

ENGENDERING RULE OF LAW IN HEALTH CARE DELIVERY IN KENYA⁺

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ABSTRACT

The healthcare sector in Kenya has been in a state of turmoil for a long time with this manifesting itself in varied forms. This has in many ways translated to adverse outcomes on individuals seeking healthcare services. Incrementally funding the healthcare sector has not necessarily translated to the improvement of services offered. This is indicative of the fact that past approaches to development have failed to acknowledge that development is a combination of distinct processes, at times having glaring intersectionalities. Particularly, the place of law as a tool for social, economic, and political change has been underappreciated with devastating consequences. Failure to adhere to the Rule of Law in the health sector has principally been a structural barrier to health improvement in the country with a multitude of stakeholders in the health sector being willing partakers in the disregard of the law. The implication of this has been a health sector that is riddled with corruption, disregard of court processes, the mushrooming of rogue providers, and high mortality rates which in the end translates to apathy from the users of healthcare services. This paper asserts the place of the Rule of Law as a foundational determinant of health. The paper analyzes some of the pitfalls that have plagued the health sector in Kenya and draws a connection between these challenges and the failure to adhere to the law. What becomes apparent throughout this analysis is that a strong correlation exists between likely health outcomes and adherence to the law.

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INTRODUCTION

Good health is instrumental in increasing productivity and societal development. A nation that is unhealthy is unproductive, and any barriers preventing access to healthcare ought to be eliminated to enable improvements in living standards and quality of life.¹ Such barriers manifest themselves in various forms which can be broadly examined under social, political, and economic frameworks. Good governance is particularly key in ensuring the wellbeing of individuals in a society to enable them to meet their desired outcomes. However, the state of good governance is, in most cases, aspirational, and the journey towards this takes the form of certain tangible steps. This desirable condition, that is, good governance, heavily depends on securing adherence to the Rule of

¹ See BARRY R. FURROW ET AL., *HEALTH LAW: CASES, MATERIALS AND PROBLEMS* 16–17 (7th ed. 2013) (discussing the multifaceted nature of the ramifications of illness not only to the individual affected but also to the society in general where resource considerations come into play).

Law.² Wide consensus has already emerged on the place of the Rule of Law in development with numerous contestations also emerging.³

Prescribing Rule of Law as a remedy for challenges in developing countries has, however, not always produced the intended results as there has been a failure to appreciate the relevant contexts in which these societies are placed.⁴ This has necessitated a change in focus with more emphasis now being attached to the end-users of Rule of Law systems with a focus on the expectations of these persons when interacting with systems.⁵ Focus on the end-users of these systems ensures that this category of persons is empowered enough to ensure that they can hold public and private actors accountable where they have been tasked with allocation of services.

The focus of this paper is on the end-user who interacts with Rule of Law systems (that is, public and private actors tasked with service delivery) in the healthcare field. The authors place their arguments in the context of the substantive conception of the Rule of Law developed by Lord Tom Bingham.⁶ Accordingly, the paper associates the presence of negative health outcomes to the fact that the end-users of healthcare services are disempowered to hold public and private actors in healthcare delivery accountable. As a result of this disempowerment, end-users of healthcare services cannot hold the providers accountable for violations which have taken the form of, corruption and mismanagement of funds,⁷ disobedience of court orders,⁸

² Angela Maria Pinzon-Rondon et al., *Association of Rule of Law and Health Outcomes: An Ecological Study*, 5 *BMJ OPEN* 1 (2015).

³ Louis-Alexandre Berg & Deval Desai, Background Paper: Overview On the Rule of Law and Sustainable Development for the Global Dialogue on Rule of Law and the Post-2015 Development Agenda, U.N. DEV. PROGRAMME 9–16 (Aug. 2013), <http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Access%20to%20Justice%20and%20Rule%20of%20Law/Global%20Dialogue%20Background%20Paper%20-%20Rule%20of%20Law%20and%20Sustainable%20DevelopmentFalsepdf> (identifying the relationship of law and development and they thus assert that the core development functions of the rule of law include: enabling economic development; citizenship and social and economic justice; preventing, mitigating and deterring conflict, crime and violence; strengthening accountability and checks on power, and reducing corruption; enhancing the fair allocation of services; and protecting the environment and natural resources).

⁴ See Rajeev Dhavan, *Law as Concern: Reflecting on Law and Development*, in *LAW AND DEVELOPMENT IN THE THIRD WORLD* 25, 33 (Yash Vyas et. al. eds., 1994); see also Philip Ochieng, *Cultivating a Legally More Beneficial Future*, *DAILY NATION*, Mon. 186, 1987, at 186.

⁵ Berg & Desai, *supra* note 3, at 2, 24–26.

⁶ See generally TOM BINGHAM, *THE RULE OF LAW* XX (2011).

⁷ See *Mismanagement has Eroded Public Confidence in NHIF*, *DAILY NATION* (Feb. 26, 2013), <http://www.nation.co.ke/lifestyle/DN2/Mismanagement-has-eroded-public-confidence-in-NHIF/957860-1704472-ihwb1h/index.html>.

prevalence of rogue providers,⁹ and kickbacks for referrals, among others.¹⁰ Furthermore, this points to the fact that the right to the highest attainable standards of healthcare, which is a constitutionally recognized right,¹¹ has not been fully appreciated by stakeholders that are tasked with ensuring the realization of this right.

This paper begins by developing the theoretical framework in which the authors place the Rule of Law and a working definition broken down into specific sub-rules. The second part then proceeds to tie together this conception of Rule of Law by looking at the place of law in development. Particularly, the second section examines the place of law in improving human capabilities (which is defined as non-monetary factors that improve well-being such as life expectancy, infant mortality, malnutrition, environmental factors, and education).¹² This lays a basis for subsequent discussions on the need to guarantee Rule of Law in the healthcare sector. Subsequently, the paper outlines the intersectionality of the Rule of Law and better health outcomes. The paper then outlines manifestations of absence of the Rule of Law in the health sector in Kenya and how this has led to glaring inequities when it comes to access to healthcare. Lastly, the paper makes an array of recommendations on how the Rule of Law can be used to strengthen the health sector to the benefit of ultimate consumers of healthcare services.

I. CONCEPTUALIZING THE RULE OF LAW

The Rule of Law in its simplest form is the principle that the law should rule.¹³ After the commencement of the 2010 Constitution of Kenya, the concept or ideal of the Rule of Law has somewhat become

⁸ See Maureen Kakah, *Court Declares Doctors' Strike Illegal as KMPDU Vows to Carry On*, DAILY NATION (Dec. 13, 2016), <http://www.nation.co.ke/news/Labour-Court-rules-Doctors-strike-is-illegal/1056-3484834-8h5ya8z/>.

⁹ See Eunice Kilonzo, *Police Arrest Fake Doctor Who Put Hundreds of Lives at Risk*, DAILY NATION (Nov. 22, 2016), <http://www.nation.co.ke/news/Bold-quack-delivered-babies—did-surgery-too/1056-3460280-y70iwoz/>.

¹⁰ See Stellar Murumba, *Revealed: How Nairobi Doctors are Bribed to Refer Cancer Patients to India*, NAIROBI NEWS (Jan. 29, 2016), <http://nairobinews.nation.co.ke/news/revealed-how-nairobi-doctors-are-bribed-to-refer-cancer-patients-to-india/>.

¹¹ CONSTITUTION art. 43(1)(a) (2010) (Kenya).

¹² See Peter Boettke & Robert Subrick, *Rule of Law, Development, and Human Capabilities*, 10 SUP. CT. ECON. REV. 109, 109, 112 (2003).

¹³ See Andrei Marmor, *The Rule of Law and Its Limits*, 23 L. & PHIL. 1, 1 (Jan. 2004).

embedded in Kenya's public law and policy lexicon.¹⁴ This ideal of "the rule of law, not of individuals" calls upon [Kenyans] to ensure that the law itself rules (governs), not the wishes of powerful individuals.¹⁵ This ideal is inherited from a powerful tradition of Western political thought on good governance.¹⁶ It should be noted that the idea of the Rule of Law itself is a fluid concept. "Rule" and "Law" are themselves targets of continuous interpretation and reinterpretation.¹⁷ The Rule of Law's ideal definition has always been contested.¹⁸ In the Kenyan context, with a Constitution that repeatedly refers to this concept, it would be important to know what the Rule of Law ideal means in Kenya. Since the Rule of Law was a concept that was neglected in pre- and post-independence Kenya, it becomes an idea that is now deeply cherished.¹⁹

Professor Obiora Okafor captures it accurately:

What happened to Jomo Kenyatta and the "Kapenguria Six" in the colonial courts was, in reality "the rule BY law" and NOT "the rule OF law." I guess that I have always had some sympathies with Lon Fuller's notion of an internal morality of law that renders certain kinds of legality so beyond the pale as not even to qualify "as legality."²⁰

The general idea is that individuals should *not* be allowed to rule by their own capricious thinking and arbitrary actions.²¹ This is because of the historically reinforced fear that individuals are capable of being irrational, capricious, and dangerously vindictive.²² Mentioning Albert Venn Dicey is inevitable when addressing the background of the Rule of Law in common law/commonwealth adherent countries. This is because

¹⁴ See CONSTITUTION preamble, art. 10, 91, 131, 156, 238, 259 (2010) (Kenya); see also Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 3 (2008) (describing the rule of law as "one of the most important political ideals of our time").

¹⁵ Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 781, 809 (1989).

¹⁶ Fred Dallmayr, *Hermeneutics and the Rule of Law*, 11 CARDOZO L. REV. 1449, 1450 (1990).

¹⁷ *Id.* at 1451.

¹⁸ Richard H. Fallon, *The Rule of Law as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 1 (1997).

¹⁹ Marmor, *supra* note 13, at 1 (arguing that nowhere is the Rule of Law so cherished as in those places where it was largely ignored for decades).

