Advocate at least where the charges levelled against a student could lead to the student being suspended. This is because students due to their tender age are impulsive and more likely to make false confessions. The same would also be in line with the best interest of the child doctrine under article 53(2) of the CoK.

The punishments as previously noted in Chapter III that can be passed by a Board of Management are scanty *to wit*, corrective measures and suspension. This has often led to the passing of corporal punishment on students. General international practice has suggested the adoption of counselling as a more incorporating form of punishment as the student is able to understand what they have done wrong and the potential consequences of their actions and/or omissions. Further to the same

detention, though rarely practiced in Kenyan schools is an alternative to the merciless beating passed on students.

The definition of corporal punishment should also be amended to cut out the perverted forms of corporal punishments i.e. punishment aimed at causing physical pain to students such as squats and press-ups. The same should be amended as per the definition given by some American Statutes which define corporal punishment as "the use of physical force with the intention of causing a child to experience pain, but not injury, for the purpose of correction or control of the child's behaviour".[169]

### 5.2.3 Reasonable Accommodation of Religion

The doctrine of reasonable accommodation as previously noted is now a core canon in upholding the right to religion of students. Nevertheless, due to the cosmopolitan nature of Kenya, there are diverse religions and beliefs with each religion or belief coming with its own set of unique practices. The BEA in this regard needs to be remodelled to introduce the post of a person in charge of religion and spiritual development of children, who would have a working understanding of various religions and their core tenets and have the capability to advise the Board of Management of a school on how to remodel the school's rules and regulations to cater for the divergent beliefs.

### 5.2.4 Private Schools – The Lacunae in their Regulation

A glaring observation has been made throughout this paper which is the little or no regulation of the activities of private schools in relation to their management. The same can be remodelled as per the existing structures on the regulation of public schools which are through a Board of Management. The same will ensure uniformity in the regulation of public and private schools.

## 5.3 Conclusion

The paper set out to identify and reveal the infringement by schools on the human rights and fundamental freedoms on students and established a part of the same through examining the disciplinary process and the right to religion. Although there remains room for more discovery in this area of the law. The paper has found that courts have been ready, willing and able to correct

[169] K Rico, 'Excessive Exercise as Corporal Punishment in Moore v. Willis Independent School District - Has the Fifth Circuit "Totally Isolated" Itself in Its Position?' (2002) 9 Villanova Sports & Entertainment Law Journal 351 <http://articles.sirc.ca/search.cfm?id=S-861748%0Ahttp://search.ebscohost.com/login.aspx?direct=true&db=s3h&AN=SPHS-861748&site=ehost-live%0Ahttp://www.law.villanova.edu/students/orgs/sports/index> accessed 8 April 2020

the infringements passed on students as the law vide the CoK is already in existence. The problem rather remains in the enforcement and several legislative changes will have to be made to remedy the current state of affairs.

## 5.4 Bibliography

### Journal Articles

Black D, 'The Constitutional Limit of Zero Tolerance in Schools' (2014) 99 Minn. L. Rev <https://scholarcommons.sc.edu/law_facpub/224/> accessed 20 July 2019 823.

Bray E, 'Rules and regulations in Public Schools: A Legal Perspective' (2005) 25 South African Journal of Education <https://www.ajol.info/index.php/saje/article/view/25028> accessed 14 July 2019 133.

Briston E, Omulema E, Maina E & Mureithi L, 'Effects of Students Suspension on their Psychological well Being in Boarding Secondary Schools in Nakuru County, Kenya' (2015) 3 Journal of Psychology and Behavioral Science <https://www.researchgate.net/publication/281305786_Effects_of_Students_Suspension_on_their_Psychological_well_Being_in_Boarding_Secondary_Schools_in_Nakuru_County_Kenya> accessed 20 July 2019 122.

DeMitchell T, 'The Duty to Protect: Blackstone's Doctrine of In Loco Parentis: A Lens for Viewing the Sexual Abuse of Students' [2002] 1 Brigham Young University Education and Law Journal, 17, 18 < https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwi0hcCL_OTnAhUHAGMBHb-vDP8QFjAAegQIAxAB&url=https%3A%2F%2Fdigitalcommons.law.byu.edu%2Fcgi%2Fviewcontent.cgi%3Farticle%3D1137%26context%3Delj&usg=AOvVaw3jOdRq5bhgHExbXsMnC7K2> accessed 22 February 2020.

Dessem R, 'Student Due Process Rights in Academic Dismissals from the Public Schools Student Due Process Rights in Academic Dismissals from the Public Schools' (1976) 277 Journal of Law and Education 277.

Dupper D & Dingus A, 'Corporal Punishment in U.S. Public Schools: A Continuing Challenge for School Social Workers' (2008) 30 Children & Schools <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwj-r-fxlrbjAhWOz4UKHYioC7sQFjAAegQIARAC&url=http%3A%2F%2Fewasteschools.pbworks.

com%2Ff%2FCorporal_punishment_2009.pdf&usg=AOvVaw37Xv8beBe6y2saVDM8ytq9> accessed 11 July 2019 243.

Goldstein S, 'The Scope and Sources of School Board Authority to Regulate Conduct and Status: A Nonconstitutional Analysis' (1969) 117 University of Pennsylvania Law Review 373.

