Thesis Title: a philosophical analysis of legal positivism with regard to the place of morality in the Kenyan judicial system

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Presented to the Board of Graduate Studies in partial fulfilment of the requirements for the award of the degree of Master of Arts of Kenyatta University
DECLARATION

Apart from borrowed ideas and phrases whose intellectual debt has been duly acknowledged through various citations, this study is my original work and has not been presented to any other institution for examination for academic purposes.

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DEDICATION

To the memory of Hadhrat Mirza Tahir Ahmad— the fourth successor to the Promised Messiah and Mahdi of the World Ahmadiyya Muslim Jamaat. He was a true servant of God with an intellectual equipment to match.
ACKNOWLEDGEMENTS

This thesis crowns the four years of my life as a Masters Degree student of philosophy. Many people have played important roles during this challenging period of academic growth—family and friends, teachers and colleagues. I am eternally grateful to all of them for their kindness and support.

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ABSTRACT

This study is a philosophical analysis of the positivist separation thesis with regard to the role of law in society and the place of morality it. Like any other study in Philosophy, the study is a reasoned response to the claims made by the legal positivist doctrine about law and morality—a response that involves putting forward a counter claim and proceeding to advance reasons why we should believe or accept it.

The study acknowledges that the law, through various judicial institutions like courts and tribunals, is the acceptable instrument for resolving disputes in modern society. However, the study argues that while the science of law as defined by the legal positivist doctrine claims that judicial systems are self-sufficient institutions for solving disputes in society that stand in no need of moral considerations when executing their functions, the contrary is the case in the sense that morality, philosophically defined, is the nourishment that judicial systems need in order to make them effective institutions for dispute resolution.

In this respect, the study holds that contrary to the position held by legal positivism, judicial systems stand in need of moral considerations in order to be effective institutions for dispute-resolution. This position, which is backed by relevant scholarly authority, legal citations and practical examples, affords us a compelling account of why the law cannot exist independently of morality. The ensuing argument also affords us the opportunity to put forward suggestions on how to bridge the gap that is asserted to exist between legal positivism and natural law theory.

The objective is to prescribe a new jurisprudence that seeks to improve the dispute-resolution functions of the Kenyan judicial system, thereby contributing to legal or judicial reforms in Kenya, or any other jurisdiction similar to Kenya’s.
The introductory chapter of the study has sought to define the central question of investigation by way of a hypothetical analysis, the objective of which is to highlight the ethical issues that make the debate about law and morality of great interest to philosophers.

In the succeeding chapters, the study attempts to put the institution of law and legal practice in an ethical perspective—expounding and giving meaning to jurisprudential theories like legal positivism and their ethical implication on the conduct of various actors in the legal profession. By use of dialectic reasoning, the study, in the fourth and fifth chapters, discusses the concept of morality in a manner that draws a critical distinction between morality from a sociological and philosophical perspective—a distinction that the study relies upon to critique and challenge the positivist position on law and morality.

The rest of the chapters are of persuasive authority—discussing ethical issues that often arise in the great debate on law and morality. Such issues include the concepts of conflict of interest, moral dilemma, justice, liberty and legitimate authority. From the accumulated discussion, the study ventures the conclusion that; the dispute-resolution function of the Kenyan judicial system is better served when it embraces morality.
CHAPTER ONE

INTRODUCTION AND BACKGROUND TO THE STUDY

1: 1.1 OVERVIEW
This chapter introduces the central question of investigation by encapsulating the subject matter of Philosophy of Law and proceeding to cite practical examples that raise ethical issues about the legal profession and the conduct of those who administer it professionally. Central to the chapter is the Statement of the Problem whose main research question is—what, if any, is the place of morality in a judicial system?

1: 1.2 INTRODUCTION
This is a study in Philosophy of Law. Philosophy of Law, or legal philosophy, is an enquiry into the general principles that justify the existence of law as an instrument for resolving disputes and regulating behaviour in society. Issues in this field range from conceptual questions about the nature of law and legal systems; to normative questions about the relationship between law and morality and the justification for various legal processes and procedure. In this regard, the business of Philosophy of Law is to critique the truth-value of the claims made by the science of law and evaluate the principles upon which legal institutions justify their existence.

As already pointed out, this study is an attempt to answer the question—what is the place of morality in a judicial system? This, therefore, makes this study an ethical evaluation of the professional conduct of legal practitioners against value terms such as 'right', 'good', and 'morally good'. Hence, the study is an attempt to establish when and how the professional conduct of lawyers can be judged as 'right' or 'wrong'; 'good' or 'bad'; 'morally good' or 'not morally good." The study begins with a demonstration that legal practitioners, by virtue of their training, are pre-ordained to uphold fidelity to
legality above every other consideration. It proceeds on the assumption that since lawyers are attached to legality beyond every other consideration, they are prepared to "blind" themselves to any moral considerations in the name of "faithful discharge of professional duty." Therefore, the study endeavours to analyse the truth-value of the foregoing assumption, citing relevant examples from the Kenyan judicial system.

In this regard, whenever it is demanded, for example, that judges should have the integrity of Caesar's wife; or whenever it said that Mr so and so is a good or bad lawyer, it is the business of this study to establish the ethical principles upon which such judgements are based. And whenever we ask questions such as— what ought a lawyer do when a client confesses to him to have committed the crime for which a defence is sought?— it is the business of this study to attempt to lay grounds upon which answers to such questions can be provided. Likewise, whenever we hazard such maxims as; "there is no crime without legislation", or that; "justice must not only be done, but must also be seen to be done", it is again the business of this study to establish and test the grounds upon which such maxims are founded.

In view of the foregoing, the study is concerned fundamentally with the question of how legal practitioners execute their mandate in relation to the question of— what, with regard to human conduct in general, is good or bad, right or wrong?" In addressing this question, the study describes and analyses the professional codes of legal practice with a view of establishing whether justice is ever served when judicial officers operate under a corporate discipline characterised by strict adherence to codes of professional conduct. These issues are examined in view of the assumption that—when a judge or advocate is said to be good, it is commonly understood that all his professional acts are, on aggregate, in accordance with the professional code of conduct.
Granted; the question then is— what justification, if any, can we give for associating the propriety of a legal practitioner’s acts with upholding fidelity to the law? If lawyers claim to act right by upholding fidelity to the law beyond every other consideration, it is the justification of such claims that the study is most intimately associated with.

Confronted with these issues, the study notes that while in theory the legal profession is intended to promote some moral value as contemplated by the lawmaking process itself, in practice such moral value, if any, faces an innocent danger of being undermined when legal practitioners choose to uphold fidelity to narrow and pure legalism in the name of "faithful discharge of professional duty". Against this background, the study endeavours to show that the Kenyan judicial system would be much better, ethically speaking, if officers who apply the law as a matter of professional duty pursue, not only that which is right by virtue of it being according to the law, but that which is also morally good.

Since adjectives such as 'right', 'good' 'just' and 'morally good' feature prominently in the discussion, the study analyses their meaning and implication in ethics, and in their application to the professional actions of legal practitioners. Against these meanings, the study also analyses the ethical dilemma that lawyers stand to encounter when pursuit of professional duty on the one hand means violating certain moral values on the other. In a quest to respond to the various puzzles raised with regard to law and morality, the following questions are posed as a guide;

1. What ought a lawyer do when a client confesses to him to have committed the crime for which a defence is sought while at the same time the advocate has to uphold the rule of privileged communication between a lawyer and a client?"
2. What ought a Judge do when he knows that the suspect in the criminal case he\(^1\) is required to adjudicate committed the offence in question but the prosecution is unable to discharge its legal burden of proof?

It is the search for answers to these questions, their justification in ethics and the justice that is claimed to flow from judicial processes that this study is concerned with.

1: 1.3 BACKGROUND

History is replete with remarks that cast aspersion on the character and nature of lawyers and the legal profession in general. For example, there is a cynical feeling in English Bars and Inns that no lawyer will go to heaven so long as there is space for one more in hell\(^2\). But the most famous classical characterisation of lawyers as an obstacle in society is found in William Shakespeare’s literary works where lawyers are used as a figure of derision.\(^3\)

In the play *Henry VI, Part 3*,\(^4\) the character Jack Cade, a trusted member of the royal court but pretender to the throne, plots to overthrow the King through a popular revolt where he promises a utopian society as a way to win the support of the masses. But Cade’s friend Dick the Butcher, being only barely smarter than Cade, knows that Cade’s scheme would not succeed if the advisors to the real King actually investigated Cade’s lineage. So, Dick the Butcher advises Cade, saying; "...the first thing we do, let’s kill all

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\(^1\)For purposes of gender sensitivity, this study adopts the approach of the Interpretation and General Provisions Act (Cap 2, Laws of Kenya), in which it is provided that; “except where a contrary intention appears, words and expressions importing the masculine gender include females.”


\(^3\)“Derision” refers to strong feeling that something or somebody is ridiculous and not worth considering seriously, often shown by laughing in an unkind way or by making unkind remarks. (*Oxford Advanced Learner’s Dictionary*).

\(^4\)*Henry VI, Part 3* is a history play by William Shakespeare believed to have been set during the lifetime of King Henry VI of England. Whereas Part 1 deals with loss of England’s French territories and the political machinations leading up to the War of Roses, and Part 2 focuses on the King’s inability to quell the bickering of his nobles, and the inevitability of armed conflict, Part 3 deals primarily with the horrors of that conflict as the once ordered nation is thrown into chaos as families break down and moral codes are subverted in the pursuit of revenge and power.
the lawyers.” Dick hopes that by killing all lawyers, it would prevent Cade from being discovered as an imposter, thus allowing the coup plot to succeed.

Few people are unfamiliar with the phrase … the first thing we do, let’s kill all the lawyers. But however rueful and mocking it may be, the suggestion often expresses the ordinary person’s frustration with the arcana and complexity of law and the men and women who apply it professionally. However, contrary to popular belief, the proposal by Shakespeare’s character, Dick, was intended to eliminate those who might stand in the way of Cade’s evil plan—thus underscoring the important role lawyers play as watchdog of society. There are, however, many anecdotal remarks expressed in literary works that paint lawyers as an evil lot. The following are some notable examples:

Vito Corleone (the Don), the main character in Mario Puzo’s novel, The Godfather, says—"the lawyer with his briefcase can steal more than a hundred men with guns!” Ambrose Bierce, in his satirical book titled The Devil’s Dictionary, describes a lawyer as one skilled in the circumvention of the law. Will Rogers, American humourist and social commentator, said; “Make crime pay. Become a lawyer.” A Spanish proverb holds that it is better to be a mouse in a cat’s mouth than a man in a lawyer’s hands. John Keats, an English Romantic poet, had very unkind words for lawyers, saying; “I think we may class the lawyer in the natural history of monsters.” In Luke 11:46, Jesus admonishes lawyers, saying; "Woe unto you also, ye lawyers! For ye lade men with burdens

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7 www.brainyquote.com/quotes/quotes/w/willrogers128273.html
8 www.mysmelly.com/content/cats/cat-proverbs-and-sayings.htm
grievous to be borne and ye yourselves touch not the burdens with one of your fingers”

These remarks about lawyers may appear cynical, pejorative and highly prejudiced. They, however, have the merit of drawing attention to the cynicism with which lawyers are viewed by ordinary people in society. The attitude conveyed in such remarks is that lawyers are engaged in a crafty business that predisposes them to do evil and that is why all of them may be “hell-bound” or should be classified in the “natural history of monsters.” But the remarks of French jurist and political theorist, Alexis de Tocqueville, provide an academically interesting account of the cynicism alluded to in the preceding citations.

Visiting the United States of America in 1835, Tocqueville offered a striking observation on the actual workings of popular sovereignty, judicial power and lawyers in the emerging American democracy. He was astonishingly perceptive in his own time, and his remarks cited below encapsulate the modern debate about the role of law and lawyers in society, and the place of morality in it. He said:

Lawyers are attached to public order beyond every other consideration and the best security of public order is authority. If they prize freedom much, they generally value legality still more; they are less afraid of tyranny than of arbitrary power and provided the legislature undertakes of itself to deprive men of their independence, the lawyers care less. They are ready to execute any prescription of either justice or injustice; to lend themselves to any side provided with the means in venerable print. Eager for employment, they pry into the business of men, with snakish smoothness slip into their affairs, discern the ingredients of litigation, and blow them up into strife. Again, we hear it urged in their favour that from dire necessity, they must be true to their clients at whatever cost of principles to themselves; that this fidelity to their client, who consigns his dearest interest, it may be either liberty or life, to their official custody,

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sufficiently cancels all claims of morality and amply atones for every obliquity they may find it convenient to practice in the faithful discharge of grave professional duty. By the force of this venerable custom of thought, we find it has really become a matter of high professional honour for these men of the law to go all lengths that are possible—snatch all advantages too—in their crafty endeavour to gain even the most unrighteous ends of their clients. Nothing, indeed, is more common at this time of the day than to hear them gravely extolled as patterns of excellence, for no other merit, than merely the cunning trick and devotion they show in the unconscientiously course of their client.¹⁰

He summed up his criticism of American lawyers describing them as "abject slaves of authority, these counterfeits of men are now to be the proud dictators of human destiny and withal the glittering favourites of fortune!"¹¹ Tocqueville’s remarks are a penetrating indictment of legal practice in general, for they elicit fundamental ethical questions that can also be asked of Kenyan lawyers today and how they pursue their craft. The question therefore is— why would an otherwise noble profession be the subject of such cynical criticism?

Criticism of lawyers or cynicism towards their profession may be legitimate because a review of how lawyers pursue their craft leaves many ordinary people persuaded that the men and women of the law are attached to legality beyond every other consideration to the extent of being prepared to exploit every available opportunity, including concealing the truth, all in the name of diligent representation of their clients. The following hypothetical example helps to illustrate this point:

Mr X picks a quarrel with his wife and stabs her to death. Realising what he has done, he runs to his lawyer to inform him about the incident and upon careful interrogation, he confesses to the lawyer that despite having picked a quarrel with his wife leading to a

¹⁰Hall, Op.cit p.313

¹¹Ibid
fight, he found it a perfect opportunity to kill her because he intended to marry a concubine—a union that would not obtain if the deceased, his lawfully wedded wife, were alive. The lawyer accepts his client’s statement but acknowledges that Mr X had a culpable intention to cause his wife’s death and that the provocation occasioned by the quarrel was a mere excuse. Mr X is arrested and charged with murder. His lawyer instructs him to plead not guilty, promising to get him off the hook.

As a seasoned criminal litigator, the lawyer in the foregoing illustration adopts the much touted tagline of litigation that—it is not what you know, but what you can prove. With respect to his client’s account, the lawyer knows that the rules of litigation in criminal matters places the legal burden of proof on the prosecution based on the principle that he who alleges bears the burden of proof. Since the Kenyan legal system is the adversarial type, the prosecution as the accuser bears the burden of proving the guilt of the accused. The rule on the burden and standard of proof in criminal matters is that the prosecution must at all times prove its allegations beyond reasonable doubt.12

The lawyer in our hypothetical example also knows that for his client to be convicted, the prosecution must prove the necessary conduct and fault elements of murder beyond reasonable doubt. Mr X is subsequently charged with murder under the Penal Code of Kenya, which spells out the offence as follows:

Any person who, of malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder.13

Given the definition of murder under the Penal Code, it is clear that “causing death of another person by an unlawful act” and “malice aforethought” constitute, respectively, the conduct and fault elements of the offence which the prosecution must prove beyond

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13 Penal Code, s.203, Cap 63, Laws of Kenya
reasonable doubt in order to have Mr X convicted. It is important to point out, with regard to the case against Mr X, that a cardinal principle of criminal law is embodied in the maxim *actus non facit reum, nisi mens sit rea.* This, according to Lord Hailsham while rendering his opinion in *Haughton v Smith,* means that “an act does not make a man guilty of a crime unless his mind is also guilty.”

In this regard, based on the requirement that the prosecution must prove its allegations beyond reasonable doubt, the defence lawyer argues persuasively that although Mr X killed his wife, he did it impulsively in self-defence because the deceased had attacked him with a kitchen knife during the quarrel. The self-defence argument is conveniently backed by the coincidence that the fight between Mr X and the deceased escalated into their kitchen where such knives are ordinarily found. Self-defence, as one of the general defences under criminal law, is a justification which an accused person can plead to rescue himself out of a murder charge. Although it has been said that criminal law does not make any clear-cut distinction between a ‘justification’ and an ‘excuse’, a justification differs from an excuse in that it renders the defendant’s conduct lawful whereas an excuse simply excuses a defendant from liability for conduct which is nevertheless unlawful.

The thrust of Mr X’s defence, therefore, lies in the argument that there was no malice aforethought and the successful plea of self-defence rendered Mr X’s act lawful. Without the prosecution proving malice aforethought and without proving that Mr X caused the death of the victim by an unlawful act or omission, the charge of murder

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14 *Haughton v Smith* [1975] AC 476, [1973] 3 All ER 1109 at 1113-1114
15 A defendant has a defence if he uses necessary and reasonable force in defence of oneself or property. If the issue of self defence is raised, the burden of proof rests on the prosecution, thus the accused is entitled to the benefit of the defence and to be acquitted unless the prosecution prove beyond all reasonable doubt that the defendant was not acting in self defence or that he used more than reasonable force. *(Op.cit Paul Dobson 2005 p.62-63)*
would not stand. This position of law in a murder trial was reiterated and solidified in the case of *Kabon v. Republic* (Criminal Appeal No.86 of 1999 at Nairobi) in which the subject matter was—"necessity for malice aforethought in a murder conviction"—to which Justices Effie Owuor, Moijo ole Keiwua and Evan Gicheru held that; “without proof of malice aforethought, the appellant’s conviction for the murder of the deceased cannot stand.”

Mr X, in our hypothetical example, is hence acquitted on grounds that the prosecution failed to prove its case beyond reasonable doubt. However, despite the acquittal, the defence lawyer knows very well that there was malice aforethought behind his client’s action but would not disclose it— yet justice was said to have been done because Mr X successfully confronted his accuser and was acquitted by a competent court of law.

This example is representative of the litigation tactics employed by lawyers, especially in criminal cases, to secure justice for their clients. It reflects the actual workings of judicial procedure especially in the adversarial legal system, thus eliciting cynical remarks about the conscience of lawyers such as the following by Will Rogers:

“I don't think you can make a lawyer honest by an act of legislature. You've got to work on his conscience. And his lack of conscience is what makes him a lawyer.”

The example of Mr X’s lawyer depicts a professional who, in Tocqueville’s words, is prepared to go all possible lengths to snatch any advantage in an endeavor to gain even the most unrighteous ends for his client, thus prompting more cynical remarks such as the following by Ralph Waldo Emerson:

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17 [www.brainyquote.com/quotes/authors/w/will_rogers.html](http://www.brainyquote.com/quotes/authors/w/will_rogers.html)
“The good lawyer is not the man who has an eye to every side and angle of contingency, and qualifies all his qualifications, but who throws himself on your part so heartily, that he can get you out of a scrape”\textsuperscript{18}

The ethical issue raised by Mr X’s illustration, which forms the central question of investigation of this study, is;—despite knowing his client’s evil intentions in the homicide, there was no professional wrongdoing on the part of the lawyer so long as he undertook his duty according to the requirements of his calling. That duty includes, \textit{inter alia}, representing clients at litigation with utmost diligence and maintaining confidentiality. It is, therefore, evident from the example under comment that the lawyer is more interested in the legal advantages that would accrue to his client beyond every other consideration. From the example, it appears that all a lawyer has to do is to search and locate in the codes and laws the appropriate dispositions necessary to solve the case in favour of his client. And he has to represent the client diligently even at the expense of his conscience.

Having known that Mr X had the evil mind to cause the victim’s death, an ordinary person would have expected the lawyer to disclose this to the court. But in the name of grave professional duty, the lawyer chose to defend his client by “blinding” himself to the moral value of telling the truth just in order to pursue what the profession demands of him under the said circumstances. Because of this frame of mind, laymen who often question whether lawyers have a conscience can be forgiven for holding cynical views about lawyers as “persons you hire when you have murdered someone and you want it explained in the best possible light.”\textsuperscript{19}

\textsuperscript{18} http://www.brainyquote.com/quotes/authors/r/ralph_waldo_emerson_4.html
\textsuperscript{19} http://criminaldefense.homestead.com/ClientInterview.html#anchor_47
The question, therefore, is—even if the lawyer’s conduct in Mr X’s case is right according to professional standards, is it morally good? The thrust of this study, therefore, lies in the answer to this question which can be broadly framed via the following questions:

1. As much as the overriding responsibility of a lawyer is to uphold fidelity to professional duty, what other considerations, if any, should they uphold so that their conduct is not only in conformity with the demands of their profession but also morally good?

2. Does morality count for anything in legal practice?

Taking these questions as a guide, and the Kenyan judicial system as a reference point, this study seeks to evaluate the place of morality in judicial matters.

1: 1.4 STATEMENT OF THE PROBLEM

By placing codes of professional conduct in legal practice on the one hand and the ethical principles of moral propriety on the other, one notices that there is a conceptual parallelism that is asserted to exist between the theories that govern professional conduct in legal practice and the theories about moral propriety. This parallelism, which is essentially referred to as the positivist separability thesis, renders it almost impossible for legal practitioners to pursue their professional duty while at the same time exercising their moral conscience. Yet, apart from mere calls by both laymen and professionals that the challenge posed by this parallelism be addressed, there is no scholarly work in analytical jurisprudence in Kenya that has attempted to advance a theoretical framework that would resolve the parallelism that renders it impossible for legal practitioners to pursue their call of duty without compromising moral principles thereby ensuring that principles of professional conduct in legal practice on the one hand, and principles of moral propriety on the other, are mutually inclusive. To this
end, although there have been celebrated efforts over the years to transform Kenya’s judicial institutions, the fact that no scholarly work has been undertaken to specifically address the parallelism that is asserted to exist between principles of legal practice and principles of moral propriety makes it necessary for this study to make a pioneering attempt to fill this gap.

This study is, therefore, an enquiry aimed at yielding a theoretical framework that brings principles of legal practice and principles of moral conduct in a relationship of mutual inclusiveness. This enquiry is made through an evaluation of the place of morality in the Kenyan judicial system with the following questions as a guide:

1. Is the right act in law necessarily morally good?

2. Should lawyers’ commitment to uphold fidelity to the law include a commitment to uphold fidelity to the moral value?

3. What moral principles, if any, are overlooked or violated when lawyers uphold fidelity to legality above every other consideration?

4. What justice, if any, flows out of a regime of strict adherence to legality? Would justice be served better if legal practitioners also made moral considerations?

1: 1.5 ASSUMPTIONS OF THE STUDY

1. Upholding fidelity to legality above any other consideration means morality is insignificant in legal matters.

2. A right act in law is not necessarily morally good.

1: 1.6 OBJECTIVES OF THE STUDY

1. To demonstrate that what is right according to the law is not necessarily what is morally good.
2. To critically assess the benefits of exercising moral considerations in the administration of justice in the Kenyan judicial system.

1: 1.7 JUSTIFICATION OF THE STUDY
The Advocates Act of Kenya (Chapter 16, Laws of Kenya) provides, among other things, the legal basis for the prohibition of unauthorized practice and discipline of advocates. Section 62(1) of the Act states:

A complaint against an advocate of professional misconduct, which expression includes disgraceful or dishonourable conduct incompatible with the status of an advocate, may be made to the Disciplinary Committee by any person.\(^{20}\)

In this regard, the Advocates Complaints Commission of Kenya is a department under the State Law Office mandated to receive complaints from consumers of legal services and recommend action against advocates who breach ethical standards. The existence of such a department and a similar one at the Law Society of Kenya presupposes that lawyers are capable of impropriety and that their conduct can be called into question. This study shares in the thinking that established the aforementioned institutions, and from the research conducted, it suggests a variety of philosophical principles upon which lawyers can be called upon to render account of their professional conduct whenever circumstances demand that they do so. The study seeks to open up new horizons in analysing the professional codes of conduct that govern legal practice by advancing a system of inquiry that could be adopted by institutions like the Advocates Complaints Commission when assessing complaints brought against advocates and making recommendations that would improve delivery of legal services.

Apart from the Complaints Commission, the Kenya Law Reform Commission also stands to benefit from the arguments advanced by this study. The way this study has critiqued the adversarial system, evaluated the concept of justice and the recommendation for the jury system in conducting trials may be of significant help to the Law Reform Commission when making recommendations on the improvement of the administration of justice in Kenya.

1: 1.8 SCOPE AND LIMITATION

(a) SCOPE
This study encompasses perspectives of moral philosophy (philosophy of action) and practical problems arising from the practice of law as a science. It is, however, not a bolts and nuts description of jurisprudence as commonly taught in schools of law. Being an attempt to achieve a convergence of moral and legal concepts, the study acknowledges that new paradigms in social relationships generate substantial ethical issues among jurists and philosophers. In this regard, ideas and theories from the general study of goodness and right action are applied to particular matters of law and then philosophical methods of inquiry are employed to analyse the ethical dimensions found in their domain. In this way, the scope of the study is clearly philosophical and not legalistic.

(b) LIMITATION
Given that the study is philosophical and not legal, it may lack the technical aspects of a purely study in law. In this regard, some of the cases cited in this study as examples are not strictly bound by the recommended standards of citing legal authorities such the Oxford Standard of Citing Legal Authorities (OSCOLA). Besides, due to the discretion
enjoyed by the National Council of Law Reporting in terms of deciding which cases are published in the Kenya Law Report, some of the cases cited as examples in the study lack the authentic legal citations because they are yet to be published in the Kenya Law Reports. However, all efforts have been made to acknowledge the alternative sources from which the said cases were cited. Above all, legal documents especially those of judicial proceedings are kept under very stringent bureaucratic red tape that tended to limit the study's access to certain important literature. This was however overcome by seeking appropriate permission to access the library at the High Court in Nairobi.

1:1.9 LITERATURE REVIEW
There are several bodies of literature that suggest themselves as sources of knowledge to enrich the content of the study and enhance its analytical force. First there are the works of philosophers of the Socratic tradition whose writings and commentaries depict humankind as a rational species by nature, capable of exercising free will and making choices after carefully evaluating various options. Then there are the works of legal theorists of the command theory school of thought which depict humankind as an inherently egoistic species whose free will, if not curtailed by some threat of force, could lead to anarchy hence the need to be guided by some form of legal order so as to achieve harmony in society. These two categories of literature represent authors of two divergent schools of thought which enable the study to gather the appropriate principles with which to judge the ethical implications of the legal norms that lawyers are enjoined to uphold. They provide insights into the meaning of value related terms such as 'right', 'wrong', 'good' and 'bad'.
George Edward Moore\textsuperscript{21} holds that if the subject of Ethics is concerned with the question of good conduct, it should be prepared to tell us what is ‘good’ as well as what is ‘conduct’—for the expression ‘good conduct’ is a complex notion whose meaning is contingent upon the meanings of individual terms ‘good’ and ‘conduct.’ Moore, however, maintains that the central problem of ethics is the question; what is good?—meaning by this, not what things are good but how ‘good’ is to be defined. Since the study has sought to establish a philosophical framework upon which to judge lawyers' conduct on the basis of ethical terms like 'good' or 'bad', 'right' or 'wrong', this study learns from Moore how to decipher the philosophical meaning of the term 'good', so that it is not assumed that 'right' and 'good' are synonyms, or that 'good' simply means self-approval.

David Ross\textsuperscript{22} clarifies the concept of 'right' versus 'morally good' by advancing a thought-provoking analogy that brings out a clear difference between the common-sense and philosophical understanding of ‘right’ and ‘morally good.’ Ross argues that suppose a man pays his debt simply for fear of punitive legal consequences, some people would say that he has done the right thing while others will deny this arguing that no moral value attaches to such an act since 'right' is meant to imply moral value—hence such act cannot be termed as right. Ross's discourse is an invaluable source of knowledge for it enables this study to contextualise the ethical issue concerning lawyers' duty or obligation to their clients, against what is 'right' and 'morally good.'

Aristotle\textsuperscript{23} articulates the onset of moral consideration in human experience in two celebrated treatises namely the *Nichomachean Ethics and Eudemian Ethics*\textsuperscript{24}. In the former,

\textsuperscript{22} David Ross (1930), *The Right and the Good*: London, Oxford University Press. p.155
it is held that human beings are inherently rational animals hence affording them the honour to be characterised as moral agents. The latter treatise articulates the ingredients necessary for morality to obtain. It holds that moral actions must be voluntary based on the fact that, since virtue and vice and the resulting deeds are in many cases commended or blamed—for blame and commendation are given not to things that occur of necessity or by luck or in the course of nature—but to all things that human beings, as moral agents, are cause of. From Aristotle, the study acquires the ethical tool to evaluate if at all what lawyers do in the name of professional duty is blameworthy or praiseworthy.

C. Pinchin\textsuperscript{25} takes the concept of morality to a higher level by advancing a methodology that enables the study to capture the ideological parallelism that is asserted to exist between legal and moral issues. It discusses the problem of free will and determinism by acknowledging that this is a problem that arises from a real or apparent conflict between scientific (a posteriori) and rational thinking (a priori). Scientific thinking, upon which legal science is founded, considers the entire universe to be reducible to physical laws. Rational thinking, on the other hand, considers human beings to possess a faculty that permits them to know things independent of experience (knowledge a priori) and which makes them responsible for their actions and thus rendering them liable to blame or praise. Therefore, morality, which is rationalistic in nature, rejects the scientific view that human actions are entirely determined by physical laws.

In this regard, Ross, Woods and Pinchin provide a philosophical methodology that assists this study to answer two critical questions namely;

1. What is morality properly so called?
2. What is the nature of law?

G.H.R. Parkinson, V.J. Seidler and K. Makokha define 'morality' in a way that strikes a chord with the concept of ‘conscience.’ Parkinson\(^26\) holds that morality is concerned with people's judgements that such and such is the right course of action, or what ought to be done will lead to something that is good or bad. Seidler\(^27\) holds that morality in a liberal society is very much a matter of individuals deciding what right action to take. It is conceived of as an individual affair between a person and his conscience.

Makokha\(^28\) concludes that morality is conceived as a human device that appeals to rational principles by which they can determine what is right and wrong, good or bad, duties and obligations and cultivate desirable traits of character for harmonious relationships.

Immanuel Kant\(^29\) acknowledges that morality, which is essentially the exercise of rational judgement, raises man's life from the 'pragmatic' (superficial), a level of calculating expediency, to the higher plane of categorical imperative.

Granted that this thesis takes issue with lawyers' tendency to uphold fidelity to legality beyond every other consideration, the lesson to learn from the foregoing sources of literature is how to identify the so-called “other considerations” that lawyers are said to forego in the name of grave professional duty.

Composta\(^30\) takes the concept of morality further by introducing the idea of free will, saying that morality is a property of the free and voluntary action of man and consists in a rapport between the action itself and its original foundation.

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\(^29\)I. Kant (1952), *Critique of Pure Reason*, translated by Abbot: Chicago, William Benton Press. p.80
However, whereas this study would be satisfied with the definitions of morality so far articulated, some critics could counter that these definitions have a philosophical bias and, therefore, not exhaustive. To this end, the study compares and contrasts the concept of morality from the perspective of Philosophy with the concept of morality from the perspective of other disciplines like Sociology.

Boss\textsuperscript{31}, therefore, offers a basis for comparing different concepts of morality, which is encapsulated in two moral theories namely; ethical relativism and universalist (objectivist) morality. Ethical relativism holds that morality is different for different people; hence an ethical relativist claims that morality is invented or created by people. In this regard, morality, like fashion, can vary from time to time, person to person and community to community. Ethical relativism is, therefore, a contextual or situational concept that represents how Sociology analyses the concept of morality. In contrast, the universalist moral theory, which is philosophical in approach, holds that there are fundamental, objective moral principles and values that are universally true for all people, independent of their personal beliefs, culture or experience. These principles are discovered rather than created by people and are rationalist in nature.

The study also explores the ethical issues between legal requirements and moral conscience. Hence the \textit{American Journal of Psychiatry, vol. 25 (1968)}\textsuperscript{32} is a useful reference especially when one considers the observation made therein that, the function of criminal law in the area of moral behaviour is to safeguard public order and decency and to protect those who, for whatever reason, are properly regarded as weak. The

\textsuperscript{30}D. Composta (1987), \textit{Moral Philosophy and Social Ethics}: Rome, Urbaniana University Press. pp.28-29

\textsuperscript{31}J. A. Boss (1999), \textit{Analysing Moral Issues}: California; Mayfield Publishing Company. p.30

\textsuperscript{32}\textit{American Journal of Psychiatry}, Vol. 125, 1968. pp.729-797
weak here include all those who stand to perish if the self-interest of others goes unrestrained. Central to this publication is the argument that; the fact that an act is considered immoral ought not to be involved in the judicial decision of its criminality. The lesson conveyed by the foregoing argument is that which concerns the theoretical principles that justify the positivist separation thesis whose centre of gravity is that, the law is one thing and the moral evaluation of the law is another.

R. Crawford\textsuperscript{33} draws attention to two philosophical principles propounded by David Hume and which are useful to this study in the sense that they assist it to establish theoretical framework contemplated in the Statement of the Problem. The two Humean principles cited by Crawford set the basis of moral judgement in modern times. The first is which concerns a person’s right to make free choices and the second is the idea that a course of action should be examined to see if it produced consequences that benefited or harmed others. Hume’s first principle about right of choice opens up the way to existentialism, which is closely associated with rationalism.

Jean Paul Sartre is the preeminent scholar of modern existentialism and he shows the essentials of existentialism by holding that, “as human beings we make ourselves and that we are not determined by physical laws.” This principle is thus cited by this study as a counterpoint to the legal positivist thesis that holds that actions of human beings can be reduced to physical laws and should, \textit{ipso facto}, be guided by positive laws. Hume’s second principle opens up to utilitarianism as a source of moral considerations and which this study has cited as a theoretical framework to assist it argue out the central question of investigation which is; the moral aspect in the Kenyan judicial system.

\textsuperscript{33}R. Crawford (1985), \textit{Can We Kill? An Ethical Enquiry}: London, Longman &Todd Ltd. p.3
In general, the foregoing sources of literature provide valuable knowledge about the concept of morality, and which this study employs to pass judgement on the conduct of people in society, including lawyers acting as professionals. In this regard, Thomas Aquinas, K. W. Thompson, P. Smith, Tahir Ahmad and Joseph Nyasani support the inclusion of moral considerations in all human institutions including legal ones. Nyasani is especially emphatic in articulating the compatibility of law and morality. He holds that law and morality are inseparable, at least in their prime objectives, but also, together and reciprocally, reinforce each other in the consolidation of those principles and values which ultimately make society humane. Nyasani, therefore, holds that law and morality complement each other and should not be treated as opposed to one another.

Aquinas, in spite of acknowledging the inclusion of moral considerations in legal matters, is principally a command theorist of the determinist persuasion. He contends that law is the will of the sovereign and that the sovereign reigns with divine guidance and that divine guidance always has a rational principle. He, therefore, to some extent achieves the middle ground between exercise of free rational choice and adherence to legitimately enacted decree. Since this study also endeavours to achieve some middle ground between law and morality by advancing a theoretical framework that would make law and morality mutually inclusive, Aquinas is a valuable source of knowledge towards this endeavour.

34 J.M. Nyasani (2001), Legal Philosophy; Jurisprudence: Nairobi, Consolata Institute of Philosophy Press. p.21
35 Ibid. p22
Ahmad\textsuperscript{36} makes clear what morality is by describing it as “the exercise of reason.” Commenting on reason as even superseding faith, Ahmad, like Aquinas and Kant, holds that in situations of competing ethical pursuits, legal or otherwise, the correct choice would be that which reason permits.

Thomson and Smith, like Aquinas, argue for the integration of legal and moral issues. Addressing the conflict between law and morality Thompson\textsuperscript{37} acknowledges that the Chinese political culture has over the times attempted to fuse morality with positive law and the two have succeeded in welding the large Chinese society together. This study also hopes to achieve such fusion for the Kenyan judicial system.

Smith\textsuperscript{38} advocates for a broader approach to legal matters other than that held by legal positivism. Smith cites the views of Oliver Wendell Holmes Jr, a former justice of the Supreme Court of Massachusetts, who addressed students and faculty of Boston University Law School in 1897 and advised that philosophical theory is crucial for practical law. Holmes thus attempted to expand the validity of law beyond the boundaries of legal positivism. Similar positions are also held by Kemit Hall who attempts an impeachment of the positivist doctrine by capturing the views of Alexis de Tocqueville. Visiting America in 1835, Tocqueville attacked the American judicial system for lack of virtue because of its blind adherence to legality. This study also seeks to subject the Kenyan judicial system to the kind of judgement in Kemit Hall.\textsuperscript{39}

Thomas Hobbes, Paul Edwards, Hans Kelsen and Joseph Raz provide useful insights into how legal positivism comes to consider morality as an extraneous element in

\textsuperscript{36}T. Ahmad (1998), \textit{Revelation, Rationality, Knowledge and Truth}: Surrey, Islam International Publication. p.380  
\textsuperscript{38}Patricia Smith (1993), \textit{The Nature and Process of Law; An Introduction to Legal Philosophy}: New York, Oxford University Press. p.67  
\textsuperscript{39}Hall, \textit{Op.cit}. p.313
judicial matters. Firstly, Thomas Hobbes\textsuperscript{40} is a methodological mechanist who engages in the debate about determinism and free will. Because of his mechanistic persuasion, Hobbes believes that the universe is made up of nothing but matter in motion and that physical laws determine the human psyche. For Hobbes, therefore, man has no free rational will and must be governed by positive laws. Hobbes introduces the concept of positive law by holding the view that it is the design of man, who naturally loves liberty and dominion over others, to introduce restrain upon themselves in order to make it possible for them to live in commonwealths. In this regard, laws must, according to Hobbes, be imposed upon men to enable them to live in harmony and that these laws must be obeyed without question.