²⁰ Hon. Dr. Justice Willy Mutunga, Chief Justice, Supreme Court of Kenya, *The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court Decisions*, 3 n.4 (Oct. 16, 2014), <http://www.saflii.org/za/journals/SPECJU/2015/6.html>.

²¹ See Radin, *supra* note 15, at 781, 813.

²² See generally Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974) (offering descriptions of systemic biases in human decision-making).

this idea has sometimes been credited to this nineteenth-century British jurist and Vinerian Professor of English Law at Oxford who coined it.²³ He defined the Rule of Law in three distinctive ways in his treatise, *Introduction to the Rule of the Constitution*.²⁴

He asserted that by the Rule of Law:

We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint [i.e., predominance of regular law over arbitrary power].²⁵

. . . .

We mean in the second place, when we speak of the “rule of law” as characteristic of our country [speaking about England], not only that with us no man is above the law, but (what is a different thing) that here every man, whatever his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals [i.e., equality before the law].²⁶

He further states that:

There remains yet a third and a different sense in which the “rule of law” or the predominance of the legal spirit may be described as a special attribute of the English Institutions. We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty or the right to public meeting) are with us as the result of judicial decisions determining the rights of private persons in particular cases brought before the courts; whereas under foreign constitutions the security (such as it is) given to the rights of the individual results, or appears to result, from the general principles of the constitution [i.e., the principles in the Constitution are as a result of the ordinary law of the land].²⁷

²³ See BINGHAM, *supra* note 6, at 1.

²⁴ A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 202–03 (10th ed. 1959).

²⁵ *Id.* at 188.

²⁶ *Id.* at 193.

²⁷ See *id.* at 196.

A. THE TWO CONTESTED CONCEPTIONS OF THE RULE OF LAW

Radin argued that the Rule of Law ideal can be viewed from two contested conceptions: one primarily instrumental and the other substantive.²⁸ Accordingly, the instrumental approach views the Rule of Law as a prerequisite for any efficacious legal order, while the substantive conceptions holds that the Rule of Law embodies tenets of a particular legal morality.²⁹ According to Radin, the great natural law jurist, Lon Fuller provided the instrumental perspective of the rule,³⁰ while the realist, John Rawls, argued on the substantive conception.³¹

Lon Fuller argued that the Rule of Law is part of the “internal” morality of the law.³² According to Fuller:

The internal morality of the law demands that there be rules, that they be made known, and that they be observed in practice by those charged with their administration. These demands may seem ethically neutral so far as the external aims of law are concerned. Yet, just as law is a precondition for good law, so acting by known rule is a precondition for any meaningful appraisal of the justice of law.³³

Fuller lists eight elements that comprise the morality of the law:

1. Generality: there must be rules that apply to specific cases.
2. Notice or publicity: the law must be easily accessible.
3. Clarity: the rules must be understandable to those they apply to.
4. Non-contradictoriness: the law must not command its subjects to do and not to do both A, and B at the same time.
5. Conformability: the subjects must be able to conform their behavior to the law.
6. Stability: the rules must not change so rapidly that the subjects can barely keep up.
7. Congruence: the rules must correspond to the patterns of enforcement.

²⁸ Radin, *supra* note 15, at 783.

²⁹ *Id.*

³⁰ LON L. FULLER, *THE MORALITY OF LAW* 38–39 (rev. ed. 1969).

³¹ JOHN RAWLS, *A THEORY OF JUSTICE* 206–13 (rev. ed. 1999).

³² FULLER, *supra* note 30, at 157.

³³ *Id.*

8. Non-retroactivity: the law should only apply to future conduct.³⁴

This conception by Fuller is regarded as instrumentalist because the “requirements are directed toward there being rule-like commands that can successfully induce desired behavior (whatever it is)” in the subjects of the law.³⁵ The logical conclusion of this is that the dictatorial African regimes, like that of the late Mobutu Sese Seko, would easily achieve its heinous goals by means of rules. Raz captures this view accurately when he states that “[a] non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities and religious persecution may, in principle, conform to the requirements of the Rule of Law better than any of the legal systems of the more enlightened Western democracies.”³⁶ It is a similar list of criteria that, in the Kenyan context, Akech refers to,³⁷ and points to Marmor³⁸ as its source.³⁹ Of course, Marmor points to Fuller as the originator of the criteria,⁴⁰ but the deficiencies that befall Fuller’s conception would also befall the other authors. Akech argues that where the foregoing criteria of the Rule of Law are observed on a day-to-day basis, the law’s promise of justice can be attained.⁴¹ His view from the criticisms of the internal morality of the law conception by Fuller would seem rebutted. This would mean that it is not accurate to say that, where such criteria are fulfilled, the law’s promise of justice can be achieved. This is especially true when noting that in most non-democratic African regimes such criteria is formerly adhered to while injustice colors the general nature of such polities.

John Rawls proposes the substantive conception of the Rule of Law by suggesting that the Rule of Law is an aspect of his overall scheme of “justice as fairness.”⁴² According to Rawls, the Rule of Law is formal justice—“the regular and impartial administration of public

³⁴ *Id.* at 39.

³⁵ See Radin, *supra* note 15, at 786.

³⁶ JOSEPH RAZ, *The Rule of Law and its Virtue*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210, 211 (1979).

³⁷ MIGAI AKECH, *ADMINISTRATIVE LAW* 58 (2017).

³⁸ See Marmor, *supra* note 13, at 5–7 (listing criteria for good law as the following: universality/generality, promulgation, prospective application, clarity, non-contradictoriness, conformability, stability, and consistency).

³⁹ AKECH, *supra* note 37, at 58.

⁴⁰ Marmor, *supra* note 13, at 5.

⁴¹ AKECH, *supra* note 37, at 59.

⁴² RAWLS, *supra* note 31, at 207; see also Radin, *supra* note 15, at 787.

rules”—applied to the legal system.⁴³ Radin proposes a rationalist model of law, from which she draws out one version of the traditional complex of ideas that comprise the Rule of Law.⁴⁴ Rawls seminally defines the legal system as “a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation.”⁴⁵ Radin unpacks this definition and from it argues the following precepts:

(i) A legal system is a coercive order of public rules:

For Rawls, as is with Fuller, the law consists of rules. Rawls therefore argues that the rules must have certain characteristics which are associated with the Rule of Law:

- (a) “Ought implies can:” the subjects must be able to conform to the rules.
- (b) Similar treatment of similar cases.
- (c) No crime without law (*nullum crimen sine lege*).
- (d) Natural justice.⁴⁶

According to Rawls, liberty is the prime value in his “justice as fairness” paradigm and the Rule of Law is meant to promote liberty.⁴⁷ Radin, therefore, suggests that Rawls makes a compelling argument that the Rule of Law is required for liberty.⁴⁸ This is the reason why Radin makes a typology of Rawls’s conception to be substantive, even though, like Fuller’s conception, his views are also tied down to “doing things” with the law.⁴⁹ Rawls advances two interrelated arguments to connect the precepts above as to liberty. First, the absence of these precepts blurs the limits of liberty, and second, a coercive sovereign is necessary to remove the incentives of self-interested individuals to break the rules that all should see are in their interest so long as all obey.⁵⁰ It is instructive to note that although the precepts of the Rule of Law, as offered by Rawls, are roughly similar to the instrumentalist conception, the justification

⁴³ RAWLS, *supra* note 31, at 207.

⁴⁴ See Radin, *supra* note 15, at 787; see also RAWLS, *supra* note 31, at 207.

⁴⁵ RAWLS, *supra* note 31, at 207.

⁴⁶ Radin, *supra* note 15, at 788; see also RAWLS, *supra* note 31, at 208–10; cf. Frederick Schauer, *Formalism*, 97 YALE L. J. 509, 510 (1988).

⁴⁷ See RAWLS, *supra* note 31.

⁴⁸ Radin, *supra* note 15, at 787.

⁴⁹ *Id.* at 789.

⁵⁰ *Id.* at 788–89.

offered is quite different.⁵¹ Rawls's conception thus covers a broader ground of liberty: fairness, justice, democracy, human rights, and human dignity.⁵²

It is Rawls's theoretical conception of the Rule of Law that underpins this paper. In the context of our analysis, the Rule of Law is instrumental in ensuring fairness (equitable distribution of resources), human rights (right to health), and human dignity (the ability of individuals to access services whenever they need them—e.g., health care). But as we show below, this is just the starting point. Lord Bingham has elucidated a wider and even more persuasive approach that will inform the analysis of the Rule of Law from a Kenyan perspective.⁵³

B. LORD BINGHAM'S CONCEPTION OF THE RULE OF LAW

As is now becoming clear in our analysis, the Rule of Law, as we indicated above, is a fluid concept that is easy to use in different situations, but difficult to define.⁵⁴ Tamanaha described the Rule of Law as “an exceedingly elusive notion’ giving rise to ‘rampant divergence of understandings’ analogous to the notion of Good in the sense that “everyone is for it, but have contrasting convictions about what it is.”⁵⁵ Such uncertainty notwithstanding, Lord Tom Bingham, who held office successively as Master of Rolls, Lord Chief Justice of England and Wales, and Senior Law Lord of the United Kingdom, has offered a pithy and persuasive working definition.⁵⁶ According to Lord Bingham, the core of the Rule of Law is “that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.”⁵⁷ For a keen observer, the definition offered by Lord Bingham here suffers from the same deformity of instrumentality suggested by Fuller.⁵⁸ In order to free ourselves to use

⁵¹ *Id.* at 790.

⁵² See Daniel B. Rodriguez et al., *Rule of Law Unplugged*, 59 EMORY L. J. 1455, 1456–57 (2010).

⁵³ See BINGHAM, *supra* note 6, at 8.

⁵⁴ See *id.* at 1.

⁵⁵ Rt. Hon. Lord Bingham of Cornhill KG, House of Lords, Sixth Sir David Williams Lecture (Nov. 16, 2006), <https://www.cpl.law.cam.ac.uk/sir-david-williams-lectures2006-rule-law/rule-law-text-transcript>.