Glickman D, 'Fashioning Children: Gender Restrictive Dress Codes as an Entry Point for the Trans* School to Prison Pipeline' (2016) 24.2 American University Journal of Gender, Social Policy & the Law <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwj2_sffmebjAhVUfMAKHTu6AkQQFjAAegQIABAC&url=http%3A%2F%2Fdigitalcommons.wcl.american.edu%2Fcgi%2Fviewcontent.cgi%3Farticle%3D1678%26context%3Djgspl&usg=AOvVaw0eXQQLQ4-qjz-1Auut-EBB> accessed 3 August 2019.

Joubert R, 'Policy-making by public school governing bodies: law and practice in Gauteng' (2008) 41 Acta Academica <http://journals.ufs.ac.za/index.php/aa/article/view/1211> accessed 20 July 2019 230.

Maphosa C and Shumba A, 'Educators' Disciplinary Capabilities after the Banning of Corporal Punishment in South African Schools' (2010) 30 South African Journal of Education 387.

Mossman E, 'Navigating a Legal Dilemma: A Student's Right to Legal Counsel in Disciplinary Hearings for Criminal Misbehaviour' (2012) 160 University of Pennsylvania Law Review <https://scholarship.law.upenn.edu/penn_law_review/vol160/iss2/5/> accessed 20 July 2019 585.

Rico K, 'Excessive Exercise as Corporal Punishment in Moore v. Willis Independent School District - Has the Fifth Circuit "Totally Isolated" Itself in Its Position?' (2002) 9 Villanova Sports & Entertainment Law Journal 351 <http://articles.sirc.ca/search.cfm?id=S-861748%0Ahttp://search.ebscohost.com/login.aspx?direct=true&db=s3h&AN=SPHS-861748&site=ehost-live%0Ahttp://www.law.villanova.edu/students/orgs/sports/index> accessed 8 April 2020.

Sihanya B, 'Devolution and education law and policy in Kenya' (2013) Law Society of Kenya Journal <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwjRh9uP3ZrkAhU6SxUIHTrPCE8QFjAAegQIABAC&url=http%3A%2F%2Fwww.innovativelawyering.com%2Fattachments%2Farticle%2F19%2FDevolution%2520and%2520education%2520law%2520and%2520policy%2520in%2520Kenya%2520working%2520draft.pdf&usg=AOvVaw37CQ6y323yzBAnizOJ4UEm> accessed 24 August 2019 (forthcoming).

Stuart S, 'In Loco Parentis in the Public Schools: Abused, Confused, and in Need of Change' (2010) 78 University of Cincinnati Law Review 969.

Yaghambe R, 'Disciplinary Networks in Secondary Schools: Policy dimensions and children's rights in Tanzania' (2013) 3 Journal of Studies in Education <http://www.macrothink.org/journal/index.php/jse/article/view/4167> accessed 12 July 2019 42.

**Books**

Curzon L, *Jurisprudence* (2 Cavendish Publishing Limited 1995).

Rabin Y, 'The Many Faces of the Right to Education' in Daphne Barak-Erez and Aeyal M. Gross (eds) *Exploring Social Rights: Between Theory and Practice* (Hart Publishing, 2007).

Ssenyonyjo M, *Economic Social & Cultural Rights in International Law* (Hart Publishing, 2009) 389.

**Thesis & Dissertations**

Ngunyi J, 'Influence of Alternative Disciplinary Measures on Students' Discipline in Public Secondary Schools in Nyandarua South Sub – County, Kenya' (M.Ed thesis, UON 2014).

**Newspaper Articles**

Hajir A, 'Duale warns teachers against banning Muslim students over Hijab' *Standard Digital* (Nairobi, 23 July 2019) <https://www.standardmedia.co.ke/article/2001335003/duale-warns-teachers-against-banning-muslim-students-over-hijab> accessed 28 July 2019.

Maina C, 'Kiambu school ordered to readmit suspended student' *The Star* (Nairobi, 23 May 2017) <https://www.the-star.co.ke/news/2017-05-23-kiambu-school-ordered-to-readmit-suspended-student/> accessed 4 August 2019.

Maroncha L, 'I was born a Girl but I have always felt like a Man' *Standard* (Nairobi, 27 October 2017) <https://www.standardmedia.co.ke/evewoman/article/2001258562/born-a-girl-grew-into-a-man-the-moving-story-of-a-kenyan-transgender> accessed 4 August 2019.

Matheka B, 'Court finds teacher guilty of corporal punishment; *Daily Nation* (Nairobi, 2 July 2018) <https://www.nation.co.ke/news/Teacher-found-guilty-corporal-punishment-/1056-4643014-g7p1v5/index.html> accessed 28 July 2019,

Muindi P, 'Blurred Lines: The life of a transgender woman in Kenya' *Standard* (Nairobi, 13 August 2017) <https://www.standardmedia.co.ke/evewoman/article/2001251180/blurred-lines-the-life-of-a-transgender-woman-in-kenya> accessed 4 August 2019.

Samuel Siringi, 'Ban followed pressure from parents and rights lobbies' (*Daily Nation*) https://www.nation.co.ke/lifestyle/1190-116632-gkb6faz/index.html accessed 5 April 2020.