Edwards\textsuperscript{41} introduces the Analytical School of jurisprudence which is credited with giving birth to legal positivism. He acknowledges that legal positivism is the negative side of the Analytical School’s conception of law because it holds the contentious view that no reference need to be made to morality or natural justice in either the definition of “law properly so called” or a determination of whether or not a given rule is a valid rule of law.

Kelsen, Dworkin and Raz follow the ideas in Hobbes and Edwards. Raz, especially, clarifies the Kelsian and Austinian theories of law and its relationship with morality. In Raz\textsuperscript{42}, a clear picture of why legal positivism places legal and moral issues at a disjunctive parallelism is demonstrated. R. Dworkin\textsuperscript{43}, John Rawls and J. Nyasani suggest useful insights into the different concepts of justice. Nyasani articulates the difference between corrective and distributive justice and thus helps enlighten the

\textsuperscript{40}Thomas Hobbes (1651), \textit{Leviathan}, edited and abridged by John Plamentatz: Glasgow, William Collins Ltd. p.85
\textsuperscript{42}Joseph Raz (1979), \textit{The Authority of Law; Essays on Law and Morality}: Oxford, Clarendon Press. p.35
\textsuperscript{43}R. Dworkin (1985), \textit{A Matter of Principle}: Cambridge, Harvard University Press. p.15
study on how justice, in the legal sense, is different from justice in the moral sense. Like Nyasani\textsuperscript{44}, Dworkin articulates the difference between rule of law from a judicial perspective and from a moral perspective. Rawls\textsuperscript{45} and D.O. Raphael\textsuperscript{46} wrap up the discussion on the concept of justice, and since 'justice' is an ethical term with which this study is intimately associated, all the foregoing authors are indeed a source of valuable ideas in answering the question; does the judicial process ensure justice?

Peter French tackles issues concerning the term 'ought' in relation to legal matters—issues with which this study is also intimately associated. In view of the value terms such as ‘ought’, questions relevant to guiding this study are also posed—central of which is; "if a citizen considers a particular law to be unjust, ought he obey it?" And "what rights, if any, does a citizen have in relation to changing a law he considers unjust?" These questions are posed in view of certain historical eras such as during Nazi Germany when a lot of questions that touch on law and morality are asked.

It has been maintained that citizens of Nazi Germany ought not have obeyed the laws of their state that caused them to commit atrocities against some races and communities. It has been argued that they must have known that the laws concerning genocide were wrong and they should not have obeyed them. Similar arguments can be extended to the legal profession where lawyers are expected not to obey judicial procedures that result into injustice. It may be argued that fidelity to legality is a universally accepted virtue that makes the science of law possible. However, this virtue

\textsuperscript{44}J.M. Nyasani (1995) Legal Philosophy: Nairobi, Consolata Institute of Philosophy. pp. 9-10
comes to grief when judged from a moral standpoint because “blind fidelity to legality” is often fallacious in the sense that it commits the fallacy of argumentum consensus gentium\textsuperscript{47}. The lesson to learn from French\textsuperscript{48} as far as ‘ought’ is concerned is that; it is not possible that one of the basic human tendencies is to obey an established authority without questioning the rightness or wrongness of what is demanded.

1: 2.1 THEORETICAL FRAMEWORK

This study is in many ways an enquiry of human action in relation to the theories of right and wrong on the one hand, and the professional choices of legal practitioners on the other. In modern ethics, these principles are given a juridical conception and are, accordingly, understood to constitute a moral code that defines the duties of people who live together in fellowship. Therefore, its inclusion in the general study of right action places two jurisprudential theories at the centre of the study.

To this end, since this study, as declared in the Statement of the Problem, is a philosophical enquiry aimed at yielding a scholarly framework that brings principles of legal practice and principles of moral conduct in a relationship of mutual inclusiveness, it will mainly be guided by two theories namely; the legal positivist theory and the natural law theory.

Legal positivism is the science of positive law, which is held to constitute a regime of commands and restrictions derived from man for the purpose of ruling man. The goal of legal positivism is to make legal practice a systematic science; and as a science, legal practice is required to contain reasons and principles that are sufficient for deciding on

\textsuperscript{47}Argument from the consensus of the nations takes the form that; 'since everybody believes or accepts $p$ as true, therefore $p$ is true'. If applied in all cases, such argument is not generally sound and may be regarded as a fallacy.

the truth of all instances of legal phenomena. The foundation of legal positivism is the Separability Thesis which, in its most general form, asserts that law and morality are conceptually distinct. It is fashioned on the frame of mind espoused in Hans Kelsen’s pure theory of law which holds that a general theory of law should be developed by excluding societal values and human conscience as extraneous elements. Hence, in this spirit of legal positivism, the law is conceived to be “what it is” as laid down in the statutes and nothing else. The study, therefore, uses the legal positivist theory to render account of why legal practitioners tend to uphold fidelity to legality beyond every other consideration.

Natural law theory, on the other hand, holds that some laws are basic and fundamental to human nature and are discoverable by human reason without reference to specific legislative enactments or judicial decisions. Also known as the law of nature, the natural law theory is the counterpoint to the legal positivist theory and has been described as a law whose content is set by nature and is, therefore, universal. As classically used, natural law refers to the use of reason to analyse human conduct and deduce binding rules of moral behavior. In this respect, natural law—contradistincted with positive law, which is human-made, conditioned by history, and subject to continuous change— is universal and immutable, meaning that it is available at all times and in all places for those whose office is to enact or develop law.49

One of the preeminent exponents of the natural law moral theory is St. Thomas Aquinas, who holds that standards of morality are in some sense derived from, or entailed by, the nature of the world and the nature of human beings. Aquinas, for example, identifies the rational nature of human beings as that which defines moral law— meaning that the rule and measure of human acts is the reason, which is the first principle of human acts.

Aquinas’s idea of natural law stems from his epistemology in which he holds that human beings have the natural capacity to know many things without special divine revelation. In this regard, since law is meant to guide human behaviour in society, human beings, according to Aquinas, have the natural capacity to guide themselves towards appropriate behaviour even in the absence of positive laws. On this common view, since human beings are by nature rational beings, it is morally appropriate that they should behave in a way that conforms to their rational nature.50

The following statement of the stoic position given by Cicero in the first century BC is the most notable summary of the classical natural law doctrine:

“True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrong-doing by its prohibition. And it does not lay its commands or prohibitions upon good men in vain, though neither have effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by Senate or People, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future but eternal and unchangeable law will be valid for all nations and for all times, and there will be one master and one ruler, that is God, over us all, for He is the author of this law, its promulgator and its enforcing judge.”51

Expounding on the merits of the natural law theory, legal philosophers like Roland Dworkin argue that legal positivism is a theory that only provides solutions to “hard cases”—where the nature of a dispute is such that its solution can be found within expressly provided laws or previously established legal principles. However, in a situation where a particular suit cannot be brought under a clear rule of law, laid down by some institution in advance, the judge cannot be expected to wash his hands off such

a case citing lack of a laid down law or legal principle to rely on. Instead, the judge has, according to the natural law theory, the ‘discretion’ to decide the case either way.\textsuperscript{52}

“His (the judge) opinion is written in a language that seems to assure one or the other party had a pre-existing right to win the suit... it remains the judge’s duty, even in hard cases, to discover what the rights of the parties are, not to invent new rights retrospectively. However, it is no part of this theory (natural law) that any mechanical procedure exists for demonstrating what the rights of parties are in hard cases.”\textsuperscript{53}

In normal human discourse with regard to the natural theory of law, ‘good’ is usually seen as ‘what comes naturally.’ For example, parental affection, heterosexual love, support for the elderly and comradely interdependence are natural and therefore good—that which ignores or distorts human nature is bad. From a legal perspective, lawyers who are positivist-inclined have often been treated to ‘naturalistic’ arguments such as the foregoing as way of inviting them to see the sense in the natural law theory, especially where an issue, as Dworkin observes above, is not covered by the arguments from legal authority with which lawyers are more familiar.

Consequently, the case of \textit{Corbett v Corbett} is often cited to reinforce the authority of the natural law theory. In this case, the judge held that a ‘marriage’ between a man and a person who had undergone a ‘sex change’ was a nullity since it could not involve the natural, biologically-determined consequences of marriage. The judge said:

“Since marriage is essentially a relationship between man and woman, the validity of the marriage in this case depends, in my judgement, upon whether the respondent is or is not a woman.... Having regard to the essentially heterosexual character of the relationship which is called marriage, the criteria must, in my judgement, be biological, for even the most extreme degree of trans-sexualism in a male or the most severe hormonal imbalance which can exist in a person with male chromosomes,

\textsuperscript{52} Roland Dworkin (1972), \textit{Taking Rights Seriously}. London, Gerald Duckworth & Co. Ltd. p81
\textsuperscript{53} Ibid.
male gonads and male genitalia cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage.”

The study, therefore, uses the natural law theory to argue for the inclusion of moral considerations in legal practice. The phrase natural law, in contradistinction to positive law, is, therefore, the standard by which this study critiques legal practice in Kenya. Used in this way, the natural law theory is invoked to critique decisions made by legal practitioners as the study endeavours to discuss the moral aspect in the Kenyan judicial system with respect to the positivist separation thesis.

The two theories, more than any other theory, provide the roadmap towards achieving the objective declared in the Statement of the Problem. However, it must also be reiterated that this study, as an enterprise in Philosophy of Law is concerned with providing a general philosophical analysis of law and legal institutions. Hence, issues in the field range from abstract conceptual questions about the nature of law and legal systems to normative questions about the relationship between law and morality and the justification for various legal institutions.

In this regard, the study is required to unpack the legal positivist theory and the natural law theory further by rendering them in an ethical perspective. By so doing, we soon realise that these two theories further fall under the general theory of duty which, in ethics, provides the benchmark upon which human conduct, choices or pursuits can be judged as either right or wrong; good or bad; and just or unjust.

The general theory of duty is, consequently, invoked by the study in order to clarify the ethicicity of the legal positivist theory and the natural law theory. The general theory of duty is further accounted for by two ethical principles namely; deontology and teleology. In deontology, the fundamental principles of right and wrong are

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54 Corbett v Corbett [1971] p83 at 106 per Ormerod J.
authoritative by virtue of being self-evident truths; that is, they are regarded as comparable to axioms (foundations) not only in being the first principles of a deductive system but also in being principles whose truths can be seen immediately upon reflection. The most influential method consistent with using the model of an axiomatic system to expound the morality of right and wrong draws on the jural conception of its principles. On this method, the principles are interpreted as expressions of a legislative will and their authority, accordingly, derives from the sovereignty of the person or group of people whose will they are taken to express.

The oldest example of the method's use is the divine command theory. Against this theory, moral principles are taken to be laws issued by God to humanity and their authority thus derives from God's supremacy. People are hence inclined to base the validity of the Ten Commandments on the view that they are issued by a well-intentioned deity. In this regard, the validity of the Ten Commandments, from a deontological perspective, is not based on the fact that they are given by a well-intentioned God, but upon the norm that people must obey God's commandments. In this regard, given the nature of legal practice, the study has used the analogy of the validity of the Ten Commandments to conclude that professional codes of conduct in the Kenyan judicial domain are valid in the same way the Ten Commandments are valid. Against this backdrop, it would appear that when legal practitioners adhere to certain rules of conduct in the name of professional duty, they don’t adhere to those rules because of their content or consequences; but solely because those rules have been established in order to be obeyed.

With regard to the second level of the general theory of duty namely teleology, the study has sought to show that, when lawyers uphold fidelity to legality above every other consideration, they in essence operate under the deontological regime without
regard to the teleological aspect. Under teleology, the justification thesis takes the form of; “just as the principle of medicine represent knowledge about how best to promote health, so the principles of right and wrong represent knowledge about how best to promote the ends of morality.”

With such a teleological conception about right action in mind, it is held that the fundamental duty of human beings is to promote certain ends, and the principles of right and wrong organise and direct their efforts in this regard. The justification of teleological principles lies in the argument that the ends they serve are the right ones to promote and the actions they prescribe are the best ways to promote them. The principles are, therefore, authoritative by virtue of the wisdom of their prescriptions.

In view of the totality of the theory of duty, when the study analyses the professional conduct of lawyers against the teleological model, concerns about the ends people ought to pursue would be the determinant of what right and wrong. But when analysed against the deontological model, the principle that certain rules and regulation have been established in order to be obeyed becomes the determinant of right and wrong irrespective of whether more evil than good result from acting in the prescribed manner. The central thesis of deontologism is encapsulated in Immanuel Kant's epigram that; "let justice be done even if the heavens fall!"

To this end, the study uses the deontological principle and the teleological principle to advance an ethical inquiry to critique the Kenyan judicial system in an effort to establish the moral aspect in it. This is done by examining the professional conduct of legal practitioners against the ethical theories of right action and moral goodness.
1:2.2 METHODOLOGY

This study is mainly a conceptual analysis and largely utilises library sources. It, however, profits from primary data obtained through a field study. The library study has sought published and unpublished literature on matters of law and morality in order to distil information to be used in testing the truth-value of the assumptions made. Such data is processed by means of analysis, critique and evaluation.

Analysis is the process of breaking a complex topic or substance into smaller parts to in order to gain a better understanding of it. In this regard, the analysis involves simplification and clarification of key concepts in order to decipher their meaning and relationship. Critique is commonly understood as fault finding and negative judgement, but it can also involve merit recognition. In the philosophical tradition, it also means a methodic practice of doubt. In this study, the critique involves scrutinising different schools of thought relevant to the study and the claims they advance in order to discern their merits and shortcomings. Evaluation is the systematic determination of merit, worth, and significance of something or someone using criteria against a set of standards. In this study, evaluation involves comparison of practical cases in the Kenyan judicial system against established ethical theories in the philosophical domain.

The field study, on the other hand, has adopted a qualitative approach and has sought to establish the predominant understanding of the concepts of law and morality by the Kenyan society. This data is obtained through personal interviews with selected respondents and whose responses are also analysed, critiqued and evaluated in order to enhance the persuasive force of the arguments advanced in the pursuit of the objective contemplated by the Statement of the Problem.
Pursuant to the foregoing, the study has sought the views of advocates, teachers and students of law, Judges and State Counsels on matters of law and morality. Respondents from this category have been contacted mainly in Nairobi from institutions such as the Law Society of Kenya, Kenya School of Law, The State Law Office and the High Court in Nairobi.

On issues of morality, the study has sought views from respondents selected from a cross section of Kenyans with at least High School level certificate. The bias for the said level of education is based on the assumption that law and morality is a fairly technical topic that cannot be grasped without a significant degree of formal education. Since a good number of Kenyans have high school certificates as their minimum level of education, the study was satisfied that this carder of respondents would give appropriate data on what the average Kenyan perceives of morality. By use of purposive sampling, respondents in this category comprise of members staff and students at Kenyatta University and the University of Nairobi. The resultant data is also analysed, critiqued and evaluated by examining the ideas and claims advanced in order to determine their quality and worth. Two philosophical methods are then employed to draw conclusions—these methods are dialectic reasoning and reductio ad absurdum.

The dialectic method is an inquisitorial, evidence-based, non-dogmatic and analytical approach to explaining phenomena aimed at constructing a chain of demonstrated truths through a rational calculus of probabilities. Deductive reasoning was first developed by ancient Greek philosophers and refined by Aristotle through his ‘dialectic syllogism.’ An argument based on deduction begins with general statements and through logical argument comes to a specific conclusion, the nature of which is that the conclusion draws from the premises with absolute necessity such that if the premises
are true, the conclusion must also be true. This method is intended to yield some self-evident premises to be used in determining the truth value of the claims made within the domain of this study.

In this regard, by saying that a proposition or premise is self-evident, we mean that its appearing to us to be true or false is not the reason why it is true or false—but the expression 'self-evident' properly means that the proposition or premise so-called is evident, true or false by itself alone; that its truth value is not an inference from our intuition. Hence the expression 'self-evident' does not mean that a proposition is true because it is evident to you, to me or to all mankind. That a proposition appears to be true can never be a valid argument what true really is—if it were, then it would amount to subjective self-approval.

The dialectic method thus eliminates intuitive judgements that may be nothing but self-approval or distaste. In this regard, dialectic reasoning begins with abstraction— which does not in any way mean an intellectual remoteness from reality. The basic principle fundamental to abstraction is that things operate according to what they are. Hence by analysing the operations of things as experienced by our senses and psyche we can be led to an understanding of the principles from which they proceed. This means that we can take a point of view of a thing, develop our opinion logically to see what we are committed to and then seek out evidence to verify our stand. Dialectic is thus a demonstrative method that is characteristic of philosophical inquiry and it is essentially the application of the truths of the class to the members of the class.

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Reductio ad absurdum on the other hand involves a procedure of contrasts which is essentially a classical ideal of philosophical inquiry propounded by thinkers as early as Socrates, Plato, and Aristotle. Central to this method is the view that if you seek to understand what something is, a good first step is to eliminate everything that it is not.
CHAPTER TWO

THE LEGAL PROFESSION IN ETHICAL PERSPECTIVE

2: 1.1 OVERVIEW

“In tribal times, there were the medicine men. In the Middle Ages, there were the priests. Today, there are the lawyers. For every age, a group of bright boys, learned in their trades and jealous of their learning, who blend technical competence with plain and fancy hocus-pocus to make themselves masters of their fellow men. For every age, a pseudo-intellectual autocracy, guarding the tricks of the trade from the uninitiated, and running, after its own pattern, the civilization of its day” 1

There has often been a growing questioning of many of the world’s longest established legal practices and traditions. As a result of such questioning, a significant proportion of the population in Kenya has over the years questioned whether there is justice under the law and concluding that there is not, especially after over 40 magistrates and 23 judges were recommended for dismissal from the Kenyan judiciary in 2003 for various professional malpractices.

It is also important to note that under the Transitional and Consequential provisions (Sixth Schedule) of the Constitution of Kenya 2010, the Judiciary was the only arm of government that was required to undergo a total overhaul with a provision under section 23 of the schedule that all judges and magistrates who were in office on the effective date of the promulgation of the constitution undergo a vetting process to establish their suitability to continue serving with respect to the principles and values of the new constitutional dispensation. This points to the fact that the Kenyan society has placed a high premium on the judiciary, not only as an institution for dispute

resolution, but as a governance institution as well. But in the main, it is not the legal journals which report these trends. It is the social scientists and the media who have shaped the questions and probed for answers. Whereas it is true that knowledge of the law is not a preserve of legal practitioners with a 'NO POACHING' sign up for other disciplines, the legal practitioners and scholars have done little to come up with an ethical explanation of why the law at times appears repugnant to the “common sense” faculty of ordinary people.

"The law is an ass" – as used by Charles Dickens in Oliver Twist helps to put into perspective the cynicism with which ordinary people often view the institution of law especially when the law flies in the face of common sense. Mr Bumble, the unhappy spouse of a domineering wife, is a character in Oliver Twist who, when he is told in court that "...the law supposes that your wife acts under your direction", replied; "...if the law supposes that, then the law is an ass.” This proverbial expression is of English origin and the ‘ass’ being referred to here is the English colloquial name for a donkey, not the American 'ass'. Donkeys have a, somewhat unjustified, reputation for stupidity. Hence, it is the stupidly rigid application of the law that “the law is an ass” refers to.

This chapter enquires into the ethicicity of the principles that govern judicial processes and legal practice. It captures the conventional definition and general function of the legal profession, enumerates the professional codes of conduct that set the standards upon which lawyers’ choices are judged, and proceeds to analyse these codes of conduct in terms of their relationship to, and, implication in the scheme of ethics. But the sting of the chapter is an enquiry into the demands that professional codes of conduct place on legal practitioners and their implications from an ethical perspective.
In view of the foregoing, let it be assumed that when lawyers adhere to the codes of professional conduct, such adherence is, *prima facie*, the “right” thing. If this is true, the question would then be—what ethical principle, if any, gives reasons for anyone to think that upholding fidelity to legality is the right thing to do? From what ethical principle, if any, does a lawyer’s way of doing things derive justification? This line of enquiry seeks to test the hypothesis that; “lawyers are attached to legality above every other consideration.” It hopes to lay the ground for analysing whether upholding fidelity to legality is ethically the “right act.” To pursue this line of enquiry successfully, we need to appraise ourselves of the legal profession itself first in order to glean the ethical issues that may be found in its domain.

2: 1.2 SALIENT FEATURES OF THE LEGAL PROFESSION

John W. Davis, an American politician, diplomat and lawyer who argued over 140 cases before the United States Supreme Court over a 60-year legal career, had the following to say about his profession as a lawyer:

True, we build no bridges. We raise no towers. We construct no engines. We paint no pictures—unless as amateurs for our own principal amusement. There is little of all that we do which the eye of man can see. But we smooth out difficulties; we relieve stress; we correct mistakes; we take up other men’s burdens and by our efforts we make possible the peaceful life of men in a peaceful state.²

This description of what lawyers do invites us to consider the definition of the legal profession which, essentially, refers to the vocation based on the expertness in the law and its application.³ It is, however, important to point out that there are other vocations

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like police service that require this expertise but are not within the domain of the legal profession proper. In this regard, in order to render the definition under comment exclusively applicable to the legal profession, we have to examine the functions of the legal profession as follows.

2: 1.3 FUNCTIONS OF THE LEGAL PROFESSION

The primary function of the legal profession is the application of the law in dispute resolution. This function is manifest in the work of the advocate and the judge in the process of solving legal disputes. In the Common Law legal systems, in which the Kenyan system falls, a lawyer, for example, investigates the facts and the evidence by conferring with his client, interviewing witnesses and reviewing documents. He may seek a summary dismissal of the charge against his client if he persuades the court that the opponent evidently has no case, or through discovery proceedings, he may force the other side to reveal more fully the issues and facts on which it relies.

In trial law, the lawyer introduces evidence, objects to improper evidence and procedure from the other side, and advances partisan positions on questions of law and fact. The advocates (collectively known as the 'bar') argue their cases before Judge(s) who are referred to as the 'bench'. The 'bench' and its function in the Common Law system is described as:

A person or body of persons with power to decide a dispute, before whom the parties to the dispute or their advocates or their surrogates present the facts of the dispute and cite existent, expressed, primary normative principles (in statutes, constitutions, rules, previous cases) that are applied by persons or body of persons who believe that they should listen to the presentation of facts and apply such cited normative principles impartially, objectively or with detachment and that they may so decide as an independent body.¹

In continental European countries, the Judge has greater responsibility in the investigation of the facts. At trial the judge plays an active role in taking evidence, questioning witnesses and framing the issues. Continental lawyers suggest lines of factual inquiry to the Judge and, like their Anglo-American counterparts, advance legal theories and argue the law in accordance with the interests of their clients. In either system, if a lawyer loses his client’s case he may seek a new trial or relief in an appellate court.

It is also important to point out that even controversies that are not resolved in court require the aid of lawyers—negotiations, reconciliation and compromise, in all of which lawyers have a large part to play, bring about the settlement of most disputes without trial. The legal profession also applies and utilises the law in the less dramatic setting of the office. The lawyer, as counselor and negotiator, may aid in shaping a transaction so as to avoid disputes or legal difficulties in future so as to achieve advantages for his client such as the minimisation or avoidance of taxes. The law confers on private persons as well as body-corporates extensive, but not unlimited, power to arrange and determine their legal rights in many matters and in various ways such as through wills, contracts, leases or corporate bylaws. In structuring these arrangements, the lawyer helps to particularise the legal rights of the parties.

Another field of legal work which developed rapidly in the 20th C is the representation of clients before administrative commissions, commissions of inquiry and legislative committees. This development has been as a result of the increase of government regulation of economic life. In executing his tasks, a lawyer has several loyalties including loyalty to his client, to the administration of justice, to the community, to his associates in practice and to himself—whether to his economic interests or to his ethical
standards. These diverse, and at times competing loyalties, often require to be reconciled with wisdom. It is, therefore, assumed that the purpose of the professional codes of conduct is to effect such reconciliation.

2: 1.4 CODE OF PROFESSIONAL CONDUCT IN LEGAL PRACTICE

Legal practice is a profession that constitutes a system of courts and tribunals as agencies of administering the law and judges and lawyers as the group of people who possess, by reason of education and experience, an expertise in the operation of the system far greater than the ordinary person. Because of these characteristics, lawyers and Judges are designated as members of the legal profession.\(^5\)

As legal professionals, lawyers and Judges swear an oath to apply and interpret the law by applying certain normative principles objectively and impartially. The term ‘judicial’ therefore refers to the decisions and activities of this group of people designated as legal professionals. As professionals, the choices and pursuits of lawyers and Judges are guided by certain codes of conduct variably referred to as ‘professional ethics’, ‘legal ethics’, or ‘judicial ethics’—depending on the focus. These, in essence, are the rules of conduct and precepts which legal practitioners, be they advocates or judges, are required to adhere to in the course of executing the requirements of their craft as well as extra-professionally. They provide the norms, principles and values in terms of which lawyers' ethical conduct is judged in order to protect the general public against professional misconduct. Therefore, by ethics of the legal profession, is meant the body

\(^5\) William B. Harvey (1975), *Introduction to the Legal System in East Africa*. Nairobi, Kenya Literature Bureau. p1
of rules and practices which determine the professional conduct of members of the legal profession. The following are the core values of professional ethics in legal practice. ¹⁶

1. To represent clients with utmost diligence.
2. To maintain the honour and dignity of the profession.
3. To promote the highest standards of justice.
4. To establish honourable and fair dealings with clients irrespective of the nature and calibre of those clients.
5. To ensure that members of the profession discharge their responsibilities to the community with honour and diligence.
6. To ensure a spirit of friendly cooperation by treating professional colleagues with utmost respect.

These values apply to every legal profession worldwide. In Kenya, a set of duties have over the years been established either by statute or professional bodies against which members' commitment to the values of the profession are measured. These include the duty to the state, to the court, to the client, to colleagues and to the general public. But lawyers' professional duty has been expressed emphatically under various applicable international and national instruments. The following provisions of the International Code of Ethics by the International Bar Association capture the lawyer's duty to the client, the court and administration of justice:

a. Lawyers shall at all times maintain the honour and dignity of their profession. They shall, in practice as well as in private life, abstain from any behaviour which may tend to discredit the profession of which they are members, and

b. Lawyers shall always maintain due respect towards the Courts. Lawyers shall without fear defend the interest of their clients and without regard to any unpleasant consequences to themselves or any person. Lawyers shall never

knowingly give to the Court information or advice which is to their knowledge contrary to the law.

c. Lawyers shall never forget that they should put first not their right to compensation for their services, but the interest of their client and the exigencies of the administration of justice.

d. Lawyers shall never disclose, unless lawfully ordered to do so by the Court or as guided by Statute, what has been communicated to them in their capacity as lawyers even after they cease to be the client’s counsel.

e. Lawyers shall never represent conflicting interests in litigation. In non-litigation matters, lawyers should do so after having discussed all conflicts or possible conflicts of interest to all parties concerned and only with their consent.7

The acknowledgement and compliance with the professional code is, hence, a necessary condition critical to ensuring the maintenance and promotion of the legal profession. The importance of, and, need for commitment to ethical values in the legal profession is expressed by providing for sanctions against those who violate the code of conduct.

This points to the fact that absolute adherence and obedience to the rules of the profession remains the ideal for pursuance by legal practitioners, and an oath to that effect is taken as a promise to remain faithful to the rules of profession. The importance to uphold fidelity to the rules of the profession is reinforced thus: “any conduct directed towards non-commitment to professional values must for that matter face disciplinary action for professional misconduct or unprofessional conduct.”8

In Kenya, the Advocates Complaints Commission is a statutory body established under the Advocates Act to enquire into any complaints against any advocate or firm of advocates. Some of the significant complaints dealt with by this commission include:

1. Failure to honour professional undertaking.

2. Any behaviour that may amount to professional misconduct—a expression that includes any disgraceful or dishonourable conduct incompatible with the status of an advocate.

Once a complaint is filed with the Commission, the Commission undertakes to look into the substance thereof, and if it constitutes a disciplinary offence, it refers the complaint to the Disciplinary Committee for appropriate action. After considering the evidence adduced, and if the disciplinary committee is of the opinion that a case of professional misconduct on the part of the advocate has been made out, the committee may order that:

1. Such advocate be admonished; or

2. Such advocate be suspended from practice for a specified period not exceeding five years; or

3. The name of such advocate be struck off the roll of advocates; or

4. Such advocate do pay a fine not exceeding Ksh1,000,000; or

5. Such advocate pays to the aggrieved person compensation or reimbursement not exceeding Ksh5,000,000; or

6. Such combination of the above as the Disciplinary Committee thinks fit.

The penalties listed above constitute punishment for wrongdoing or transgression, and this makes this function of the Complaints Commission philosophically interesting because punishment is a moral issue, especially when it invites us to consider the utilitarian theory of punishment which asks the question—is punishment justified?

In the case of a lawyer who is punished by the Complaints Commission for whatever transgression, the suffering of pain by the person who is punished is calculated to be itself a bad thing, and the bringing of this bad thing upon the person is held to need justification; and to receive it only for the fact that the effects of the punishment are
likely to be so much better than those that would obtain from his non-punishment as to outweigh the evil of his pain. The effects are usually aimed at deterrence, reformation or retribution.\(^9\) In this way, legal practice seeks a moral solution to a problem within its domain, hence supporting the position taken by this study that law and morality are mutually inclusive.

With daunting penalties to be imposed on any act of professional misconduct, there is no doubt that every legal practitioner always strives to avoid all conduct that could land them on the wrong side of the rules and regulations that govern the profession. The importance of upholding fidelity to professional codes of conduct is emphasised as follows:

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\text{Absolute obedience to the rule in all instances stands as the ideal to which each practitioner should consciously strive. Where a practitioner's conduct falls short of the rule, the extent to which it will be reprehended and dealt with as misconduct will depend upon its gravity or the frequency of its commission by the practitioner and it may well be that a number of trivial lapses revealing a pattern of indifference to the rule will promote disciplinary action.}\(^{10}\)
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It is, therefore, evident from the foregoing citation that a lawyer would strive to maintain an unswerving commitment to professional duty above everything else. This explains why lawyers sometimes have no qualms defending clients whom they know committed the crimes for which representation is sought.

The hypothetical example cited in Chapter One, in which Mr X kills his wife but successfully pleads self-defence, illustrates this point. In the said example, it is evident that despite knowing that self-defence was not the reason why Mr X killed his wife, the


\(^{10}\) E.A.L. Lewis (1982), *Legal Ethics; A Guide to Professional Conduct for South African Attorneys*: Juta Ltd. p.5
lawyer, in the name of grave professional duty, was concerned with winning the case in favour of his client above everything else. The lawyers gets his client acquitted of the charge of murder—a job he does diligently according to acceptable tenets of judicial procedure.

In view of these examples, it is justified to conclude that lawyers are attached to legality beyond every other consideration— that they are prepared to use any means they find convenient, including concealing truth, to gain even the most unrighteous ends of their clients. It is this frame of mind towards lawyers that prompts cynics like Patrick Murray, a former English screen actor, to say—“A lawyer will do anything to win a case. Sometimes he will even tell the truth!”

2: 1.5 PROFESSIONAL CODE OF CONDUCT IN ETHICAL PERSPECTIVE

After analysing the general codes of professional conduct in legal practice, the next task is to place these codes in a moral perspective by establishing the principles of philosophy upon which they are founded. In this respect, it would appear that when a lawyer upholds fidelity to professional codes of conduct, such fidelity is judged as the ‘right’ thing. In ethics, when “right thing” means adherence to the authority of a given norm, more so when such adherence admits of no exceptions, the underlying philosophical principle is referred to as the “axiomatic system.”

In philosophy, the axiomatic system is variably known as “foundation ethics” or simply as “foundationalism.” Under the axiomatic system, foundation ethics or foundationalism, the fundamental principles of right and wrong are authoritative by virtue of being self-evident truths (norms)—an act is, therefore, judged as “right” if it is

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11 http://www.quotesdaddy.com/author/Patrick+Murray
consistent with a specified norm relevant to its domain and “wrong” when it is inconsistent with the norm. The most influential method of justification consistent with using the model of an axiomatic system to expound the morality of right and wrong draws on the jural conception of its principles. Accordingly, the principles are interpreted as expressions of a legislative will whose authority derives from the sovereignty of the person or institution whose will they are taken to express. The oldest example of the method’s use is the divine command theory under which “right” and “wrong” are derived from the laws issued by God to humanity— their authority, therefore, derives from the supremacy of the deity.

If we apply the divine command theory to legal practice by taking professional codes of conduct to be the will of a sovereign authority, when a lawyer upholds fidelity to legality, such action is “right” the way upholding the Ten Commandments is “right”. It must, however, be acknowledged on hindsight that for whatever reasons the lawyer upholds fidelity to professional codes, he does so fundamentally because there are lingering sanctions to be visited upon him if he did not. Because of the looming threat of sanctions, it would appear that a lawyer’s choices and pursuits under the code are a matter of duty, that is, they constitute “must be done.” The codes bind each member of the profession hence yielding some kind of corporate discipline. When rendered into ethical theory, such corporate discipline whose authority justifies professional conduct would fall under either of the following philosophical principles of ethical evaluation:

1. **Formalism**: This ethical principle is exemplified by the ethics of Immanuel Kant who holds that, it takes a moral principle to be the precept that satisfies the formal criteria of a universal law, and it takes formal criteria to be the marks of pure reason\(^\text{12}\). By this Kant means that moral principles are laws that issue from

reason—they are laws that humans, as rational beings, give to themselves and that these laws regulate conduct insofar as human engage each other's rational nature. For example, reasonable human beings would wear clothes to conceal their private parts while in public as a matter of decency whether or not there exists a law prohibiting walking naked in public. Through this ideal, Kant makes intelligible and forceful the notion that moral principles derive their authority from the sovereignty of reason. In this respect, codes of professional conduct take the character of formalism, and are promulgated to all members of the legal profession because they are assumed to issue from the sovereignty of reason of the men and women who partake in that profession.

2. **Contractarianism**: Also draws inspiration from Kant's ethics as well as from the social contract theories of John Locke and Jean Jacques Rousseau. Its fullest and most influential statement is expressed by Professor John Rawl's who holds that moral principles represent the ideal terms of social cooperation for people who live together in fellowship and regard each other as equals. These principles are taken to be the conditions of an ideal agreement among such people, an agreement that they would adopt if they met as an assembly of equals to decide collectively on the social arrangements governing their relations and reached their decisions as a result of open debate and rational deliberation. The authority of ethical principles derives then from the fairness of the procedures by which the terms of social cooperation would be arrived at in this hypothetical constitutional convention and the assumption that any rational individual who wanted to live peaceably with others and who imagined himself to be party to this convention would, in view of the fairness of its procedure, assent to its results. The ethical lesson flowing from this is that—certain things have to be
done because they derive their authority from the hypothetical consent of the governed.

Given what they stand for, formalism and contractarianism tend to create and establish a privileged stratum of values that guide the conduct of people in society. Immanuel Kant refers to such stratum of values as the “moral law” — to be upheld without reservation. The idea central to the Kantian moral law principle is, in this regard, the cornerstone of the corporate discipline that legal practitioners are required to uphold. In jurisprudence, such corporate discipline is variably referred to as “the rule of law.” The concept of ‘rule of law’, also known as ‘nomocracy’ refers to the influence and authority of law in society, especially as a constraint upon behaviour including the behaviour of government officials.13

From a contractarian standpoint, both lawyers and laypeople agree that there is a distinct ideal called the “rule of law”14— which is acknowledged to be the cornerstone of any legal profession. However, laymen and lawyers seem to disagree about what the ideal of rule of law is. There are, in fact, two different conceptions of the idea of rule of law, each of which has its position depending on one’s school of thought. The first is that which is referred to as “legal positivism” or the “rule-book” conception, which holds that, so far as is possible, the power of the state should never be exercised against individual citizens except in accordance with rules explicitly set out in a public rule-book available to all. The government and the governed must play by those rules until they are changed in accordance with further rules about how they should be changed — the latter which are also set out in the rule book15.

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14Dworkin, Op.cit. p.4
15Ibid, p.5
However, the rulebook conception is perceived to be very narrow because many a times it does not stipulate any reason for the content of the rules other than the mere fact that those rules have been legitimately enacted and must be obeyed. It insists that whatever rules in the book must be followed to the letter until changed. And in view of the spirit underlying the professional codes of legal practice, it is evident that lawyers are wedded to this conception. Partisans to this conception do not care about the rationale or implications of the contents of the rulebook, arguing that; “this is a matter of substantive law, and substantive law admits of no exceptions until such exceptions are sanctioned by a competent authority and specified as a rule in the rulebook”. The second conception is the “rights” conception. As a counterpoint to the rulebook conception, the “rights” conception is in several ways more liberal than the rulebook conception. It assumes that people living in fellowship have moral rights and duties to one another and political rights and duties against the state. It requires that the rules in the book capture and enforce moral values.

In view of the foregoing contradistinction, it is evident that the legal profession is a system guided by codes of conduct whose principle of right act, notably principles of justice and honesty, prescribe actions even though more evil than good would result from doing them. Rendered in ethical terms, this frame of mind is deontological. There is a classical example in the history of philosophy that best captures the spirit of deontological theory of ethics. This involves the life experience of the patriarch Greek philosopher, Socrates, as narrated by his student, Plato, through several treatises like the Apology and Crito.