⁵⁶ BINGHAM, *supra* note 6, at 8.

⁵⁷ *Id.*

⁵⁸ See FULLER, *supra* note 30.

Lord Bingham's definition, it will be important to note that he has coincidentally divided his definition into eight precepts.

Lord Bingham's eight precepts are the following:

The accessibility of the law,

Application of law, not discretion,

Equality before the law,

The exercise of power should be in good faith, fair, for purpose conferred, reasonable, and not exceeding limits,

Adequate protection of fundamental human rights,

Resolving disputes without prohibitive cost or inordinate delay,

A fair trial (adjudicative procedures provided by the state should be fair,

The Rule of Law in the International Legal order (compliance by the state with its obligations in international law).⁵⁹

To Lord Bingham's credit, four of his carefully formulated sub-rules are substantive in nature and thus tied more to Rawls's conception of "justice as fairness."⁶⁰ The sub-rules of equality before the law, exercise of power, protection of fundamental human rights, and fair trial all embody core substantive content.⁶¹ The other four, even though seeming more instrumentalist when read to together with the substantive four, act as appropriate vessels for delivering justice.

II. RULE OF LAW AND HUMAN CAPABILITIES

The place of law in development has been a subject of numerous deliberations, especially in developing countries where the Rule of Law has been prescribed as being a panacea in the quest for development. The nature of law as a tool that societies can use to relate with the material objects within their reach has seen law play an instrumental role in the distribution of societal goods, such as healthcare.⁶² Law is, therefore, instrumental not only as a reflection of societal conditions in place, but

⁵⁹ See BINGHAM, *supra* note 6, at 38–119.

⁶⁰ RAWLS, *supra* note 31, at 206–08.

⁶¹ See Rodriguez et al., *supra* note 52, at 1457 n.7, 1461 n.26, 1471, 1476.

⁶² See Collins Odote & Smith Otieno, *Getting It Right: Towards Socially Sustainable Exploitation of the Extractive Industry in Kenya*, 2015 E. AFR. L.J. 202, 204, 214–15 (2015).

also as a tool for reforming the underlying conditions, hence influencing change.⁶³ The coercively obligatory nature of the law has, however, had negative consequences with some segments of the society that interact with the law. This has led those segments to reject that coercively obligatory nature outright, which in turn leads to lack of fidelity towards the law and/or the legal system.⁶⁴ This has particularly been the case where constitutionalism is not upheld notwithstanding the fact that the Rule of Law has attained wide recognition as “the very essence of constitutionalism.”⁶⁵

As already stated, the Rule of Law has been closely associated with development, with an emphasis on how the Rule of Law plays a role in development taking different forms.⁶⁶ In the health care sector, for example, emphasis on fidelity to the law has been highlighted as a critical factor in attracting private sector investment which promotes positive results in the health care sector.⁶⁷ This has been attributed to the fact that the Rule of Law promotes confidence in the institutional and governance infrastructure in a country, hence eliminating factors that may undermine investments.⁶⁸ The role that the Rule of Law plays in strengthening confidence in health systems can be summed by Lord Bingham’s second sub-rule that advocates for application of law and not discretion which is instrumental in guaranteeing stability.⁶⁹ Development, on the other hand, has been equated with the increase in human capabilities resulting in a paradigm shift from equating development with growth in Gross Domestic Product (GDP) per capita.⁷⁰ Proponents of this changed view of development include Amartya Sen, who argues that development should focus more on expanding the abilities of individuals to lead the sort of lives that they value, hence expanding the real

⁶³ See Okech-Owiti, *Law, Ideology and Development: Dialectics or Eclecticism at Play?*, in YASH VYAS ET AL., *LAW AND DEVELOPMENT IN THE THIRD WORLD* (Faculty of Law, University of Nairobi, 1993).

⁶⁴ Dhavan, *supra* note 4, at 44.

⁶⁵ AKECH, *supra* note 37, at 9.

⁶⁶ See F.A. HAYEK, *THE ROAD TO SERFDOM* 72 (1944) (arguing that the rule of law “means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge”).

⁶⁷ Darrell West et al., *Health Governance Capacity: Enhancing Private Sector Investment in Global Health*, THE BROOKINGS PRIV. SECTOR GLOB. HEALTH R&D PROJECT 6, 13 (Mar. 29, 2017), <https://www.brookings.edu/research/health-governance-capacity/>.

⁶⁸ *Id.* at 6.

⁶⁹ See BINGHAM, *supra* note 6, at 72.

⁷⁰ See Boettke & Subrick, *supra* note 12, at 110.

freedoms of people.⁷¹ According to Sen, development is to be attained by, among other things, removing deprivations in healthcare and addressing issues of health injustice, which in the end leads to the expansion of human capabilities and freedoms.⁷² A clear link, therefore, emerges where the Rule of Law has a place in development, and this translates to improvement of human capabilities. This, in particular, can be achieved through the law extending adequate protections to fundamental human rights which Lord Bingham considers to be a key element of the Rule of Law.⁷³

The Rule of Law plays the important role of ensuring development through the intricate mix of institutions that enable individuals to realize the benefits of exchanges.⁷⁴ Institutions also have an indispensable role to play in guaranteeing the Rule of Law. It has been noted that law cannot bring about the desired outcomes without support from institutions.⁷⁵ The Rule of Law, on the other hand, guarantees equitable distribution of services by the institutions that are tasked with these responsibilities.⁷⁶ Experience has, however, shown that institutions tasked with service delivery do not always fulfill their obligations.⁷⁷ What mostly emerges is the fact that there is usually a contest between claimants and those who owe them an obligation.⁷⁸ Social norms, such as the existence of Rule of Law, are what catapult the former category of persons to the realization of their aspiration of acquiring the social goods.⁷⁹ Where institutions respect the Rule of Law, substantive rights that favor the politically and economically marginalized become more effective.⁸⁰ Institutions, such as dispute resolution bodies, can also play the role of furthering the Rule of Law by ensuring that litigants are able to resolve disputes in a non-costly manner and without inordinate

⁷¹ *Id.* See generally AMARTYA SEN, DEVELOPMENT AS FREEDOM 10–11, 297–98 (2000).

⁷² Amartya Sen, *Foreword* to JENNIFER PRAH RUGER, HEALTH AND SOCIAL JUSTICE, at viii (2010).

⁷³ See BINGHAM, *supra* note 6, at 75.

⁷⁴ Boettke & Subrick, *supra* note 12, at 113.

⁷⁵ Araya Kebede Araya, *Interplay Between Institutions and Rule of Law to Engender Development*, 8 LOY. U. CHI., <http://www.luc.edu/media/lucedu/prolaw/documents/pdfs/5studentjournalaraya.pdf>.

⁷⁶ See Daniel M. Brinks, *Inequality, Institutions, and the Rule of Law: The Social and Institutional Bases of Rights* 6 (Kellogg Inst. Working Paper No. 351, 2008), <https://kellogg.nd.edu/publications/workingpapers/WPS/351.pdf>.

⁷⁷ *Id.* at 7.

⁷⁸ See *id.* at 7.

⁷⁹ *Id.* at 2.

⁸⁰ See *id.*

delays.⁸¹ This, as we shall see later in this paper, is particularly relevant when it comes to resolution of disputes arising from cases of medical negligence.

Before we move into the next section where we discuss the Rule of Law and health outcomes, it is apt to reiterate the conceptual and theoretical framework of Rule of Law that we follow. We associate ourselves with the substantive approach to Rule of Law whose focus is on substantive outcomes of Rule of Law processes, with outcomes such as “justice” and “fairness.”⁸² The substantive view of Rule of Law is concerned with the extent to which formal rules contribute to the achievement of a particular substantive goal of the legal system.⁸³ We have, therefore, established that Rule of Law has a special role to play in expanding human capabilities (which in this paper we determine to be positive health outcomes). Next, we look at the linkage between Rule of Law and health outcomes as this forms the basis of the discussions in the subsequent parts of the paper.

III. THE RULE OF LAW AND HEALTH OUTCOMES

In the preceding section, we established the nexus between the Rule of Law, development, and the improvement of human capabilities. The United Nations has also developed a series of indicators used to monitor Rule of Law in various contexts.⁸⁴ The key dimensions of the Rule of Law developed by the U.N. are⁸⁵: performance,⁸⁶ integrity, transparency and accountability,⁸⁷ treatment of members of vulnerable groups,⁸⁸ and capacity.⁸⁹ The existence of these dimensions is what

⁸¹ See BINGHAM, *supra* note 6, at 77.

⁸² See Araya, *supra* note 75, at 10.

⁸³ Matthew Stephenson, *Rule of Law as a Goal of Development Policy*, WORLD BANK, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:20763583~menuPK:1989584~pagePK:210058~piPK:210062~theSitePK:1974062,00.html>.

⁸⁴ See DEP'T OF PEACEKEEPING OPERATIONS ET AL., U.N., THE UNITED NATIONS RULE OF LAW INDICATORS VI (2011), http://www.un.org/en/events/peacekeepersday/2011/publications/un_rule_of_law_indicators.pdf.

⁸⁵ *Id.*

⁸⁶ See *id.* at 3 (showing that institutions provide efficient and effective services that are accessible and responsive to the needs of the people).

⁸⁷ *Id.* (showing where institutions operate transparently and with integrity, and are held accountable to rules and standards of conduct).