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16The term ‘deontology’ derives from the Greek words ‘dean’ (duty) and ‘logos’ (science) to mean the science of duty. A deontological theory of ethics is one which holds that at least some acts are morally obligatory regardless of their consequences for human weal or woe. The popular slogan *fiat justitia ruat coelum* (let justice be done even if the heavens fall) conveys the spirit underlying deontological ethics.
In the *Crito*, Plato encapsulates the spirit of deontological ethics by pointing out that some virtues must be upheld without exception. The *Crito* in its form of diction is, essentially, a dialogue between Socrates and his friend Crito, and the dialogue is centred on Crito's proposal to help Socrates escape from jail. Earlier in the *Apology*, Plato reports on Socrates' indictment on charges of teaching Athenian youths how to think critically. The charge against Socrates read as follows:

Socrates acts criminally by being a busy body and inquiring into what is under the earth and in the heavens. He makes the weaker (unpopular) argument the stronger (popular) one and he teaches other people to do the same.\(^{17}\)

In the case under comment, Socrates was found guilty as charged by what was obviously a kangaroo court, and was given the option to either renounce his teachings or die by lethal poisoning. The *Crito* is therefore a dialogue between Socrates and Crito over a plan hatched by Crito to assist Socrates escape from jail in order to avoid the humiliation of either taking poison or renouncing his teachings. But Socrates turned down Crito’s offer on grounds that escaping from jail would violate the legitimate laws laid down by the Athenians, and he being part of the Athenians he was bound by those laws. In turning down the offer, Socrates had this to say to Crito:

Now considering the arguments you have made Crito, in favour of trying to escape; about the money you say can be provided for bribes and so forth, about what people will think, and who will bring up my children. The truth is that these are the vulgar multitude’s arguments; the arguments of the very people who are ready to sentence people to death. But our own argument has provided to us that we should consider nothing else except the question whether it would be just to pay bribes and favours to those men who can release me from this prison. Would it be just to do these things? If we decide that it would be unjust to act in this

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way, then there will be no need to explore the question whether I will have to die if I stay here and do nothing, nor the question whether I should suffer anything rather than do what is unjust.\textsuperscript{18}

The point central to Socrates’ thesis is that virtue must be upheld at all costs and one should never commit a vice even to save another man’s life. The first of the modern philosophers to emphatically enunciate the deontological principle was Immanuel Kant according to whom objectively right behaviour may be inspired by prudence, by benevolence, by respect for the moral law, or by still other motives. But the highest and the only unqualifiedly moral motive is respect for the moral law. To reinforce this, Kant says;”…two things awe most, the starry sky above me and the moral law within me.”

Against this background, if considerations based on concern for one's own well-being or the well-being of others indicate a course of action at odds with that dictated by respect for the moral law, respect for the moral law should prevail. Kant went so far as to argue that it is wrong to tell a lie even to save another man's life. In view of the strict and clear demands that professional codes of conduct place on legal practitioners, it is evident that the values conveyed by such codes are ones that must be upheld without exception. If any other value, however good, is at odds with the dictates of professional codes, then the codes— the equivalent of what Kant refers to as the moral law— must prevail. It should be kept in mind that to ensure that the “moral law” is upheld without exception, the legal profession has guaranteed compliance by imposing sanctions for any breach of the codes. It appears, therefore, that the most prominent and general feature of professional codes at all times and places, is that their existence means that certain kinds of lawyers’ conduct are no longer optional but obligatory. And in this

\textsuperscript{18}R. Kraunt (ed) 1992, \textit{The Cambridge Companion to Plato}: Massachusetts, Cambridge University Press. p.32
respect, we no longer speak of voluntary action on the part of the lawyers in conducting their professional affairs but behaviour under threat of sanctions.

The simplest way in which conduct is no longer optional, is when one man is forced to do what another tells him to do, not because he is physically compelled in the sense that his body is pushed or pulled about, but because the other threatens him with unpleasant consequences if he refuses. A gunman, for example, orders his victim to hand over his purse or threatens to shoot if he refuses. If the victim complies, we refer to the way in which he was forced to do so by saying that he was coerced to do so— in this situation where one person gives another an order backed by threats and in this sense of 'oblige' coerces him to comply, we have the essence of law or at least the key to the science of positive law.

There is no doubt, therefore, that a code of conduct in legal practice often presents this aspect among others— a penal statute declaring certain conduct to be an offence and specifying the punishment to which the offender is liable is illustrative of the gunman situation. In this regard, voluntary action as a necessary constituent of moral action is excluded from lawyers' conduct. Without acting voluntarily, it appears that the course of action lawyers pursue in the name of professional duty is not a subject of moral judgement because, as articulated in Chapter Three of this study, moral responsibility is only assigned to voluntary actions. In view of the foregoing argument, our hypothesis that "lawyers are attached to legality beyond every other consideration" is true— its truth being accounted for by the doctrine of legal positivism, which is acknowledged to be the cornerstone of the legal profession.
2: 1.6 LEGAL POSITIVISM IN ETHICAL PERSPECTIVE

Legal positivism is the science of positive law. It constitutes a regime of commands and restrictions derived from man for the purpose of ruling man. Advocates and judges, as legal practitioners, are trained to take positive law to constitute commands based on the relationship between ruler and the ruled. Its primary nature is that it is man-made because it springs from no source higher than the human will.

Thomas Aquinas expounded the whole concept of legal positivism by conflating man-made law (lex humana) and positive law (lex posita or ius positiva). Positive law refers to law by the will of whomever made it; while man-made law treats law from the position of its origin (in this case, from man to man). Hence, man-made law (lex humana) is a concept that is usually considered in opposition to concepts like natural law or divine law, and as Aquinas put it; “a just law is a man made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. Hence, an unjust law is a human law that is not rooted in eternal law and natural law.” However, according to the tenets of positive law as defined by John Austin, the noted 19th C British jurist who became the founder of the Analytical School of Jurisprudence, law consists of definite rules of human conduct with appropriate sanctions for their enforcement, both of these being prescribed by duly constituted human authority. In developing the theory of legal positivism, Austin attempted to clearly separate moral rules from positive law, citing three basic points as being central to his theory. These are:

- the law is command issued by the uncommanded commander—the sovereign;

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• such commands are backed by threats of sanctions; and
• a sovereign is one who is habitually obeyed.

But the central idea in legal positivism, which is relevant to this study, is that reference need not to be made to morality or natural justice in either the definition of law properly so-called, or a determination of whether a given rule is a valid rule of law. In this regard, lawyers, under the legal positivist thesis, are enjoined to uphold fidelity to professional codes of conduct and the rule of law without a need to refer to any moral consideration in the determination of whether the given codes are valid. On account of this doctrine, moral considerations, as far as legal practitioners are concerned, are peripheral issues, if not, completely excluded from juridical matters. No doubt, therefore, that the enjoining powers contemplated by the legal positivist doctrine are the ones responsible for the tendency for lawyers to uphold fidelity to legality above every other consideration.

In view of the foregoing, it is evident that apart from being bound by general laws as citizens, the professional codes of legal practice are an additional set of rules that bind the practitioners into some sort of corporate discipline—such corporate discipline is the hallmark of the principle of legal positivism. And as a doctrine that evidently falls within the deontological category of ethical theory, legal positivism advances one pertinent principle that captures the deonticity of the doctrine— the principle is; that obedience to the professional codes of conduct is a necessary condition for the existence of the legal profession. In its purest form, legal positivism involves the basic assumption that all law (including the codes of professional conduct) is positive law—implying that, all laws owe their justification to the fact that they have been laid down by a

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legitimate authority. Laws, so conceived, are laws with position—meaning that they are set or prescribed by humans to humans.\textsuperscript{22}

In a modified form, the idea of the law being seen as “laws with position” is captured by Hans Kelsen, celebrated 20\textsuperscript{th} C legal theorist and jurist, who holds that—law is always positive law and its positivity lies in the fact that it is created and annulled by acts of human beings, thus being independent of morality and other norm systems.\textsuperscript{23}

The positivist doctrine is, therefore, the foundation upon which many, if not all, modern legal systems are built. It is fashioned on the frame of mind espoused in Kelsen’s pure theory of law which holds that a general theory of law should be developed by excluding societal values as extraneous elements.\textsuperscript{24}

Austin, another prominent legal positivist, also holds that; “legal arguments can never be clear if we allow irrelevant considerations to creep in.”\textsuperscript{25} What Kelsen and Austin consider as extraneous and irrelevant considerations in legal matters include general principles of natural justice, morality and religion. In this regard, legal positivism, so conceived, advocates for a disciplinary autonomy between law and morality—meaning that law and morality are mutually exclusive subjects, prompting the likes of Jean Giraudoux, the noted World Wars French novelist and essayist, to sarcastically say:

You’re an attorney. It’s your duty to lie, conceal and distort everything, and slander everybody.\textsuperscript{26}

\textsuperscript{24}Ibid, p.II
\textsuperscript{25}Austin, \textit{Op.cit.} p.109
\textsuperscript{26}http://www.brainyquote.com/quotes/authors/j/jean_giraudoux.html
The point central to Giraudoux’s sarcasm is that, since moral values are irrelevant in legal matters as prescribed by legal positivism, lawyers can as well lie, conceal and distort issues without any qualms.

2: 1.7 THE RATIONALE OF LEGAL POSITIVISM

The underlying thinking in legal positivism as propounded by Kelsen and Austin is that when we say that a society is governed by laws, we mean laws as made by a legislature and that these laws are codified and promulgated, in the manner such as we find in Kenya, by way of codes like, the Penal Code, the Civil Procedure Code, the Criminal Procedure Code among many other codes that contain rules and regulations including the codes of legal practice.

Governed by a regime of rules or codes, the legal practitioner (judge or advocate) is to be no more than a machine intelligently applying a body of clear and stable rules—rules that are assumed to be a complete, smooth and seamless network, the measurement of any dispute against which would automatically indicate its solution. This mechanistic approach to law is summed-up by Robert Schmitt, an Arizona trial attorney, as follows— “the average lawyer is essentially a mechanic who works with a pen instead of a ball peen hammer.”

In this spirit of legal positivism, the law is conceived to be “what it is” as laid down in the code and nothing else. The goal of legal positivism is to make legal practice a systematic science; and as a science, legal practice is required to contain reasons and principles that are sufficient for deciding on the truth of all instances of legal phenomena. Claiming, for example, that a case is decided by material facts makes it

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necessary to show that all phenomena of a case, including well established ones, new ones and those yet to be discovered, are explainable and accountable by that claim. The law, so understood, becomes a code which has to be the sole guide of judges, advocates and those who come under it— and whose mere enactment is the sufficient warrant of its validity, and to values beyond or outside which neither judge, advocate nor citizen has any business to look into.

Legal positivism, also known as normative positivism, is also the philosophy propounded by Thomas Hobbes, David Hume and Jeremy Bentham who hold that legal systems should be formulated such that moral-based decision-making by judges or advocates is eliminated as much as possible. The reason given by Hobbes, Hume and Bentham has to do with the desirability for certainty, security of expectations and knowledge of what legally empowered officials are likely to require. The exponents argue that if the decisions of judicial officers turned on the exercise of moral judgement, there would be no telling what they may come up with. Therefore, from the point of view of citizens trying to organise their lives according to legal requirements, the officials’ decision would be arbitrary. By arbitrary decisions, legal positivists ordinarily mean three things; first it means "unpredictable" and this was the charge that particularly worried Bentham and thinkers in the mainstream of British positivism. Secondly, it means the "unreasoned" as when a decision is made on the basis of whim or reflex prejudice rather than on the basis of argument (facts of the case and applicable law).

A third sense of arbitrariness has ancestry in American constitutional law out of which some feel that even if judges are making moral-based decisions as reasonably and as predictably as possible, still their decisions lack legitimacy. This view, based on the political doctrine of separation of powers, holds that it is not for the judges to take the
determination of social principle and moral value into their own hands because judges are not legislators. In this sense, 'arbitrary' means "without authority or legitimacy."  

For reasons like these, normative legal positivists oppose and seek to minimise the amount of moral-based decision-making exercised by judges and other officials in the judicial system. On the strength of certain practical examples, it can be shown that Kenyan judges have also enhanced the positivist aspect in their professional conduct arguing that, even when interpreting legislation they only seek to give effect to the intention of parliament and that the intention of parliament can only be discerned from the ordinary meaning assigned to the words in any given piece of legislation. Therefore, in this sense of applying law "as it is", if on the wording of legislation a particular situation appears not to be covered, or that some good taste is violated, judges will generally not engage in some form of "gap filling" by reading in or implying words to bring out a particular desired situation within the scope of legislation. Engaging in "gap filling" could be regarded as beyond the scope of the proper judicial role of judges and more akin to a "legislative act" on the part of the courts.

There are two examples from the Kenyan judicial system that illustrate the foregoing notion. The first is Civil Case No. 908 of 2001 in which the High Court ruled on a petition filed by the Central Bank of Kenya, as an interested party, against the famous ‘Donde’ Act. In this case, the High Court was called upon to nullify the interest rate control provisions of the ‘Donde’ Act for reasons which the petitioners cited as placing the country in disharmony with other liberal economies with which Kenya has deals with and whose consequence would cause the Kenyan economy to sink, if not collapse.

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The Act had fixed lending rates for the financial markets at a maximum of 4 percent above the prevailing Treasury Bill rate and interest on deposits at a minimum 3 percent below the Treasury Bill rate. It further provided that the total interest charged on a loan must not exceed the principal sum advanced. But the court refrained from pronouncing itself on this issue, with judges Thomas Mbaluto and Justice Richard Kuloba saying that whether or not a country wished to control interest rates was a question of policy and beyond their judicial duty as judges to decide. They hence washed their hands off the matter by stating as follows:

“Some people want a state controlled economy; others do not want any form of control and desire a free enterprise. That is for economic policy makers and the court cannot go into this arena.”

Another case that helps to illustrate how the positivist separation thesis is entrenched in the Kenyan judicial system is *R v Kimani Kongo and Kuria wa Gathoni* in which the defendants were charged with the February 2001 murder of one Charles Yaw Sosa. During the trial, the defendants contested their prosecution through an application to the constitutional court claiming that their rights to a fair trial had been violated by the prosecution presenting weak evidence. But the constitutional court rejected the application in July 2002 with Justices Samuel Oguk, David Rimita and Kalpana Rawal saying:

Such litigation would open a flood-gate of chaos. It’s not within our powers as judges to look into the evidence with a microscope to see if there was sufficient evidence to charge and prosecute the two.

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29 *Trust Bank Ltd v Nairobi Alarms Ltd & 2 others* [2001] eKLR: Civil Case No. 908 of 2001
30 *Daily Nation, 17th* September 2003: Nairobi, Nation Media Group. p.2
In essence, the judges were saying that the boundaries of their mandate as judges were clearly marked out and it was not their business to delve into territory that did not concern them.

In view of the foregoing examples, it is evident that the Kenyan judicial system is based on very strict normative principles such that judges would keep off any matter that is outside their juridical scope. Every decision by the professionals involved in a trial is guided, almost mechanically, by normative principles found in either statute or precedent (case-law). In this regard, what judicial officers feel as a matter of their conscience is considered extraneous and, therefore, irrelevant. It is against this background that legal positivism has sought to eliminate moral based decision-making by judges in order to ensure consistency and predictability. The positivist separation thesis insists that the law must strictly be applied “as it is” in order to provide litigants with a consistent and predictable system that would enable them to organise themselves in the scheme of things. Such a predictable system is the principle central to Kelsen’s pure theory of law which dominates modern legal systems.

2: 1.8 KELSEN’S PURE THEORY OF LAW

When fully analysed, this theory tends to prove the truth of our hypothesis namely; lawyers are attached to legality beyond every other consideration. Going in tandem with the legal positivist doctrine, Hans Kelsen developed a theory of law that has occupied a dominant position in the advancing column of legal practice all over the world. The pure theory of law holds that a general theory of law can and should be developed by excluding societal values as extraneous elements. In this regard, the pure theory of law, as a theory within the doctrine of legal positivism, is the theory of actual right and does not ask itself whether this real positive right is just or unjust, good or
bad.\textsuperscript{31} By “actual right” is meant that the pure theory of law as a science of positive law is a doctrine of rights and duties as they have actually been created by legislation and are at work in social reality regardless of whether such positive law is considered good or bad, just or unjust from any value standpoint. To this end, any positive law can be called just from one particular standpoint and decried as unjust from another. Because of this, the pure theory of law explicitly hopes to keep aloof from what it considers as “emotional” and “subjective” value judgments.

The foregoing position is in harmony with the positivist school of thought in which law is understood in terms of rules or standards whose authority derives from their provenance in some human source, sociologically defined, and which can be identified as law in terms of that provenance.\textsuperscript{32} Thus, statements about what law is— whether in describing a legal system, offering legal advice or disposing of particular cases— should be made without exercising moral or other evaluative judgment. The import of this legal positivist stance is that once a legal rule is laid down, no further exercise of moral or any other evaluative judgment is required for its identification or application. Legal positivism, also referred to as descriptive positivism, hence maintains that "this is what law is"—that is—“law as such”. It is, therefore, in light of this positivist frame of mind that we have seen, on several occasions, Kenyan lawyers express a passionate desire to uphold the law strictly according to the “letter of the law.”

This frame of mind looms large in the Kenyan legal thinking and was exhibited in September 2004 by lawyer Ahmednassir Abdullahi upon his resignation from the chairmanship of the advisory board of the Kenya Anti-Corruption Commission (KACC)

\textsuperscript{31}Raz, \textit{Op.cit.} p.23

\textsuperscript{32}R.P. George (1992), \textit{Natural law Theory; Contemporary Essays}: New York, Oxford University Press. p.160
in protest against the refusal to appoint one Julius Rotich as deputy-director of KACC. In this case, President Mwai Kibaki (Kenya’s Head of State between 2002 and 2012) declined to approve Mr Rotich’s appointment as deputy-director of the Kenya Anti-Corruption Commission, citing questionable dealings by the nominee in previous postings. But the president’s refusal to approve Rotich’s appointment, in spite of the legitimate moral concerns it raised, was declared illegal by the Kenyan legal fraternity led by Mr Abdullahi who was also the chairman of the Law Society of Kenya.

Castigating the President’s refusal to approve Mr Rotich’s appointment, Mr Abdullahi had the following to say:

Due process must be followed. What is difficult in following legal procedure and process and showing fidelity to the law? 33

From Mr Abdullahi’s remarks, we see a legal professional exhibiting a frame of mind that is prepared to uphold fidelity to legality beyond every other consideration. Mr Abdullahi can thus be characterised as a legal positivist—one who abides by the principle that once a law has been laid down, no further exercise of moral or any other evaluative judgment is required for its application.

When the law is understood from a positivist point of view, then even the legal order of apartheid South Africa, for example, is just as much a legal order as that of communist China or that of democratic United States of America. The pure theory of law, in this respect, wholly abstracts from the question about whether those legal orders are just or unjust and whether one is more just than another— all that matters is that the law has

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33Daily Nation, 14th September 2004: Nairobi, Nation Media Group. p.1
been legitimately enacted and it must be complied with. The following examples give a practical weight of presumption in favour of the proposition that lawyers are attached to legality beyond every other consideration.

1. In an opening address to a conference of lawyers, a former Archbishop of Canterbury, William Temple, said— I cannot say that I know much about the law having been far more interested in justice. But at the other end of the scale was the lawyer who, in addressing a class of students said— I can only tell you what the law is. If you are interested in justice you had better go to a school of divinity. 34

Assuming that the archbishop and the lawyer in the foregoing citation represent the prevalent frame of mind of the professions that these two serve, it is clear that there is a disciplinary parallelism that is asserted to exist between law and justice. It is also evident from this example that, although judicial systems claim to promote justice, lawyers themselves care less, or, are simply not interested in justice.

2. Oliver Wendell Jr, a former Justice of the Supreme Court of Massachusetts, once said— when many lawyers engage in their profession, they merely study what they shall want in order to appear before judges or to advise people in such a manner as to keep them out of court. 35

3. Patrick Kiage, a Nairobi lawyer who would later become a judge of a superior court, holds the opinion that morality is a side show in legal controversies, hence irrelevant. "A court is a court of law and not a court of sentiment," he says. He, therefore, believes that morality can have a place in parliamentary discussions that result in enactment of legislation, and should end there. According to Mr Kiage, legal practitioners, especially judges, should stick to the law and avoid trying to introduce their sense of right or wrong in legal controversies because this


would turn them into judicial activists and thereby blur their impartiality and objectivity. Mr Kiage is, therefore, passionate in holding the view that judges must remain judges and only do that which the law directs and allows them to do.

With this frame of mind, it is evident that Mr Kiage is a legal positivist who believes that the positivist separation thesis applies to the Kenyan judicial system.

4. Richard Magare, a graduate of the Kenya School of Law in 2004 and Robert Asiani, newly admitted to the bar in 2004, are in agreement with the positivist separation thesis as far as the Kenyan legal system is concerned. Richard holds that if the law is not applied by the judges and advocates the way it is, there would be no legal profession to speak of. Robert supports the positivist separation thesis by approving the following position— the legal practitioner concentrates his attention on law at the point where it emerges from the institutional process that brought it into being. It is the finally made law itself that furnishes his subject of inquiries. How it was made and what directions of human effort went into its creation are for him irrelevancies.36

5. In Attorney General v Harmer, Lord Justice Hamilton consoled himself by expressing a frame of mind that leaves no doubt about the influence of the positivist separation thesis on legal practitioners. When holding that a map was inadmissible evidence of the extent of Spitalfields market in the 18th C, Justice Hamilton said— Generally I quite-agree that I should desire to know the historical evidence about Spitalfields which, for every purpose except that of deciding the issue as to property as between private persons, nobody would think of excluding. But I yield to authority on the law of evidence without reluctance because I am satisfied that in the main, the English rules of evidence are just and I am satisfied also that there is no portion of the English law which ought more rigidly to be upheld. My experience is that the public have in the result derived great benefit from their strict application.37


From the foregoing example, we glean a frame of mind of a judge who believes in the strict application of the law, thereby lending weight to the position that the positivist separation thesis holds sway in all the professional choices and pursuits of legal practitioners. The following illustration also betrays the positivist underpinning in the Kenyan judicial system:

6. In a speech conveyed through the media outlining the strategic plan of the Judiciary for the period between 2005 and 2008, Chief Justice of Kenya Evan Gicheru said—For us in the judiciary, the due administration of justice in accordance with the rule of law is our noble aspiration. It is to its achievement that we are daily engaged. 38

The conclusion drawn from the foregoing six examples is that lawyers endeavour to uphold fidelity to legality above everything else. In addition to the influence of legal positivism which looms large in the psyche of Kenyan lawyers, there is no doubt about where the passion for upholding fidelity to legality comes from since the codes that guide lawyers' choices and pursuits expressly demand that they be loyal to their clients and loyal to the rule of law. Rendered in ethical terms, the codes of professional conduct can, therefore, be characterised as categorical expressions—expressions marked by an unequivocal statement without qualifying, reserving or obscuring.

Taking the categorical aspect of the professional codes of conduct and rendering it in ethical terms, it is clear that it dove-tails with Immanuel Kant’s concept of the categorical imperative. In this regard, a professional commitment like “representing clients with utmost diligence” would be characterised, in Kantian terms, as a moral obligation or command that is unconditionally and universally binding to all legal

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38 The Standard, 18th March, 2005: Nairobi, The Standard Group of Newspapers. p.32
practitioners.\textsuperscript{39} For judges, their professional code essentially lies in the legal tenet that informs their outlook of the law. Although there are many legal principles, the legal positivist one remains fundamental to judges. Under this principle, the judges must look at the law as it is laid down—meaning that the positivist judge is one whose principle is not to mix the “law as laid down” with the “law as it ought to be.”

Against this background, even if some law is enforced but includes values that 'ought to be', it is those oughts that have filtered through accepted criteria of validity which include precedent, legislation or custom that becomes law ‘as is’. It is such incorporation of “the ought” into law that is taken to be valid law irrespective of its moralness. Hence, even if an immoral or unjust proposition were embodied in a law or rule, such proposition would still be legitimate because it would exhibit the formal stamp of validity. However, as much as the legal positivist principle remains the undisputed concept underlying legal practice, it is important to reiterate that the natural law theory is always on standby, waiting to be cited as a counterpoint to legal positivism. Natural law theory holds that a proposition is law, not merely because it satisfies some formal requirement, but by virtue of an additional minimum moral requirement.

2: 1.9 SUMMARY
This chapter has attempted to place the practice of law in an ethical perspective. In doing so, it has established that strict obedience to the law, both its substance and procedures, is the cornerstone of the existence of the legal profession. The laid down legal rules, in turn, become the sole guide of the judges, advocates, and all those who come under it, and whose mere enactment is the sufficient warrant of their validity; and

\textsuperscript{39}Kant, \textit{Op.cit.} p.120
to values beyond or outside which neither judge nor advocate has any business to look into.

The chapter has also brought to light the definition and function of the legal profession by focusing on the professional codes of conduct and their relationship to and implication in the scheme of ethics. It has attempted to demonstrate that when rendered into ethical perspectives, the codes of legal practice are properly within the deontological category of the theory of duty which has been encapsulated in the theoretical framework. As falling within the deontological category of the theory of duty, these codes are evidently categorical imperatives, meaning that, their enforcement admits of no exceptions. The chapter has also brought to light the doctrine of legal positivism and argued that this doctrine is the cornerstone of the legal profession, and in which the notion of strict obedience to law (rulebook conception) is encapsulated. Rendered in ethical perspective, the chapter has endeavoured to show that legal positivism is fundamentally a doctrine falling within the deontological principle of the theory of duty. The foregoing being the case, it is evident then that the existence and practice of law derives its authority from the deontological principle—meaning that certain actions, on the part of legal practitioners, must be performed as a matter of duty because the requirement to perform them admits of no exceptions. To this end, the following conclusions are drawn from the accumulated discussion.

1. On the authority of the positivist separability thesis, lawyers are attached to legality beyond every other consideration.

2. In view of the frame of mind exhibited by Chief Justice Evan Gicheru and by lawyers Ahmednassir Abdullahi, Patrick Kiage, Richard Magare and Robert Asiani, Kenyan lawyers subscribe to the legal positivist approach to law and would, therefore, uphold fidelity to legality above every other consideration.
However, in spite of the merits of the deontological principle to legal practice, it would be less than candid to pretend that the deontological theory has the last word in determining the propriety of an act and that it is faultless in the entire scheme of ethics. To this end, the fact that deontologism is inadequate and that it can be faulted when evaluating matters of 'right', 'good' or 'morally good' makes it necessary to examine other schools of thought. Hence, the teleological theory of ethics is the next point to be contradistinguished with the deontological theory.
CHAPTER THREE

TELEOLOGICAL ETHICS VERSUS DEONTOLOGICAL ETHICS
WITH REGARD TO LEGAL PRACTICE

3: 1.1 OVERVIEW

“While law is supposed to be a device to serve society, a civilized way of helping the wheels go round without too much friction, it is pretty hard to find a group less concerned with serving society and more concerned with serving themselves than the lawyers”¹

This chapter analyses the concept of morality as understood in the world of philosophy by contrasting it to the loose way the term ‘morality’ is used in ordinary speech. However, even in the world of philosophy, the concept of morality is the subject of a great deal of debate. In this regard, the chapter examines the rationale and implication of the teleological principle of the theory of duty as a counterpoint to the deontological principle within the wider theory of duty. The deontological theory of duty, as argued in the preceding chapter, is the cornerstone of legal practice. The chapter takes cognizance of the conclusion drawn in chapter two that— lawyers are prepared to uphold fidelity to legality beyond every other consideration. In view of this conclusion, the guiding question would then be— if a lawyer considers that adherence to a particular legal norm as a matter of professional duty would lead to injustice or evil of some sort, ought he obey such a legal norm?

The foregoing question is posed with certain historical events, like those during Nazi Germany, in mind. It has been maintained that citizens of Nazi Germany ought not to have obeyed the laws of their state that caused them to do harm to certain minority communities. Against this background, it has been argued that ordinary Germans

ought to have known that the laws permitting them to commit genocide were wrong and they should not have obeyed them. In this respect, this chapter seeks to demonstrate that it is not possible that human beings can be expected to obey an established authority (norm) without questioning its rightness or wrongness.

Since one way of establishing the propriety of a norm is by considering its consequences, this chapter examines the virtue of teleological ethics. It endeavours to show that when legal positivism insists that the mere enactment of a law is the sufficient warrant of its validity, and to values beyond or outside which neither judge nor advocate has any business to look into, it essentially means that legal practitioners have no business worrying about the consequences of the legal norms they are required to uphold when making professional choices.

The other guiding question would then be— if lawyers are attached to legality beyond every other consideration as legal positivism demands, what moral considerations, if any, do they 'blind' themselves to in their so-called faithful discharge of professional duty? The conclusion to be endorsed is that, whenever lawyers make choices in the name of faithful discharge of professional duty, they yield to the authority of legal norms without considering the outcome of what is demanded of them— meaning that they ignore or 'blind' themselves to the teleological\(^2\) principle.

\(^2\)The idea central to the teleological theory of ethics is that the fundamental duty of human conduct is to promote certain ends, and the principles of right and wrong organize and direct our efforts in this regard. The justification of this principle, on this view, is that the ends they serve are the rights ones to promote and the actions they prescribe are the best ways to promote them.
3: 1.2 PRINCIPLES OF TELEOLOGICAL ETHICS

Whereas the dominant notion in deontological ethics is that certain norms are binding to all legal practitioners even though the conduct demanded may lack any necessary connection to the good of the person obligated, the dominant notion in teleological ethics is that people ought to do those things that are productive of some good. Against this background, the propriety of an act is judged by its results.

Expounding the teleological theory of ethics, Aristotle declares in the *Nicomachean Ethics* that, as every action aims at some good, the task of ethics is to discover the chief or most final good.\(^3\) Further to this notion, it is held that just as the principles of medicine represent knowledge about how best to promote health, so the principles of right and wrong represent knowledge about how best to promote the ends of morality. In this regard, it is evident that while a deontological theory of ethics, on the one hand, holds that some actions are obligatory regardless of their consequences for human weal or woe, a teleological theory of ethics, on the other, insists that human conduct be judged by the wisdom of its consequences.

If the teleological principle were to hold sway or be considered in legal practice, then judicial controversies would have to be left to the wisdom of lawyers— to evaluate and choose how best to dispose them off depending on the probabilities of their outcomes. If this were to be the case, then standard codes of procedure and professional conduct would not be necessary. The legal profession would, in this respect, cease to be a systematic science as contemplated by the legal positivist doctrine.

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3: 1.3 RATIONALE OF THE TELEOLOGICAL THEORY OF ETHICS

Aristotle is the earliest exponent of the teleological theory of ethics. He developed it as a counterpoint to the deontological ethics earlier propounded by his predecessors, Socrates and Plato. The rationale of teleological ethics is captured in the following maxim:

…it is not possible that one of the basic human tendencies is to yield to the authority of an established norm without questioning the consequences of what is demanded” 4

Therefore, despite the merits of the deontological principle to legal practice, in which certain conduct is binding to all legal practitioners even though the conduct demanded may lack any necessary connection to the good of the person obligated, the virtue that deontologism seeks to promote easily comes to grief when confronted with what teleologism stands for. The challenge to deontologism is captured by the following fundamental questions:

a. In what might the bindingness of the categorical imperative consist?

b. What makes certain requirements or demands obligatory?

These questions prompt another more fundamental one—what else does it take for any norm or rule to be binding other than the mere fact that it is legitimately enacted?

In this regard, if lawyers are attached to legality beyond every other consideration, it means that the concerns raised by the foregoing questions mean nothing to them. For example, when lawyer Ahmednassir Abdullahi protested President Kibaki’s refusal to confirm the appointment of Julius Rotich, insisting that the law be followed, did the questions raised about Dr Rotich’s integrity mean anything to him? In this regard — the

merits of legal positivism notwithstanding—would it be unreasonable for legal practitioners to worry about the consequences of their professional conduct? Are legal practitioners trained to look at issues through the eyes of reasonable men? And does reasonableness not include evaluating the consequences of what is demanded of an agent?

These questions are asked with the following remark by Will Rogers, the celebrated American screenplay actor, humourist and social commentator, in mind:

I don’t think you can make a lawyer honest by an act of legislature. You’ve got to work on his conscience. And his lack of conscience is what makes him a lawyer.  

The remark—“lack of conscience is what makes him a lawyer”—is indeed the layman’s way of encapsulating the positivist separation thesis that is at the core of legal practice. But taking the aforementioned questions as a guide, it would be impractical, from a deontological perspective, for lawyers to concern themselves with the outcome of their conduct when handling matters professionally—otherwise they would cease to be lawyers. Nonetheless, the moment people, as conscientious beings, start to worry about the consequences of whatever course of action they take, it means they are prepared to go beyond deontological considerations (in which the mere enactment of a norm is the reason why it should be upheld) and move towards teleological considerations (in which the results produced is a factor). The moment human beings enter this domain of mental consciousness, the ethical question that begins to loom large is—what right ends (results) should we promote?

Different teleological views in the theory of duty correspond to different answers to the question of what the right ends to promote are. The most common answer is happiness, and the main division among the corresponding views reflects the distinction in the

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5 http://www.brainyquote.com/quotes/authors/w/will_rogers.html
theory of intrinsic value between egoism and utilitarianism. Ethical egoism is based on the ideal of rational self-love while utilitarianism is based on the ideal of rational benevolence. The most famous exponents of ethical egoism in modern philosophy are Thomas Hobbes and Spinoza while Jeremy Bentham and John Stuart Mill head the list of distinguished defenders of utilitarianism.

Hence if legal practitioners were to pursue their professional duty against a teleological theory, they would have to worry about the consequences of their conduct both on themselves and other people. In this regard, they would not only be concerned with upholding fidelity to legality, but also ask themselves what consequences come with yielding to the authority of legal norms without reservation. Against this background, a legal practitioner’s course of action would certainly be analysed against the Aristotelian teleological principle which holds thus:

    Every action aims at some good, hence the choice and pursuit of a legal practitioner is to discover the chief or final good.

In this respect, if, for instance, a lawyer successfully defends a client who, in reality, committed the crime in question, the lawyer achieves the good for both himself and the client since he gets his client out of jail and gets to earn his fee from it. Additionally, he gets the accolades of a “good lawyer.”

However, as much as this may seem to be the case, an evaluation of the professional codes of legal practice indicates that the “good” that may flow out of litigation is merely 

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Egoism and utilitarianism in the teleological theory of ethics hold respectively that the fundamental duty in human conduct is to promote as best as one can one’s own happiness and to promote as best as one can the happiness of humanity. (P.W. Goetz, 1987, Encyclopaedia Britannica: New York, Encyclopaedia Britannica Inc. p.870)

By ‘good’ Aristotle means the “good for men”—For the purpose of this study, ‘good’ in the Aristotelian sense would include the welfare of the legal practitioner as an individual and other parties involved in the case.
incidental. Such “good”, if any, is hardly what is aimed at by a litigation process. Instead, litigation is about upholding the law and its processes above every other consideration, prompting Ambrose Bierce to sarcastically define “litigation” as: “a machine which you go into as a pig and come out of as a sausage.”

Nonetheless, if the teleological principle were to apply in legal practice, then to be something that a lawyer “must do” is to be something that furthers the “chief good.” Contradistinted with the deontological principle, to be something that a lawyer ought to do, deontologically speaking, is to respect legitimately enacted decrees above everything else. Hence, while in deontologism the validity of a lawyer’s conduct is based on the unconditional respect for the legal norm, the validity of a lawyer’s conduct in teleologism would be judged by the “good results” achieved for both the lawyer and other people involved in a legal process.

But in view of the position advanced by the deontological theory of ethics on the one hand and that advanced by the teleological theory on the other, it would be foolhardy for philosophers to assume that there being an obligation to adhere to a legislated norm, or an action being something an agent has to do, is the same thing as the action furthering the agent’s good and the good of others. However, the possibility that a lawyer’s good might conflict deeply with the good of others or with rules, general compliance with which is mutually advantageous, evidently looms large.

In view of such possibility of conflict of interest, the question then is— should a lawyer comply with mutually advantageous demands (professional codes of conduct) even when it is contrary to his own good or the good of others to do so? This question raises legitimate issues about propriety of lawyers’ professional conduct.

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8 [http://www.brainyquote.com/quotes/authors/a/ambrose_bierce.html](http://www.brainyquote.com/quotes/authors/a/ambrose_bierce.html)
Analysing the propriety of an action calls for the use of adjectives like 'right', 'good' and 'moral good'. Hence an evaluation of the propriety of lawyers' professional conduct inevitably involves an examination of what 'right', 'good' and 'moral good' are in themselves. Thus what is “right”, what is “good” and what is “moral good” is the issue to be settled next.

3: 1.4 ANALYSIS OF 'RIGHT', 'GOOD' AND 'MORALLY GOOD' IN RELATION TO LEGAL PRACTICE

“If there were no bad people, there would be no good lawyers”⁹ — Charles Dickens

The following analysis examines the meaning, relationship and implication of three terms namely, 'right', 'good', and 'morally good'. The meaning of these terms is vital in any ethical evaluation of the professional actions of legal practitioners. The analysis also evaluates what it takes for anything or anybody to be moral. The guiding questions, in this regard, are as follows:

1. If a lawyer upholds fidelity to legality and successfully defends a client whom he knows committed the crime for which the defence is sought, does such a lawyer act right?
2. If yes in (1) above, is such act good; and
3. If yes in (2) above, is it morally good?

Answers to these questions provide grounds upon which we can respond to the main question namely— what ought a lawyer who is bound by the rule of “privileged

⁹ http://www.brainyquote.com/quotes/authors/c/charles_dickens.html
communication” do when a client confesses to him to have committed the crime for which a defence is sought?

3: 1.5 THE MEANING OF ‘RIGHT’

a. METHODOLOGICAL PREMISES IN DEFINING ‘RIGHT’

A good starting point in establishing the meaning of ethical terms such as 'right' and 'good' is not the lexicographical approach but the analytical approach. This is because a considerable ambiguity attaches to any attempt to discuss the meaning of such terms as 'right' or 'good.' Prof George Edward Moore (1873–1958) was, together with Bertrand Russell, Ludwig Wittgenstein and (before them) Gottlob Frege, one of the founders of the analytic tradition in philosophy, whose notable contribution to ethics was the establishment of an analytical formula for defining value terms such as ‘good.’

According to Moore, there are three main objects that such an attempt at definition may have. He states:

When we say as Webster dictionary says that, the definition of the term ‘horse’ is; “a hoofed quadruped of the genus Equus”, we may in fact mean three different things namely:

a. We may mean merely— when I say 'horse' you are to understand that I am talking about a hoofed quadruped of the genus Equus. (This might be called the arbitrary verbal definition.)

b. We may mean, as Webster ought to mean— when most English people say 'horse', they mean a hoofed quadruped of the genus Equus. (This may be called the verbal definition proper).

c. But we may, when we define ‘horse,’ mean something much more important. We may mean that a certain object which all of us know is composed in a
certain manner— a heart, a liver etc, all of them arranged in definite relations to one another.\(^{10}\)

Hence, says Moore, we have to ask ourselves whether, in discussing the meaning of 'right', we are attempting anyone of this kind of definition or something different. Pursuant to this subject, Dr David Ross suggests a theoretical framework for establishing the ethical meaning of 'right' which involves keeping in touch with the general usage of the word. Ross holds:

> While other things may be called 'right' (as in the phases, 'right road' or 'the right solution'); the word is specifically applied to acts\(^ {11}\).

Going by Ross’ position that the term 'right' is applied to acts, it is appropriate then that the professional choices and pursuits of lawyers be judged as right or wrong acts. In this regard, if a lawyer chooses to defend a client whom he/she knows actually committed the crime for which the defence is sought, such a choice is an act that is a subject of judgement as “right” or “wrong.”

But while a lawyer’s professional choice and pursuit is appropriately an act that can be judged as such, Ross points out that the general usage of the term 'right' is not entirely consistent. This is because most words in any language have a danger of ambiguity, and there is a special danger of ambiguity in the case of the term 'right' because the term does not signify any object that we can point out to one another and apprehend by use of any of the five human senses. The danger of ambiguity extends even to normative terms that signify definite objects that can be pointed out to one another and apprehended by the human senses. For example, even if two people find that what one calls “red” is just the thing that the other calls “red”, it is by no means certain that they

\(^{10}\)G.E. Moore, \textit{Op.cit.} p.60  
\(^{11}\)D. Ross, \textit{Op.cit.} p.2
mean the same quality. There is only a general presumption that since the physiological structure of their eyes (if neither is colour-blind) is pretty much the same, the same object acting on the eyes of the two men produces pretty much the same kind of sensation called ‘red’. In the case of the term ‘right’, there is nothing parallel to the highly similar organisation of different peoples’ eyes to create a presumption that when they call the same act “right,” they mean to refer to the same quality of it.\textsuperscript{12}

It is, therefore, evident that there is considerable difference of view as to the application of the term ‘right’. This difference of view is illustrated in the following analogy:

Suppose a man pays a particular debt simply for fear of the legal penalties for not doing so, some people would say he had done what is right while others would deny this, arguing that no moral value attaches to such an act; and since ‘right’ is meant to imply moral value, the act cannot be right. They might generalise and say that no act is moral unless it is done from a sense of duty; or they might say that no act is right unless done from some good motive such as either sense of duty or benevolence.\textsuperscript{13}

If legal practice is analysed against the foregoing, the argument would go as follows:

Suppose a lawyer upholds fidelity to legality for fear of the legal penalties to be visited upon him for not doing so, some people would say he had done what is right. Others would deny this, arguing that no moral value attaches to such an act, and since ‘right’ is meant to imply moral value, the act cannot be right.

\textsuperscript{12}Ibid, p.2: This example captures the problem of relativism that underlies the usage of words in any language; one which in our case must be cleared in order to achieve an objective evaluation of lawyers’ professional conduct. The aim is to remove any subjective judgement where ‘right’ or ‘wrong’ merely means self-approval or self-distaste respectively.

\textsuperscript{13}Ibid, p.2
It is evident from the foregoing that a lawyer's choices and pursuits can be judged as “right” from one perspective and not “right” from another. This difference of view is attributed to two causes articulated by the following argument:

Both parties may be using 'right' in the same sense, i.e. the sense of 'morally obligatory' and differing as to the further character an act must have in order to have this quality. Or the first party may be using 'right' in the sense of 'morally obligatory' and the second in the sense of 'morally good'.

Whereas it is not clear which sense is intended in the application of 'right' when the difference of view in the usage of the term arises, it is probable that some people fail to notice the distinction between 'right' and 'morally good'; and that others, while distinguishing the meaning of these terms, think that only what is morally good is right. But it is clear that 'right' does not mean the same thing as 'morally good'. This is qualified by the following computation.

If 'right' and 'morally good' meant the same thing, then we should be able to substitute, for instance, 'he is a right man' for 'he is a morally good man'; nor is our inability to substitute merely a matter of English idiom, for if we turn to the sort of moral judgement in which we do use the word 'right', such as, 'this is the right act', it is clear that by this we mean, 'this act is the act that ought to be done' or 'this act is morally obligatory.' And to substitute either of these phrases for 'morally good' in 'he is a morally good man' would obviously be not merely unidiomatic, but absurd. It should, therefore, be obvious that 'right' and 'morally good' mean different things.

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14Ibid, p.2

15Ibid, p.3
It is, however, noted that 'morally good' has a wider application than 'right' in the sense that, it can be applied to agents as well as to acts, yet when applied to acts they mean the same thing. Nonetheless, whereas it appears that by 'this act is the right act' we mean 'this act is the act that ought to be done', 'right act' cannot strictly mean the same as 'act that ought to be done'; and also the same as 'morally good act'. This is because there is a minor difference between the meaning of 'right' and the meaning of 'something that ought to be done', or 'that is my duty' or 'that is incumbent upon me'.

The difference is clear since it sometimes occurs that there is a set of two or more acts, one or the other of which ought to be done by me rather than any act not belonging to this set. In such a case, any act of this other set is right, but none is my duty, for my duty is to do 'one or other' of them. Thus 'right' has a somewhat wider application than something 'that ought to be done' or any of its equivalents. But when applied to acts, 'right' properly means that which 'ought to be done', or 'morally obligatory'. Hence, when we say that "this is the right act", it is clear that by this we mean "this act is the act that ought to be done". It is, however, pointed out that 'right act' as denoting 'this act is the act that ought to be done' does not mean 'this act is the morally good act'. This is because it can be demonstrated that nothing that ought to be done is ever morally good—therefore, 'morally good' does not mean the same as 'that which ought to be done'.

b. 'RIGHT' AS THAT WHICH OUGHT TO BE DONE

In view of the foregoing, if 'right' means 'that which ought to be done', such that the phrase 'this is the right act' means 'this act is the act that ought to be done', or simply, 'this act is incumbent upon me', then the act of a lawyer choosing to uphold fidelity to legality would be judged as a right act because the professional duty of a lawyer, in
view of the deontological theory of ethics, is not only that which 'ought to be done', but that which 'must be done' in order to have a legal profession to speak of. Therefore, since 'right' means 'that which ought to be done', then a lawyer who does what ought to be done to defend a client diligently within the letter of the law acts right. Against this background of usage of the term 'right', it is evident that the professional choices and pursuits of lawyers are right acts because they constitute acts that ought to be done.

Since lawyers become members of the legal profession by virtue of taking an oath to uphold the law, it seems clear that when a lawyer says that it is right to uphold fidelity to legality, he is not in the least thinking of the total consequences of such an act, about which he knows and cares little or nothing. Hence when a plain man fulfils a promise because he thinks he ought to do so, just the way a lawyer upholds fidelity to legality because he took an oath to do so, it seems clear that he does so with no thought of its total consequences, still less with any opinion that these are likely to be the best possible. Both plain man and lawyer think, in fact, much more of the past than of the future. What makes them think it is right to act in a certain way is the fact that they promised to do so and usually nothing else. That their acts will produce the best possible consequences is not their reason for calling them right.

c. 'RIGHT' AS PRODUCTIVE OF GOOD

There is another application of 'right' as 'productive of good' which is different from 'right' as 'that which ought to be done'. This usage has Dr Hastings Rashdall (1858-1924) and Professor George Edward Moore as its greatest exponents. In this view of 'right', it is held that acts are “right” or “wrong” according to whether they produce well-being in which pleasure and virtuous disposition are constituents. This usage is consistent with G. E. Moore's third sense of definition in which it is held
that 'right' can be defined by reducing it to elements simpler than itself. Egoism and utilitarianism are attempts towards such reduction in which 'right' is defined as “productive of the greatest possible pleasure to the agent or productive of the greatest possible pleasure to mankind”.

The foregoing is also captured by Jeremy Bentham who holds:

The greatest happiness of all whose interest is in question as being the right and proper end of human conduct\(^{16}\).

Against this background, the professional choices and pursuits of a lawyer would, therefore, be judged as 'right act' if they promote or achieve the greatest advantages for all those whose interest is in question. This view of 'right' evidently conveys a teleological spirit. But the most deliberate claim that 'right' is definable as 'productive of so and so' is made by G.E. Moore who holds:

'Right' is analysable into 'productive of the greatest possible good.' Hence to assert that a certain line of conduct is right or obligatory is obviously to assert that more good or less evil will exist in the world if it be adopted, than if anything else be done instead.\(^{17}\)

Hence, to ask “what kind of conduct is right”, in view of the foregoing, is to ask “what kind of effects such action and conduct will produce”. Against this background, 'right' means 'cause of a good result'; and thus often identical with 'useful'. With regard to professional choices and pursuits of a legal professional, 'right act' would have to be an act productive of the greatest good producible under the circumstances.

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\(^{16}\)Douglas G. Long (1977), Bentham on Liberty; Jeremy Bentham's Utilitarianism: Toronto, University of Toronto Press. p.7

It must, however, be emphasised that once it is shown that nothing that ought to be done is ever morally good, it will be clear, \textit{a fortiori}, that 'morally good' does mean the same as 'that ought to be done'. It follows that the only acts that are morally good are those that proceed from a good motive. In this regard, if action from a good motive is never morally obligatory, then 'morally good' is never 'right,'—hence 'right' does not mean the same as 'morally good'. Granted, it may then be pointed out that 'right' signifies 'morally obligatory' and would, in this regard, be idiomatically unsound for those who may be tempted to speak of 'right action'; for this would simply mean 'morally morally obligatory'.

With respect to legal practice, what a legal practitioner does as a matter of professional duty is right because it is that which ought to be done. It may be right in the second sense of the term 'right' if it is productive of some good. However, as argued in Chapter Two and elsewhere in this chapter, what lawyers do as a matter of professional duty has nothing to do with their desire, for the legal positivist theory has already demonstrated that they (legal practitioners) do what they do because it is obligatory and any good that may result from their professional undertaking is merely incidental; and for which they are not deserving of praise.

3: 1.6 MEANING AND IMPLICATION OF ‘GOOD’ IN LEGAL PRACTICE

a. METHODOLOGICAL PREMISES IN DEFINING 'GOOD'

The meaning of 'good' and the nature of goodness should begin by recognising that there is a diversity of senses in which the word is used. The first distinction to be drawn is between:

a. The adjunctive or attributive use of the word as when we speak of 'a good runner' or 'a good poem': and
b. The predicative use of it as when it is said that 'knowledge is good' or that 'pleasure is good'.

Within the attributive use of 'good', two distinctions are made namely; its application to persons and its application to inanimate objects. When applied to persons, the root idea expressed by 'good' is clearly that of success or efficiency. In this regard, we ascribe to someone a certain endeavour and describe the person as a 'good so-and-so' if we think of him/her to be comparatively successful in this endeavour.

Against this background, we speak of a 'good lawyer', 'a good singer', or 'a good doctor'. The idea central to such application of 'good' to persons is that the person in question ministers to our well-being to the satisfaction of our desires. However, our well-being is not the only endeavour that can be imputed to persons characterised as 'good' since we can, in this very sense, call a man 'a good liar' not because he contributes to the satisfaction of any of our desires, but because we regard him successful in what he sets out to do.

When applied to things (objects) there are several elements included in what we mean by 'good'. It may mean:

(i) Ministering to some particular human interest as for instance; a good knife is essentially one that can be successfully used for cutting and good medicine as one that soothes our physical pain.

(ii) The notion that the object in question is one in which its maker has successfully achieved his purpose, for example 'a good portrait of Plato.'

If we turn to the predicative use of 'good' we gather that the term is absolute—meaning that there is no aspect of implication as when it is said that 'courage is good' or 'pleasure
is good’. The idea central to the predicative usage of the term is that ‘good’ is not relative in either of the phrases ‘courage is good’ and ‘pleasure is good’.

Hence, because ‘pleasure’ and ‘courage’ are indivisible attributes, we do not mean when we apply the term ‘good’ to both of them that courage or pleasure is a successful or useful instance of a species, nor do we mean that it is merely comparatively good, rising above the average of its kind. In both respects ‘good’, in this usage, is an absolute term. In the predicative sense therefore, we have three notions of ‘good’ all which are mutually inclusive. They are:

i. The intrinsically good

ii. The ultimately good; and

iii. The contributively good.

In view of the distinction between the attributive and predicative sense of the term ‘good’ on the one hand, and the nature of the legal profession on the other, it is evident that when ordinary people attempt to judge the professional conduct of a lawyer against the term ‘good’, they clearly have the attributive sense of the term in mind. The attributive sense of ‘good’ suffices, in this regard, to mean productive or achievement of certain results. We therefore take ‘good’ to be a consequential attribute in the sense that, that which is good is good by virtue of something else in its nature or by being of a certain kind. A good lawyer would, therefore, be the one who is successful in what he sets out to do, and a legally good act would be described so depending on the net aggregate of advantages it produces over disadvantages.

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19Ibid, p.67
There is, however, a further sense in which when applied to persons, 'good' stands for moral excellence. This is the case where emphasis is laid on either the adjective or the noun as in the phrase 'a good man'. Both 'a good man' as opposed to a 'strong, clever, handsome man'; and 'a good man' as opposed to 'a good poet, plumber, lawyer'; stand for moral excellence.

When the foregoing argument is analysed against the title of this study namely, 'A Philosophical Analysis of the Positivist Separation Thesis: The Moral Aspect in the Kenyan Judicial System', it is clear that it is in the “moral excellence” sense that we have to apply the term 'good' to lawyers as persons and to their professional choices and acts as objects. The guiding question then is, "are lawyers’ professional choices morally good acts?" This line of inquiry should assist us answer the question posed in the Statement of the Problem namely; is what is legally right necessarily morally good?

3:1.7 MEANING AND IMPLICATION OF ‘MORALY GOOD’ IN LEGAL PRACTICE

Having established that 'good' is a teleological attribute, 'morally good' would then mean good either by being of a certain sort of character, or by being related in one way to a certain sort of character. But while a variety of kinds of things can be said to be morally good, it is clear that a man is morally good by virtue of having a character of a certain kind, and an act is morally good by virtue of proceeding from a character of a certain kind. This account of the meaning of 'morally good' is deduced from the usage of the phrase 'morally good' itself. The following syllogism illustrates this usage:

Suppose it were said that conscientious action, knowledge and pleasure are all good, conscientious action is the only one of the three that is morally good. What we should mean is that while conscientious action is good by virtue of proceeding from a certain sort of character, knowledge and pleasure are good not by virtue of proceeding from a certain
sort of character but by virtue of being, respectively, knowledge and pleasure in themselves.\textsuperscript{20}

The foregoing argument clearly shows that 'morally good' applies to things that are capable of some motive or desire. To this end, only conscientious beings are capable of action from some motive or desire. Hence, 'morally good' properly applies to conscientious action only. If the foregoing account of what is meant by 'morally good' is correct, then the answer to the question, what kinds of things are morally good, is clear.

It is, however, argued that nothing that ought to be done is ever morally good, hence 'morally good' does not mean the same as 'that which ought to be done'.\textsuperscript{21} But in view of the conclusion drawn in Chapter Two— that lawyers' choices and pursuits have a deontological justification because they constitute acts that ought to be done— it follows, in view of the argument under comment, that lawyers' professional conduct cannot be characterised as 'morally good' because it is not performed out of any mental desire but performed out of some sort of compulsion because of the looming penalties imposed on those who do not comply. Arriving at this conclusion, therefore, necessitates an inquiry into what is meant by the term 'moral' in order to establish what conditions should obtain for a person or an act to be designated as morally good.

3: 1.8 METHODOLOGICAL PREMISES IN UNDERSTANDING THE OBJECT OF MORALITY

The meaning of the term ‘morality’ defies a quick fix in terms of a single and straight definition\textsuperscript{22}. Because of this complexity, the issue of morality has attracted the attention

\textsuperscript{20}Ibid, p.68
\textsuperscript{21}Ibid, p.4
\textsuperscript{22}Makokha, \textit{Op.cit.} p.23
of various disciplines in the humanities and social sciences, many of which have yielded definitions that suit certain schools of thought. Prominent among these disciplines are Philosophy and Sociology and whose conception of morality is as follows.

a. THE OBJECT OF MORALITY IN SOCIOLOGY

According to Sociology, the moral fact, taken as a social function or event, does not admit of a morality intimate to conscience—the moral fact is not interior but depends on society as for example education, social pressure, religion or custom of the people. Therefore, personal ideas on morality, even those seeming to be ours, are according to this school of thought, stereotypes, praxis and linguistics acquired from the social environment which, through art, religion and law, weigh on the individual and confer upon him or her morality. Against this background, morality is held to be an invention of the people.

In this respect, morality, like fashion, can vary from time to time, person to person, and community to community. It is worth noting that this genre of morality is subjective in the sense that it constitutes nothing but a sphere of acceptable actions that are socially authorised (conceded, permitted or legitimised) and produced in a subject by a concedent norm. If this view of morality is to prevail, then the acts of Kenyan legal practitioners would be morally good depending on how they are deemed to conform to, or, be at variance with the customs or values of the different communities that obtain in Kenya. We would, therefore, expect lawyers and judges to determine cases on the basis of the morality conferred upon them by their customs or societies they were brought up in. It is also worth noting that morality, from the perspective of Sociology, shares the forgoing attribute with the law. The only difference being that, while the enforcement of
moral norms depends on the assumed good will of the people they apply to, the enforcement of legal norms depends on a machinery of government in the form of legitimate punishment imposed by institutions like courts and prison services. Because of this, Sociologists have often described law as a higher morality.

But similarities between law and morality from a sociological perspective notwithstanding, a legal regime where social morality is to be considered when deciding judicial matters is potentially chaotic. It is a fact that Kenyan judges and lawyers come from diverse communities with diverse customs. Therefore, if custom or societal values are the ones that confer morality upon people the way Sociology holds, it would be practically impossible for this kind of morality to play a role in determining legal disputes within the Kenyan judicial context, or any other modern judicial system for that matter.

b. THE OBJECT OF MORALITY IN PHILOSOPHY

As a counterpoint to the sociological school, philosophy holds that the solutions to the many moral problems raised by human experience cannot be satisfactory if we heed the word of sociologism. It suggests that it is necessary to apply a method not only experiential, but also fundamental. The experiential but partial method (such as those of psychoanalysis and neopositivism) does not correspond to all the exigencies of moral life, nor can one consider sociologism satisfactory which, studying moral facts superficially, neglects the profoundness and complexity of these same acts. Hence, philosophy determines to search for the ultimate causes of the moral fact according to four lines of enquiry stated as follows:

a. The space of human activities (or material cause); hence the problem of the voluntariness of human acts.
b. The formal constitutive of the moral act (or the formal cause); hence the moralness or ethicity of the moral act.

c. The efficient principles of the moral act (or efficient cause); hence the problem of moral conscience, of virtues, and of the moral norm.

d. The goal of moral activity (or final cause); hence the problem of the ends of morality.

Since this is a study in philosophy, the philosophical concept of morality would have to hold sway. In this regard, morality, according to Philosophy, is a matter of people engaging their conscientious faculties, through which they decide that this or that is right or wrong. This concept of morality, *a fortiori*, justifies the application of the phrase 'morally good' exclusively to conscientious beings and acts. It is evident, then, that the moral fact, from a philosophical standpoint, has to do with conscience. It may then be pointed out that the prefix 'morally' coming before any adjective or noun presupposes conscientious action or being respectively.

But one may be tempted to speak of 'morally right action' — to which it must be clarified that we technically apply 'act' to the thing done and 'action' to the doing of it. We should hence talk of 'right act' but not of 'right action', and of 'morally good action' but not of 'morally good act'. Granted, it may be added that the doing of a right act may be a morally bad action, and the doing of a wrong act may be a morally good action. This is because 'right' and 'wrong' refer entirely to the thing done, while 'morally good' and 'morally bad' refer entirely to the motive from which it is done. It would then be idiomatically unsound to speak of 'morally right' since it would simply mean 'morally morally obligatory' — this would be a veiled attempt to avail alternative choices to an act that is obligatory.
3: 1.9 DEFINITION OF ‘CONSCIENCE’

Since morality in philosophy has to do with engaging conscientious faculties, it is important to establish what the term ‘conscience’ refers to. Hence, to understand the object of conscience, it is important to, first, acknowledge that if man were not free, that is, if he could not follow his conscience freely, then the very term ‘moral obligation’ or 'right act' would be nonsensical. In fact, man is free in the sense that he is not bound to follow his instinctive inclinations with necessity. Man's will is, in principle, independent of the allurement of the phenomenal world— it is not subject to mechanical determination.23

In this regard, 'conscience' is defined as:

The sense of right or wrong within the individual (the capacity to decide a matter according to their own; the awareness of moral goodness or blameworthiness of one's own conduct, intentions, or character together with a feeling of guilt or remorse for ill-doing). Or the faculty, power or principles that guides towards the right and away from wrong.24

From an epistemological perspective, ‘conscience’ is a very abstract object—but this does not mean an intellectual remoteness from reality. Rene Descartes, celebrated French epistemologist and mathematician, holds that moral conscience is an interior precept removed from the physical world. Kant and Sartre conceive conscience to be removed from anything real (extended in space) and from the nature itself of man respectively25. We gather, from the foregoing, that conscience is an object of mental states, and since the moral fact is a preserve of conscientious beings, then 'morally good'

23I. Klinger & C. Rimiru (2000), Philosophy, Science & God: Nairobi, Consolata Institute of Philosophy. p.21
25The idea central to this frame of mind from an epistemic perspective is that conscience has to do with non-material properties which Rene Descartes describes as an object of mental states hence incorporeal. (S. Voss, 1993, Essays on the Philosophy and Science of Rene Descartes: Rome, Urban University Press. p.97)
can only apply to human beings and actions that are capable of moral responsibility. The attribution of the moral fact to conscience is traced to Socrates who held that "the unexamined life is not worth living." It is against this background that the moral fact in philosophy derives its definition as follows.

3: 2.1 DEFINITION OF ‘MORAL FACT’

G.H.R. Parkinson, V.J. Seidler and K. Makokha define 'morality' in a way that strikes a special chord with human conscience. Parkinson holds that morality is concerned with people's decisions that such and such is the right course of action, or what ought to be done will lead to something that is good or bad. Seidler contends that morality is very much a matter of individuals deciding what right action to take is. It is conceived of as an individual affair between a person and his conscience. Makokha holds that morality is conceived as a human device that appeals to rational principles by which they can determine what is right and wrong, good or bad, duties and obligations and cultivate desirable traits of character for harmonious relationships.

Other thinkers like Emmanuel Kant acknowledge that morality is essentially the exercise of rational judgement and raises man's life from the 'pragmatic' (superficial—a level of calculating expediency) to the higher plane of categorical imperative. Morality is also described as a property of the free and voluntary action of man and consists in a rapport between the action itself and its motivation. But it is in Aristotle's theory of action that the moral fact is most clear. Central to this theory is the expression

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28 Kant, Op.cit. p.97
29 Composta, Op.cit. p.27
of the teleological principle in which the consequences of an action are central to its propriety.

However, in view of the codes of professional conduct in legal practice, it appears that teleological considerations in legal practice would go against Article Six of the International Code of Ethics promulgated by the International Bar Association. Article Six, *inter alia*, holds:

> Lawyers shall without fear defend the interest of their clients and without regard to any unpleasant consequences to themselves or any person.

In view of what the teleological theory of ethics stands for on the one hand, and what Article Six of the International Code of Ethics demands of legal practitioners on the other, there is clearly a parallelism that renders it impossible for the legal profession to embrace morality, the latter which, from a philosophical perspective, is an attribute of conscientious beings. To address this parallelism would, therefore, require a clearer understanding of morality and the significance of teleologism in it. No theory provides a much appreciative philosophical account of the moral fact better than Aristotle's theory of action. To this end, Aristotle’s theory of action is the issue to be discussed next.

3:2.2 THE MORAL FACT IN ARISTOTLE’S THEORY OF ACTION

John Locke, English philosopher and physician regarded as one of the most influential of Enlightenment thinkers, underscores the importance that Philosophy attaches to Aristotle's theory of action, especially when explaining the moral fact differently from how Sociology does. Locke says:
"God was not so sparing to men as to make them merely two-legged creatures, leaving it to Aristotle to make them rational."\(^{30}\)

Aristotle’s theory of action makes the moral fact clear by acknowledging that human behaviour displays a purposive finality and a conscious process of reflective capacity that enables people to be held responsible for their conduct. Following in the footsteps of the rationalist thesis earlier propounded by Socrates and Plato, Aristotle describes the moral fact as “deliberate choice between virtue and vice guided by a rational principle.” Writing in the *Nichomachean Ethics*, Aristotle advances the thesis that human action must issue from first principles; holding that:

> Knowledge brings profit to those who desire and act in accordance with a rational principle. It is hence not enough to know the end but action towards the end must be directed by a rational principle.\(^{31}\)

From this Aristotelian frame of mind, we gather that any human behaviour capable of moral evaluation must be directed by a rational principle— the underlying principle being that moral actions are voluntary, goal oriented and intentional.

Aristotle further articulates why the moral fact must have to do with voluntary action, arguing that since virtue and vice and the resulting deeds are in many cases commended or blamed— for blame and commendation are given not to things that occur of necessity or by luck or in the course of nature, but to all things we ourselves are cause of— then virtue and vice have to do with those of which a man himself is the cause.


To crystalise this argument, Aristotle says:

Since we agree that all those things that are voluntary and in accordance with an individual’s choice he is a cause of, while those that are involuntary he is not a cause of— and all the things that he does having chosen to do them, he actually does voluntarily— it follows that both virtue and vice must concern the acts that are voluntary.\[^{32}\]

Hence, the moral fact and, *a fortiori* ‘morally good’, applies to agents and actions that are voluntary, free willed, rational and goal oriented. What therefore passes as moral, according to Aristotle’s theory of action, is only that which is guided by intelligence and will— or, simply, that which is guided by understanding and willing or by awareness and consent. Morality proper, therefore, means deliberate choice over right and wrong where choice proceeds from the will following upon the knowledge of the end— with reason and will being the foundation of choice.

In this regard, the idea central to Aristotle’s theory of action is that moral responsibility begins with our awareness that, as human beings, we have alternative possibilities in our behaviour, yet we are not only capable of doing either one but we are also capable of controlling our action.

There are a number of schools of thought that lend support to the view that the moral fact has to do with conscientious beings. The first is Judeo-Christian theology which is well captured in Pico della Mirandola’s *Oration on the Dignity of Man (1484)*, in which the following passage, popularly known as ‘God speaks to Adam’, is cited:

I have given you Adam neither a predetermined place nor a particular aspect nor any special prerogatives in order that you may take and possess these through your own decision and

choice. The limitations on the nature of other creatures are contained within my prescribed laws. You shall determine your own nature without constraints from any barrier by means of the freedom to whose power I have entrusted you. I have placed you at the centre of the world so that from that point you might see better what is in the world. I have made you neither heavenly nor earthly, neither mortal or immortal so that like a free and sovereign artificer you might mould and fashion yourself into that form you yourself shall have chosen.\textsuperscript{33}

A similar view of the moral fact as applying to conscientious beings also looms large in Islamic theology in which it is declared that:

Surely, We have created man in the best make; then if he does evil deeds, We degrade him as the lowest of the low\textsuperscript{34}.

The idea central to the foregoing citations is that man is born with a pure and unsullied nature, with a natural tendency to do good but he has also been given a large measure of freedom of will and action to mould himself as he chooses. Free will, as a necessary condition for the moral fact, is also captured by Article 1 of the Universal Declaration of Human Rights (1948). It is declared:

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.\textsuperscript{35}

In view of the following examples, free rational choice as a necessary condition for the moral fact is not in doubt. Other philosophers, apart from Aristotle, have also shed light on what it takes to be moral. Existentialist philosopher Jean Paul Sartre is one such theorist. He holds the following position:

\begin{footnotes}
\textsuperscript{33}M. Hollis, (1987), \textit{The Cunning of Reason}: New York, Cambridge University Press. pp.3-4
\textsuperscript{35}\textit{Handbook on the Universal Declaration of Human Rights}: New York, United Nations Department of Information. p.2
\end{footnotes}
The foundation of morality is authenticity which negatively establishes itself as the exclusion of every bond of the moral act to norms, values and moral authorities and which establishes itself positively as the impulse of conquest of a greater freedom. 36

Sartre's existentialist morality puts emphasis on absolute freedom. It holds that freedom is the only source of value for which the world exists. Within this vision there is no place for divine command since God would limit the primary object of freedom; and so long as freedom remains human, it is necessary that it not be bound by any norms. For Sartre, anything is permitted so long as it is "I who must decide what to do". In view of what it means to be moral, on the one hand, and what it takes to be good on the other, the answer to the question, "what kind of things are morally good", is clear.

3:2.3 SUMMARY OF ANALYSIS OF VALUE TERMS

This chapter has examined in detail the ethical meaning of 'right', 'good' and 'morally good'. In this regard, the following conclusions are drawn:

1. Since 'right' is either 'that which ought to be done' or 'that which is productive of some good', the professional choices and pursuits of legal practitioners are right acts by virtue of being that which ought to be done.

2. Since “good” is a teleological attribute, a legal practitioner’s choices and pursuits are good acts if they produce a net aggregate of advantages over disadvantages to the people concerned.

4. Since 'morally good' applies to conscientious beings and actions, and given that nothing that ought to be done (or obligatory) is ever morally good, on the authority of Ross’s definition of ‘morally good,’ no act by a lawyer performed in the name of grave professional duty is morally good because such conduct is compelled.

The point in (4) above is well captured by Aristotle's disposition that:

36J.P. Sartre (1948), *Existentialism and Humanism*; translated by Philip Mairet: London, Eyre Methuen Ltd. p.3
To distinguish the voluntary and involuntary is necessary for those who are studying the nature of virtue, and also for legislators with a view to assigning both the honours and punishment.\textsuperscript{37}

From the accumulated discussion of the moral fact based on Aristotle’s theory of action, two pertinent lessons are drawn.

1. Praise and blame are only attributed to voluntary actions while involuntary action can only earn pardon.

2. Those who make laws and those who apply them need to know the importance of voluntary and involuntary in the event of assigning honours and punishment.

In this respect, there is little doubt that both virtue and vice, the two main choice options in moral behaviour, must concern action that is voluntary. Aristotle stresses that everything that is in accordance with desire is voluntary — for everything involuntary seems to be compelled and what is compelled is unpleasant, as is everything which men are forced to do or undergo. He argues further that if a thing is unpleasant, it is compelled and if compelled, unpleasant. But everything contrary to desire is unpleasant (because desire is for the pleasant), so it must be compelled and involuntary. Thus that which is in accordance with desire is voluntary, and that the voluntary and involuntary are opposed to one another.

However, as much as human beings possess a capacity for free rational choice to mould their actions as they desire, they also live in societies that impose duties and obligations on them. It would appear then that membership to a society means a sacrifice of one’s freedom since no collection of persons would constitute a society unless they share an understanding which involves sacrifice of freedom, actual or potential. This means that people sometimes have to act against their conscience resulting in all sorts of moral

dilemmas. Legal practitioners are such people who face all manner of dilemma when pursuit of professional duty, on the one hand, conflicts with their moral conscience, on the other. In this regard, we must surely agree that its merits notwithstanding, membership to the legal profession means a considerable limitation of one’s free will.

Indeed, professional codes of conduct are meant to ensure some kind of corporate discipline such that consumers of legal services are guaranteed that all bona fide members of the legal profession render service in a systematic and predictable manner consistent with the fact the law is a science. For this reason, membership to the legal profession means a considerable limitation of one’s free will as a necessary evil. This largely explains why Mr X’s lawyer in our hypothetical example in Chapter One would, at all times, go against his conscience to defend a client whom he knows had the evil intention to commit the offence for which the lawyer is defending him.
CHAPTER FOUR

JUSTICE, LAW AND MORALITY WITH REGARD TO LEGAL PRACTICE

4:1.1 OVERVIEW

“A lawyer’s relationship to justice and wisdom is on a par with a piano tuner’s relationship to a concert. He neither composes the music, nor interprets it—he merely keeps the machinery running,”1 — Lucille Kellen

Every legal system claims to have "justice for all" as the philosophy of its existence. We, for example, tend to accept that justice is served after a person charged with an offence goes through the due process of law and is either acquitted or convicted. For example, after American pop singer Michael Jackson was acquitted on charges of child molestation in June 2005, his defence lawyer Thomas Mosereau spoke to the media where he declared; “Justice has been done. The defence had a good feeling about our client’s innocence and went to prove that.”2 On the other hand, the lead prosecutor in the same case, Thomas Sneddon, also spoke to the media where he conceded defeat saying:

“Without a doubt, once you read the entire trial transcripts from Michael Jackson Child Molestation trial, you will realise why Michael Jackson, even though found not guilty in the trial, is viewed as a pedophile in the court of public opinion. In the transcripts is, amongst other things, unchallenged testimony that Michael Jackson shared a bed with a pre-teen Brett Barnes for more than 460 nights over a two-year period; Michael Jackson begged June Chandler for over 30 minutes to sleep with her son; Michael Jackson had huge quantities of porn strewn throughout Neverland Ranch ready for boys to "discover"; Michael Jackson called up compliant mothers asking them to deliver young boys to his bedroom, often in the middle of the night; plus many more examples of his pedophilic behaviour. But since the judicial

1 http://www.plentyquotes.com/topics-q/Lawyers/quote-55.html#ixzz2xY9C3CJN

system of the United States is designed to do justice through due process of law, the prosecution has to live with Mr Jackson’s acquittal if that is what justice means in the United States. But I am still convinced that Michael Jackson is a child molester.”

The Kenyan judicial system, like others of its kind, is the adversarial type because it takes on the character of a battle of wits or contest. Under this system, if in a criminal case the defendant denies committing the acts charged against him, the courts must choose between his version of the facts and the prosecution’s. And if he asserts that his conduct did not constitute a crime, the court must decide whether his view of the law or the prosecution's is correct. After both sides (litigants) to a dispute have presented their facts and arguments before a judge, the judge decides on the case by applying certain legal principles impartially, objectively or with detachment depending on how the facts and arguments from the litigants have complied with the rules of procedure. Under such procedure, courts operate by known rules with reasonably predictable results.

In this type of judicial system, the accuser bears the burden of proving the guilt of the accused, failure of which one loses the case. Therefore, in the case of the late Michael Jackson, it means that the court decided that the defence’s version of facts and the law was the correct one. But the question would then be; are the facts of each case and the applicable law alone sufficient in determining what is just in a legal dispute? In view of the doctrine that underlies legal practice in which advocates and judges are enjoined to uphold fidelity to legality beyond every other consideration, does the judicial process under the adversarial system ensure justice?

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3 http://www.mjfacts.info/2005_trial_transcripts.php#ixzz2xxHrCrl
4 The adversary type is the Common Law system of judicial procedure for conducting trials under strict rules of evidence and procedure with the right of cross-examination and argument where one party (accuser) putting his/her case and the other party (respondent) striving to disprove those facts or establish an affirmative defence.
This chapter examines the concept of justice and its implication in the legal and ethical domains. Because justice is essentially a moral issue, the chapter demonstrates that what is perceived to be just in legal practice is not the same as what is perceived to be just from a moral perspective. This difference is the one that causes many a common-man to feel alienated from the justice that is claimed to flow from the judicial process, hence prompting the likes of Mr Bumble in Charles Dickens’ *Oliver Twist*, to quip — the law is an ass.

4: 1.2 THEORIES THAT DEFINE JUSTICE

The slogan; ‘Justice be our shield and defender’ inscribed on the wall at the entrance of the High Court building in Nairobi is a constant reminder of the vocational duty of the Kenyan courts. But what is justice? The concept of justice is traced among the ancient Greeks who conceived it as a cosmic order, by which they meant change within stability. In the history of philosophy, the Pythagoreans represented justice as a quadrant whose sides express arithmetic reciprocity. Greek philosopher, Pythagoras, is the progenitor of the quadrant approach to justice and understood it to mean a square number or a number multiplied into itself.⁵

According to Pythagoras, a square number constitutes a perfect harmony since it is composed of equal parts and the number of its parts is equal to the numerical value of each part. Where justice is conceived as a square number, the underlying assumption is that any civil state will be composed of equal parts in terms of its citizenry. J.M. Nyasani expounds this thesis saying:

> A state from the quadrant approach will be just if it is characterised by the equality of its parts provided the equality of its parts is maintained and preserved. Justice in

In this mathematical view of justice, the underlying metaphysical concept is that society has a holistic construction where the whole is understood to be greater than any of its parts and the parts are understood in terms of their contribution to the attainment of the whole. The part and the whole are therefore mutually inclusive. Justice in the Pythagorean sense, thus, constitutes an interplay of individual parts in order to construct and ensure the harmony of the whole. The parts exist in a relationship where they all work for the fulfillment of the whole. Each part hence deserves the opportunity to contribute, to the best of its capacity, in attaining and sustaining the whole.