⁸⁸ *Id.* (showing how criminal justice institutions treat minorities, victims, children in need of protection or in conflict with the law, and internally displaced persons, asylum-seekers, refugees, and stateless and mentally ill individuals).

improves public confidence in institutions that operate within their societies.⁹⁰ Further, the presence of these indicators within an institution translates to lesser incidences of inequality.⁹¹ Lesser incidences of inequality improves health outcomes as institutions tasked with service delivery deploy the requisite resources effectively, knowing that they can be held accountable based on the existence of certain rules and standards.⁹²

The place of Rule of Law in development of health systems and promotion of health outcomes has also not escaped the attention of the World Health Organization (WHO).⁹³ Through the Good Governance in Medicines (GGM) program initiated in 2004, the WHO has advocated for the use of good governance initiatives to improve health capacity worldwide.⁹⁴ Accordingly, a WHO background paper argues:

Governance in health is being increasingly regarded as a salient theme on the development agenda. Leadership and governance in building a health system involve ensuring that strategic policy frameworks exist and are combined with effective oversight, coalition-building, regulation, attention to system design and accountability. The need for greater accountability arises both from increased funding and a growing demand to demonstrate results. Accountability is therefore an intrinsic aspect of governance that concerns the management of relationships between various stakeholders in health, including individuals, households, communities, firms, governments, nongovernmental organizations, private firms and other entities that have the responsibility to finance, monitor, deliver and use health services.⁹⁵

The concern of this section is the nexus between Rule of Law, as conceptualized in the preceding sections of this paper, and health

⁸⁹ *Id.* (showing where institutions have the human and material resources necessary to perform their functions, and the administrative and management capacity, to deploy these resources effectively).

⁹⁰ *See id.*

⁹¹ *See* Robert J. Barro, *Rule of Law, Democracy and Economic Performance*, in INDEX OF ECONOMIC FREEDOM (Heritage Foundation ed., 2000).

⁹² *See* Harry Jones, *Equity in Development: Why It Is Important and How to Achieve It 4–7* (Overseas Dev. Inst., Working Paper No. 311, 2009).

⁹³ *Good Governance for Medicines (GGM) Overview*, WORLD HEALTH ORG., <http://www.who.int/medicines/areas/policy/goodgovernance/en/>.

⁹⁴ *Id.*

⁹⁵ *See generally* Guitelle Baghdadi-Sabeti & Fatima Serhan, *WHO Good Governance for Medicines Programme: An Innovative Approach to Prevent Corruption in the Pharmaceutical Sector: Compilation of country case studies and best practices*, (World Health Rep. Background Paper No. 25, 2010), <http://www.who.int/healthsystems/topics/financing/healthreport/25GGM.pdf?ua=1>.

outcomes. Here, we discuss how the observance of Rule of Law translates into better quality of healthcare. The US Institute of Medicine defines quality in medicine as “the degree to which health services for individuals and populations increase the likelihood of desired health outcomes and are consistent with current professional knowledge.”⁹⁶

The desire by human beings to have certain health outcomes or to be in a certain desirable state is reminiscent of the capabilities approach to development postulated by Sen⁹⁷ and G.A. Cohen.⁹⁸ The latter asserts that the focus of the capabilities approach is the achievement of desirable states of well-being.⁹⁹ This state of well-being can be tangibly manifested in the form of low rates of premature mortality, capability to avoid escapable morbidity, accountability, and encouraging end-users of health systems to participate in policy-making and implementation processes.¹⁰⁰

Health outcomes are influenced by certain determinants which have commonly been referred to as social determinants of health. The WHO defines social determinants of health to encompass the full set of social conditions in which people live and work which contribute to the overall health of populations.¹⁰¹ The WHO, however, notes that little attention has been paid on health systems as social determinants of health.¹⁰² Accordingly, the WHO notes that health systems have an instrumental role to play, especially with regards to ensuring access to healthcare and these systems which may lead to the empowerment of

⁹⁶ KATHLEEN N. LOHR, INS. OF MED., MEDICARE: A STRATEGY FOR QUALITY ASSURANCE 4 (1990) (emphasizing that there has been a move to measure quality by looking at processes and outcomes. The former measures activities that contribute to quality but which are, essentially, operational, while the latter concerns itself with such aspects like disease stage, morbidity, mortality, complications rates, and readmission rates); *see also* GREGER VIGEN ET AL., MEASUREMENT OF HEALTHCARE QUALITY AND EFFICIENCY: RESOURCES FOR HEALTHCARE PROFESSIONALS 16-17 (Soc’y of Actuaries 2010).

⁹⁷ *See* Amartya Sen, *Capability and Well-Being*, in THE QUALITY OF LIFE 30-31 (Martha Nussbaum & Amartya Sen eds., 1993).

⁹⁸ *See* G.A. Cohen, *Equality of What? On Welfare, Goods, and Capabilities*, in THE QUALITY OF LIFE (Martha Nussbaum & Amartya Sen eds., 1993).

⁹⁹ *See id.*

¹⁰⁰ *See* RUGER, *supra* note 72, at 61.

¹⁰¹ WORLD HEALTH ORG., A CONCEPTUAL FRAMEWORK FOR ACTION ON THE SOCIAL DETERMINANTS OF HEALTH 6, 9 (2009) (these conditions include structural arrangements in a society which define individual socioeconomic position within hierarchies of power, prestige and access to resources and these are rooted in key institutions tasked with redistribution of societal goods. Psychosocial circumstances as well as behavioral and biological factors also come into play); *see id.* at 6.

¹⁰² *Id.* at 39.

end-users through participation, depending on how these systems are structured.¹⁰³

This indispensable role played by health systems, as determinants of health, can only be successful where these systems uphold fidelity to the law. Studies have established that a country's adherence to the Rule of Law is strikingly interconnected with the overall national public health status.¹⁰⁴ Gostin argues that states have a responsibility to govern well, with honesty, transparency, civic deliberation, accountability, and failure to abide by this in the health sector deprives people of access to health.¹⁰⁵ It has been noted that prevalence of Rule of Law leads to the betterment of health outcomes regardless of a country's level of economic development.¹⁰⁶ Law plays this key role through its various manifestations in the health sector. The law is instrumental in designing health systems, licensing health professionals, protecting the environment, organizing effective public health responses to pandemic infectious diseases, regulating drugs and medical devices, reducing of risk factors such as tobacco and alcohol, and criminalizing violent behavior.¹⁰⁷ Further, the law plays an instrumental role in promoting health governance by mandating governments to establish transparent institutional processes, while also providing opportunities to health system users to effectively participate in decision-making and promoting accountability.¹⁰⁸ According to Lord Bingham, the law can also play these roles by requiring adequate protection of fundamental human rights¹⁰⁹ as well as requiring institutions to act in good faith with fidelity to the law and not operate on the whims

¹⁰³ *Id.* at 40 (it has been argued that health systems have three obligations to play in confronting inequity:

1. To ensure that resources are distributed between areas in proportion to their relative needs
2. To respond appropriately to the health care needs of different social groups; and
3. To take the lead in encouraging a wider and more strategic approach to developing healthy public policies at both the national and local level, to promote equity in health and social justice).

See also MICHAELA BENZEVAL ET AL., TACKLING INEQUALITIES IN HEALTH: AN AGENDA FOR ACTION (1995).

¹⁰⁴ Pinzon-Rondon et al., *supra* note 2, at 5, 10.

¹⁰⁵ Lawrence O. Gostin, *What Duties Do Poor Countries Have for the Health of Their Own People?*, 40 HASTINGS CTR. REP. 9, 9–10 (2010), <https://muse.jhu.edu/article/376760>.

¹⁰⁶ See Pinzon-Rondon et al., *supra* note 2.

¹⁰⁷ *Id.* at 7.

¹⁰⁸ See Gostin, *supra* note 105, at 9.

¹⁰⁹ See BINGHAM, *supra* note 6, at 75.

of those tasked with governing these institutions.¹¹⁰ The institutions tasked with health care delivery are, therefore, required to guarantee the realization of the right to the highest attainable standards of health and enable access to dispute resolution mechanisms where disputes arise between the patients and health care providers.

The law is key in institutionalizing conduct of professionals in the health sector and the expectations of the users of health services. This makes enforcement easy based on the existence of clear duties and responsibilities. The law also requires that these professionals exercise powers conferred on them reasonably, in good faith, and for the purposes that these powers were conferred.¹¹¹ Where fidelity to the law is the norm, it has been established that life expectancy increases, accountability increases in the health sector, and better outcomes are achieved by users of health services.¹¹² Dismal performance in the health sector, on the other hand, is attributable to a lack of observance to laws and regulations as this becomes a good breeding ground for lack of accountability and non-performance by institutions.¹¹³ This is further attributed to the fact that discretion breeds excesses and, as John Locke posited, “[w]herever law ends, tyranny begins.”¹¹⁴

The following section illustrates how the health care sector in Kenya performs with regards to fidelity to the Rule of Law. Particularly, this section illustrates instances where there is perceived absence of fidelity to the law as illustrated by the examples provided. What becomes apparent from these discussions is that there are always forces pulling away from the center which leads to underperformance and maladministration in these institutions. Also, clear from these discussions is the fact that public confidence and a sense of justice always increase where the institutions uphold rule of the law. As will be illustrated later, increased public confidence in these institutions further leads to their increased use by members of the public who are confident in the ability of the institutions to deliver societal goods.

¹¹⁰ *Id.* at 78.

¹¹¹ *Id.*

¹¹² See Boettke & Subrick, *supra* note 12, at 121.

¹¹³ See RODGER MAGNUSSON, ADVANCING THE RIGHT TO HEALTH: THE VITAL ROLE OF LAW 73–77 (2017), <http://www.who.int/healthsystems/topics/health-law/chapter5.pdf>.

¹¹⁴ See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 103 (Hackett Pub. Co. 1980) (1690).