Accordingly, every part (individual persons) in society is entitled to an opportunity to participate in the attainment of the whole. In this set up, justice would comprise in the fairness of opportunities to fulfill oneself to the fullest capacity and attainment of the whole. The Pythagorean conception of justice defines justice as fairness of opportunities. In the quadrant theory justice is described as 'entitlements' or 'deserved dues'. However, while in reality everybody is in favour of justice in one way or another, not all have the same interpretation of it. Justice appears both in law and morality and in each of these spheres it has conservative and reformative aspects respectively. These aspects can be illustrated as follows:

Left-wingers give priority to social justice with an intention to reform society in the direction of greater equality and removal of poverty. On the other hand, a right-winger’s concept of justice sets more store by virtues of the law and order, of stability, of reward for enterprise and merit.⁷

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Having affirmed that the legal profession is anchored on the deontological principle of the theory of duty, it appears from the foregoing citation that legal justice is of the right-wing school of thought, hence conservative. And having affirmed that morality strikes a special chord with the teleological theory of ethics, it appears that moral justice is of the left-wing conception, hence reformative.

4:1.3 APPLICATION OF THE TERM ‘JUSTICE’

The kind of things that can be described as 'just' or 'unjust' fall into three basic categories namely: agents, actions, and states of affairs which are created by the actions of agents. Details of this categorisation are as follows:

1. The traditional usage in which the quality of justice is commonly ascribed to individuals as such, a 'just God', 'a just monarch' or a 'just man'. It is hence common to speak of persons with a greater or lesser sense of justice. We also use the term to refer to governments which can have a general reputation for justice or tyranny.

2. We also ascribe justice to particular actions and decisions rather than to people. Hence we can speak of a just action or decision as one which is sensitive to the rights of all those affected by it. An unjust action or decision is one which violates these rights.

3. Justice is also ascribed to institutions which are held to exhibit the qualities of justice or injustice in varying degrees. Here we can speak of certain human societies, a rule of law and a legal system. A society can be just or unjust in many ways. It can be organised in such a way that its benefits or burdens are distributed fairly or unfairly, and an unjust society can be understood as one in which the discrimination against or persecution of minorities is commonplace. A legal system which is assumed to be the embodiment of the pursuit and protection of justice can be 'just' or 'unjust' to a greater or lesser degree. Legal systems which fall into disrepute are those which for instance suspend habeas corpus or prevent the rules of evidence. Legal systems can also be defective in other substantive ways by failing to provide just and accessible remedies for civil

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wrongs or by failing to develop an effective system of criminal justice. More specifically, an unjust law is one which is perceived to perpetrate a formal or substantive injustice. In view of the subject matter of this study, the term 'justice' would appropriately apply to the actions of advocates and judges.

In view of the foregoing categories, the question is— is it just for an advocate to defend a client who confesses to have committed the crime for which representation is sought? Is it just for a judge to acquit a suspect who, from off-record information, is known to the judge to have actually committed the crime in question though the prosecution is unable to prove the guilt of the accused person? These questions can be answered only after examining the different categories of justice.

4: 1.4 CATEGORIES OF JUSTICE
Apart from 'justice' being conservative and reformative, it is further categorised as corrective (conservative) and distributive (reformative) depending on its function. Corrective justice covers the whole sphere of civil and criminal law since its purpose is to restore a violated and interrupted equality. Accordingly, if one party in an association takes advantage of another in a way substantive in law, justice will require that the aggressor's gain is taken away and restored to the sufferer. The underlying thinking in this kind of civil justice is that everyone is entitled to their rightful dues, such that where one, for instance, removed the beacons of his neighbour's estate shall lose the improperly gained estate to its original owner in order to restore the balance.

Corrective justice is also inclusive of criminal justice by and through which the state has statutory powers to force aggressors to recognise the whole scheme of rights and duties which they have disturbed. The state achieves this by meting out proportionate punishment to aggressors as a measure of criminal liability not so much because of the

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amount of injury done to the aggrieved, but by the amount of disturbance of the principle upon which it is based. To attain corrective justice the state, through a system of courts and tribunals plus other relevant law enforcement agencies, becomes an indispensable organ.

Distributive justice on the other hand holds the view that the state, as an association of people, shall distribute offices or honours or privileges to its members on account of the contributions they make to it. The underlying principle in distributive justice is that in a community or association of persons, an individual is regarded as a contributor to the association who brings to the common pool some or other objects which are deemed necessary to the fulfillment of the association’s goals. Taken in this context, distributive justice aims to pursue a moral life based on the consequences of peoples' actions. Thus every just man must be regarded as contributing his own virtue to the common stock.

The two categories of justice are summarised as follows:

The quality of an association of equals which, on the one hand awards to its members according to the amount of their contribution, the offices and other rewards it has to bestow; and, on the other hand, prevents encroachment by one member upon the sphere of another. In a word, it both guarantees the province of each individual against every other and secures to each individual his proper position as a part of the whole.

It is, therefore, evident from the foregoing categorisation that judicial processes usually aim at corrective justice. This view of justice is engrained in the idea that when lawbreakers are dealt with under criminal law, the intention is to preserve society and the way it is run by and through legitimate rules.

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10Ibid. p.9
4: 1.5 THE DEONTOLOGICAL DIMENSION IN CORRECTIVE JUSTICE

The preservation of orderly society, which is the objective of corrective justice, proceeds from the understanding that civil society has structures that depend on the adherence to certain laid down rules. People who break the rules are made liable to punishment in order to repair the damage they cause. When disputes between individuals or groups are considered and settled under civil law, the intention is to protect an existing system of rights and order. This notion has found justification in various legal systems, especially the Common Law system. The principle of *stare decisis et non quieta movera* (stand by past decisions and do not disturb things at rest) is an expression that underscores the need to preserve a certain orderly society.

Against this principle, if one man encroaches on the rights of another, he is liable to be required to restore the balance by making good the damage or paying compensation or, at least, make an undertaking to respect the rights of the injured party in future. The procedures of legal justice in both cases are conservative because they aim at protecting and restoring an established order. Such established order is a result of legislation and the protection and restoration of this order, in case of violation, is backed by legal authority. Therefore, in this vision of corrective justice, judges are appointed to administer justice according to the procedures prescribed by established law. The decision of a judge, in this regard, is said to promote justice because it restores an established order of things whenever such order is violated. An advocate’s professional conduct will also be just if it attains the restoration of an established order. Because legal justice is conservative, advocates and judges too tend to uphold a conservative perspective of justice. And since advocates and judges are enjoined to uphold fidelity to legality beyond every other consideration, they blind themselves to any other concept of justice notably the moral (reformative) justice. For this reason, it is correct to conclude that judicial procedure aims at ensuring corrective justice only.
Corrective (conservative) justice tends to preserve an existing order of things based on the assumption that everyone benefits from a stable society despite the obvious defects of any actual social order. The justice that flows out of a judicial system is therefore deontological because it strives to protect and restore a privileged set of values, whose only justification is that they have been legislated by a superior authority. Corrective justice is also known by Aristotle’s description as ‘harsh’ justice. It manifests itself in the Kenyan judicial system in many ways such as it was in *Kimei & Another v. Republic*. In this case, the court was called upon to decide whether or not the death sentence must follow where there is a conviction for robbery with violence under section 296(2) of the Penal Code. The following ruling by Justices William Tunoi, A.B. Shah and Evan Gicheru in view of the case under comment illustrates the severity of the conservative notion of justice which judicial processes in Kenya usually aim at.

We are in no doubt that the appellants were guilty of the offence of robbery with violence under Section 296(2) of the Penal Code. The penalty flowing from such conviction is a mandatory death sentence. The sentence of ten years imprisonment with ten strokes of the corporal punishment issued by the trial court were certainly illegal. The illegal sentence cannot be allowed to stand; the same is set aside and in substitution thereof the appellants sentenced to suffer death in the manner authorised by law.\(^{12}\)

The foregoing is a clear manifestation of the conservative nature of judicial justice—it admits of no exceptions. The decision of the judges indicates that they sought to preserve a set of norms set out in the Penal Code and substituted a lighter sentence with a severe one.

\(^{12}\) *Kimei & Another v. Republic*; Criminal Appeal case No.7 of 1995 at Nairobi.
4:1.6 THE TELEOLOGICAL DIMENSION IN DISTRIBUTIVE JUSTICE

Whereas corrective justice is deontological, distributive justice is teleological. The latter concept of justice is teleological because it does not buy into the deontological assumption that everyone benefits from a stable society. In this regard, distributive justice (variably known as progressive or reformative justice) seeks to remedy the obvious defects in society by redistributing rights in order to create a fair society.

As a counterpoint to corrective justice, distributive justice attempts to create a fair society through a rational assessment of peoples’ needs and abilities in society. It then proposes a scheme of distributing them equally and equitably. In this way, distributive justice acquires a moral outlook. And because of this moral outlook, distributive justice is also referred to as moral justice. In this regard, corrective and distributive justice can be contradistinguished as follows; a legal rule, for example, prohibits queue-jumping as a way of protecting and promoting an established order of doing things. But despite the unfairness of queue-jumping, we do not insist on “first-come first-served” in all circumstances. If, for instance, passengers on a ship in distress have to take the lifeboats, it is proper for women and children to take them first. Similarly, if several candidates apply for an appointment, there is no unfairness in preferring the best qualified to the earliest arrival. Distributive (reformative, progressive or moral justice) is therefore characterised by a process of weighing the exigencies of circumstances as opposed to corrective (conservative) justice whose only justification is to protect and restore an established order of things.

4: 1.7 JUSTICE AS FAIRNESS

There are two different concepts of “fair” and which, apparently, are incompatible with each other. First there is the idea of justice as depending on merit, and it can be seen in criminal justice (playing a conservative role) as well as in ideas of fairness in social
ethics. Criminal justice is about punishing people who are guilty of breaking the law—for it would be unjust to punish people who have done nothing to deserve it. It would also be unjust to let those who deserve punishment go unpunished.¹³ A just reward, likewise, has to do with merit. A reward or prize should go to the person who has earned it. To pass over the candidate or competitor who deserved the prize and to hand it over to somebody who did not deserve it would be unjust or unfair. For instance, at the end of a war people who have served the state in the armed forces are given a gratuity in recognition of their service to the community—it would be unfair to treat them no differently from those who have not made the same sort of sacrifice and have been able to continue normal civilian life.

The same applies to giving people responsibilities and opportunities. Who should be appointed to a post of a manager or foreman or headmistress? Should it not be the person who is most capable of doing the job? Would it not be unfair to pass over the most meritorious candidate and appoint someone of less merit, less well qualified to do that job? Which students should be awarded first-class honours and a scholarship for postgraduate studies? Should it not be the one who has shown high talent in the subject? Would it not be unjust to prefer a less meritorious candidate?

These questions point to an idea of justice that is different from the conservative idea of justice which is zealously pursued by judicial processes. The idea of justice conveyed in the foregoing examples clearly answers to many of our common-sense notions because it appears to appeal to our social life than the judicial sense of justice. In this regard, there is also the idea of justice based on equality and need. According to this view, justice requires us to treat human beings as of equal worth and as having equal claims.

It is unjust to discriminate in favour of some and against others, except in order to meet special needs. This, therefore, demands that we do something special for the poor, the sick or the disabled because they are disadvantaged compared to most people. In doing so, we should try as much as possible to bring them unto, or near, equality with the more fortunate.

Although discrimination means treating people unequally and therefore unjust, discrimination in favour of need has an egalitarian purpose. It gives more to the needy because they have less—it is an attempt to reduce inequality. Other kinds of discrimination are, however, inegalitarian in effect as well as in method because they increase the existing inequalities. For example, it is a fact that the specially-talented individual already has an advantage over ordinary people. Hence if you give him special rewards or special prizes or a good job, you will increase his advantage. It may, however, be useful to society to do this if the person with special talents for a particular job such as running a business or a school will bring more benefit to the community in doing that job than would someone else of less talent. So it makes sense to train the talented individual, put him in the responsible job and pay him well as an incentive. It is socially useful and right for that person, but we cannot pretend that it is just. Strict justice, according to this view, requires us to treat everybody alike apart from helping underdogs to approach the rest.

The different ideas of justice so far articulated are, however, clearly incompatible with each other. Each one of them has an intuitive appeal to our consciences though some go pretty strongly for one than the other. But despite the incompatibility, moral justice can accommodate all the different conceptions of justice. Conservative (judicial) justice on the other hand accommodates only that concept of justice contemplated by judicial processes.
4:1.8 ETHICAL ISSUES BETWEEN LEGAL JUSTICE AND LIBERTY
Liberty is a moral issue because it has got to do with freedom of choice, and has a bearing to this study because it is an appropriate counterpoint to positivist separation thesis already discussed elsewhere in this study. In view of Aristotle's theory of action, it is important to point out that the fundamental idea of morality is the capacity for human beings to exercise free will in their choice of a course of conduct. It is because of this that they are characterised as agents of moral responsible. Another term for “free will” is liberty, and this is why liberty is a moral issue. However, as much as human beings are preordained with liberty, in reality their liberty is restrained by the exigencies of social life. Philosophers have identified two theories of society that justify imposition of restrictions on liberty which justify the positivist separation thesis. These theories are the consensus model of society on the one hand, and the conflict model of society on the other.

4:1.9 CONSENSUS MODEL OF SOCIETY
Propounded by thinkers like Aristotle and John Locke, this theory of society holds that human beings have a natural impulse to live together in an interdependent relationship. By exercising their rational faculties, individuals come to some cordial understanding as to what kind of society they should have in order to preserve civility. Together they form institutions of self governance and lay down laws to protect and restore the civil state in case of violation. Positive law thus emanates from the need to sustain the civil state. Thus if, for instance, the inhabitants of a village all agree that Mr X should sound the alarm in the event of an attack from enemies, then we have arguably the making of a law. Under this theory of society, membership to a civil state means a sacrifice of freedom, actual or potential.\textsuperscript{14} The restrictions placed on individuals of any society by a

legal regime and the obedience that people show to the law is a manifestation of the
said sacrifice.

4:2.1 CONFLICT MODEL OF SOCIETY
Propounded by command theorists like Nicolo Machiavelli and Thomas Hobbes, this
type is a counterpoint to the consensus model and argues that society cannot depend
on the people's rational faculties to build a harmonious civil state. It argues that human
beings are inherently self-seekers and if their egoistic desires are not restricted, there
will be chaos in society. Because of the unsocial inclination of men, it is hopeless to
expect them to agree spontaneously to respect each other's rights.

Hobbes starts with a very severe view of human nature, holding that all of human
voluntary acts are aimed at self-pleasure or self-preservation. This position is known as
psychological hedonism because it asserts that the fundamental psychological
motivation in people is the desire for pleasure. This unpromising picture of self-
interested individuals who have no notion of good apart from their own desires serves
the foundation of Hobbes's account of civil society in the treatise titled, *Leviathan.*

Starting with the premise that human beings are self-interested and the world does not
provide for all their needs, Hobbes argues that in the state of nature, without civil
society, there will be competition between people for wealth, security and glory. The
ensuing struggle is Hobbes's famous "war of all against all" in which there can be no
industry, commerce or civilisation and the life of man is solitary, poor, nasty brutish
and short. The struggle occurs because each individual rationally pursues his or her
own interest but the outcome is in no one's interest. How can this disastrous situation
be overcome? According to Hobbes, this disastrous situation can be overcome:
Not by an appeal to morality or justice because in the state of nature these ideals have no meaning. Yet we want to survive and we can reason! Our reason leads us to seek peace if it is attainable but to continue to use all the means of war if it is not. How is peace to be obtained? Only by a social contract. We must all agree to give up our rights to attack others in return for their giving up rights to attack us.\(^{15}\)

In spite of the merits of a social contract, Hobbes is under no illusion that the mere making of a promise or a social contract will carry any weight. In this regard, he holds that; "...covenants without the sword are but words of no strength to secure a man at all."\(^{16}\) In holding this severe view, Hobbes says that since we are self-interested we will only keep our promises only if it is in our interest to do so, a promise that cannot be enforced is worthless. Therefore, in making the social contract we must establish some means of enforcing it, and to do this Hobbes suggests that we must all hand over our powers of free will to another person or group of persons with absolute authority and who will punish anyone who breaches the contract.

In view of the foregoing authoritarian frame of mind, the person or group of persons in whom authority is vested is what Hobbes calls the sovereign. The sovereign may be a single person, an elected legislature or almost any other form of government, the essence of which consists in the sovereign having absolute powers to keep the peace by punishing those who break it. Hobbes insists that, it is only when such sovereign exists that justice becomes meaningful in the sense that agreements or promises are necessarily kept. Both the consensus and conflict theories of society, together, constitute what is known in modern political philosophy as the social contract theory.

\(^{16}\)Ibid. p.639
4:2.2 LAW AS EMANATING FROM THE NATURAL INSTINCT OF HUMANS TO CREATE CIVIL STATE

In view of the social contract theories discussed, it is evident that all legal systems are consequences of the need to form and consolidate a civil state necessary for harmonious co-existence of human beings as social animals. Against this background, it is held that the fundamental nature of positive law is that it constitutes a set of rules and regulations made and altered by certain institutions and enforced by a machinery of government.\(^{17}\)

Positive law is also defined as the body of rules that are intended to direct and alter behaviour and are determined and enforced by the state\(^{18}\). It is also conceived to comprise all the principles, rules and enactments that are applied by the power of the state.\(^{19}\) The law, so conceived, constitutes a set of rules accompanied by penalties. It demands the obedience and allegiance of the people failure of which certain penalties are visited upon those who do not comply with the law. But since society consists of individual persons, there is bound to be a tension between social cohesion and the feelings of independence and separate identity for every individual person. Thus justice and liberty are liable to be contrasted with each other. Justice is a social virtue that gains expression more within an association of persons while liberty is concerned with the individual ready, among other things, to defend the rights of the individual against the demands of the state.


\(^{18}\)S. Shavell (200 I) "Law versus Morality as Regulators of Conduct": A seminar paper presented at the Law and Economics Workshop at the University of Chicago Law School in the summer of 2001.

John Stuart Mill discusses the issues underlying the debate on the demands of society against individual liberty. He says:

The greatest possible latitude in personal freedom ought to be the aim of society. The government should use as its guidance a 'self-protection principle' in which society is justified in interfering with the conduct of the individual only in so far as it may harm others.\(^{20}\)

Although Mill, unlike Sartre, justifies the imposition of laws on individual conduct if such conduct goes against public interest, the fundamental idea in his thesis, which he shares with Sartre, is that personal freedom ought to be the aim of society. Personal freedom certainly includes, and most importantly, the exercise of free rational choice on a range of decisions in life. But since positive law calls for unconditional allegiance and obedience to enacted law in the name of preserving a certain order that is assumed to be beneficial to public interest, it technically encroaches on personal freedom beyond Mill's expectations of legitimate limits.

In this regard, it can be pointed out that positive law becomes unjust when it protects and upholds an order of things that favours majority interest over minority. For example, a law against hawking in the streets is meant to secure the uninterrupted use of the streets by the public while at the same time ensuring some sort of public order. But such a law, on the other hand, is an assault on the hawker's inherent freedom to earn a living via the doctrine of free enterprise. A law against hawking, therefore, arbitrarily views public interest to override individual freedom.

The tendency for public law to favour public interest over individual freedom manifests itself very often in the Kenyan judicial process as exhibited by a range of pleadings made in court or judicial inquiries. An example of a pleading pitting personal liberties against public interest was made in *Judicial Commission of Inquiry into the Goldenberg Affair* where, while arguing against a judicial review application submitted to the High Court of Kenya by lawyer Aurelio Rebello appearing for Kamlesh Patni, Wilfred Koinange and Job Kilach, counsel assisting the Goldenberg Commission Mr John Khaminwa, in a typical positivist fashion, urged the court to decide on the issue in such a way as to enhance public interest and not individual rights because, according to Mr Khaminwa, the Goldenberg scandal was of great public interest.

Another example is the one that involved a civic leader with the Thika Town Council, Ms Cecilia Wamaitha Mwangi, who had sought the intervention of the court to stop the 2003 National Constitutional Conference, arguing that the list of delegates to the conference was faulty and, therefore, in violation of the law guiding the manner in which the said conference was supposed to be constituted. But even before the court could look into the facts of the case, the presiding judge Justice David Onyancha dismissed the application saying:

> This application is by only one councillor against 30 million Kenyans. I, therefore, ask; how do her interests weigh against those of other Kenyans?²¹

Such is the ‘injustice’ that flows out of our court system based on the argument that the legal order is designed to protect public interest at the expense of individual interest. The injustice obtains because conservative (legal) justice tends to preserve things on the assumption that everyone benefits from a stable society despite the obvious defects of

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²¹*Daily Nation*, 29th April, 2003: Nairobi, Nation Media Group. p.1
any actual social order. But progressive (moral) justice tries to remedy the defects by redistributing rights in such a way as to make a more fair society.

4:2.3 SUMMARY

The following conclusions draw from the discussion in this chapter:

1. The moral view of justice is not always compatible with the legalist view of justice.
2. In the name of professional duty, advocates and judges would strive to achieve the ends of legal justice without regard to the ends of moral justice.
3. Judicial procedure pursues conservative (legal) justice not infrequently at the cost of moral value to those who administer the law professionally.
4. No judicial system can purport to promote complete justice at the exclusion of the moral principle.
CHAPTER FIVE

EVALUATION OF THE MORAL ASPECT IN THE KENYAN JUDICIAL SYSTEM

5:1.1 OVERVIEW

This chapter pays specific attention to the ethical issues arising from the Kenyan legal system with regard to the positivist separation thesis. It examines the place of morality in the Kenyan judicial system by, first, citing some practical examples that point to the fact that the system is among those modeled on the positivist separation doctrine, and, secondly, demonstrating that since the positivist separation thesis underpins the Kenyan Judicial system, morality is an extraneous element when resolving legal disputes. In this regard, the Kenyan judicial system, because of its positivist foundation, preordains those who administer it professionally to uphold fidelity to legality beyond every other consideration.

5:1.2 EXAMPLES THAT POINT TO THE POSITIVIST ASPECT OF THE KENYAN JUDICIAL SYSTEM

The positivist separation thesis is, undoubtedly, the cornerstone of modern legal systems. This doctrine holds that the law is one thing and morality, or moral evaluation of the law, is another.¹ This means that there is a disciplinary autonomy that is asserted to exist between law and morality—and this explains why judicial decisions need not conform to our common-sense notions of moral propriety. The positivist aspect in any judicial system is characterised by certain features, key among them being the following:

1. The principle of *nullum crimen sine lege* (there is no crime without legislation) against which it is held that all positive law is law made by man for the guidance of man and that no act is proscribed unless a legitimately enacted law says so.
2. A promulgation of rules and regulations in codes (rule-book); which command or prohibit certain actions; accompanied with specific penalties to be visited upon those who may violate such rules.

3. A system of courts and tribunals based on the adversarial approach of dispute resolution under strict rules of procedure and evidence with the burden of proof conferred upon the one who alleges.

The Kenyan judicial system is patently modeled on the legal positivist doctrine, features of which are evidenced by primary data gathered by this study through field research and secondary data existing in the form of case-law and Comparative Law.

5: 1.3 EVIDENCE OF THE POSITIVIST ASPECT IN PRIMARY DATA

Primary data that points to the positivist foundations of the Kenyan judicial system has been gathered through a simple stratified sampling method in which the researcher recognises different strata in the population in order to select a representative sample. In this regard, the primary used in this section of the study is obtained from fifty (50) respondents comprising of advocates, magistrates and judges who are classified as legal professionals by virtue of possessing an expertise in the application of the law. The respondents were asked to say whether or not the moral aspect has a role to play in judicial matters and give reasons for their answer.

Out of the 50 respondents, five have held the position of judge of the High Court of Kenya, eleven were magistrates and the rest were advocates of the High Court of Kenya. All the judges and magistrates requested anonymity to protect their impartiality lest their opinions are construed to represent professional prejudices as officers of the court. However, their responses convey the view that a code of rules variably known as due process of law is the sole guide of the judges, advocates and litigants who come under it, and whose mere enactment by lawful authority is the sufficient warrant of its validity and to values beyond or outside which neither judge, advocate, nor litigant has any business to look into.

These responses, some of which are listed below, are a clear demonstration of a positivist frame of mind on the part of these judicial officers. Hence, the following responses by at least
three respondents who authorised their identities revealed provide a practical weight of presumption in favour of the proposition that the Kenyan judicial system is modeled on the positivist doctrine:

1. Nairobi advocate Patrick Kiage of Kiage & Company Advocates, who would later rise to become judge of the High Court of Kenya, says that morality is a side show in legal controversies. He says: "Courts are courts of law and not courts of sentiment," pointing out that the moral aspect should, perhaps, play a role in parliamentary debate and end there. Lawyers, especially judges, should stick to the law since trying to introduce their sense of right in legal disputes would turn them into judicial activists and thereby blur their impartiality. Mr Kiage makes clear his positivist frame of mind saying: "judges must remain judges every time they execute the functions of their office."

2. Richard Magare and Robert Asiani, both fresh graduates of the Kenya School of Law and newly admitted to the bar as advocates of the High Court of Kenya also express views that reveal the positivist underpinning in the Kenya judicial system. Mr Magare holds that if the law is not applied the way it is promulgated there would be no legal profession to speak of. Mr Asiani cites, with approval, the following view as the basis of a lawyer's professional concern:—“The legal practitioner concentrates his attention on law at the point where it emerges from the institutional process that brought it into being. It is the finally made law itself that furnishes his subject of inquiries. How it was made and what directions of human effort that went into its creation are for him irrelevancies.”

Other pronouncements that attest to a positivist underpinning in the Kenyan judicial system include those expressed by Nairobi advocate Ahmednassir Abdullahi who in 2004 resigned from the chairmanship of the Kenya Anti-Corruption Advisory Board protesting President Mwai Kibaki’s refusal to ratify the appointment of one Dr Julius Rotich as Vice Chairman of the Kenya Anti-Corruption Commission. In challenging the President’s action, Mr Abdullahi had this to say:

“I am not saying that he (Rotich) is guilty or innocent. What I have insisted is that in attempting to get to the bottom of these allegations, due process must be followed. What is difficult in following legal procedure and showing fidelity to the law?”

Dr Rotich had been nominated by the Kenya National Assembly to the position of KACC Vice Chairman pursuant to the Anti-Corruption and Economic Crimes Act. But the President declined to assent to Mr Rotich’s nomination as was required of him by the same Act, citing accusations of abuse of office leveled against the nominee in his previous positions. Many lawyers admonished the President’s decision saying he had no powers in law to decline to approve Mr Rotich’s nomination, allegations against the nominee notwithstanding. The lawyers’ position on the matter was conveyed by Mr Abdullahi, then chairman of the Law Society of Kenya. It demonstrates that Kenyan lawyers uphold fidelity to legality beyond every other consideration hence attesting to the positivist character of the Kenyan legal system. The same positivist character of the Kenyan judicial system is manifested in the views of Chief Justice of Kenya, Mr Evan Gicheru, in 2005. Outlining the strategic plan of the judiciary for the period between 2005 and 2008, the Chief Justice expressed remarks that expose the positivist underpinning of the Kenyan judicial system and had this to say:

“For us in the judiciary, the due administration of justice in accordance with the rule of law is our noble aspiration. It is to its achievement that we are daily engaged."

5: 1.4 EVIDENCE OF THE POSITIVIST ASPECT FROM CASE LAW

The following cases were decided in a manner that exposes the legal positivist frame of mind that underlies the Kenyan judicial system.

1. Criminal Appeal No.7 of 1995 at Nairobi, *Kimei & Another v. Republic*, whose subject matter is; "sentence only for offence upon which one is convicted." In their ruling Justices William Tunoi, A.B. Shah and Evan Gicheru held that an offender must be sentenced only for those offences of which he has been convicted. This ruling underscores the significance of the positivist doctrine of *nulla poena sine lege* (there is no penalty without a law), meaning that that one cannot be punished for doing something that is not

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prohibited by law. This principle is accepted and codified in modern democratic states as a basic requirement of the rule of law.

2. Criminal Appeal No.154 of 2000 at Nairobi, *Mbashi v. Republic*, the subject matter being "accused under no obligation to prove innocence." Justices Abdul Lakha, Emmanuel O’kubasu and Evan Gicheru held that it is a trite law that the burden of proving an accused person’s guilt lay with the prosecution throughout the trial and that the accused person is under no obligation to prove his innocence. The decision of the judges in this case echoes the adversarial character of the Kenyan judicial system especially in trial law.

3. Criminal Appeal No.86 of 1999 at Nairobi, *Kabon v. Republic*, the subject matter being "necessity for malice aforethought in a murder conviction." Justices Effie Owuor, Moi乔ole Keiwua and Evan Gicheru held that without proof of malice aforethought, the appellant’s conviction for the murder of the deceased cannot stand. This ruling is another indication of the adversarial nature of the Kenyan judicial system which places the burden of proof on the accuser.

5: 1.5 EVIDENCE OF POSITIVIST ASPECT IN COMPARATIVE LAW

History provides a clue to an understanding of the positivist underpinning in the Kenyan judicial system. As a colonial power, Britain bequeathed on the Kenyan judicial system its positivist character. In AD 1900, the first International Congress of Comparative Law was held in Paris and attended by jurists from diverse backgrounds. A principle idea that emerged from the congress aimed at achieving the creation of a *droit commun legislatif*, as the law of the 20th century shared by all civilised humanity. In this regard, legal science founded on universalism was to formulate this common law where the legislation of the different nations, acting together by means of international treaties, was to promulgate it and make it the positive law of their several countries. Two familiar families of law namely, Romano-
Germanic\textsuperscript{4} and Common Law, emerged from the Paris Congress as most prominent models upon which many countries formulated their legal systems.

The Common Law system includes the law of England and those laws modeled on English law. Common law originated in the grants of dispute-settling authority made by the King of England to their Justices. The Common Law legal rule is one which seeks to provide the solution to a trial rather than to formulate a general rule of conduct for the future. The principle of \textit{stare decisis} which holds that past decisions be followed in the adjudication of similar cases was made a core principle in litigation. In the course of time, there have been numerous contacts between the Romano-Germanic family and the Common Law family resulting into a hybrid system incorporating the two families. The Kenyan legal system is one such hybrid.

However, it is important to stress that for all former British dependencies in Africa, the legal profession is based on the English model, and this is one of the important and most enduring legacies of British colonialism.\textsuperscript{5} As a former British colony, Kenya inherited from the English Common Law the principle of \textit{stare decisis} but also adopted features of the Romano-Germanic family which are manifested by codified rules found either in the constitution, the Penal Code, the Civil and Criminal Procedure codes among others.

As one partly modeled on the civil law family, the Kenyan legal system is, therefore, one that declares rules and regulations enacted by parliament and specifies appropriate penalties if the rules are broken. The following are examples of coded laws that demonstrate the Romano-Germanic character of the Kenyan legal system:

\textsuperscript{4}This group includes those countries in which legal science has developed on the basis of Roman law. Here the rule of law is conceived as rules of conduct made and altered by legislative institutions (parliaments or congresses) and the rules are in turn expressed in comprehensive codes. This is the family in which the doctrine of \textit{nullum crimen sine lege} finds prominent expression.

\textsuperscript{5}L.B. Gower (1967) \textit{Independent Africa— the Challenge to the Legal Profession.} Cambridge, Mass.; Harvard University Press. p104
1. Section 83 of the Penal Code (Laws of Kenya: 1981) declares a riot as a felony and specifies the penalty thereto as follows—“if a proclamation is made commanding the persons engaged in a riot, or assembled with the purpose of committing a riot, to disperse, every person, who after the expiry of a reasonable time from the making of such proclamation, takes or continues to take part in the riot or assembly, is guilty of a felony and is liable to imprisonment for life.”

2. Section 203 of the Penal Code criminalises murder by stating that—“any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder; and section 204 follows thereafter with the provision that; any person convicted of murder shall be sentenced to death.”

The court system in Kenya was established in the latter parts of the 1888's when Britain committed herself to the establishment of British spheres of influence in the interior of Africa. In finding the means by which jurisdiction in these areas could legally be exercised, the British government promulgated the 1889 African Order in Council under the Foreign Jurisdictions Act, enabling local jurisdictions to be set up within the African continent.

Once a local jurisdiction was established, the consul's court had jurisdiction over British subjects. Years later when the British Government took over from the Imperial British East African Company responsibility for the administration of the East African protectorates, the 1889 Order in Council was replaced in these territories by orders setting up new courts in place of those of the consuls. The East African Order in Consul of 1897 established in the protectorates a court styled Her Majesty's Court for East Africa, the predecessor of the High Court set up by Order in Council of 1902. The High Court in each territory had full jurisdiction, civil and criminal, over all persons and matters. Such jurisdiction was to be

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7 H.F. Morris (1972), Indirect Rule and the Search for Justice; Essays in East African Legal History: London, Oxford University Press. p.73
exercised in accordance with certain Indian codes and ordinances locally enacted and exercised in conformity with the Common Law, the doctrines of equity and the statutes of general application then in force in England. The English legacy continued after independence of the East African countries.

5:1.6 EVIDENCE OF THE POSITIVIST ASPECT FROM TRIAL LAW

The positivist character of the Kenyan judicial system is not in doubt in view of the clear examples discussed above. But whatever the merits of legal positivism, its identification of right or wrong exclusively with what the law dictates appears to be untenable from a philosophical point of view. This is because there are instances when upholding fidelity to legality beyond every other consideration yields decisions that are repugnant to a philosophical mind. Such was the case in July 2004 when a successful appeal by one death-row convict opened a flood-gate of acquittals that saw more than 100 other death-row convicts released from Kenyan prisons merely because the convictions were obtained by police prosecutors below the rank of Inspector; thereby extinguishing the legal value of the convictions.

The interesting thing about the acquittals in the instance case was that; the prosecution proved their case beyond reasonable doubt during the trial to earn the convictions, but the good effort came to naught merely because the prosecutors were junior police officers! Worst of all, it took one appeal to set free more than 100 other criminals. It is such instances that prompt many ordinary people, like Mr Bumble in Charles Dickens’ *Oliver Twist*, to question whether the law makes sense at all. The following quote reinforces the observation that fidelity to legality beyond every other consideration is sometimes ethically untenable:

> Legal rules are made; they are not discovered somewhere as a traveler discovers a mountain. Why do men make those rules? Obviously, in order that there be justice and not in order that there merely be rules of law.\(^8\)

In view of the foregoing, if upholding fidelity to legality ends up allowing dangerous criminals to skulk through the net of judicial vigilance in the name of grave professional duty, isn’t it time legal professionals, as conscientious beings, re-evaluated their so-called unswerving commitment to professionalism? The fact that laws are made in order that there be justice means that lawyers should not uphold fidelity to legality if justice itself faces the danger of being undermined in the name of upholding the letter of the law. And although strict adherence to legality is essential for any legal system to ensure a system of stable procedures and rules with reasonably predictable results, there is a lot of good to be gained if judges and advocates are allowed to depart from narrow legalism by exercising their conscientious faculties whenever it is right to do so.

There are, indeed, instances in Kenya where departure from narrow legalism has enhanced the attainment of justice more than it would if only strict adherence to the law were to prevail. Such was the situation involving some of the Goldenberg scandal cases where the state had to drop its bid to scuttle an application challenging the Attorney General's powers to terminate Goldenberg related cases. In one such case, lawyer Gibson Kamau Kuria acting for the Attorney General sought to get the application by the main suspect, Kamlesh Pattni, struck out on legal technicality. Mr Kuria argued that the application was unprocedural as Mr Pattni had not filed facts in law in support of questions framed by a magistrate’s court. But the court prevailed upon Mr Kuria to abandon the attempt, saying that minor procedural issues should not be used to block a case referred for constitutional interpretation. This call for abandonment of narrow legalism was itself exercise of a moral sense by the judges and demonstrates how the wheels of justice can be oiled by removing procedural snares that slow down the judicial process.

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*Daily Nation, 26th June, 2003: Nairobi, Nation Media Group. P.4*
A similar exercise of moral sense or something comparable was exhibited in Civil Appeal case No. 133 of 1999 at Nairobi, *Trust Bank v. Eros Chemist & Another*. The judges in this case acknowledged that too much rigid adherence to legality may lead to injustice. The issue at question concerned “when the Court of Appeal should depart from its own previous decision.” Justices Riaga Omolo, Abdul Lakha, Samuel Bosire, Moijo ole Keiwua and Evan Gicheru held that:

The existence of two conflicting decisions of the court, in our judgement, raises questions of considerable difficulty which can only be resolved by application of first principles. It is, we think, beyond dispute that since the establishment of this court, it ceased to hold the position of an intermediate appellate court but became a final court of appeal for the sovereign state of Kenya. Its position is analogous to that of the House of Lords. The decision of the House of Lords upon questions of law are normally considered by the House to be binding upon itself but because too rigid adherence to precedent may lead to injustice in a particular case and unduly restrict the proper development of the law, the House will depart from a previous decision when it appears right to do so—so should this court. For those reasons, we are satisfied that as a matter of judicial policy, this court as the final Court of Appeal of Kenya, while it will normally regard a previous decision of its own as binding, should be free in both civil and criminal cases to depart from such a previous decision when it appears right to do so.10

In the presence of such examples where judges appeared to abandon pure legalism, we can conclude that despite the disciplinary autonomy that is asserted to exist between law and morality, the Kenyan judicial system would better serve the interests of justice if it allowed advocates and judges to abandon narrow legalism whenever it is right to do so.

In summary, this section has examined the Kenya judicial system with a view to establish the place of the moral fact in its domain. By use of appropriate examples, the section has sought to demonstrate that the positivist separation doctrine looms large in the Kenyan judicial system, hence making it appear that the moral factor is, *ab initio*, an extraneous and irrelevant

10 *Trust Bank v Eros Chemist & Another* [Civil Appeal case No. 133 of 1999, Nairobi]
element in its domain. However, the assertion that the moral aspect is an extraneous and irrelevant element in the Kenyan judicial system may come to grief when faced with provisions of the Sexual Offences Act, 2006. Despite occasional amendments, the Sexual Offences Act has always concerned itself with offences designated as “offences against morality”—it criminalises rape, defilement, incest, prostitution, among others.

One would, therefore, argue that the Kenyan legal system is mindful of morality to the extent that there are express statutory provisions against immoral conduct. It may be assumed that the judicial system entertains the moral fact in its domain when courts give legal relief when certain moral norms are violated. However, while legal practice and the moral fact may appear to be mutually inclusive in view of provisions of the Sexual Offences Act, we must point out that the moral fact contemplated in the said law is sociological in perspective and not philosophical. The sociological perspective of morality, as explained in Chapter 3, is a far cry from the philosophical one. In this regard, the fact that Kenyan law prohibits certain conduct that is sociologically regarded as a move to uphold morality does not mean that judges and advocates involved in resolving legal disputes in such cases exercise their moral conscience in the manner that morality is defined in philosophy. To this end, provisions of the Sexual Offences Act notwithstanding, moral consideration technically remains an extraneous and irrelevant element in the Kenyan judicial system.

5: 1.7 ANALYSIS OF THE APPLICABILITY OF THE MORAL FACT IN RESOLVING LEGAL DISPUTES

In view of the Kelsian and Austinian concepts of law, there is no doubt that a judicial system modeled on the positivist separation thesis is bound to raise some pertinent ethical controversies. The Kenyan legal system raises its share of ethical issues because of the demonstrated legal positivism that underpins it. Some of these issues, which sometimes
manifest themselves as deficiencies, have found expression in the form of criticism leveled against the criminal justice system as illustrated below:

The process of determining the guilt of an accused person is long and disheartening. To be suspected of murder, treason or violent robbery is a terrifying possibility. What is even more terrifying is that the process is riddled with flaws and inadequacies that make it almost impossible for a court to make a decision with reasonable certainty. Yet if there are too many acquittals on account of doubt the system will be deemed weak and ineffective.\footnote{M. Kibanga (2000), "Apathy Causes Injustice": an article published in \textit{The Lawyer}; Issue No. 24: Nairobi, August 2000. p.12 (A quarterly magazine on legal issues)}

In 2000, the Court of Appeal of Kenya quashed a decision of the High Court condemning a mother and son to death for the offence of murder. The appellate court held that:

The record is haphazard and proceedings are inconceivably unintelligible. The approach to the issues in the trial is casual, confusing and without consideration. The language defies logic and comprehension.\footnote{Ibid. p13}

By describing the High Court's decision in the foregoing example as inconceivably unintelligible and an affront to logic, the Court of Appeal made it clear that robust measures need to be taken to improve the administration of justice in the adversarial system without letting loose too many criminals but while ensuring that no innocent citizen is punished wrongly. This delicate balance can be achieved by allowing judges to exercise their conscientious faculties whenever it is right to do so.

The need to incorporate the moral aspect in the Kenyan judicial system is to improve the administration of justice which, as cited in Chapter Four, is the vocational duty of every legal system. In this regard, there are instances in legal practice where legal practitioners, as problem solvers, may be required to employ their conscientious faculties in order to resolve a dispute—such instances may be those that involve conflict of interests or conflict of laws.
5: 1.8 CONFLICT OF INTEREST, MORAL DILEMMA AND THEIR IMPLICATION IN LEGAL PRACTICE

This section examines the nature and implications of conflicting interests in legal practice and how such conflict may constitute a moral dilemma for legal practitioners. The issue of moral dilemma is discussed because it helps to clarify why legal practitioners would uphold fidelity to legality beyond every other consideration. However, appropriate examples are also cited pointing to instances when legal practitioners can exercise their conscientious faculties and legitimately abandon blind fidelity to legality. In this regard, let us take cognizance of the following givens:

1. The professional choices and pursuits of legal practitioners are right acts by virtue of being acts that ought to be done for the proper functioning of the legal profession.

2. Although lawyers' professional choices and pursuits are right acts on account of being that which ought to be done, they are nonetheless not morally good actions because nothing that ought to be done is ever morally good.

3. As human beings, lawyers are conscientious beings and, a fortiori, moral agents from whom morally good action is expected.

In view of the foregoing, it is noticed that there are instances when pursuit of professional duty will come into conflict with the conscientious faculties of the legal practitioner. And the question would then be — should a lawyer comply with a professional norm even if it is contrary to his good and/or the good of others to do so? This section attempts to answer this question and, further, respond to another question namely — what ought a lawyer do when a client confesses to him to have committed the offence for which the defence is sought? Or, what ought a judge do if he knows, from sources outside those on record, that the suspect in the case he has to decide indeed committed the crime in question but the prosecution is unable to prove its case?
In view of these two questions, the issues to grapple with are—should the lawyer (in the first question) follow his/her conscience and betray the client, or, should the Judge (in the second question) assist the prosecution to convict the suspect? In ethics, grappling with what do in situations such as the ones illustrated above constitutes what is referred to as a moral dilemma. In legal practice, this situation is often referred to as conflict of interest.

5: 1.9 THE NATURE AND IMPLICATION OF MORAL DILEMMA IN LEGAL PRACTICE

A moral dilemma may generally arise from any problem where a conscientious process is required to make a choice. This involves conflicts not only among moral reasons, but also conflict between moral reasons and reasons of law, religion or self-interest. An example is the biblical account of Abraham who was in a moral dilemma when faced with the challenge of obeying God's command to sacrifice his son though he had no moral reason to obey it. Similarly, we may be in a moral dilemma if we cannot help a friend in trouble by foregoing a lucrative but morally neutral business opportunity.

'Moral dilemma' also refers to any topic area where it is not discernible what, if anything, is morally good or right. For example, when one asks whether or not abortion is immoral, then we could call such a topic 'the moral dilemma of abortion.' The abortion debate, which has loomed large in legal philosophy for many years refers to the controversy surrounding the moral and legal status of abortion. The two main groups involved in the abortion debate are the self-described “pro-choice” movement (emphasizing the right of women to choose whether they wish to bring an embryo or fetus to term) and the self-described “pro-life” movement (emphasizing the right of the embryo or fetus to be born). Both of these ascriptions are considered loaded terms in public discourse where terms such as "abortion
rights" or "anti-abortion" are preferred. Each movement has, with varying results, sought to influence public opinion and to attain legal support for its position.\textsuperscript{13}

There is also what economist James Buchanan referred to as the Samaritan’s Dilemma. This is a dilemma in the act of charity, and hinges on the idea that when presented with charity, a person will act in one of two ways—using the charity to improve their situation, or coming to rely on charity as a means of survival. The argument against charity frequently cites the Samaritan’s Dilemma as reason to forgo charitable contributions. It is also a common argument against Communism and Socialism, claiming that state aid is equivalent to charity, and that the beneficiaries of such aid will become slothful or otherwise negligent members of society.\textsuperscript{14}

In recent years, philosophers have discussed a much narrower set of situations that qualify to be moral dilemmas. Under these discussions, moral dilemma has been defined in terms of a situation where an agent ought to do each of two acts but cannot do both. An example is that cited by Jean Paul Sartre of a student in German occupied France who morally ought to have cared for his sick mother in Paris but at the same time was required to go to Britain to join the free French to fight the Nazi occupation.\textsuperscript{15}

In all these examples of what constitutes moral dilemma, one notices that the term 'ought' looms large. The term seems to cover ideal actions that are not morally compelling, such as, when a person ought to give to charity but not required to do so. In this regard, since most


\textsuperscript{15}Sartre, \textit{Op.cit.} p.93
common examples of moral dilemma include moral obligations or requirements, it is accurate to define 'moral dilemma' more narrowly as a situation where an agent has a moral obligation or requirement to do each of two acts but cannot do both. Some philosophers like Kant, however, refuse to call a moral dilemma if one of the conflicting requirements is clearly overridden, such as when one has to break a promise in order to save a life. To exclude such resolvable conflicts, 'moral dilemma' can be defined as a situation where an agent has a moral requirement to adopt each of two alternatives, and neither alternative is overridden by the other, but the agent cannot fulfill both.

The issue of euthanasia presents a philosophically interesting example of a moral dilemma. In many countries, the state has outlawed euthanasia as a precautionary measure to guard against potential abuse by doctors and patients. It may hence be a good law to illegalise euthanasia, but such a law is legitimate only so far as makers of the law assume that doctors may use euthanasia to fulfill evil intentions. However, as much as legislators may have good reason to outlaw euthanasia, this law comes to grief when faced with situations of terminally ill patients suffering from ailments like cancer. Cancer sometimes causes excruciating pain to its sufferers, and physicians in such cases are allowed, under normal clinical practice, to administer pain-relieving medication like morphine.

But pharmacists argue that morphine is a potentially highly addictive substance because it is derived from opium, and very high doses can cause instant death. The question to ponder over would then be; if a terminally ill cancer patient expresses a desire to die rather than live with the pain of disease, what would be the position of a doctor who administers high doses of morphine to such a patient with the intention to relieve pain but knows very well that the dose could cause death? If it occurs that the patient dies after the administration of the dose, hence inadvertently fulfilling his desire to die, should the doctor be held liable of illegal euthanasia?
Until proved otherwise, it would appear on face value that the doctor is culpable of illegal euthanasia since the law against such an act admits of no exceptions. If the doctor end up being charged for administering illegal euthanasia, should the court admit the doctor’s good intentions to relieve pain as mitigation despite the unfortunate death which, nonetheless, fulfilled the patient’s wish to die? But if the court admits the doctor’s good intentions as a lawful excuse and pardons such a doctor, would the court not have set a precedent to legalise euthanasia through the principle of *stare decisis*?

There are interesting examples in legal practice where the moral dilemma pertaining to euthanasia (doctor-assisted suicide) has had to rely on arguments advanced by moral philosophy in order to arrive at conclusions that assist courts to resolve disputes. These examples exist mainly in the realm of criminal law and law of torts. It is important to point out that a crime is a legal wrong, whether or not it is also a tort, a breach of contract or a breach of trust. However, the principal legal consequence of a crime is that the offender, if he is detected and it is decided to prosecute, is prosecuted by or in the name of the State, and if found guilty is liable to punishment which can be in the form of imposition of a fine, imprisonment or both. The primary purpose of criminal law is to:

i. Forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interest; to subject to public control persons whose conduct indicates that they are disposed to commit crimes;

ii. To safeguard conduct that is without fault from condemnation as criminal and give warning of the nature of conduct declared to be an offence;

iii. To differentiate on reasonable grounds between serious and minor offences.

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16 Kenya inherited the doctrine of *stare decisis* from the English Common Law. The phrase literally means to “stand by decided matters”, and it enjoins courts to follow rules or principles laid down in previous judicial decisions unless they contravene the ordinary principle of justice. The goal of *stare decisis* is to promote and ensure uniformity in the administration of justice through the courts.

As explained elsewhere in this study, a cardinal principle of criminal law is embodied in the maxim *actus non facit reum, nisi mens sit rea*—meaning; an act does not make a man guilty of a crime unless his mind is also guilty. In this regard, the courts in criminal litigation mainly seek to establish that the defendant, beyond reasonable doubt, committed the prohibited act (*actus reus*) and he had the appropriate mental state (*mens rea*) to commit the prohibited act—this is often referred to as assigning criminal liability.

In view of the foregoing, courts usually have a difficult time in assigning criminal liability when confronted with moral dilemma situations, the kind of which obtain when, for example, a doctor administering strong medication to a terminally-ill patient with the aim relieving pain causes the death of that patient in a manner that smacks of illegal euthanasia. Such cases, known in moral philosophy as the doctrine of double effect, arise where someone (a doctor for example) acts for a good purpose which he knows cannot be achieved without also having a bad consequence. Two classes of double effect can be distinguished.

The first is where the good purpose and foreseen (but undesired) bad consequence both relate to the same individual; as where a doctor, in the best interest of the patient, administers pain-killing drugs in appropriate quantities for the purpose of relieving that patient’s pain, but realizing that an incidental effect of doing so will be to hasten the death of the patient. In view of this kind of dilemma, there is a morally-based double-effect argument which the courts have adopted to make the conduct of a doctor who finds himself in such a situation permissible in law so long as it was in the best interest of the patient (victim).

The morally-based double-effect argument where a doctor, in the best interest of the patient, administers pain-killing drugs in appropriate quantities for the purpose of relieving that patient’s pain but realizes that an incidental effect of doing so would be to hasten the death of the patient, appears to have been recognized as part of law by Lord Goff in *Airedale National*
Health Service Trust v. Bland. In this case, 17-year-old Anthony Bland was, in 1989, involved in the Hillsborough Stadium disaster suffering irreversible brain damage and thereafter was in a persistent vegetative state—no cognitive function, no sight, hearing, capacity to feel pain, move his limbs, or communicate in any way. Being unable to swallow, he was fed by nasogastric tube. Repeated infections were treated by antibiotics. The consensus of medical opinion was that there was no hope of his improvement or recovery.

On the application (with the support of Bland’s parents) of Airedale NHS Trust, in whose hospital Bland was a patient, Sir Stephen Brown granted a declaration that the Trust might lawfully (1) discontinue all life-sustaining treatment including ventilation, nutrition and hydration by artificial means and (2) discontinue medical treatment except for the purpose of enabling Bland to die peacefully with the greatest dignity and least distress. The Court of Appeal dismissed an appeal by the Official Solicitor who appealed further to the House of Lords. He submitted that the withdrawal of artificial feeding would constitute murder. The House, though accepting that their decision in this civil action would not be legally binding on a criminal court, unanimously dismissed the appeal. In dismissing the appeal by the Official Solicitor, Lord Goff said the following when describing the doctor’s duty to act in the best interest of his patient:

“It is this principle too which, in my opinion, underlies the established rule that a doctor may, when caring for a patient who is, for example, dying of cancer, lawfully administer pain-killing drugs despite the fact that he knows that an incidental effect of that application will be to abbreviate the patient’s life. Such a decision may properly be made a part of the care of the living patient, in his best interests; and, on this basis, the treatment will be lawful. Moreover, where the doctor’s treatment of his patient is lawful, the patient’s death will be regarded in law as exclusively caused by the injury or disease to which his condition is attributable.”18

18 Airedale National Health Service Trust v Bland [1993] 1 All ER, House of Lords
The second class of double-effect is where the good purpose relates to one person but it cannot be achieved without having foreseen (but undesired) consequence for another person. This is demonstrated by the case of *Re A (conjoined twins surgical separation)* where the Civil Division of the Court of Appeal was concerned with the legality of separating Siamese twins, who were otherwise doomed to die probably within three to six months, in order to save the stronger twin, when it was known that the proposed operation would result in the death of the weaker one. Dealing with the issue of whether the doctors would intend to kill or do serious bodily harm to Mary (the child who would die), Lord Justice Robert Walker said:

“...The proposed operation would not be unlawful. It would involve the positive act of invasive surgery and Mary’s death would be foreseen as an inevitable consequence of an operation which intended, and is necessary, to save Jodie’s (the stronger twin) life. But Mary’s death would not be the purpose or intention of the surgery, and she would die because tragically her body, on its own, is not and never has been viable.”

In this regard, euthanasia raises a fundamental ethical debate about the value of life in the eyes of the law on the one hand, and the value of life in the eyes of medical practice on the other. While the law may insist that terminally ill patients should die the natural way, medical practice enjoins practitioners to alleviate suffering and preserve life as much as possible—thus requiring the application of moral philosophy to reach a settlement.

It is, therefore, against this background that the conflict between a lawyer's professional duty and his conscience are also analysed as a moral dilemma. Of particular interest is the situation of a client who confesses to his lawyer to have committed the crime for which a defence is sought, or a situation where a judge independently knows that the suspect whose case the judge has to decide actually committed the crime in question but the prosecution has failed to prove its case. In the first instance, if the lawyer reveals the client’s confession, he would be in breach of the rule of privileged communication between a lawyer and a client—

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19 *Re A (conjoined twins surgical separation)* 4 All ER 961, CA
such breach amounts to professional misconduct and may attract penalties on the part of the lawyer. In the second instance, if the judge tells what he independently knows about the suspect having committed the crime in question, then the judge would have descended into the arena of battle by aiding the prosecution to prove its case, and this would constitute a breach of the rules of litigation, in addition to the judge eroding his integrity as an impartial arbiter. But if in both instances, the lawyer and judge, respectively, choose to remain silent and pretend that they know nothing about the matter in question, then they would appear to be allowing criminals to skulk through the net of judicial vigilance in the name of fidelity to professional codes of conduct, in addition to betraying their conscience.

In the case where a client confesses to a lawyer about committing the crime for which legal representation is sought, the moral dilemma arises out of the fact that lawyers are enjoined to uphold the rule of privileged communication between a lawyer and a client. This rule demands that advocates should not divulge any information given in confidence which prejudices the legal rights of the litigant for whom the advocate is appearing. However, there are exceptions to the rule in the sense that there is no privilege in respect of communication made in the furtherance of a crime, but communication made to an advocate for the purpose of a defence in criminal proceedings are within the rule and hence privileged. In this respect, the dilemma then is—should the advocate uphold fidelity to professional duty and defend the client who confesses to have committed the crime in question, or should the advocate follow his conscience and tell the truth?

In the second instance where a judge independently knows that the suspect before him committed the crime for which the judge has to decide upon, the legal norm is very clear—

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20 According to the *Digest of Professional Conduct and Etiquette* issued by the Law Society of Kenya, the object of the rule of privileged communication is to ensure that a client can confide completely and without reservation in his advocate and the privilege extends to communication made to the advocate’s agents and to counsel where the advocate acts as a solicitor.
the judge it prohibited to pursue his own sense of justice. The following citation demonstrates this point:

The judge has the professional duty to make the law’s will to validity become de facto validity. He has merely to ask himself what legally ought to be done and not what is just or unjust. The judge must disregard his own sense of justice and obey the law’s command.21

In this regard, it is evident that in a situation where a judge, from sources outside the litigation process, knows that the suspect before him actually committed the crime in question, such a judge must disregard his sense of right and do that which must be legally done. Hence, if the prosecution fails to meet its burden of proof, then the judge must acquit the suspect irrespective of what the judge knows about the suspect. If the judge wishes to tell what he knows, then he must withdraw as a judge and probably swear-in as a witness, but cannot aid the prosecution’s case while he remains a judge for that would amount to contravening the litigant’s charter which prohibits a judge from being both litigant and arbiter in the same matter. This kind of dilemma is captured in the following illustration:

A one-time Kibera Principal Magistrate, Ms Catherine Mwangi, served in the crime-prone area of the city of Nairobi where she dealt with many offenders, some of whom she even knew by name because they appeared before her frequently. Early in 2001, Ms Mwangi surprised everyone in her court when she paraded two men charged with violent robbery and masquerading as police officers and told the packed courtroom, "I know these two men to be hardcore criminals and all of you should be wary of them." But in the next minute, she acquitted them for lack of evidence.22

This illustration in indicative of a moral dilemma; where the judge's hands are “tied” by legal technicality. In the name of grave professional duty, Ms Mwangi has no choice but to acquit the suspects despite knowing independently that they were hardcore criminals. This was certainly a decision that went against her conscience, but one she had to make. Commenting on a similar case where suspects known to the public to be hardcore criminals were acquitted

22Daily Nation, 12th March, 2001: Nairobi, Nation Media Group. p.16
for lack of evidence, the spokesman of the Judiciary in Kenya (by 2005) Mr Dola Indidis had this to say:

We cannot impute bad faith where evidence is not water-tight. If there is foolproof evidence, the magistrate will convict but he or she is not expected to shed tears where evidence is not enough. Courts will not be emotional in any case. They will use their discretion to make any ruling whether that of conviction or bail.23

Mr Indidis' remarks encapsulate what a Kenyan judge is generally expected to do as a matter of professional duty even when faced with a moral dilemma. In view of the Spokesman's position in the example under comment, it is evident that judges must disregard what their conscience tells them and uphold fidelity to legality in all their professional undertaking.

5:2.1 EVALUATION OF MORAL DILEMMA IN LEGAL PRACTICE AGAINST THE MEANING OF ‘RIGHT’, ‘GOOD’ & ‘MORALLY GOOD’

Given that a legal practitioner is very much likely to encounter a moral dilemma in his professional life, the following analysis seeks to assign value terms such as ‘right’, ‘good’, and ‘morally good’ to various choices that may be taken by a legal practitioner in situations where a moral dilemma is implied.

1. If a lawyer chooses to follow his conscience and decline to defend a client who confides in him to have committed the crime in question, such a course of action would be ‘good’ from a teleological perspective of the theory of duty if it produced a net aggregate of advantages over disadvantages to all the people involved. Such advantages could be in the form of a sense of satisfaction for telling the truth on the part of the lawyer and helping to achieve the ends of judicial justice. But the same choice would be a wrong act from the deontological perspective of the theory of duty because the lawyer would have failed to uphold fidelity to professional duty whose only justification is that it has been enacted by a legitimate authority and that the lawyer has taken an oath to uphold it.

2. If the lawyer remains a lawyer and defends the client in spite of the confession, then this course of action would be ‘right’ from the deontological perspective of the theory

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23 *Daily Nation*, 14th April, 2005: Nairobi, Nation Media Group. p.11
of duty because by defending the client irrespective of what the lawyer's conscience says, such a lawyer would have done what professionally ought to be done by being true to his client at whatever cost of principle to himself. This course of action would however not be ‘morally good’ since the lawyer pursues that which ought to be done but as demonstrated elsewhere in this chapter, nothing that ought to be done is ever morally good.

In view of the foregoing analysis, the answer to the question — what ought a lawyer do when faced with a legal norm, general compliance with which is contrary to his conscience — is clear. If the moral good is to be upheld, then a lawyer would have to abandon conduct whose validity is nothing other than that it constitutes that which must be done as a matter of professional duty. Hence, in order to perform a morally good action in legal practice, a practitioner must not defend a client who confesses to him/her to have committed the crime for which representation is sought if, out of a good motive, the lawyer's conscience says that doing so is wrong. But since it has been demonstrated that lawyers would always remain loyal to professional duty above everything else, yet remaining loyal to professional duty itself has been shown to be not morally good, it becomes important that we analyse the implication of “legitimate authority” on moral conscience.

5: 2.2 LEGITIMATE AUTHORITY VERSUS CONSCIENCE

In view of the principles of professional conduct in legal practice which have been discussed in the preceding chapters, especially under the legal positivist doctrine, there is no doubt that legal practitioners would normally not concern themselves with the moralness of their professional conduct. All they have to concern themselves with is upholding fidelity to legality and their acts would be judged as right in view of the deontological principle which, as demonstrated in Chapter Two, underpins the legal profession. A good example of case law to illustrate how the positivist doctrine looms large in solving legal disputes is the famous Fisher v. Bell case.
Fisher v. Bell is an English contract law case whose strict requirements in the formation of a contract were relied upon to determine a criminal case. The case concerns the requirements of 'offer' and 'acceptance' in the formation of a contract, where the court established that, where goods are displayed in a shop together with a price label, such display is treated as a mere 'invitation to treat' by the seller, and not an offer to sell. The offer is instead made when the customer presents the item to the cashier together with payment. Acceptance occurs at the point the cashier takes payment.

**Facts:** The Defendant displayed a flick knife in the window of his shop next to a ticket bearing the words "Ejector knife – 4s." Under the Restriction of Offensive Weapons Act 1959, section 1(1), it was illegal to manufacture, sell, hire, or offer for sale or hire, or lend to any other person, amongst other things, any knife "which has a blade which opens automatically by hand pressure applied to a button, spring or other device in or attached to the handle of the knife". On 14 December 1959, the Claimant, a chief inspector of police, brought forward information against the Defendant alleging the Defendant has contravened section 1(1) by offering the flick knife for sale.

**Judgment (High Court):** At first instance, the Prosecutor submitted that the Defendant has displayed the knife and ticket in the window with the object of attracting a buyer, and that this constituted an offer of sale sufficient to create a criminal liability under section 1(1) of the Act. The Defendant countered, arguing that the display was not sufficient to constitute an offer. The judges at first instance found that displaying the knife was merely an invitation to treat, not an offer, and thus no liability arose. The Prosecutor appealed the judges' decision.

**Upheld (Court of Appeal):** The court upheld that, although the display of a knife in a window might at first appear to "lay people" to be an offer inviting people to buy it, and that it would be "nonsense to say that the shopkeeper was not offering it for sale"; whether an item is offered for the purpose of the statute in question must be construed in the context of the general law of the country. The judges were of the opinion that, in the absence of a definition in the Act of 1959, the words “offer for sale” ought to be construed as they were in the law of contract, so that, in this instance, the respondent’s action was merely an invitation to treat and not a form offer for sale which needed but a customer's acceptance to make a binding contract for sale. They also read the statute on an exclusive, noting that other legislation prohibiting the sale of weapons referred to "offering or exposing for sale" (emphasis added). The lack of the words exposing for
sale in the Restriction of Offensive Weapons Act 1959 suggested that only a true offer would be prohibited by the Act. Appeal dismissed.

As a result of the dismissal of the criminal charge against the defendant in Fisher v Bell, makers of the law would later be forced to seal this loophole by enacting the Restriction of Offensive Weapons Act 1961; — in which, unlike in the 1959 law, the words “or exposes or has in his possession for the purpose of sale or hire” were inserted after the words “offers for sale or hire”

Summing up the majority decision of the Court of Appeal in Fisher v. Bell, Lord Parker CJ acknowledged that the law is, indeed, sometimes framed in a manner that is repugnant to the common sense understanding of lay people. However, judges and advocates, as professionals, must always apply the law as it is irrespective of any repugnancy to their conscience. The following excerpt from Lord Parker’s speech in Fisher v. Bell, brings out even more clearly the legal positivism that underlies the professional choices of legal practitioners:

“The sole question is whether the exhibition of that knife in the shop window with the ticket constituted an offer for sale within the statute. I think that most lay people would be inclined to the view (as, indeed, I was myself when I first read these papers), that if a knife were displayed in a window like that with a price tag attached to it, it was nonsense to say that that was not offering it for sale. The knife is there inviting people to buy it, and in ordinary language it is for sale; but any statute must be looked at in the light of the general law of the country, for Parliament must be taken to know the general law. It is clear that, according to the ordinary law of contract, the display of an article with a price on it in a shop window is merely an invitation to treat. It is in no sense an offer for sale the acceptance of which constitutes a contract. That is clearly the general law of the country. Not only is that so, but it is to be observed that, in many statutes and orders which prohibit selling and offering for sale goods, it is very common, when it is so desired, to insert the words “offering or exposing for sale”—“exposing for sale” being clearly words which would cover the display of goods in a shop window. Not only that, but it appears that under several statutes—like the Prices of Goods Act 1939 and the Goods and Services (prices control) Act, 1941—Parliament, when it desires to enlarge the ordinary meaning of these words, has a definition section enlarging the ordinary meaning of “offer for sale” to cover other matters including exposure
of goods for sale with the price attached. In those circumstances I, for my part, though I confess reluctantly, am driven to the conclusion that that no offence was here committed. At first sight it appears absurd that knives of this sort may not be manufactured, they may not be sold, they may not be hired, they may not be lent, they may not be given, but apparently they may be displayed in shop windows. But even if this is a *casus omissus*—and I am by no means saying that it is—it is not for this court to supply the omission. I am mindful of the strong words of Lord Simonds in *Magor & St Mellons Rural District Council v. Newport Corpn* in which case one of the lord justices in the Court of Appeal had, in effect, said that the court, having discovered the supposed intention of Parliament, must proceed to fill in the gaps such that what the legislature has not written, the court must write. But in answer to that contention, Lord Simonds in his speech said—it appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation...For my part, approaching this matter apart from authority, I find it quite impossible to say that an exhibition of goods is a shop window is in itself an offer for sale. I cannot find any assistance in favour of the appellant from the various authorities we have been referred. Accordingly, I have come to the conclusion in this case that the justices in the instance court were right, and this appeal must be dismissed.”

In view of Lord Parker’s own acknowledgement, the display of the flick knife in the shop window is a clear offer to sale as far as a lay person is concerned; after all, that is how the common sense understanding of lay people views such displays. But the judges invoked complex principles of law of contract that are alien to the common sense of lay people, thus setting free the defendant who, in the eyes of the lay person, should have been held criminally liable for offering for sale a prohibited commodity. Besides, after pointing out the loophole in the 1959 law, the judges, in typical positivist fashion, refrained from engaging in some kind of ‘gap filling’, leaving it to the makers of the law to make amends by enacting the 1961 law in which appropriate provisions were made to criminalise the display of flick knives for sale.

In view of the positivism demonstrated by *Fisher v. Bell*, most legal practitioners would be eligible to receive the rather cynical advice that Lord Mansfield gave to a newly appointed

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governor of a colony who was unversed in the law. Lord Mansfield had this to say to the rookie governor:

There is no difficulty in deciding a case; only hear both sides patiently then consider what legal justice requires and decide accordingly. But never give your reasons, for your judgement will probably be right according to the law but your reasons will certainly be wrong!25

This could sound like a curious advice coming from a judge in the Commonwealth. It, however, lends credence to the legal positivist thesis that legal matters need not be compatible with reason. However, as much as legal practice must ignore moral values as extraneous elements, it would be less than candid to pretend that the officers who apply the law professionally can completely ignore their rational faculties in situations where diligent pursuance of a legal norm is repugnant to the moral values that define them as conscientious beings. Given that human beings are intrinsically conscientious creatures and that lawyers are no exception, it would appear that to be subjected to the authority of the law without any exceptions is to be incompatible with conscience— for conscience requires that one should always act on the balance of reasons of which one is aware and has deliberated upon its consequences. Yet it is the nature of legal authority to demand total submission even when one thinks that what is demanded of them is against their conscience. It would, therefore, appear that submission to authority is irrational.

Similarly, the principle of moral autonomy entails action on one's own judgment on all possibilities of action. But since the legal profession requires lawyers to stick to the law even if doing so goes against their conscience, it follows that to be a truly legal professional requires one to abandon their moral autonomy. In this regard, it is clear that rigid fidelity to legality is incompatible with conscientious action and, *a fortiori*, incompatible with the free-

will component of morality. But the question is— is there a theoretical framework within which these two can be mutually inclusive? This question is posed with regard to the objective specified in the Statement of the Problem.

5: 2.3 COMPATIBILITY OF LEGAL PRACTICE WITH MORALITY

Whereas the tenets of the legal profession often require advocates and judges to act against their conscience, there is a way in which fidelity to legality and conscience are compatible. This compatibility demonstrates that positivist separation thesis is wrong about the exclusion of the moral fact from judicial matters. One of the reasons legal positivists have given to exclude moral considerations from legal matters is that of 'unpredictability' and which particularly worried the likes of Jeremy Bentham and thinkers in the mainstream of British legal positivism. The other is that of 'legitimacy', which is associated with American constitutionalism and which holds that, even if judges exercised their moral sense in legal controversies as reasonably and as predictably as possible, such decisions still lack legitimacy because it is not for the judges to take the determination of what is right and wrong into their own hands.

But according to the natural law theory which has already been discussed in the Theoretical Framework of this study, the parallelism which legal positivism insists must exist between legal matters and moral concerns can be resolved without taking the severe option of completely eliminating the moral sense from legal matters. In view of this, there is nothing wrong in judges exercising a moral sense in their judicial functions. This is because exercise of the moral sense is unavoidable and is, in fact, an integral part of what good adjudication requires. For this reason, Dworkin repudiates the American constitutional charge of illegitimacy and Bentham’s worry about unpredictability saying, "legal controversies can be handled rationally."

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This position is reiterated by Edmund Burk’s famous quote that; “It is not what a lawyer tells me I may do; but what humanity, reason, and justice tell me I ought to do.”

To show that there is nothing wrong with judges exercising their moral sense in legal matters, the case of Shaw v. Director of Public Prosecutions (1961) is a good example. Below is the brief of the case.

Frederick Charles Shaw, a British subject had published the magazine titled The Ladies Directory giving names, addresses and telephone numbers of female prostitutes indicating, in code, their sexual specialties. The magazine, which included a number of nude photographs, made it clear that the women listed in the magazine were making themselves available for sexual intercourse and sexual exhibitions of various kinds at a fee. In 1961, Shaw was brought to trial, charged with three offences, prominent of them being "conspiracy to corrupt public morals." The jury found Mr Shaw guilty of all offences and handed him a nine-month prison sentence, which he immediately appealed. His first appeal to the Court of Criminal Appeals was rejected prompting him to move to the House of Lords. In May 1961, the House of Lords sustained Shaw’s conviction maintaining that he was guilty of the common law crime of conspiracy to corrupt public morals. However, the Lords curiously conceded that they found no statute that declared such a conspiracy to be a crime.

This case is landmark because it was one of those rare occasions when judges made a bold and radical departure from pure legalism by upholding the conviction of a person charged of a crime that did not exist in the statutes. It is evident that the Lords were driven more by a moral sense about what is right and wrong rather than by blind fidelity to legality. Since the judges indicated clearly that they found no statute that declared the said conspiracy a crime, the case should have been declared a mistrial and the accused acquitted on the strength of the positivist doctrine of nullum crimen sine lege, (there is no crime without legislation). But the judges stood their ground and convicted the accused.

The following excerpt from the speech of Lord Simonds with regard to Shaw’s case demonstrates how Judges can justifiably advance the course of justice by appealing to their

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27 http://www.brainyquote.com/quotes/quotes/e/edmundburk149730.html#EJFM5DEMJeZzLP8
conscientious faculties contrary to the position held by the Kelsian and Austinian positivist separation thesis that the law is only that command which the legislature has established and whose mere enactment is the sufficient warrant of its validity, and to values beyond or outside which neither judge or advocate has any business to look into. This is how Lord Simonds put in the majority opinion dismissing Charles Shaw’s final appeal in the House of Lords with regard to the non-existent offence of conspiracy to corrupt public morals:

“Need I say my Lords, that I am no advocate of the right of judges to create new criminal offences?...But I am at a loss to understand how it can be said either that the law does not recognize a conspiracy to corrupt public morals or that, though there may not be an exact precedent for such a conspiracy as the case reveals, it does not fall fairly within the general words by which it is described. I do not propose to examine all the relevant authorities, but the fallacy in the argument that was addressed to us lay in the attempt to exclude from the scope of general words acts well calculated to corrupt public morals just because they had not been committed or had not been brought to the notice of the court before. It is not thus that the common law has developed. We are, perhaps, more accustomed to hear this matter discussed on the question whether such and such a transaction is contrary to public policy. At once the controversy arises. On the one hand it is said that it is not possible in the 20th Century for the court to create a new head of public policy, on the other it is said that this is but a new example of a well-established head. In the sphere of criminal law, I entertain no doubt that there remains in the courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety of and order but also the moral welfare of the state, and that it is their duty to guard it against attacks which may be more insidious because they are novel and unprepared for. That is the broad head (call it public policy if you wish) within which the present indictment fall. It matters little what label is given to the offending act. To one of your Lordships it may appear an affront to public decency, to another, considering that it may succeed in its obvious intention of provoking libidinous desires, it will seem a corruption of public morals. Yet others may deem it aptly described as the creation of public mischief or the undermining of moral conduct. The same act will not in all ages be regarded in the same way. The law must be related to the changing standards of life, not yielding to every shifting impulse of the popular will but having regard to fundamental assessments of human values and the purpose of society. Today, a denial of the fundamental Christian doctrine, which in past centuries, would have been regarded by the ecclesiastical courts as heresy and the common law as blasphemy, will no longer be an offence if the decencies of controversy are observed. When Lord Mansfield, speaking long after the Star
Chamber had been abolished, said [in Delaval (1763) Burr 1438] that the Court of King’s Bench was the custos morum of the people and had the superintendency of offences contra bono mores, he was asserting, as I now assert, that there is in that court residual power, where no statute has yet intervened to supersede the common law, to superintend those offences which are prejudicial to the public welfare. Such occasions will be rare, for Parliament has not been slow to legislate when attention has been sufficiently aroused. But gaps remain and will always remain since no one can foresee every way in which the wickedness of man may disrupt the order of society. Let me take a single instance to which my noble and learned friend, Lord Tucker, refers. Let it be supposed that, at some future date, perhaps early, homosexual practices between adult consenting males are no longer a crime. Would it not be an offence if, even without obscenity, such practices were publicly advocated and encouraged by pamphlet and advertisement? Or must we wait until Parliament finds time to deal with such conduct? I say, my Lords, that, if the common law is powerless in such an event, then we should no longer do her reverence. But I say that her hand is still powerful and that it is for Her Majesty’s judges to play the part which Lord Mansfield pointed out to them. The appeal on both counts should, in my opinion, be dismissed.”

The import of the foregoing ruling is that, contrary to the positivist principle that lawmaking is the preserve of the legislature and not the judiciary, the courts found it prudent to create a new offence under the ‘thin veil of interpretation’ and went ahead to convict the defendant without affording him the opportunity to prepare an appropriate defence to it. It is important to point out that before handling Shaw’s case, Lord Simonds was a fierce opponent of judge-made law when, in Magor & St Mellons Rural District Council v. Newport Corporation, opposed the ‘gap-filling’ functions of the courts. In this case, the Court of Appeal had 1951 tried to fill in the gaps in a statute where parliament had intended an effect that was not clearly specified in the statute. The issue was whether rights to compensation are well capable of falling within the definition of ‘property of a company’ in the relevant provisions of the Corporations Law; to which Lord Simonds said:

“It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation. The duty of the court is to interpret the

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29 Shaw v. Director of Public Prosecutions [1961] 2 All ER, House of Lords
words that the legislature has used; those words may be ambiguous, but, even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited. If a gap is disclosed, the remedy lies in an amending Act and not in a gap-filling expedition by the court.”