IV. ILLUSTRATIONS OF NON-COMPLIANCE WITH THE RULE OF LAW IN THE KENYAN HEALTH SECTOR

This section of this paper discusses the various illustrations of the violation of the Rule of Law in the health system in Kenya. As discussed in this section, absence of the Rule of Law manifests itself in different forms including: corruption and mismanagement of resources, medical malpractice and kickbacks, disobedience of court orders, and absence of safeguards to encourage public participation in decision-making in the health sector.¹¹⁵ It becomes apparent that these incidences have wide ramifications on the performance of the health sector.¹¹⁶

A. CORRUPTION AND MISMANAGEMENT OF PUBLIC FUNDS

A health care provision system is dependent on the efficient combination of human resources, financial resources, supplies, and competent delivery of services.¹¹⁷ For this system to work there is need to mobilize and equitably distribute resources.¹¹⁸ In developing countries, such as Kenya where such resources are scarce, it becomes more necessary to ensure that resources are deployed and efficiently managed by all the relevant stakeholders including government, health insurers, healthcare providers, and administrators. Corruption and mismanagement of funds is illustrative of lack of good faith by those entrusted with the management of resources on behalf of the public. This is clearly a departure from one of the core sub-rules of the Rule of Law conception envisioned by Lord Bingham, that is exercise of power on a good faith basis which is of importance and should be taken into account by those tasked with provision of services.¹¹⁹

Unfortunately, this has not been the case, especially within the public health system in Kenya.¹²⁰ The public health system in Kenya has

¹¹⁵ Pinzon-Rondon et al., *supra* note 2, at 2; see Kakah, *supra* note 8.

¹¹⁶ See Pinzon-Rondon et al., *supra* note 2.

¹¹⁷ Maureen Lewis, *Governance and Corruption in Public Health Care Systems* 6 (Ctr. for Global Dev., Working Paper No. 78, 2006).

¹¹⁸ See Tao Zhang et al., *Inequality in the Distribution of Health Resources and Health Services in China: Hospitals Versus Primary Care Institutions*, 16 INT'L J. EQUITY HEALTH 42, 42 (2017).

¹¹⁹ See BINGHAM, *supra* note 6, at 78.

¹²⁰ Pinzon-Rondon et al., *supra* note 2, at 2.

been crippled by corruption and mismanagement of funds.¹²¹ Corruption and mismanagement in the health care system usually manifests itself in various ways, including: corrupt officials, mis-procurement, nepotism, weak oversight systems, misappropriation of funds, and inadequate fraud and abuse controls.¹²² For example, Professor Anyang' Nyong'o stated in a 1995 parliament session that the mismanagement of the National Hospital Insurance Fund (NHIF) funds was causing strain in the public health system and its complete breakdown.¹²³ This was evidenced by the deaths of many people from illnesses, such as dysentery, which are easily prevented and curable with primary health care.¹²⁴ Additionally, it was stated that the tendering system for purchase of medicine was inherently flawed, facilitating fraud and theft.¹²⁵ These flaws manifestly hindered the provision of adequate protection of the right to health care.

Some of these incidences have made Kenya the subject of international ridicule and condemnation with some donor agencies eventually suspending funding to certain programmes that have been riddled with corruption.¹²⁶ Donor money meant for such initiatives like combating malaria, tuberculosis, and HIV/AIDS has been subject to plunder and theft and this has on numerous occasions led to the freezing of such donations at the expense of the sick in dire need of this assistance.¹²⁷ In 2004, a report by the Government Efficiency Monitoring Unit detailed how senior managers of the National AIDS Control Council were responsible for the theft of millions of shillings meant for HIV/AIDS projects, with the report recommending prosecution of these officials.¹²⁸ The head of the Council, Margaret Gachara, was subsequently prosecuted and jailed for abuse of office and illegal

¹²¹ See Kizito Lubano, *The Disease of Corruption Hits Kenya's Health Sector Hardest*, STANDARD (Dec. 28, 2016), <https://www.standardmedia.co.ke/lifestyle/article/2000228132/the-disease-of-corruption-hits-kenya-s-health-sector-hardest>.

¹²² Lewis, *supra* note 117, at 7.

¹²³ OFFICIAL REC. HANSARD S. 894 (June 7, 1995), KENYA NAT'L ASSEMB. (statement of Prof. Anyang' Nyong'o).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Anita Chepkoech, *Godec Says US Suspended Aid to Health Ministry Over Graft*, DAILY NATION (May 9, 2017), <http://www.nation.co.ke/news/Godec-US-suspended-aid-Health-Ministry-graft/1056-3919662-format-xhtml-lvkqktz/index.html>.

¹²⁷ *See id.*

¹²⁸ See Njoki Ndungu, *Why Robbing the Dying Has Become a Career*, STANDARD (Nov. 1, 2008), <https://www.standardmedia.co.ke/article/1143998298/why-robbing-the-dying-has-become-a-career>.

acquisition of funds.¹²⁹ It is noteworthy that she was released within five months of serving her sentence following the intervention of the Office of the President.¹³⁰ This clearly sent a message to public officials that you can steal public money and get away with it.¹³¹ It also sent the message that not everybody was equal before the law and that some could avoid being held accountable by the law. For the ailing public, however, money that was meant for their use was no longer available following backlash from donors; this meant inadequate supplies of the much-needed medical products.

This rampant mismanagement and corruption leaves the system with inadequate facilities and human personnel.¹³² The few personnel employed in the system are constantly lamenting over poor wages which the government is always resistant to improve, claiming inadequate finances.¹³³ Most of the supplies are stolen by health officers who sell them privately for personal gain, and the cash generated from the facilities is often embezzled.¹³⁴

Given the history of challenges Kenya has faced with corruption and mismanagement of funds, the Constitution provides for integrity as an essential element of governance.¹³⁵ Accordingly, Article 73 (2) (c) of the Constitution requires leaders to act in public interest. They should act

¹²⁹ PATRICIA KAMERI-MBOTE & MIGAI AKECH, KENYA: JUSTICE SECTOR AND THE RULE OF LAW 68 (2011).

¹³⁰ *Id.*

¹³¹ Gaiitho P. Kahuha, From Institutional and Programmatic Approach to Alternative Management of Corruption in Kenya 90 (June 2015) (unpublished M.A. dissertation, University of Nairobi) http://erepository.uonbi.ac.ke/bitstream/handle/11295/85905/Gaiitho_From%20institutional%20and%20programmatic%20approach%20to%20alternative%20management%20of%20corruption%20in%20Kenya.pdf?sequence=1.

¹³² Kempe R. Hope, *Kenya's Corruption Problem: Causes and Consequences*, 52 J. COMM. & COMP. POL. 4 (2014); see also *Stop Mismanagement of Health Resources*, DAILY NATION (June 29, 2015), <http://www.nation.co.ke/oped/Editorial/Stop-mismanagement-of-health-resources-/440804-2769614-mr3orp/index.html>; see also Allan Odhiambo, *Poor Management and Corruption Threaten Future of Devolved Funds*, BUS. DAILY (Apr. 6, 2010), <http://www.businessdailyafrica.com/-/539546/893264/-/view/printVersion/-/2uxd03/-/index.html>.

¹³³ See Abdi Latif, *Kenya's Health Workers Claim Mismanagement*, AL JAZEERA (Jan. 13, 2014), <http://www.aljazeera.com/indepth/features/2014/01/kenya-health-workers-claim-mismanagement-20141751735209910.html>.

¹³⁴ Taryn Vian, *Review of Corruption in the Health Sector: Theory, Methods and Interventions*, HEALTH POL'Y & PLAN. 83, 90 (2008); see also Edward R. O. Ouko, REP. OF THE AUDITOR-GEN., THE REPORT OF THE AUDITOR-GENERAL ON THE APPROPRIATION ACCOUNTS, OTHER PUBLIC ACCOUNTS AND THE ACCOUNTS OF THE FUNDS OF THE REPUBLIC OF KENYA FOR THE YEAR 2012/2013 273 (2013) (unbanked and unaccounted for revenue collected by Kapenguria district hospital amounting to Kshs.1,086,955.00, in the financial year 2012/2013).

¹³⁵ CONSTITUTION art. 10(2)(c) (2010) (Kenya).

honestly and declare any personal interest that may conflict with public duties.¹³⁶

It involves accountability to the public for decisions and actions by state officers.¹³⁷ Accountability connotes state officers exercising powers in good faith and without exceeding prescribed limits.¹³⁸ State officers are expected to behave in a manner “that does not compromise any public or official interest in favor of a personal interest.”¹³⁹ Additionally, Article 201 of the Constitution provides that public money shall be used in a prudent and responsible way.¹⁴⁰ As guiding principles on governance, these provisions have informed section 3 of the Public Procurement and Asset Disposal Act, which includes maximization of value for money as a key principle in procurement.¹⁴¹ Further section 66 of the Public Procurement and Asset Disposal Act makes it an offence to engage in corrupt, coercive, obstructive, collusive or fraudulent practice, or conflicts of interest.¹⁴²

Despite the existence of these provisions in law, mismanagement of resources and corruption continue unabated.¹⁴³ In December 2010, the Minister of Finance stated that corruption and mismanagement of funds robs Kenya at least Kenya Shillings (Kshs.) 270 billion (USD 2.7 billion)¹⁴⁴ which would otherwise be utilized in ministries such as health and education.¹⁴⁵ This essentially means that funds that could have otherwise been used to purchase life-saving supplies end up in private pockets and the sick end up not accessing the much-needed healthcare services.

According to the Auditor General’s reports, The Ministry of Health, Constituency Development Fund Committees and County Governments have overseen mismanagement of resources aimed for

¹³⁶ CONSTITUTION art. 73(2)(c) (2010) (Kenya).

¹³⁷ CONSTITUTION art. 73(2)(d) (2010) (Kenya).

¹³⁸ See BINGHAM, *supra* note 6, at 78.

¹³⁹ CONSTITUTION art. 75 (2010) (Kenya).

¹⁴⁰ CONSTITUTION art. 201 (2010) (Kenya).

¹⁴¹ Public Procurement and Asset Disposal Act, No. 33 (2015) § 3 (Kenya).

¹⁴² Public Procurement and Asset Disposal Act, No. 33 (2015) § 66 (Kenya).