The conversion of Lord Somonds from a fierce opponent of judge-made law as demonstrated in *Magor & St Mellons Rural District Council v. Newport Corporation* to an entertainer of judge-made law as demonstrated in *Shaw v Director of Public Prosecutions* demonstrates that judges can make conscientious decisions whenever it is appropriate to do so. The question, therefore, is—should Kenyan judges, when it is appropriate to do so, be allowed to exercise the kind of moral sense exhibited by judges in *Shaw v. Director of Public Prosecutions*? To this question, the answer according to this study is affirmative.

Since it is acceptable, as illustrated by Lord Simonds’ positions in *Magor & St Mellons Rural District Council v. Newport Corporation* on the one hand, and *Shaw v Director of Public Prosecutions* on the other, that judges can exercise their own sense of justice whenever it is right to do so, the moral sense should also have prevailed in the case in which Kibera chief magistrate Catherine Mwangi had to acquitted robbery suspects for lack of direct evidence yet her conscience was reasonably convinced that they were dangerous criminals. In Shaw’s case, the Lords abandoned narrow pure legalism and upheld the conviction of the accused, but in the Kibera case, the magistrate upheld legal technicality only to allow dangerous criminals to skulk through the net of judicial vigilance in the name of upholding fidelity to legality.

Whereas the judicial system in Kenya could be intended to give effective remedies and reliefs whenever social order is violated, narrow legalism often hamstrings these good intentions. An example of how narrow legalism sometimes hamstrings the course of justice can be found in the law concerning election petitions. Before Kenya enacted the Constitution of Kenya

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2010, one of the rules necessary to petition the results of a presidential, parliamentary or civic election was that the petition papers must be served in person to the person whose election was being contested. But in cases where a petition was being launched against a sitting president, it was almost impossible to serve the president in person because of the logistic and security detail that surrounds the holder of the office of the president—yet without such service the petition would be considered null and void.

This scenario was encountered in *Imanyara v. Moi & 12 others* when the 1992 election of Daniel Arap Moi as president of Kenya was contested by Mr Gitobu Imanyara. Although the overall petition did not succeed, there was an instance when the judges exercised good conscience to thwart what was an attempt by Mr Moi to use narrow legalism to render the entire petition a still-born by having it struck out before going to full trial. In one of his submissions to have the petition struck out on grounds of legal technicality, Mr Moi argued that the notice for the petition was not published within the prescribed time limits. Below is a brief of the case:

*Practice and Procedure* (the issue): Service of election petition—where service of the petition was made out of time by only one day outside the 10 days time limit prescribed by Rule 14 of the Election Petition Rules, 1993—whether the Court had the power or discretion to extend the time for service of the petition.

In the initial stages of the case, Mr Daniel Arap Moi (applicant) made an application seeking to have the petition against his 1992 election as President of the Republic of Kenya dismissed on grounds that he had not been served with the petition within the stipulated time limit. Through lawyer Mutula Kilonzo, Mr Moi had sworn an affidavit in which he said that he had not been duly served with the petition because it was filed on January 25, 1993 and notice of it was not given in the Gazette until February 5, 1993, one day later than the time limit of 10 days as prescribed by Rule 14 of the Election Petition Rules. In this regard, Mr Inamdar, for Mr Moi, submitted that it mattered not that the service was out of time by only one day as rule 14 was mandatory and the court had no power or discretion to extend the time for service of the petition. In counter-argument, Dr John Khaminwa, for Mr Imanyara, submitted that
the late publication of the petition was through no fault of the petitioner but through the deliberate default of the government printer.

_Held:_

1. The Court had no power under rule 14 to extend time for service of the petition, but there was power under section 3A of the Civil Procedure Act to prevent an injustice.
2. It could not be the case that the restrictive provisions of a regulatory rule (Rule 14) under a subsidiary legislation, whether mandatory or directory, could override or assume any preponderance over the inherent jurisdiction of the court under the substantive provisions of section 3A of the Civil Procedure Act that conferred power on the court to make orders necessary for the ends of justice and to prevent the abuse of the court process. Rules and regulations could not enlarge or delimit the jurisdiction of the court granted by substantive provisions of a parent statute.

_Decision:_ Application dismissed

Narrow legal technicalities such as the ones provided by Rule 14 in the case under comment have often been used persuasively by positivist lawyers to stop many cases from going to full trial and thereby denying courts the opportunity to explore the substantive issues of such cases. It has, however, taken the courage of some judges exercising their conscientious faculties to pursue higher values instead of seeking to appear to uphold fidelity to the law. In dismissing Mr Moi’s application with regard to Rule 14 in _Imanyara v. Moi & 12 others_, the judges (Tagbor, Amin and Couldrey) said:

“Equity looks on that as done which ought to be done and will not suffer a wrong to be without remedy. Let it not be said in this instance that we had the opportunity to remedy a wrong and did not take it or that, confronted with injustice, we turned our backs on it and took cover under subsidiary legislation. We think that the appropriate remedy for the petitioner is to be put in a position to exercise his right of challenge under the constitution by the hearing of his petition on a date to be fixed and notified. We so rule and order, and award him the costs of this application.”

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31 _Imanyara v Moi & 12 others_; (2008) 1KLR (EP)
To cure the problem of legal technicalities with regard to service of notice and time limits in presidential election petitions, the Constitution of Kenya 2010 would provide under Article 159 (2d) that; “justice shall be administered without undue regard to procedural technicalities.” However, provisions of Article 159 (2d) and the attendant mischief it was intended to cure notwithstanding, the Supreme Court of Kenya would still “take cover” under legal technicalities to dismiss additional information that could have been a game-changer in *Raila Odinga & 5 others v. Independent Electoral and Boundaries Commission & 3 others.*

In this case, Mr Raila Odinga (petitioner) had challenged the declaration by the Independent Electoral and Boundaries Commission (IEBC) of Uhuru Kenyatta as the winner of the March, 2013 presidential election, citing, among other things, fraudulent tallying of figures, discrepancies in the election management process and flouting of election laws. At one point in the process of the trial, it was established that the petitioner had annexed an 839-page affidavit containing what was regarded as “additional new evidence” that was not filed through the correct procedure under Rules and Procedure of the Supreme Court in election petitions. With respect to this ‘new’ affidavit, the Supreme Court had to, among other things, pronounce itself on the following issues:

a. Procedure for filling of documents in a presidential election petition;
b. Time prescribed for determination of a presidential election petition as prescribed by Article 140 of the Constitution of Kenya 2010;
c. Where the affidavit was lengthy and introduced new issues; and admissibility of a further affidavit or additional evidence in a presidential election petition filed without leave of the court.

In declining to accept the 839-page affidavit and ordering that it be expunged from the court’s record, the judges— WM Mutunga, PK Tunoi, MK Ibrahim, JB Ojwang, SC Wanjala and NS Ndung’u— held, among other things, that:
a. The petitioner had used an unusual method of availing affidavits as annexure or evidence, thus evading paying the requisite filing fees and rendering the probative value of the affidavit questionable;
b. The period for the filling, prosecution and determination of a presidential election petition was only 14 days from the time of filling the petition which was a very tight, short and limited period. The background to the setting of the strict timelines ought to be known to most Kenyans as there was a purpose for it and the intention of the People of Kenya and of Parliament ought to be respected;
c. If the further affidavit was small or limited so that the other party was able to respond to it, then the court could have been considerate, taking into account all aspects of the matter. However, where the material introduced was so substantial involving not only a further affidavit but massive additional evidence so as to make it difficult or impossible for the other parties to respond effectively, the court would exercise caution and care in the exercise of its discretion to grant leave for filing of the further affidavit and admission of additional evidence;
d. The additional facts and evidence contained in the affidavit tended to introduce new matters that would have changed the character and nature of the petition and probably lead to a serious departure from the original case.32

Given that the decision of the Supreme Court in a presidential election petition was final and could not be subjected to any appeal, one would have expected the judges to engage the highest level of their conscientious faculties in the decision in Raila Odinga & 5 others v. Independent Electoral and Boundaries Commission & 3 others—more so because of the immense public-interest that underlies presidential election petitions. If anything, the judges in the instance case, as the issues that required determination indicated, were faced with some kind of moral dilemma since they were confronted with a situation where they were required to pronounce themselves on two competing provisions of the Constitution of Kenya 2010—these provisions were Article 140(2) and Article 159(2d).

Article 140(2) provided that, within 14 days after the filing of a petition contesting the results of the presidential election, the Supreme Court should hear and determine the petition and its decision shall be final. On the other hand, Article 159(2d) provided that justice shall be

32 Raila Odinga & 5 others v. Independent Electoral and Boundaries Commission & 3 others, [2013] KLR-SCK Petitions Nos 5,3,4 of 2013 (Consolidated)
administered without undue regard to procedural technicalities. In substantive terms, the former provision addressed itself to the value of time limits and finality of jurisdiction, while the latter provision addressed itself to the value of justice. Given the arguments advanced by the parties to the case, the judges found themselves confronted with a situation where they had a requirement to adopt each of two alternatives (Article 140 and Article 159), and neither alternative is overridden by the other, but they could not fulfill both. In this regard, a conscientious process was required of the judges to make a choice between the plain provisions of Article 140(2) and the elastic provisions of Article 159(2d)—which would boil down to a choice between adherence to strict time limits and ensuring that justice is served.

As it would turn out, the judges went for the easier option by ‘taking cover’ under the strict timelines provisions of Article 140(2) instead of serving the interests of justice by facing up to the challenge would have been presented by Article 159(2d) which, by all estimations, would have required them to burn the midnight oil and look into the merits of the 839-page affidavit whose contents, even the judges themselves conceded, would have been a game changer should they have been considered in the final decision in Raila Odinga & 5 others v. Independent Electoral and Boundaries Commission & 3 others. In essence, the judges in Raila Odinga & 5 others v. Independent Electoral and Boundaries Commission & 3 others chose strict timelines over justice which, from a moral point of view, amounted to choosing a lower value over a higher value.

Would the Kenyan judicial system, in view of the foregoing analysis, be better off if it allowed judges and advocates to exercise their conscience on certain legal disputes whenever it is right to do so? The answer to this question is affirmative. The following example helps to illustrate how Kenyan judges can make rational decisions which, though may fall outside the scope of proper judicial procedure, reasonably promote the ends of justice:

In May 2003, Alex Etyang, then a judge of the High Court of Kenya, quashed the conviction of a man accused of rape and, by doing so, set
a precedent that would usher sex-attack trials in Kenya into a new era. The judge upheld an appeal filed by Richard Kiptoo Cherutich who had been jailed for 14 years by a lower court for the rape of a housewife. Etyang insisted that forensic tests should have been carried out to prove that swab specimen taken from the victim matched that of the alleged attacker. But the ruling aroused consternation among advocates who described it as flying in the face of conventional practice in rape trials where convictions had hitherto been obtained by a woman only proving that she had been forced into sex and demonstrating, not necessarily through specimen analysis, that her attacker was indeed the person accused in court.\textsuperscript{33}

In view of the reasoning employed in \textit{Shaw v. Director of Public Prosecutions, Imanyara v Moi & 12 others} and Justice Etyang’s judgement as contrasted with the reasoning in \textit{Raila Odinga & 5 others v. Independent Electoral and Boundaries Commission & 3 others}, it is clear that the judges in the former cases were guided by a moral sense which is demonstrative of a conscientious process in handling serious matters while the judges in the latter case decided to uphold fidelity to narrow and pure legalism which is indicative of the positivist underpinning of their judicial philosophy.

It is, however, possible that the judges in the former examples were not aware that contrary to the doctrinal position of their function as judges, they were enforcing moral positions—but that, nevertheless, is what they did. In this regard, it is important to point out that a process where judges exercise their moral sense or consider issues outside the official judicial scope in solving a dispute may be justified by the doctrine known as \textit{ex aequo et bono}—which literally means “according to what is equitable and good”. This doctrine demands that a case be decided on its own merits and is commonly used in international law when a case, by agreement of the principals, is decided on grounds of equity and reason rather than on specific points of law.

\textsuperscript{33}\textit{Daily Nation}, 22\textsuperscript{nd} May, 2003: Nairobi, Nation Media Group. P1
Given that the issues raised by the petitioners in *Raila Odinga & 5 others v. Independent Electoral and Boundaries Commission & 3 others* were in the interest of democracy as a universal value and not just a personal contest between the petitioners and respondents, the court ought to have directed itself properly at the pre-trial stage of the case by espousing the *ex aequo et bono* doctrine. By deciding this case based on this doctrine, where the unique issues surrounding the March 2013 polls in Kenya are dealt with on their own merit other than specific points of law and procedure, the final judgement would have, by all estimations, inspired confidence in the Supreme Court of Kenya as the highest court in the land whose decision in any dispute brought before it should be beyond reproach.

In this regard, by putting a higher premium on legal technicalities at the expense of justice, the decision of the Supreme Court of Kenya in *Raila Odinga & 5 others v. Independent Electoral and Boundaries Commission & 3 others* failed to inspire confidence in Kenyans just the way the decision of the Supreme Court of the United States in *Dred Scott v. Sandford* failed to inspire confidence in the American people.

In a 2014 speech delivered to delegates attending a Law Society of Kenya annual conference in Kwale County, then Director of the Kenya School of Law PLO Lumumba claimed the judges relied on faulty jurisprudence to arrive at the decision in *Raila Odinga & 5 others v. Independent Electoral and Boundaries Commission & 3 others*. Prof Lumumba said that the Supreme Court judgment that validated the election victory of Uhuru Kenyatta as president should not be taught in any law schools, pointing out that the authorities the judges relied on were from Nigeria and Pakistan which are military states. Then Busia Senator Amos Wako, a former Attorney General, also faulted the judgment in *Raila Odinga & 5 others v. Independent Electoral and Boundaries Commission & 3 others*, and also expressed concern over the same
Supreme Court was overturning Court of Appeal decisions that, according to him, were founded on more credible jurisprudence.\(^{34}\)

In *Dred Scott v. Sandford*, the court made two main rulings— the first ruling was that African-Americans were not citizens and, therefore, had no standing to sue in federal court. The second ruling was that the federal government had no power to regulate slavery in any territory acquired subsequent to the creation of the United States. The rationale of the Supreme Court regarding the jurisdictional ruling implied that people of African descent (both slave and free) were not protected by the Constitution and were not U.S. citizens. But since passage of the 14\(^{th}\) Amendment to the U.S. Constitution in 1868, both rulings are superseded and no longer valid precedent. Nonetheless, the case retains historical significance as it is widely regarded as the worst decision ever made by the Supreme Court of the United States.

Dred Scott, an African-American slave, had asked a United States Circuit Court to award him his freedom because he and his master had resided in a state (Illinois) and a territory (Wisconsin Territory) where slavery had been banned. Chief Justice Roger Taney, writing for the court, held that Scott, as a person of African ancestry, was not a citizen of the United States and therefore had no right to sue in federal court. The judge wrote:

> We are satisfied, upon a careful examination of all the cases decided in the State courts of Missouri referred to, that it is now firmly settled by the decisions of the highest court in the State, that Scott and his family upon their return were not free, but were, by the laws of Missouri, the property of the defendant; and that the Circuit Court of the United States had no jurisdiction, when, by the laws of the State, the plaintiff was a slave, and not a citizen... the authors of the Constitution had viewed all blacks as beings of an inferior order, and altogether unfit to associate with the white race, either

\(^{34}\) https://www.standardmedia.co.ke/?articleID=2000131945&story_title=plo-wako-criticise-supreme-court
in social or political relations, and so far inferior that they had no rights which the white man was bound to respect.\textsuperscript{35}

This holding was contrary to the practice of numerous states at the time, particularly Free states, where free blacks did in fact enjoy the rights of citizens, such as the right to vote and hold public office. The Court went on to hold that Congress had no authority to prohibit slavery in federal territories because slaves are personal property and the Fifth Amendment to the Constitution protects property owners against deprivation of their property without due process of law. In reaching this decision, Taney had hoped to settle the growing controversy surrounding slavery in the United States, but it had the opposite effect.

5:2.4 LAW OF EQUITY AS AN ASPECT OF MORAL CONSIDERATION IN JUDICIAL MATTERS

‘Equity’ or ‘Law of Equity’ is the name given to the set of legal principles, in jurisdictions following the English common law tradition, that supplement strict rules of law where their application would operate harshly. In essence, equity developed as a way to "mitigate the rigor or harshness of common law" by allowing courts to use their discretion and apply justice in accordance with natural law.\textsuperscript{36}

In many modern jurisdictions, the law, as the civilised and most predictable way of solving disputes in society, is either found in constitutions, statutes or case law. This means that, if the constitution as a source of law does not provide a remedy to a certain legal problem, then one can refer to a relevant statute to see if he can find the appropriate remedy, and if no statute provides the remedy, he is required to refer to case law or common law to find a remedy. But what happens if no remedy is found in any of the three sources. Does such a person remain suffering in silence?

\textsuperscript{35} Dred Scott v. Sandford, 60 U.S. 393 (1857)

\textsuperscript{36} A. Hudson (2009), *Equity and Trusts*. New York; Routledge-Cavendish. p24
Because of the likelihood of this kind of situation where one can fail to find a remedy in the established sources of law, the law of equity developed to, among other things, do some ‘gap-filling’ in a situation where someone suffers harm but there is no remedy in the available traditional sources of law. The converse could also be the case— the law provides a remedy to a problem but the procedures and principles guiding how the remedy should be arrived at are so rigid that justice ends up being compromised. Aristotle encapsulates this point more succinctly:

When the law speaks universally (in general sweeps as opposed to worldwide), and a case arises on it which is not covered by the universal statement, then it is right to…correct the omission. Hence, the equitable is just, and better than only one kind of justice—not better than absolute justice, but better than the error that arises from the absoluteness of the statement. And this is the nature of the equitable: a correction of law where it is defective owing to its universality (rigidity).\(^{37}\)

Equity may, therefore, find relevance in situations such as in the law of torts where the claimant suffers harm as a result of the defendant’s wrongful conduct but the law does not find the defendant negligent, hence not liable. For example, in *Esso Petroleum Co. Ltd v Southport Corporation* an oil tanker belonging to the defendant developed a steering fault when approaching tide water in rough weather, and because of the bad weather and the danger of turning round, the master decided to continue into the channel. However, the vessel took a heavy shear to starboard and ran aground on a coastal wall. In order to save the vessel crew from danger, the master discharged 400 tonnes of oil to lighten the vessel, and polluted the Southport coastline. Southport Corporation claimed damages on grounds that the deposit of oil on their property constituted a nuisance, or was a trespass, and also negligence.

Judgment of the case involved different phases. At the first instance the judgment by the court given by Judge Devlin J. gave judgment in favour of the defendants, dismissing the

liability claim brought against the ship owners. But the plaintiff went on to appeal to the Court of Appeal of which the decision was reversed by the House of Lords. In dismissing the action in trespass, the House of Lords held:

There must be unjustifiable contact with the plaintiff’s property. This contact will have to be direct, if it is indirect, then it will be considered as nuisance. The damage cause must be intentional, and if it is not, this will probably constitute negligence as opposed to trespass. The defendant therefore will only answer for damages caused directly by his intentional contact with the rights of others.\(^{38}\)

In the *Esso Petroleum Co Ltd v Southport Corporation* case, trespass was rarely discussed since it was turned down from the start for reasons of necessity—the situation of the defendants made the discharge of oil unavoidable. The alternative action was that of trespass to land: the general principle of law is that in order to support the action of trespass to land, the act must be done by the defendant physically, and such act should be done directly on to the plaintiff’s land. In the case of *Reynolds v Clarke*, where the defendant put a rain spout on his house from which water poured on the walls of the plaintiff’s house and caused them to rot. The plaintiff however brought an action for trespass, but failed because he should have brought an action upon the case. And this is because the prejudice to the plaintiff was not immediate, but consequential.

Another case cited here is between *Read v J. Lyons and Co. Ltd.* where Viscount Simon L.C. confirmed the same situation when he observed that the issues in *Fletcher v. Rylands* did not constitute a case of trespass because the damage was indirect and not direct. In relating this situation with that of *Esso Petroleum Co Ltd v Southport Corporation*, it can be deduced that Southport Corporation could not sue in trespass because the discharge of oil was not done

\(^{38}\) *Esso Petroleum Co Ltd v Southport Corporation* [1956] A.C. 218
directly on to their foreshore, but outside the coastline, but was carried by water tide on to their land, which was indirect and not direct.

The other possible cause of action was that of private Nuisance: For Esso Petroleum’s action to have been related in the cause of private nuisance, the defendant must have used his own land or some other land in such a way that it will be injurious to affect the enjoyment of the plaintiff’s land. “The ground of responsibility”, said Lord Wright in Sedleigh-Denfield v. O’Callaghan, “is the possession and control of the land from which the nuisance proceeds.” However, in relating this principle to the Esso case, it can be seen that the discharge of oil was not a private nuisance because it did not involve the use by the defendants land, but only of a ship and sea.

Because of the universal (broad sweeping) principles of the law of torts, Esso Petroleum Co. Ltd v Southport Corporation explains how hard it is to bring an action based on the three separate torts which happened in the case of coastline by an oil spill at sea. The same often occurs in other civil matters such as in contract law and property law where damages may not be the sufficient remedy to compensate the aggrieved party. Equity, therefore, steps in to mitigate the rigor or harshness of the law in order to provide appropriate remedies that are just, fair and reasonable. In this regard, ‘equity’ appeals to conscience instead of the law, and that is why courts of equity were initially referred to as ‘courts of conscience’ instead of ‘courts of law.’
CHAPTER SIX
EVALUATION OF RESEARCH FINDINGS, GENERAL OBSERVATIONS, CONCLUSIONS, SUGGESTIONS AND RECOMMENDATIONS

6:1.1 OVERVIEW

This study has sought to answer research questions stated in the Statement of the Problem, key among them being—what, if any, is the place of morality in the Kenyan judicial system? This question is the focus of the statement of the problem and its answer is arrived at by way of comparing and contrasting various philosophical theories related to the subject of Philosophy of Law.

In answering this question, the study has employed the dialectic method to define morality on the one hand and judicial practice on the other. In defining morality, the study has examined the moral fact from two disciplinary perspectives namely, sociological and philosophical. Morality from the sociological perspective is subjective—it depends on the dictates of society such as education, social pressure or customs of a people. Morality from the philosophical perspective is objective—it involves people employing their conscientious faculties in choosing what course of action to pursue or eschew.

In defining the judicial (legal) system from an ethical perspective, the study has cited the deontological theory of ethics and concluded that a judicial system comprises of a procedure in which a privileged stratum of rules and regulations are applied in order to direct human conduct—these rules are applied by legal practitioners who are enjoined to uphold certain codes of professional conduct without exception. To this end, a judicial system, once established, must function according to the rules that govern its operations—rules whose mere enactment by a legitimate authority is the sufficient warrant of their validity, and to values beyond or outside which neither judge nor advocate has any business to consider.
In view of the principles of morality on the one hand, and the principles of legal practice as guided by the positivist separation thesis on the other, it appears that morality has no role to play in judicial matters. However, there are instances, as illustrated in Chapter Five, in which Kenyan judges have made professional decisions based on values outside their strict judicial mandate, thereby demonstrating a conscientious underpinning on their part. Whereas the foregoing is common especially in the Common Law judicial system, the fundamental point in legal science is that values beyond or outside the judicial scope are extraneous and irrelevant elements in judicial controversies.

6: 1.2 GENERAL OBSERVATIONS

1. In view of the primary data collected pursuant to the methodology of this study, it emerged that majority of Kenyans hold a sociological notion of morality. More than 95 percent of the respondents consider morality to be the norms conferred either by custom or religion, and which prescribes acceptable behaviour and forbid vice in society.¹

2. There is a presumption in judicial practice that; “makers of the law are men and women with good intentions.” In view of this presumption, the root of law is said to be a network of objective ends assumed to be good. It is against this presumption that the positivist separation thesis anchors its position that moral considerations should be excluded from judicial controversies, arguing that, such moral considerations would be irrelevant in legal matters since they are assumed to have been considered at the law-making stage.

In view of the foregoing, the strategy of adjudicating disputes in a judicial process involves three main functions namely — knowing the facts of the dispute before the court, knowing the law applicable to the facts and knowing the best way of applying the law to the available facts. Against this background, and with regard to what legal

¹Annexed herewith is an evaluation of representative samples of what respondents consider morality to be.
positivism stands for, legal practice is considered to be a systematic science consisting of a body of clear and stable rules. These rules are assumed to be a complete, smooth, seamless network, the measurement of any dispute against which would automatically indicate its solution. It is on this basis that legal practitioners argue their cases, citing certain established normative principles found in statutes, constitutions, rules or previous cases. Because of this character, legal practice becomes a science that argues from authority. However, whereas there is nothing fundamentally wrong with citing authority when advancing certain arguments, there are times when this mode of reasoning, which underlies many judicial decisions, commits the fallacy\(^2\) known as “argument from authority.”

Argument from authority is a kind of argument that employs expert opinion (\textit{de facto authority}) or the pronouncements of someone vested with an institutional office or title (\textit{de jure authority}) to support a conclusion. As a practical, but fallible method, of steering discussion toward a presumptive conclusion, the argument from authority can be a reasonable way of shifting a burden of proof. However, if pressed too hard and pushed too far in a discussion or portrayed as a better justification for a conclusion than the evidence warrants, argument from authority can end up committing the fallacy of \textit{argumentum ad verecundiam}.\(^3\)

\textit{Argumentum ad verecundiam} (argument to reverence or respect) is the fallacious use of expert opinion in argumentation to try to persuade someone to accept a conclusion.\(^4\)

An aspect of the judicial process that tends to commit informal fallacies is the one that concerns the law of evidence. Under the adversarial system in which parties to a

\(^2\)A fallacy is an error of reasoning or tactic of argument that can be used to persuade someone with whom you are reasoning that your argument is correct when really it is not.


\(^4\)\textit{Ibid}: p.375. (John Locke in \textit{Essay Concerning Human Understanding}; 1690, describes such arguments as tactics of trying to prevail on the assent of someone by portraying him as irrelevant or immodest if he does not readily yield to the authority of some learned opinion cited. However, not all appeals to expert authority in argument are fallacious. They can be reasonable if used judiciously.)
dispute present their case before judges, evidence of facts plays a vital role in arriving at the conclusions necessary to resolve disputes.

The example cited in Chapter Five in which Kibera Principal Magistrate Catherine Mwangi acquitted two robbery suspects for lack of evidence despite the magistrate admitting knowledge of the suspects' criminal activities underscores the reason why judicial processes put a high premium on the issue of admissibility of evidence— especially empirical evidence.

Because legal positivism, the theory upon which all legal systems are based, characterises legal practice as a science, it has, ipso facto, placed an equally high premium on empirical evidence. This characterisation has somehow caused the judicial system to appear to entertain the assumption that; “lack of evidence means the alleged offence did not take place.” As a result of entertaining this assumption, judicial processes, citing the law of evidence, often commit the fallacy of argumentum ad ignorantiam. Argumentum ad ignorantiam (argument to ignorance) takes the following form:— a proposition \( p \) is not known or proved to be true/false; therefore \( p \) is false/true.

Argumentum ad ignorantiam is a negative type of knowledge-based or presumptive reasoning, generally not conclusive. It is a kind of presumption-based argumentation employed to advocate for the adoption of a conclusion provisionally in the absence of hard knowledge that would determine whether the conclusion is true or false. The legal principle in criminal law known as “presumption of innocence” falls under this category of argument.\(^5\)

\(^5\)Ibid. p.375: A practical example of argumentum ad ignorantiam would be as follows; Smith has not been heard from for over seven years, and there is no evidence that he is alive. Therefore it may be presumed (for the purpose of settling Smith’s estate) that he is dead. Another example comes from the U.S. Senate hearings in 1950, in which Senator Joseph McCarthy used case histories to argue that certain people in the State Department be considered Communists. Of one case he said, “I do not have much information on this except the general statement of the agency that there is nothing in the files to disprove his Communist connections!”
However, this kind of reasoning, which looms large in the law of evidence, raises a number of epistemic issues that are eligible for a philosophical enquiry. In the branch of philosophy known as epistemology, there are two categories of knowledge namely; knowledge *a posteriori* and knowledge *a priori*. Knowledge *a posteriori* refers to the capacity for human beings grasp things (sensations) by any of the five senses. In this regard, people know things by either sense of touch, hearing, sight, feeling or smell. Such knowledge is, variably, known as empirical knowledge and can be inspected by use of any of the five human senses.

Knowledge *a priori*, on the other hand is knowledge that is gained independent of the five senses. It is, variably, known as rational knowledge and includes mathematical knowledge. For instance, we all know what the mathematical operation $2+2=4$ means and it makes sense to us whether we employ any of our five senses or not.

In view of the foregoing categorisation, let us pose some epistemological questions, relate them to the standard law of evidence and see if they make sense. If a large branch falls off a tree in the middle of the Congo forest but there is nobody to see it fall or hear the sound of it falling, would it be correct to conclude that the branch didn’t fall? Epistemologically speaking, the answer is certainly ‘No’, because it is obvious that whether or not there is somebody to see or hear it fall, the objective fact is that the branch would have fallen. However, if somebody is murdered but the body is not found, would it be correct to conclude that the murder did not take place? Legally speaking, the answer to this question is ‘Yes’, because under the law of evidence, there is no murder without the body. However, the answer would certainly be ‘No’ from an epistemological perspective because the empirical existence of things does not depend on them being perceived or conceived by human beings.
The foregoing analysis demonstrates the difference between how philosophy on the one hand, and legal science on the other would prove the existence of a fact. From an epistemological point of view, it would be unreasonable to conclude that a murder did not take place merely because the body was not found. However, from a legal point of view under the law of evidence, it is sufficient to deny the occurrence of a murder by simply relying on the fact that the body of the victim has not been found. Because of such differences in analysing issues, philosophy views positive law to comprise a system of artificial and technical rules, having little regard to principles of correct reasoning to the extent of believing that the best lawyer is one who is most skilful and adroit in using the weapons furnished by the legal system. Those who hold this opinion about law and legal practice are represented by the likes of French jurist Alex de Tocqueville. But there is the other school of thought whose exponents include positivist thinkers like John Austin, Thomas Hobbes, David Hume and Hans Kelsen who hold the positions that law and the legal profession, as a science founded upon reason and principle, constitute a network of objective ends assumed to be good.

In this regard, legal positivists have sought to promote fidelity to legality as a way of ensuring that judicial processes conform to the scientific status claimed by legal science and thereby standing equal to Sir William Jones’s conditional that, “if law be a science and really deserve so sublime a name, it must be founded on principle and claim an exalted rank in the empire of reason.”

6.1.3 GENERAL CONCLUSIONS

This study has made a broad evaluation of the place of the moral aspect in judicial matters. Two extreme, but, pertinent positions have emerged from the discussion—one exalting

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conscience over legality (absolute autonomy of conscience) and the other placing legality above or against conscience (primacy of law). Hence moralism and legalism are the two theoretical positions that the study has endeavoured to give reasons for thinking that one takes precedence over the other. By use of relevant examples, the study has examined and analysed the nature and function of the legal profession and concluded that the fundamental principal of the legal profession is that those who administer it professionally must follow the law to the letter and to moral values against or beyond which an advocate or judge has no business to look into.

In view of the foregoing, the study has analysed the legal profession from an ethical perspective and concluded that the underlying doctrine that enjoins legal professionals to uphold fidelity to legality beyond every other consideration falls within the deontological principle of the theory of duty. The study has also analysed the teleological principle of the theory of duty as a counterpoint to the deontological principle. The study has then examined the conduct of legal professionals in view of ethical adjectives such as 'right', 'good' and 'morally good' and concluded that such conduct is right from one perspective and not right from another. It has also examined two schools of thought about morality namely the sociological and philosophical and concluded that the latter conception of morality is intimately associated with conscience. Above all the study has established that whatever its merits, the professional conduct of a lawyer could be right by virtue of being that which ought to be done but none of such conduct is morally good. But the focus of the study is the analysis of the moral dilemma that obtains when pursuance of professional duty means violation of a moral value. In view of these considerations, the following conclusions are drawn:

1. Morality from a philosophical perspective, morality is a matter of people exercising their conscience in choosing what course of action to pursue hence rendering human beings as agents of moral responsibility.
2. That in spite of being moral agents capable of making free rational choice, the legal profession most of the time demands that lawyers ignore what their conscience dictates.

3. Since 'right' means either 'that which ought to be done' or 'that which is productive of some good', the professional choices and pursuits of lawyers are right acts by virtue of being that which ought to be done.

4. Since 'good' is a consequential attribute, a lawyer's professional conduct is good only if it produces a net aggregate of advantages over disadvantages to all the people involved.

5. Since 'morally good' applies to conscientious beings and acts only, and since nothing that is compelled is ever morally good, what a lawyer must do as a matter of professional duty is not morally good because it is not done out of free choice.

6. Granted that the legal positivist doctrine is the cornerstone of any legal profession, the moral aspect is *ipso facto* an extraneous and irrelevant element in judicial matters.

7. The moral aspect is an extraneous and irrelevant element in the Kenyan judicial system on account that the Kenyan judicial system is modeled on the positivist separation thesis.

8. The justice aimed at by the Kenyan judicial system is the conservative type of justice variably known as harsh justice.

9. In a situation of a moral dilemma where pursuance of professional duty is repugnant to a moral value, a lawyer would be prepared to uphold professional duty at the expense of any moral value.

In view of the foregoing conclusions it is clear that, whatever its merits, law cannot make men moral. Only men can do that through their inherent capacity to make free rational choice. Therefore, no amount of legal education or experience in legal practice can make a
lawyer moral. For this reason, cynics like Will Rogers seem to be spot on when they say: “I don't think you can make a lawyer honest by an act of legislature. You’ve got to work on his conscience. And his lack of conscience is what makes him a lawyer.”

Laws may command some outward conformity to certain sociological rules of moral uprightness. In this way, laws play a subsidiary role in attaining some social moral order by forbidding certain powerfully seductive and corrupting vices such as prostitution, incest and defilement. But while law has a subsidiary role to play in social morality, morality from a philosophical perspective has a substantial role to play in judicial matters. For this reason, the following quote by Plato makes sense: “Good people do not need laws to tell them to act responsibly, while bad people will find a way around the laws.”

6: 1.4 SUGGESTIONS
If this study has opened up any new horizons, then there are three areas where the ideas in this study can be utilised. The first is in the law of evidence, the second is the Advocates Complaints Commission and thirdly in the teaching of law at the various schools of law in Kenya.

A. LAW OF EVIDENCE
Evidence is the information by which facts tend to be proved and the law of evidence is that body of rules regulating the means by which facts may be proved in courts of law. Having acknowledged the role of the jury as a conveyer of the moral aspect in judicial matters, the jury can be a vital organ in improving the law of evidence in the Kenyan judicial system. This is because of the general rule that, questions of law must be determined by the judge and questions of fact must be determined by the jury.

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For example, the meaning of an ordinary word of the English language is not a question of law but it certainly is a question of fact. It should thus be the business of the jury to consider, not as a matter of law but as fact, whether the words of a statute are or are not, as a matter of ordinary usage of the English language, assigned their ordinary meaning. In this way the jury plays a crucial role in the interpretation of statutes.

If Kenya had the jury system, it would have been the most appropriate instrument to use in *Miscellaneous Civil Case No. 82 of 2004(os)* in which a fundamental public-interest legal challenge was posed to the Constitution of Kenya Review process popularly known as the Bomas Constitutional Conference. The issue that required determination in the case was, among others, the meaning of the term 'amend' under Section 47 of the constitution in force at that time. The question at issue was whether the amendment clause in the constitution in force at that time could be used to replace the same constitution with an entirely new one. But an interpretation of the meaning of several terms by Judges Aaron Ringera and Benjamin Kubo ruled that there was no law to prevent parliament, under section 47 of the constitution in force at that time, to enact a new constitution for Kenya. Below are excerpts of how the court ended up defining ordinary words of the English language and arriving at a decision:

In *Miscellaneous Civil Case No. 82 of 2004(OS)*, one of the applicants sought the following order—“That a declaration be issued declaring that section 28 (3) and (4) of the Constitution of Kenya Review Act is inconsistent with section 47 of the Constitution and therefore null and void.”

The applicants’ counsel submitted that the power vested in Parliament is a limited power and does not include:-

a) Power for Parliament to make, adopt or enact a new Constitution.
b) Power for Parliament to abrogate or repeal the existing Constitution.

In applicants’ counsel’s view, Parliament has two roles:-

a) To make ordinary legislation under section 30 of the Constitution.

b) Only to amend the Constitution under section 47 of the said Constitution.

He submitted that the power to make the Constitution belongs to the people in exercise of their constituent power and that Parliament has no power outside the Constitution. The purport of section 28 (3) and (4), contended applicants’ counsel, is to invest Parliament with power to enact a new Constitution. He submitted that this is unconstitutional because the Constitution itself does not give Parliament that power. Counsel recalled that the deficiencies the applicants have complained about before this court about the constitutional review process is a matter the applicants have taken issue with previously and said so. He reiterated his reliance on the Indian case of Kasavananda where he had alluded to the effect that the Indian Parliament had no power vide its amendment power under article 368 to make a new constitution. In applicants’ counsel’s view, the power vested in the Kenyan Parliament by section 47 of the Constitution does not include changing the basic structure of the constitution, let alone replacing it. He added that article 368 of the Indian Constitution is equivalent to section 47 of the Constitution of Kenya. Applicants’ counsel urged the court to declare section 28 (3) and (4) unconstitutional and, therefore, null and void.