¹⁴³ Njuguna H. Kimani, *The Influence of Political Patronage on the Operationalization of Public Procurement Law in Kenya*, 2 IMPERIAL J. INTERDISCIPLINARY RESEARCH 103, 1597 (2016), <http://www.ippa.org/IPPC5/Proceedings/Part6/PAPER6-14.pdf>; see also Anna Persson, *The Failure of Anti-Corruption Policies: A Theoretical Mischaracterization of the Problem*, QOG WORKING PAPER SERIES, June 2010, at 19, http://www.qog.pol.gu.se/digitalAssets/1350/1350163_2010_19_persson_rothstein_teorell.pdf.

¹⁴⁴ KEMPE RONALD HOPE, SR., *THE POLITICAL ECONOMY OF DEVELOPMENT IN KENYA* 114 (2012).

¹⁴⁵ *Id.*

public health.¹⁴⁶ For instance, in the Auditor's report 2014/2015, there are unsupported expenditures incurred by the Ministry of Health amounting to Kshs. 178,025,962 (USD 1,780,259.62).¹⁴⁷ In the financial year ending 2015, the amount of unsupported expenditure amounted to Kshs. 402,025,962.00 (USD 4,020,259.62).¹⁴⁸ There was also irregular transfer of funds from the ministry to the parliamentary commission which is contrary to Section 43(1) of the 2012 Public Financial Management Act, which prohibits reallocation of funds from one Government Entity to another.¹⁴⁹

In the same financial year, there are also several projects that were flagged for irregularities and mismanagement of resources. For example, in Othaya there was an unsupported variance of Kshs. 142,241,948 (USD 1,422,419.48) which was the increase in the cost for the upgrading of Othaya district Hospital.¹⁵⁰ According to the Auditor General's report, other payments amounting to Kshs. 578,542,747 (USD 5,785,427.47) could not be verified as resulting in any work since the contractor had abandoned the site and there were no project progress reports.¹⁵¹

In the financial year 2013/2014, the total amount of unsupported expenditures by the Ministry of Health amounted to Kshs. 22,500,344,808 (USD 225,003,448.08).¹⁵² There was also irregular reallocation of funds from the Ministry of Health to the Parliamentary Service Commission, contravening Section 43(1) of the 2012 Public Financial Management Act, which prohibits reallocation of funds from one Government Entity to another.¹⁵³ Further, the report indicated an expenditure of Kshs. 34,070,876.00 (USD 340,708.76) on non-existent consultancy services which were irregularly acquired and for which there was no document to support the transaction.¹⁵⁴ There are also a number of

¹⁴⁶ *Id.*

¹⁴⁷ OFFICE OF THE AUDITOR-GEN., REPORT OF THE AUDITOR-GENERAL ON THE FINANCIAL STATEMENTS FOR NATIONAL GOVERNMENT FOR THE YEAR 50 (2014/2015) [hereinafter OFFICE OF THE AUDITOR-GEN.].

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 101.

¹⁵⁰ *Id.* at 51.

¹⁵¹ *Id.* at 52.

¹⁵² SUMMARY OF THE REPORT OF THE AUDITOR-GENERAL ON THE FINANCIAL STATEMENTS FOR MINISTRIES, DEPARTMENTS, COMMISSIONS, FUNDS AND OTHER ACCOUNTS OF THE NATIONAL GOVERNMENT 18 (2013/2014).

¹⁵³ OFFICE OF THE AUDITOR-GEN., *supra* note 147, at 101.

¹⁵⁴ *Id.*

stalled projects in the health sector, even though, the government had made the relevant payments to the contractors.¹⁵⁵ These include the proposed upgrading of Othaya District Hospital Phase I and the construction of proposed central radioactive waste processing facility at Ololua, Ngong.¹⁵⁶ Therefore, the Ministry is not getting value for its money. The public is getting ripped off by public officials through corrupt schemes.

Additionally, the expenditure on the fitting of ward partitioning curtains at Othaya District Hospital was irregular in that the payment vouchers of Kshs. 12,080,500 (USD 120,805) were not supported by the relevant quotation evaluation and tender committee minutes, nor the contract agreement and certificate from the acceptance committee, which would have confirmed that the curtains were actually received and were of the right specification.¹⁵⁷ This makes it impossible to say whether the project was competitively sought and the funds appropriately used.¹⁵⁸

In the financial year 2012/2013, there were several irregularities in the Ministry of Health. First, the procurement of an ambulance for Githunguri Health Centre at a cost of Kshs. 3,4000,000 (USD 340,000) was irregular in that the ambulance was not inspected by the Chief Mechanical and Transport Engineer as required by the 2006 Public Procurement and Disposal Regulations.¹⁵⁹ Hence the propriety of these amounts could not be ascertained.¹⁶⁰

Mismanagement of funds in the health sector was not only limited to funds at the Ministry but, also Constituency Development Fund (CDF). For instance, in financial year 2012/2013, Kikuyu Constituency Development Fund's Office maintained that they had contracted the construction of the Gikambura Health Centre for Kshs. 5,910,050 (USD 59,100.5) and that the construction had been completed.¹⁶¹ Yet, the Auditor General's report indicated that the site was

¹⁵⁵ OFFICE OF THE AUDITOR-GEN., *supra* note 152, at 104.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 103.

¹⁵⁸ *Id.*

¹⁵⁹ OFFICE OF THE AUDITOR-GEN., REPORT OF THE AUDITOR-GENERAL ON THE FINANCIAL STATEMENTS FOR NATIONAL GOVERNMENT FOR THE YEAR 2012/2013 127 (2013).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 128.

incomplete.¹⁶² Once again, the propriety of the Kshs. 5.9 million (USD 0.059 million) could not be ascertained.¹⁶³

In the same financial year, Saku Constituency Development Fund Office contracted the construction of a maternity health care facility for Kshs. 1,995,450 (USD 19,954.5). The office maintained that the project was complete.¹⁶⁴ However, upon inspection for audit purposes, the Auditor General's report indicates that the ward was shoddily constructed and the District Medical Officer of Health (DMOH) Marsabit had already stated it was not suitable for use as a maternity ward.¹⁶⁵ This ended up being wasteful of public resources as the constituency did not get value for their money. Additionally, in the same financial year, 2012/2013, Tigania East Constituency Development Fund could not account for Kshs. 9.3 million (USD 0.093 million) which was allegedly used in the health sector.¹⁶⁶

In the financial year 2011/2012, the Auditor General's report recorded unsupported expenditures amounting to Kshs. 1,920,758,129 (USD 19,207,581.29).¹⁶⁷ In the financial year 2010/2011 Kshs.342,424,953 (USD 3,424,249.53) could not be accounted for.¹⁶⁸ In the financial year 2010/2011 expenditures totaling Kshs. 8,000,000.00 (USD 80,000) on the construction of Nyandiwa Model Health Centre – Suba District could not be adequately accounted for as the site was abandoned before completion although the contractor had been paid in full.¹⁶⁹ There were no documents to support the contract and the expenditure.¹⁷⁰ This was also the case with regards to construction of Nalondo Dispensary Model Health Centre in Bungoma Central District where, despite records certifying the project as complete and full payment made, the auditor's report recorded that the project was far from completion.¹⁷¹

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 136.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 156.

¹⁶⁷ OFFICE OF THE AUDITOR-GEN., REPORT OF THE AUDITOR-GENERAL ON THE FINANCIAL STATEMENTS FOR NATIONAL GOVERNMENT FOR THE YEAR 2011/2012 368 (2012).

¹⁶⁸ OFFICE OF THE AUDITOR-GEN., REPORT OF THE AUDITOR-GENERAL ON THE FINANCIAL STATEMENTS FOR NATIONAL GOVERNMENT FOR THE YEAR 7 (2010/2011).

¹⁶⁹ *Id.* at 342–43.

¹⁷⁰ *Id.* at 343.

¹⁷¹ *Id.* at 345.

Notably in 2010 after the promulgation of the new Constitution, devolution was seen as a remedy to many maladies in governance in Kenya.¹⁷² One of them was to facilitate access of resources in counties including improving the public health system.¹⁷³ However, it appears that corruption was also devolved to the counties, based on the extent of mismanagement of county resources.¹⁷⁴ Counties are grappling with corruption, which is undermining devolution and its objects, among which is the provision of medical care.¹⁷⁵ For example, in the 2014/2015 financial year, Meru County bought curtains worth Kshs. 7.5 million (USD 0.075 million) for the county general hospital, whereas Nyamira county spent Kshs. 2.5 million (USD 0.025 million) in the construction of a hospital gate, yet these hospitals barely have sufficient medicine for their patients.¹⁷⁶ The prices under which these projects are undertaken are way beyond the market prices indicating a likelihood that they had inflated prices and some officials might have pocketed the excess funds.¹⁷⁷ Notably, the perpetrators of the misuse of funds are rarely brought to book, and many times the funds are rarely recouped. For instance, with reference to the curtains in Meru, the Governor indicated that those responsible would be brought to justice; however, this has never been actualized.¹⁷⁸ The public, on the other hand, has watched this circus in dismay, with a sense of hopelessness as there are no adequate safeguards to facilitate them holding their elected officials accountable. This state of hopelessness has further been expressed by President Uhuru

¹⁷² John Matakha Kangu, *Constitutional Law of Kenya on Devolution*, 2 STRATHMORE L. J. 213, 213 (2015).

¹⁷³ See generally *id.*

¹⁷⁴ Billow Kerrow, *How Grand Corruption in the Counties Undermines Devolution*, STANDARD MEDIA (July 17, 2016), <https://www.standardmedia.co.ke/article/2000208861/how-grand-corruption-in-the-counties-undermines-devolution> [hereinafter Kerrow].

¹⁷⁵ See generally ETHICS AND ANTI-CORRUPTION COMMISSION, CORRUPTION AND ETHICS SURVEY REPORT (2015); see also Dominic Wabala, *Bribery, Nepotism, Tenders Lead in County Corruption*, STAR (Aug. 18, 2016), https://www.the-star.co.ke/news/2016/08/18/bribery-nepotism-tenders-lead-in-county-corruption_c1405243.

¹⁷⁶ Agnes Aboo, *Uproar as Meru County Government Spends Sh7.8m on Hospital Curtains*, DAILY NATION (Sept. 22, 2015), <http://www.nation.co.ke/counties/meru/Meru-hospital-curtains/1183302-2880716-5239vz/index.html>.

¹⁷⁷ Ally Jamah, *Kenyans Outraged as Corruption Takes Deep Root in Counties*, STANDARD (Nov. 13, 2015), <https://www.standardmedia.co.ke/article/2000182406/kenyans-outraged-as-corruption-takes-deep-root-in-counties>; see also Cyrus Ombati, *Bribery, Nepotism Most Prevalent Form of Corruption in Counties-Survey*, STANDARD (Aug. 17, 2016), <https://www.standardmedia.co.ke/article/2000212376/bribery-nepotism-most-prevalent-form-of-corruption-in-counties-survey>.

¹⁷⁸ Ombati, *supra* note 177.

Kenyatta who during a state function furiously ranted about his frustrations in the fight against graft.¹⁷⁹ This situation therefore, means that the public has been left without access to proper redress mechanisms hence not knowing about the consequences of the actions by the officers who misappropriate funds. This is a clear affront to the Rule of Law precepts, particularly, the demand that the law and redress mechanisms must be adequately accessible to the public.¹⁸⁰

Another example is Isiolo County. In the Financial year of 2013/2014, Kshs. 12,000,000 (USD 120,000) was said to have been used in the purchase of medical drugs yet the hospitals in the county barely had medical supplies.¹⁸¹ According to the *2015 Corruption and Ethics in Devolved Services: County Public Officers' Experiences*, the health department of the Nakuru County Government is one of the departments that is most prone to corruption and mismanagement of funds.¹⁸²

Further in 2014, county governments were reported to have purchased illegally converted ambulances which were much cheaper than the budgeted amount.¹⁸³ These were left-hand-drive vehicles converted to right-hand drive vehicles by people who lacked the requisite expertise. The difference between the actual price of these ambulances and the budgeted price is alleged to have gone to the pockets of the corrupt officials.¹⁸⁴ In 2014, the auditor general reported 50% of the expenditures in Bomet County on health to be unsupported by relevant documents.¹⁸⁵

Questions have also been raised with regard to the initiative to lease medical equipment to be used in hospitals within various counties. The initiative meant for bringing specialized health care services closer

¹⁷⁹ Patrick Lang'at, *Uhuru's 'surrender' on Corruption is Disheartening, Kalonzo Says*, DAILY NATION (Oct. 19, 2016), <http://mobile.nation.co.ke/news/politics/Uhuru-Kenyatta-surrender-on-corruption-is-disheartening-Kalonzo/3126390-3422098-format-xhtml-11p0g9v/index.html>.

¹⁸⁰ See BINGHAM, *supra* note 6, at 70.

¹⁸¹ Abraham Mutai, *Devolution on Trial in Kenya: Case Study on Isiolo County*, SOMALIA NEWSROOM, <https://somalianewsroom.com/devolution-on-trial-in-kenya-case-study-on-isiolo-county/>.

¹⁸² Cf. Caroline Wafula, *Several Nakuru County Departments Prone to Graft – EACC*, DAILY NATION, <http://www.nation.co.ke/news/Anti-graft-agency-cites-corruption-in-Nakuru/1056-3350170-view-asAMP-ocetvo/index.html>.

¹⁸³ *Scandal of Imported 'Converted' Ambulances*, DAILY NATION (Sept. 13, 2014), <http://www.nation.co.ke/news/Ambulances-County-Governments-Conversions/1056-2452092-10cn6n1/index.html>.

¹⁸⁴ *Id.*

¹⁸⁵ THE REPUBLIC OF KENYA, REPORT OF THE AUDITOR-GENERAL ON THE FINANCIAL STATEMENTS OF BOMET COUNTY GOVERNMENT FOR THE SIXTEEN MONTHS PERIOD ENDED 30 JUNE 2014 3 (2015).

to the people.¹⁸⁶ The initiative has, however, been marred with allegations of graft and assertions that the government is not getting value for money based on the agreements entered with the equipment suppliers.¹⁸⁷ Questions have also arisen on whether the national government is usurping the role of county governments by taking over the equipping of facilities within the counties.¹⁸⁸

Strikingly, these are just a few of the selected instances of misuse of funds in the health sector. Yet, there seems to be no effort on the part of the government to curtail these practices by making rogue officials accountable for their actions. It has merely become a tradition of releasing audit reports documenting these irregularities. Meanwhile, there is a legal framework to curtail the misuse of public funds that is not applied to these circumstances hence defeating the need for predictability in application of the law.

B. MISMANAGEMENT OF THE NATIONAL HOSPITAL INSURANCE FUND (NHIF)

The NHIF was established to provide health insurance for formal sector employees.¹⁸⁹ However, its scope was expanded to include voluntary contributions in 1972.¹⁹⁰ At the point of its establishment the NHIF was under the management of the Ministry of Health; however, in 1998 it was transformed into a state corporation with autonomous management.¹⁹¹

The role of health insurance in facilitating access to healthcare cannot be understated. The establishment of the NHIF is particularly illustrative of the desire of Kenyans to have Universal Health Coverage.

¹⁸⁶ Walter Menya, *Many Counties Yet to Receive Medical Equipment, Says Munya*, DAILY NATION (Jan. 3, 2016), <http://www.nation.co.ke/news/The-intrigues-behind-Sh38bn-county-medical-equipment-deal-/1056-3019626-ldx1xrz/index.html>.

¹⁸⁷ Dennis Odunga, *Leasing Fees for County Medical Equipment Inflated, Leaders Say*, DAILY NATION (Apr. 11, 2015), <http://www.nation.co.ke/news/Leasing-fees-for-county-medical-equipment-inflated/1056-2683004-ylc5lyz/index.html>.

¹⁸⁸ Otiato Guguyu, *MPs Raise Eyebrows at Sh80 Million Counties' Medical Equipment Fine*, STANDARD (Mar. 6, 2017), <https://www.standardmedia.co.ke/business/article/2001231602/mps-raise-eyebrows-at-sh80-million-counties-medical-equipment-fine>.

¹⁸⁹ Timothy Abuya et al., *Historical Account of the National Health Insurance Formulation in Kenya: Experiences from the Past Decade*, BMC HEALTH SERVICES RES. (Feb. 12, 2015), <http://bmchealthservres.biomedcentral.com/articles/10.1186/s12913-015-0692-8>.

¹⁹⁰ *Id.* at 5.

¹⁹¹ The National Hospital Insurance Fund Act (1998) (Repealed); National Hospital Insurance Act (2012) Cap 255.

According to World Bank estimates, NHIF accounts for 18% health insurance coverage of the Kenyan population and is instrumental in any move towards Universal Health Coverage in the country.¹⁹² Universal Health Coverage, on the other hand, is instrumental in ensuring access to healthcare as cost barriers are eliminated.¹⁹³

This notwithstanding, the performance of the NHIF as a national health insurance fund has been dismal since its establishment. In 1995, Professor Anyang' Nyong'o, then a member of parliament, stated that NHIF resources were misused; hence, the broken system of health insurance.¹⁹⁴ In 2001, Mr. Mwakiringo, then as a member of parliament for Voi constituency, also noted that NHIF had mismanaged its funds and that that was the cause for its dismal performance as the national health insurer.¹⁹⁵ He pointed to various factors, key among them being mismanagement of the fund which was fueled by the failure to comply with the regulations.¹⁹⁶

The NHIF has been embroiled in several corruption scandals. In 2002, the NHIF multi-story parking was contracted for Ksh. 900 million (USD 9 million).¹⁹⁷ Upon its completion in 2008, the total cost of the parking was Kshs. 3.3 billion (USD 0.033 billion).¹⁹⁸ However, there was

¹⁹² Rachel Mwuara, *The Path to Universal Health Coverage in Kenya: Repositioning the Role of the National Hospital Insurance Fund*, IFC (June 2015), <http://documents.worldbank.org/curated/en/832461468188355009/pdf/99070-BRI-IFC-586467-SMART-LESSONS-Box393181B-PUBLIC-20150624T081248-2015-Universal-Health-Coverage-Kenya-C.pdf>.

¹⁹³ See generally Elizabeth Docteur & Howard Oxley, *Health-Care Systems: Lessons from the Reform Experience*, OECD HEALTH WORKING PAPERS (Dec. 5, 2003), <https://www.oecd.org/els/health-systems/22364122.pdf>.

¹⁹⁴ HANSARD, KENYA NATIONAL ASSEMBLY OFFICIAL RECORD 893 (1995).

¹⁹⁵ HANSARD, KENYA NATIONAL ASSEMBLY OFFICIAL RECORD 1428 (2001).

¹⁹⁶ *Id.* (During the process of discussing the proposals for a Social Insurance model in the country which would incorporate various stakeholders drawn from donor agencies, the private sector and the Government, opposition built up especially from members of the private sector who expressed their reservations on the capacity of the Government to run a scheme of such magnitude. One participant observed:

And at that time the NHIF was very inefficient, spending too much money on administration costs, and we put it at 10%. And we also wanted to look into contribution at a rate of 2.5% per person. So that was not very contentious but the most contentious issue was this animal we are giving money, how efficient is the animal that is now NHIF.).

See also Abuya et al., *supra* note 189, at 9.

¹⁹⁷ *Mismanagement has Eroded Public Confidence in NHIF*, DAILY NATION (Feb. 26, 2013), <http://www.nation.co.ke/lifestyle/DN2/Mismanagement-has-eroded-public-confidence-in-NHIF/957860-1704472-ihwb1h/index.html> [hereinafter DAILY NATION].