Counsel for the 2nd respondent submitted that the contention by the applicants’ counsel that section 47 of the Constitution simply allows Parliament to amend the Constitution but not to repeal or replace it is erroneous. In his view, that contention is based on a wrong interpretation of the meaning of supremacy of the Constitution under section 3 thereof. He contended that the supremacy of the Constitution under section 3 is expressly made subject to section 47. He argued that the makers of the Constitution recognized that from time to time the need may arise for the Constitution to be revisited, by amendment or repeal. That is why everything is subject to section 47. He drew attention to the definition of “alter” in
section 47 (6) (b) and submitted that the word “re-enactment” used there means that the Constitution in its entirety can be re-enacted by Parliament and that re-enactment means a new Constitution can come in lieu of the existing Constitution. In this connection he referred to section 123 (9) (b) of the Constitution which provides that words in the singular shall include the plural while words in plural shall include the singular. He submitted that section 47 (6) (b) and 123 (9) (b) are clear and unambiguous and that there are no limitations on what Parliament can do. He invited the court not to follow the Indian case of Kasavananda but follow the Singapore case of *Teo Soh Lung vs Minister for Home Affairs & Others* [1990] LRC 490.

Counsel for the 1st respondent invited the court to look at the Constitution as it is and not to read into it or imply any matters not provided for there. She saw no inconsistency of section 28 (3) and (4) of Cap 3A with section 47 of the Constitution. She observed that section 28 (3) and (4) merely provides a time frame for the Attorney-General to publish the Bill from Bomas and wondered how the subsections can be termed as inconsistent with section 47 of the Constitution which does not deal with procedures prior to a Bill getting to Parliament. She posed: Would failure of the Attorney-General to comply with section 28 (3) and (4) contravene section 47 of the Constitution? She answered the question in the negative and submitted that no inconsistency exists to warrant granting of the order sought under prayer No. 9.

The 3rd respondent said the Bomas process was preparing a Bill for consideration by Parliament under section 47 of the Constitution. That is the intention. He wondered how an intention can be unconstitutional. In his view, there is limitation on Parliament to make law but it is not imposed by the constitution but by the constituent authority of the people.

Counsel for the 1st and 2nd interested parties submitted that section 47 of the Constitution authorises Parliament to alter the Constitution. That section 28 (3) and (4) of Cap 3A relates to the ordinary process of legislation. He noted that there was nothing new in the consultative process ushered in by Cap 3A as a similar process had been used in the development of a
children Bill which led to the new Children Act, No.8 of 2001 which came into force on 01.03.02. He also made reference to the mass movement which led in 1991 to the repeal of section 2 A of the Constitution. He submitted that the court can’t find for the applicants in prayer No. 9.

In reply, applicants’ counsel reiterated his earlier submissions on prayer 9. With regard to the Singapore case of Lung, he drew attention to article 9 of the Constitution of the Republic of Singapore which provides as follows:

“9. Subject to this article, the Interpretation Act shall apply for the purpose of interpreting this Constitution and otherwise in relation thereto as it applies for the purpose of interpreting and otherwise in relation to any written law within the meaning of the Act.”

He submitted that this article requires the Singapore Constitution to be interpreted like an ordinary statute and that such interpretation is narrow and inappropriate in Kenya. He also submitted that this court should depart from the EI Mann doctrine of interpreting the Constitution which in his view is also narrow and that instead the court should follow the liberal interpretation in the Crispus Karanja case. In answer to the argument by counsel for the 1st and 2nd interested parties that there had been other consultative processes leading to enactments before, he said that the applicants’ problem with Cap 3A is not the outside consultations but that Cap 3A does not comply with the Constitution. He submitted that Parliament does not have power even to amend the Constitution to provide that it can make a new Constitution. Applicants’ counsel reiterated his prayer that the court grants prayer 9.

Counsel for the Law Society of Kenya expressed the view that the definition of “alteration” in section 47 (6) (b) of the Constitution includes total replacement. He reiterated that the section was written like this to prevent abuse; that you can replace the Constitution at once or over a period of time; and that section 47 (6) (b) was written in the present form because it would be dangerous to make an express provision for replacement.
The ruling:

I have given due consideration to the interpretation issue raised by prayer 9. The matter is not without difficulty. Black’s Law Dictionary defines the words ‘alter’ and ‘alteration’, inter alia, as follows:

“Alter. To make a change in; to modify; to vary in some degree; to change some of the elements or ingredients or details without substituting an entirely new thing or destroying the identity of the thing affected. To change partially. To change in one or more respects, but without destruction of existence or identity of the thing changed; to increase or diminish.”

“Alteration. Variation; changing; making different. A change of a thing from one form or state to another; making a thing different from what it was without destroying its identity ...”

Among the terms used in section 47(6) (b) of the Constitution to define “alteration” is the word re-enactment. Black’s Law Dictionary defines enact and enactment as follows:

“Enact: vb. 1. To make into law by authoritative act ....”

“Enactment: n. 1. The action or process of making into law ....”

Another term used in section 47 (6) (b) in defining “alteration” is the word repeal. The above Dictionary defines it as follows:

“Repeal: n. Abrogation of an existing Law by legislative act.”

The applicants contended, among other things, that Parliament cannot under section 47 abrogate the existing Constitution and replace it with a new one. As can be seen above, the dictionary definitions are giving somewhat conflicting signals as to what the term “alteration” means. Where do we go from there? The full text of section 47 (6) (b) states:
“47. 6 (b) references to the alternation of this Constitution are references to amendment, modification, re-enactment, with or without amendment or modification, of any provision of this Constitution, the suspension or repeal of that provision and the making of a different provision in place of that provision.”

It is noted that there is constant reference to a provision of this Constitution in the singular. Section 123 (9) (b) provides:

“9. In this Constitution, unless the context otherwise requires –

(b) Words in the singular shall include the plural, and words in the plural shall include the singular.”

The Indian case of Kesavananda was decided by 9 out of 13 judges of the supreme Court of India. Article 368 of the Indian Constitution which was under discussion is fairly similar to our section 47. One of the dissenting Judges, Ray, J. had this to say:

“The power to amend is wide and unlimited. The power to amend means the power to add, alter or repeal any provision of the Constitution. There can be or is no distinction between essential features of the Constitution to raise any impediment to amendment of alleged essential features. Parliament in exercise of constituent power can amend any provision of the Constitution. Under article 368 the power to amend can also be increased. Amendment does not mean mere abrogation or wholesale repeal of the Constitution. An amendment would leave organic mechanism providing the Constitution, organization and system for the State. Orderly and peaceful changes in a constitutional manner would absorb all amendments to all provision of the Constitution which in the end would be “an amendment of this Constitution.”

In view of sections 47 (6) (b) and 123 (9) (b) of The Constitution of Kenya, it is my respectful view that it is legitimate to interpret Parliament’s alteration power under section 47 to mean that if Parliament can alter one provision, it can alter more; and if it can alter more, it can alter all. And this conclusion flows from the Constitution itself.
I am, therefore, of the considered opinion that section 47 of the Constitution of Kenya does not limit the power of Parliament to amend or repeal the Constitution and replace it with a new Constitution. The words in section 47 do not in my respectful view impose any limitations as contended by the applicants. Section 28 (3) and (4) is not in my view purporting to confer any power on Parliament but it is merely acknowledging Parliament’s Legislative power.

I have come to the clear finding that the applicants have not made out a case to support their prayer that sub sections (3) and (4) of Section 28 of the Constitution of Kenya Review Act (Cap 3A) be declared inconsistent with Section 47 of the Constitution. Accordingly, I would refuse to grant the prayer.

In view of the issues in question at that time, since there was no jury system in Kenya, the determination of the ordinary meaning of the term 'amend' was left to the judges, and the term ended up being assigned a complex and legalistic meaning instead of its ordinary meaning in the English language. Ideally, the task of determining the meaning of ordinary words, as the situation demanded in the case under comment, should have been assigned to a jury since such meaning is principally a question of fact and not a question of law.

B. THE ADVOCATES COMPLAINTS COMMISSION

The Complaints Commission is a statutory body established under section 53 of the Advocates Act (Cap.16) to inquire into any complaints against an advocate or firm of advocates. The Commission deals with various complaints including the following key ones:

1. Failure to honour professional undertaking
2. Conflict of interest where an advocate acts for two or more clients without their permission.
3. Any other behaviour which may amount to 'professional misconduct' (an expression which includes any disgraceful or dishonourable conduct incompatible with the status of an advocate).

A complaint against an advocate actually means expressing dissatisfaction with his/her professional service. In view of the mandate of the Complaints Commission, it is clear that complaints amount to an indictment of lawyers' professional conduct. This study has raised and established some significant ethical standards which the Complaints Commission can refer to when determining the complaints brought to its attention. And since this study has shown that a lawyer's course of action is right by virtue of being that which ought to be done, the Complaints Commission may find this study useful in assessing whether any complaint made reveals substance that constitute a disciplinary offence. This should be useful, especially, as a measure to discourage frivolous complaints and litigations.

_Hall v. Simon_ illustrates the grounds upon which the Advocates Complaints Commission should find this study useful. In the case under comment, the court clarified the legal position of advocates who were sued by their clients. Their immunity from prosecution seems to have been lifted in all areas after this case and, prior to which, advocates could not be sued for their work as legal professionals since it was felt that clients might blame the skills of the lawyer rather than the nature of the case which might have been difficult for anyone to win. Below is a detailed brief of the case:

This case involved three conjoined appeals concerning claims against solicitors. Each solicitor had relied on the immunity rule relating to advocacy in negligence claims. At first instance the trial judge had struck out each claim. The Court of Appeal held that the claims were wrongly struck out. The House of Lords was invited to reconsider the immunity of legal professionals when conducting advocacy in court.

_Held_: The rule relating to immunity of an advocate in respect of and relating to conduct of legal proceedings should no longer be maintained.
Lord Steyn summed it up, saying:
"There would be benefits to be gained from the ending of immunity. First, and most importantly, it will bring to an end an anomalous exception to the basic premise that there should be a remedy for a wrong. There is no reason to fear a flood of negligence suits against barristers. The mere doing of his duty to the court by the advocate to the detriment of his client could never be called negligent. Indeed if the advocate's conduct was bona fide dictated by his perception of his duty to the court there would be no possibility of the court holding him to be negligent. Moreover, when such claims are made courts will take into account the difficult decisions faced daily by barristers working in demanding situations to tight timetables. For broadly similar reasons it will not be easy to establish negligence against a barrister. The courts can be trusted to differentiate between errors of judgment and true negligence. In any event, a plaintiff who claims that poor advocacy resulted in an unfavourable outcome will face the very great obstacle of showing that a better standard of advocacy would have resulted in a more favourable outcome. Unmeritorious claims against barristers will be struck out. The new Civil Procedure Rules, 1999, have made it easier to dispose summarily of such claims: rules 3.4(2)(a) and 24.2. The only argument that remains is that the fear of unfounded actions might have a negative effect on the conduct of advocates. This is a most flimsy foundation, unsupported by empirical evidence, for the immunity. Secondly, it must be borne in mind that one of the functions of tort law is to set external standards of behaviour for the benefit of the public. And it would be right to say that while standards at the Bar are generally high, in some respects there is room for improvement. An exposure of isolated acts of incompetence at the Bar will strengthen rather than weaken the legal system. Thirdly, and most importantly, public confidence in the legal system is not enhanced by the existence of the immunity. The appearance is created that the law singles out its own for protection no matter how flagrant the breach of the barrister. The world has changed since 1967. The practice of law has become more commercialised: barristers may now advertise. They may now enter into contracts for legal services with their professional clients. They are now obliged to carry insurance. On the other hand, today we live in a consumerist society in which people have a much greater awareness of their rights. If they have suffered a wrong as a result of the provision of negligent professional services, they expect to have the right to claim redress. It tends to erode confidence in the legal system if advocates, alone among professional men, are immune from liability for negligence."

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9 Arthur Hall v Simons [2000] 3 WLR 543 House of Lords
C. LEGAL EDUCATION

In October 2003, 23 senior judges were suspended from the judiciary in Kenya on allegations of committing offences ranging from corruption to professional misconduct. Several commentators sought to explain why the judicial arm of government in Kenya was alleged to be so corrupt and attempted to offer advice that would rout the alleged corruption and professional misconduct in the judiciary.

Commenting on the matter of corruption and professional misconduct in the Judiciary Paul Mwangi\(^\text{10}\) held that corruption and misconduct in the Kenyan judiciary is traceable to the training institutions in which legal professionals emerged. He held that the judges who were under investigation must have studied in the local legal training institutions which do not imbue in the learners any social or philosophical morality. He had this to say about the legal profession in Kenya.

The legal profession in Kenya is devoid of any philosophical essence. It means nothing to be an advocate of the High Court of Kenya apart from having passed a law degree and done four months study at the School of Law. The profession has no sense of ethic and has not come up to be an integral part of industry, public administration and social morality.\(^\text{11}\)

Mr Mwangi’s position, like that of Alex de Tocqueville, is a penetrating criticism of the legal profession in Kenya. He blamed corruption in the Kenyan judiciary on the failure of training institutions to identify the proper purpose for which to train people to join the legal profession. He adds:

“To train people to carry out a role for the benefit of society, we must indoctrinate them with the aspirations of that society. Hence every lawyer should be trained to uphold these ideals. It must also be a condition of the continued membership of the profession to carry out these ideals in the professional work.”

\(^{10}\)Mr Mwangi is (by 2004) a Nairobi based lawyer and author of ‘Black Bar’, a study of the Kenyan Judiciary.

Mwangi’s position is essentially a moralist approach to legal training—he clearly acknowledges and calls for the incorporation of moral considerations in legal matters, especially when training legal practitioners. This study concurs with Mr Mwangi’s position that legal training in Kenya should include units in moral philosophy. We, therefore, recommend this study as a valuable source of teaching material for legal training institutions in Kenya. This suggestion is made in view of the first objective of the curriculum of the School of Law of the University of Nairobi which reads as follows.

To expose the student to the multifaceted nature of the development process and arouse his/her intellectual and practical interest in the phenomena of nation-building, fidelity to the law and its institutions and so develop his/her responsibility for the national heritage.12

From the way it is framed, the above objective is clearly oriented towards the legal positivist theory. The phrase "arouse his/her intellectual and practical interest in... the fidelity to the law and its institutions..." is a clear indication of the curriculum’s bias towards legal positivism. However, given the theoretical shortcomings of legal positivism which this study has canvassed extensively by use of both practical examples and philosophical theory, if the ideas of this thesis were to be adopted by the developers of the law degree curriculum at the University of Nairobi, they would easily wish to revise the first objective of the curriculum for legal training. In sharing the ideas of this study, the curriculum developers would probably wish to develop a curriculum that imbues in the learners a philosophical frame of mind much more than just “arousing in them an interest in the fidelity to the law and its institutions.”

12Cited from the 1998/1999 prospectus for the LLB programme of the Faculty of Law, University of Nairobi. p.30
6: 1.5 RECOMMENDATIONS

a. In view of the discussion about the implication of moral dilemma in legal practice, this study recommends that the Kenyan judicial system embraces the doctrine of *ex aequo et bono* in matters of immense public interest such as election petitions. In making this recommendation, two pertinent questions are posed—(i) If lawyers must uphold fidelity to legality beyond any other consideration, for what purpose should they do so?, and (ii) Does a judicial or legal process aim at anything?

In view of the foregoing questions and with respect to the reasoning in *Shaw v Director of Public Prosecutions*, *Imanyara v Moi & 12 others* and *Raila Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others*; if justice is the goal of a judicial process, then legal practitioners should exercise their conscientious faculties whenever it is right to do so instead of always upholding blind fidelity to legality.

b. This study also recommends the use of the jury system of trial as a way infusing the moral aspect in the resolution of legal disputes in Kenya. This can significantly enhance the administration of justice so long as justice remains the vocation of the Judiciary in Kenya.

Trial by jury is of course trial by jury under the supervision of a judge. The jury system provides a complex formula for sharing decision-making powers between the jury and a judge. In civil cases, the jury decides both issues of liability and amount of damages while in criminal cases it is generally restricted to issues of guilt with punishment left to the judge.13 In this regard, the general rule in a jury-aided system of administering justice is that questions of law should be determined by the judge and questions of fact be determined by the jury.14

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In this system, the judge, firstly, declares what the jury may or may not hear under the rules of evidence. Secondly, if the judge finds that the evidence presented leaves no factual issues to be resolved, he may withdraw the issue from the jury and direct the jury to acquit a defendant or, in a civil case, find either for the plaintiff or defendant. A judge cannot however direct a guilty verdict in a criminal trial. Thirdly, in some jurisdictions the judge may, and often will, summarise the evidence or even discuss its weight. Fourth, the judge instructs the jury as to the law it should apply in reaching the verdict. Finally, if the judge finds the jury’s verdict to be manifestly against the weight of evidence, he may, with one exception, set it aside and order a new trial. The only exception is in a criminal trial in which the jury renders an acquittal, and under Anglo-American law (though not under European continental law) the jury’s acquittal is always final. The jury normally renders a general verdict in the form of a 'yes' or 'no' answer to liability or guilt, and does not give reasons for its decision. At times, however, courts employ 'special verdicts' or 'special interrogatories' in which the jurors are asked to decide a series of specific factual issues that bear on the overall verdict.

Despite its acceptance, there is a great deal of debate over the merits of a jury, which is centred on three issues. First is the acknowledgement that the jury provides an important civic experience that makes tolerable the stringency of certain decisions—that it acts as a sort of lightning rod for animosity that otherwise might centre on the more permanent judge, and that the jury is a guarantor of integrity since it is said to be more difficult to bribe twelve people than one. Against this view it has been argued that the jury’s duty disenchants the citizen—that it imposes an unfair burden, that the jury is expensive and that it makes it difficult to do away with the often interminable delays that exist in civil litigation.
Second there is the issue of the jury’s competence. It is argued that the judge, by training, discipline, experience and superior intelligence, is better equipped to understand law and facts than laymen drawn from a broad range of levels of intelligence without experience and without durable official responsibility. However, against this charge, proponents of the jury argue that twelve heads are better than one; that the jury as a group has wisdom and strength beyond that of individual members; that it makes up in common sense and experience what it lacks in training, and that its very inexperience is an asset because it secures a fresh perception of each trial, avoiding the stereotypes that may infect the judicial eye.

Finally, there is the question of the jury’s interpretation of the law. Its critics complain that the jury will not follow the law, either because it does not understand it or because it does not like it, and will, therefore, dispense justice haphazardly and that the jury produces a government by men and not by rule of law—against which Anglo-American political tradition is so steadfastly set. The jury’s champions, however, offer this flexibility as its most endearing characteristic. They see the jury as a remarkable device for ensuring that the rigidity of the general rule can be shaped to justice in a particular case with government by the spirit of the law and not merely by its letter.

But whatever shortcomings the jury system may have, its role in litigation is meant to represent the larger society as well as limit the incessant prejudices of legality. The deficiencies of the jury are less serious risks to take than adherence to narrow legalism. This study, therefore, considers the jury as an aspect of moral consideration and therefore recommends that it be institutionalised in the Kenyan judicial system. Although the Kenyan system uses assessors who function as a quasi-jury, it should be pointed out that the role of assessors is quite limited and hence their impact quite minimal in trials. A full jury system would enjoy a more prominent role and wider powers to check the excesses of pure legalism.
c. We further recommend that in legal disputes of great public interest like presidential election petitions, trials should adopt a mixture of the adversarial (common law) and inquisitorial (civil law) systems. In *Raila Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others*, for example, the trial was purely adversarial, thus requiring the petitioners to prove their case and the respondents to disprove it. This made it look like the issues raised by the petitioners and respondents were merely personal and had no bearing on the greater public, yet in reality the petitioners raised very pertinent issues that touched on democracy as one of the highest values of the entire Kenyan society. In this regard since elections are an important aspect of democracy which affects the entire society including the judiciary itself, the judges in the instance case should have also adopted the inquisitorial approach by framing issues from the Bench and seeking clarifications beyond the submissions made by the litigants in the case.

d. A look at how the court arrived at its decision in *Miscellaneous Civil Case No. 82 of 2004(OS)* reveals that conclusions in judicial processes are arrived through a logical process. In this regard, this study recommends that logic, as a science of distinguishing correct from incorrect reasoning, be taught as a common course in law schools, especially in the advocates training programme. Lawyers who are well-grounded in logic are in a position to be good advocates, especially in trial advocacy, since they can advance sound arguments.

6: 1.6 ANSWERING THE MAIN QUESTION

In the introductory section of this study, the following guiding question was posed — what, if any, is the place of morality in judicial matters? With respect to what the positivist separation thesis stands for as analysed in Chapter Two, it is clear that morality is an extraneous element and, therefore, has no place in judicial matters. However, if we consider morality from a philosophical perspective as analysed in Chapter Three, it turns out that morality plays an
important role in judicial matters, the position of the positivist separability thesis notwithstanding.

In this regard, if we take the philosophical conceptualization of morality as constituting a process by which human beings engage their conscientious faculties in deciding what is ‘good’ or ‘bad’, ‘right’ or ‘wrong’; then there are a number of instances when morality is the underlying principle in resolving legal disputes. One such instance is when positive law is silent or inadequate on a certain kind of behaviour that is offensive, yet society expects a pronouncement that would regulate that behaviour. In such situations, courts have had to assume legislative functions by falling back on the conscientious faculties of judges in order to regulate behaviour in society even if that amounts to acting beyond their proper function of arbitration. The following position conveyed by Lord Simmons in Shaw v Director of Public Prosecutions is a good example of the place of morality in judicial matters.

Need I say my Lords, that I am no advocate of the right of judges to create new criminal offences?...At once the controversy arises. On the one hand it is said that it is not possible in the 20th Century for the court to create a new head of public policy, on the other it is said that this is but a new example of a well-established head. In the sphere of criminal law, I entertain no doubt that there remains in the courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety of and order but also the moral welfare of the state.... It matters little what label is given to the offending act. To one of your Lordships it may appear an affront to public decency, to another, considering that it may succeed in its obvious intention of provoking libidinous desires, it will seem a corruption of public morals. Yet others may deem it aptly described as the creation of public mischief or the undermining of moral conduct. The same act will not in all ages be regarded in the same way. The law must be related to the changing standards of life, not yielding to every shifting impulse of the popular will but having regard to fundamental assessments of human values and the purpose of society...When Lord Mansfield, speaking long after the Star Chamber had been abolished, said [in Delaval (1763) Burr 1438] that the Court of King’s Bench was the custos morum of the people and had the superintendency of offences contra bono mores, he was asserting, as I now assert, that there is in that court residual power, where no statute has yet intervened to supersede the common law, to
superintend those offences which are prejudicial to the public welfare...Let it be supposed that, at some future, perhaps, early, date homosexual practices between adult consenting males are no longer a crime. Would it not be an offence if, even without obscenity, such practices were publicly advocated and encouraged by pamphlet and advertisement? Or must we wait until Parliament finds time to deal with such conduct? I say, my Lords, that, if the common law is powerless in such an event, then we should no longer do her reverence. But I say that her hand is still powerful and that it is for Her Majesty's judges to play the part which Lord Mansfield pointed out to them.

In view of the foregoing, the judges exercised their moral sense and rendered a decision that filled a gap in criminal law in a situation where Parliament had not acted. Hence, morality plays a critical role in judicial matters by providing an opportunity for judges to contribute to the development of the law.

Another area where morality plays a critical role in judicial matters is that of criminal law when courts have to assign criminal responsibility and liability. As analysed in Chapter Two, human beings are judged as moral beings because, as Aristotle puts it, their behaviour displays a purposive finality and a conscious process of reflective capacity that enables them to be held responsible for their conduct. From this Aristotelian perspective, we gather that any human behaviour capable of moral evaluation must be directed by a rational principle—the underlying principle being that moral actions are voluntary, goal oriented and intentional. In this regard, morality is an important underlying principle which courts must consider when assigning criminal responsibility and liability, given that such responsibility and liability cannot be assigned in situations where the defendant acted involuntarily either due to undue duress, intoxication or the defendant is a minor. This is why intoxication, duress or insanity are some of the general defences under criminal law. In R v Quick, for example; the defendant, a diabetic was charged with assaulting his victim. The assault occurred whilst the defendant was in a state of hypoglycaemia (low blood sugar level due to an excess of insulin). The court held that the defendant should have been acquitted on the
ground of automatism (involuntary act). His unconscious state had been the result of external factors, i.e. the taking of insulin.\textsuperscript{15}

It is, therefore, important to point out that liability presupposes responsibility: For example, I am liable only for that which I am responsible. To be so liable, the person committing the prohibited act must do so of his own free will and volition; have the capacity to distinguish right from wrong; and have the ability to foresee the evil consequences of the act.\textsuperscript{16} Criminal liability might be strict or vicarious, if it is imposed for what might have been done through non-culpable inadvertence or for the actions of others. It is then imposed without moral responsibility, but still presupposes criminal responsibility. Hence, I am strictly or vicariously liable only if the law holds me strictly or vicariously responsible.\textsuperscript{17}

However, responsibility does not entail liability— I can admit responsibility (criminal or moral) for an action, but avert liability by offering a defence. I might offer a justification like—I deliberately broke your window, but that was the only way to bring help to your grandfather who had collapsed inside the locked house. Or I might offer an excuse like—I committed perjury, but only as a result of a kind of duress that, whilst it did not suffice to justify my action, was sufficiently frightening to render me non-culpable for giving in to it.\textsuperscript{18}

In both cases, responsibility is admitted for action, but an exculpatory answer is given such that if accepted, blocks the transition from responsibility to liability, and thus averts moral blame or criminal conviction and punishment.

In this regard, to be responsible is to be answerable—I may be called, and must be prepared, to answer for that which I am responsible; I am then liable to moral criticism or criminal conviction if I cannot offer a suitably exculpatory answer. Therefore, responsibility often creates a presumption of liability, but that presumption is defeasible in the sense that; I am

\textsuperscript{15} R v Quick [1973] 3 All ER 347, Court of Appeal, Criminal Division
\textsuperscript{18} Ibid. p162
liable unless I can offer an exculpatory answer\textsuperscript{19}, but can avert liability by offering such an answer. Suffice is, therefore, to say that; we are pedagogically responsible for our activities as teachers; parentally responsible for our activities as parents; filially responsible for our activities as children of our parents; philosophically responsible (to our fellow philosophers) for our philosophical activities or legally responsible for our legal activities. In the same breath, we are criminally responsible for any criminal activities just as we are morally responsible for our moral misdeeds.

In view of the foregoing, moral considerations, philosophically speaking, play a critical role in the process of assigning criminal responsibility and liability under criminal law—hence morality, from a philosophical perspective, has a role to play in judicial matters notwithstanding the position taken by the positivist separation thesis that morality is an extraneous and irrelevant element in judicial matters.

One of the pre-eminent characteristics of morality from a philosophical perspective is logical reasoning. As already pointed out, morality has to do with men engaging their conscientious faculties in choosing what course of action to pursue—a process that falls within the domain of logic. It is, therefore, important to point out that logic is the normative science of correct inference whose primary purpose is to help students, scholars or professionals distinguish valid from invalid arguments.

Everyone thinks, but not everyone can distinguish valid from fallacious thinking. Everyone reasons, but not everyone understands the thought patterns which form the basis of valid reasoning. The primary function of logic is to show how men should reason if they are to reason soundly.\textsuperscript{20}

\textsuperscript{19} Exculpatory evidence or answer is that which is favourable to the defendant in a criminal trial— it is that explanation which clears or tends to clear the defendant of guilt or culpability. Exculpatory evidence/answer is the opposite of inculpatory, which tends to prove guilt or culpability.

\textsuperscript{20} Henry Ehlers (1968), \textit{Logic by Way of Set Theory}: New York, Holt, Rinehart & Winston Inc. p1
As a normative science, logic seeks ideal standards of definition, classification, proof, analysis and verification. In this regard, logic as a pre-eminent aspect of morality has a critical role to play in legal matters such as statute interpretation, which is one of the key functions of the judiciary in Kenya.

An appropriate example where logic was applied to resolve a legal dispute was the presidential petition in *Raila Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others.* One of the controversial issues in the 2013 Kenyan presidential election was whether, in calculating the total amount of votes for purposes of meeting the 50% + 1 threshold in order to avoid a run-off election, the Independent Electoral and Boundaries Commission (IEBC) should have included ‘rejected votes’—keeping in mind provisions of Article 138(4) of the Constitution of Kenya 2010 which held that; “a candidate shall be declared elected as President if the candidate receives (a) more than half of all the votes cast in the election; and (b) at least 25% of the votes cast in each of more than half of the counties.

In deciding on this issue, the Supreme Court looked at the wording of the Constitution, the Elections Act and its regulations as well as the decisions of other courts, and made the following observations:

a. Neither the constitution nor the Elections Act, 2011 defines the term ‘rejected votes’.
   The Elections Regulations 2012, while providing for the ‘spoilt ballot paper’ and the ‘disputed vote’, does not define the term ‘rejected vote.’

b. The interpretation section of the Elections Act states that ‘ballot paper’ means a paper used to record the choice made by a voter and shall include an electronic version of a ballot paper or its equivalent for electronic voting.

c. When the expression ‘rejected ballot paper’ is considered alongside the term ‘spoilt ballot paper’, then by virtue of regulation 71 of the Elections Regulations 2012, this
would be a ballot paper which has been dealt with by the voter in such a manner it
cannot be conveniently used as a ballot paper. The regulation provides that such a
ballot paper is to be surrendered to the presiding officer and a new one issued in its
place, and the spoilt paper is to be cancelled. Therefore, it was clear that in law, a
‘spoilt ballot paper’ will not find its way into the ballot box and so it does not count as
a vote.

d. Different countries refer to votes cast by different terms, and assign differing
consequences to the contrasting categories of votes. In Ghana, Cyprus and Portugal,
the winner in an election is determined only by the valid votes cast. Under the
constitution of Seychelles, the broad term ‘votes cast’, just as in Kenya, has been
adopted. The most striking example of a departure from this line of reasoning is in the
Constitution of Croatia, which provides that ‘the President shall be elected by a
majority of all electors who voted,” thus in the tallying of votes, invalid votes are
taken into account.

e. The Regulations made by IEBC have no provision for ‘rejected votes’, though they
provide for ‘rejected ballot papers’ and ‘disputed votes’. It is clear that ‘spoilt ballot
papers’ are those which are not placed in the ballot box, but are cancelled and replaced
where necessary by the presiding officer at the polling station. This differs from the
‘rejected ballot papers’ which, although placed in the ballot box, are subsequently
declared invalid on account of certain factors specified in the election regulations—
such as fraud, duplicity of marking, and related shortfalls.

f. No law and no Regulation brings out any distinction between ‘vote’ and ‘ballot paper’,
even though both the Elections Act and its regulations have used these terms
interchangeably. From this, the Court drew the conclusion that neither the legislature
nor IEBC had attached any significance to the possibility of differing meanings, which
led the Court to the conclusion that a ‘ballot paper’ marked and inserted into the ballot
box has consistently been perceived as a ‘vote’; thus the ballot paper marked and inserted into the ballot box will either be a ‘valid vote’ or ‘rejected vote.’

g. Since, in principle, the properly marked ballot paper, or the vote, counts in favour of the intended candidate, this is the valid vote; but the non-compliant ballot paper, or vote, will not count in the tally of any candidate; it is not only rejected, but is invalid, and confers no electoral advantage upon any candidate. In that sense, the rejected vote is void.

In view of the foregoing observations, the Court posed to itself the all-important question—why should such a vote, or ballot paper, which is incapable of conferring upon any candidate a numerical advantage be made the basis of computing percentage accumulations of votes, so as to ascertain that one or the other candidate attained a threshold of 50% + 1, and so that such a candidate should be declared the outright winner of the presidential, and there should be no run-off election? In answering this question, the Court arrived at an interpretation of the term ‘votes cast’ in Article 138(4) of the Constitution as referring only to ‘valid votes cast’, and not including ballot papers or votes cast but which are later rejected for non-compliance with the law.

It is clear that the Supreme Court decision in the foregoing illustration was arrived at through some logical process since the conclusion about what the term ‘votes cast’ means appears to be supported by a series of premises. However, upon careful analysis, one discovers that the Supreme Court’s conclusion that ‘votes cast’ means ‘valid votes cast’ is false. Essentially, the Supreme Court’s entire argument about the meaning of the term ‘votes cast’ is invalid because the conclusion arrived at is not supported by the premises given. In this regard, the Supreme Court committed what is known is logic as the *modus tollens* fallacy of affirming the consequent.
Affirming the consequent, sometimes called *converse error* or *fallacy of the converse*, is a formal fallacy of inferring the converse from the original statement. The corresponding argument usually takes the following the general form:

1. If $P$, then $Q$.
2. $Q$.
3. Therefore, $P$.

An argument of this form is invalid, i.e., the conclusion can be false even when the premises (statements 1 and 2) are true. Since $P$ was never asserted as the *only* sufficient condition for $Q$, other factors could account for $Q$ (while $P$ was false). To put it differently, if $P$ implies $Q$, the *only* inference that can be made is *non-*$Q$ implies *non-*$P$. (*Non-*$P$ and *non-*$Q$ designate the opposite propositions to $P$ and $Q$.) This is known as logical contraposition and is symbolically expressed as follows:

$$(P \rightarrow Q) \iff (\neg Q \rightarrow \neg P)$$

The name *affirming the consequent* derives from the premise $Q$, which affirms the "then" clause of the conditional premise. One way to demonstrate the invalidity of this argument form is with a counterexample with true premises but an obviously false conclusion. For example:

1. If Bill Gates owns Fort Knox, then he is rich.
2. Bill Gates is rich.
3. Therefore, Bill Gates owns Fort Knox.

Owning Fort Knox is not the *only* way to be rich. Any number of other ways exist to be rich. However, one can affirm with certainty that "if Bill Gates is not rich" (*non-*$Q$) then "Bill Gates does not own Fort Knox" (*non-*$P$). This is the contrapositive of the first statement, and it must be true if the original statement is true. Arguments of the same form can sometimes seem superficially convincing, as in the following example:

1. If I have the flu, then I have a sore throat.
2. I have a sore throat.
3. Therefore, I have the flu.

But it must be pointed out that having the flu is not the only cause of a sore throat since many illnesses cause sore throat, such as the common cold or strep throat. In each of the above examples of the fallacy of affirming the consequent, the premise of the argument may be true but the conclusion does not follow from the premises. The invalidity of these arguments has nothing to do with their content and is due entirely to their fallacious form. A statement \( p \) never follows from the statements \( \text{if } p \text{ then } q \) and \( q \). Even if the premises of an affirming the consequent argument were true, the conclusion doesn't follow from them.\(^{21}\) Being fallacious, however, does not mean that the conclusion is false—the fallacy emanates from the mere fact that the conclusion, even if true, is not supported by the premises. The following example of the affirming the consequent argument has true a conclusion, only that the conclusion does not flow from the premises.

1. If President Obama is a Christian, then he is not a Muslim.
2. He is not a Muslim.
3. Therefore, President Obama is a Christian.

So, how did the Supreme Court’s argument in *Raila Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* that ‘votes cast’ only mean ‘valid votes cast’ become fallacious? Looking at the observations (a) to (g) as laid down by the judges, it is clear that the judges intended these to be the premises upon which they would rely upon to arrive at the conclusion that ‘votes cast’ only mean ‘valid votes cast’. However, none of the premises or a combination of premises supports the conclusion that the term ‘votes cast’ as per the provisions of Article 138(4) of the Constitution of Kenya 2010 means only ‘valid votes cast.’ If anything, premise (d) which cites the constitution of the Republic Croatia has valid grounds capable of leading one to the conclusion that ‘votes cast’ as used in Article 138(4) of the Constitution of Kenya 2010 include ‘rejected votes’ or ‘invalid votes.’ But it was strange that

the judges chose to ignore this premise only to arrive at the un-supported conclusion that ‘votes cast’ only mean ‘valid votes.’ The converse error in the Supreme Court’s argument arose at the point where the judges unjustifiably expanded the meaning of the term ‘spoilt ballot’ to include ‘rejected ballot’ in order to create the excuse to exclude rejected ballots— which though properly cast— from the total amount of votes required for purposes of meeting the 50% + 1 threshold in order to avoid a run-off election.

If we were to advance the contrapositive argument to the fallacious argument adopted by the Supreme Court in defining the meaning of ‘votes cast’, then the judges would have been informed that the worth of a ‘ballot’ or ‘vote’ is not only judged by the numerical advantage that it is capable of conferring upon any candidate. Instead, the worth of a ‘ballot’ or ‘vote’ lies in the mere fact that the person who cast it participated in the democratic exercise, irrespective of whether that ballot or vote conferred a numerical advantage upon any of the candidates. That is why even the vote of the losing candidate(s) is respected in a democratic process— this explains why in the Constitution of Republic of Croatia, which provides that— “the President shall be elected by a majority of all electors who voted”. Thus in the tallying of votes, invalid votes (those which did not confer a numerical advantage upon any candidate) are also taken into account.

In view of the foregoing, if the decision of the Supreme Court were not final, then the decision of the Supreme Court of the Republic of Kenya in *Raila Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* with regard to the meaning of the term ‘votes cast’ as provided for under Article 138(4) would have been appealed on grounds of fallaciousness or improper inference for committing the *modus tollens* fallacy of affirming the consequent. In this way, logic, as a preeminent aspect of morality with regard to setting standards for distinguishing right from wrong inference, plays a key role in adjudicating legal disputes.
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