¹⁹⁸ *Id.*

additional cost of 626 million (USD 6.26 million) making the total cost Kshs. 4 billion (USD 0.04 billion).¹⁹⁹ The surge in the costs was not fully explained and accounted for.²⁰⁰

In 2012, the NHIF experienced one of its largest scandals. The fund was accused of making huge, irregular payments to ghost clinics and to irregularly selected clinics leading to the loss of hundreds of millions of funds.²⁰¹ The then President Kibaki ordered investigations into the scandal which led the Ethics and Anti-Corruption Commission (EACC) to take into custody NHIF Officials and directors of the fraudulent clinics (Meridian and Clinix Health care providers).²⁰² The whole process was wanting in transparency as these providers were found to lack the necessary infrastructure to provide the service.²⁰³ In 2013, several NHIF staff were suspended and the directors of the clinics were charged with looting from the fund by the EACC and prosecuted by the Director of Public Prosecution (DPP).²⁰⁴ At the time of publication this case was still ongoing.

This level of corruption and mismanagement of the NHIF persists despite section 6 of the NHIF Act, which provides that the NHIF Board has duty to manage, control, and administer the assets of the Fund in such manner and for such purpose as best promotes the objects for which the Fund is established.²⁰⁵ The Board in many of these instances fails to meet the requirements provided by the law in its role as the manager and the oversight body of the fund. It is notable that the continued underperformance of the fund, despite its massive potential,

¹⁹⁹ Edwin Mutai, *Civil Servants Lose Sh3.5bn NHIF Medical Cover Cash*, BUS. DAILY (Nov. 25, 2014), <http://www.businessdailyafrica.com/news/Civil-servants-NHIF-medical-cover-cash/539546-2533846-wb58p0z/index.html>.

²⁰⁰ *Id.*

²⁰¹ *Scandal Lands Former NHIF Bosses in Court*, DAILY NATION (Oct. 1, 2013), <http://www.nation.co.ke/news/Scandal-lands-former-NHIF-bosses-in-court/1056-2015356-format-xhtml-n7idv2z/index.html>.

²⁰² Peter Leftie, *Police and Anti-Graft Team to Probe NHIF*, DAILY NATION (June 6, 2012), <http://www.nation.co.ke/news/Police-and-anti-graft-team-to-probe-NHIF-/1056-1422324-63xyj2z/index.html>.

²⁰³ DAILY NATION, *supra* note 197; see also Lillian Onyango & Sandra Chao, *Step Down Over NHIF Scandal, Nyong'o Told*, DAILY NATION (May 13, 2012), <http://www.nation.co.ke/news/politics/Step-down-over-NHIF-scandal-Nyong'o-told-/1064-1405104-x0ptev/index.html>.

²⁰⁴ Roselyn Obala, *Scandal to be Prosecuted, Says Anti-Corruption Body*, STANDARD (Oct. 16, 2013), <https://www.standardmedia.co.ke/health/article/2000095684/officials-named-in-nhif-scandal-to-be-prosecuted>; see also *Republic v. Director of Public Prosecution & 3 Others Ex-Parte Meridian Medical Center Ltd. & 7 Others* (2015) 363 K.L.R. 1 (Kenya).

²⁰⁵ National Hospital Insurance Fund Act (2012) Cap. 255 § 6 (Kenya).

can be attributed to these incidences of mismanagement and poor public perception.²⁰⁶ This offers one explanation as to why there are low insurance penetration levels among persons in the informal sector who are allowed to become voluntary members of the fund.

C. DISOBEDIENCE OF COURT ORDERS

The Rule of Law demands for predictability of conduct where the law requires one to act in a given manner and the nature of this conduct may also be prescribed by judicial decisions.²⁰⁷ Predictability prevents arbitrariness even when it comes to decision making as those tasked with this responsibility will ensure application of the law and not discretion.²⁰⁸ Unfortunately, this has not been the case in the health care sector in the country especially when it comes to giving deference to judicial decisions. Between December 2016 and March 2017 for approximately one hundred days, doctors represented by the Kenya Medical Practitioners and Dentists' Union (KMPDU) were on strike claiming, among other things, better pay, working conditions, and terms. The doctors' strike, which lasted for close to three months, had dire consequences on the public health system in Kenya with many patients not having anywhere to go and some succumbing to their illnesses.²⁰⁹ The strike was based on the alleged failure by the Government to honor a Collective Bargaining Agreement (CBA) signed between the Ministry of Health and Kenya Medical Practitioners and Dentists' Union (KMPDU).²¹⁰ The CBA states that it is guided by the desire to promote the well-being of the workers and for the overall improvement of

²⁰⁶ HANSARD, KENYA NATIONAL ASSEMBLY OFFICIAL RECORD (1998).

²⁰⁷ Jeremy Waldron, *The Concept and the Rule of Law*, 43 Ga L. Rev. 1, 57–58 (2008).

²⁰⁸ See BINGHAM, *supra* note 6, at 72.

²⁰⁹ Antony Gitonga & Vincent Mabatuk, *More Patients Die in Nakuru as Doctors' Strike Persists*, STANDARD (Sept. 29, 2016), <https://www.standardmedia.co.ke/article/2000217737/more-patients-die-in-nakuru-as-doctors-strike-persists>; see also Esther Wahome & Grace Gitau, *Two Die as Doctors' Strike Bites*, DAILY NATION (Sept. 20, 2016), <http://www.nation.co.ke/counties/nyeri/Two-die-as-doctors-strike-bites/1954190-3387774-format-xhtml-12g19na/index.html>; see also Wambugu Kanyi, *Patient Dies as Doctors Strike Hits Nyeri PGH*, STAR (Dec. 11, 2013), https://www.the-star.co.ke/news/2013/12/11/patient-dies-as-doctors-strike-hits-nyeri-pgh_c869599; see also Agencies, *Kenyans Urged to End Medical Strike after Patients Die*, AL JAZEERA (Dec. 7, 2016), <http://www.aljazeera.com/news/2016/12/kenyans-urged-medical-strike-patients-die-161207163601421.html>.

²¹⁰ *The Council of County Governors v. Kenya Medical Practitioners Pharmacists and Dentists & 10 Others* (2016) 2486 K.L.R. 1, 3 (Kenya).

healthcare delivery in the public health sector.²¹¹ The CBA is replete with provisions that are meant to improve the welfare of doctors. Some of these include provisions on internships, promotions, training, work hours, and even on car loans to be issued to doctors who are members of the Union.²¹² Despite the fact that the CBA notes that its aim is also to improve healthcare services in Kenya, it is notable that provisions dealing with the actual improvement of these services are thinly phrased and are generic in nature compared to the deeply detailed provisions in other provisions, like remuneration of doctors.²¹³ This does not mean that the demands by the doctors are unjustified. Instead, doctors ought to be as assertive on the other issues that specifically improve healthcare services as they would on matters relating to their welfare. The CBA for example, lacked provisions on holding doctors accountable for the quality of care they offer to the public notwithstanding the fact that public taxes would be employed in improving their welfare.²¹⁴ We assert that improvement of doctors' welfare should concomitantly be done while setting standards on the quality of care they should offer. This means that mechanisms ought to have been established in the CBA to guarantee result-oriented procedures by doctors which in effect could translate to better health outcomes by consumers of healthcare services. This also recognizes the fact that doctors have an instrumental role to play in promoting the realization of the fundamental right to the highest attainable standards of health care.

Failure by the government to submit the CBA to the Employment and Labour Relations Court for registration led to *The Kenya Medical Practitioners, Pharmacists and Dentists Union v. The Principal Secretary Ministry of Health and 3 Others*.²¹⁵ The Claimant in this case claimed that failure by the Respondents and interested parties to submit the CBA for registration was illegal and unlawful, and was therefore seeking the registration of the Agreement.²¹⁶ The Respondents' main argument was that there was failure to involve other parties, like

²¹¹ See COLLECTIVE BARGAINING AGREEMENT BETWEEN MINISTRY OF HEALTH REPUBLIC OF KENYA AND KENYA MEDICAL PRACTITIONERS, PHARMACISTS & DENTISTS' UNION (KMPDU) (signed on June 27, 2013).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *The Kenya Medical Practitioners, Pharmacists and Dentists Union v. The Principal Secretary Ministry of Health and 3 Others* (2015) 974 K.L.R. 1 (Kenya).

²¹⁶ *Id.* ¶¶ 4–7.

the County Government and the Salaries and Remuneration Commission, as required by law and that failure to register the CBA made it ineffective under law.²¹⁷ The Court further directed the parties to move forward and register the CBA, or in a negotiated form, with the Court before the lapse of Ninety days.²¹⁸ Failure to enforce the CBA subsequently led to the doctors' strike.

On December 1, 2016, the industrial court called off the industrial action, declaring it illegal as it was premature and asked the government and the doctors union, KMPDU, to negotiate.²¹⁹ However, the doctors refused to obey the court order.²²⁰ They refused to return to work while undergoing negotiations with the government.²²¹ While sentencing the doctors for contempt of court, the judge stated that: "It is for every person to obey the orders until they are discharged, or the court rules otherwise. The orders are not to protect the dignity of the judge issuing them . . . but to protect the dignity of the court and the rule of law."

This sentiment had been previously mentioned in numerous cases. For example, Justice G.V Odunga in *Judicial Service Commission v. Speaker of the National Assembly & another* stated:

Respect of Court orders however disagreeable one may find them is a cardinal tenet of the Rule of Law and where a person feels that a particular order is irregular the option is not to disobey it with impunity but to apply to have the same set aside. When the decision to obey particular Court orders are left to the whims of the parties public disorder and chaos are likely to reign supreme yet under the Preamble to our Constitution we do recognize the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.²²²

²¹⁷ *Id.* ¶ 10.

²¹⁸ *Id.* ¶ 54.

²¹⁹ Maureen KahKah, *Court Declares Doctors' Strike Illegal as KMPDU Vows to Carry On*, DAILY NATION (Dec. 13, 2016), <http://www.nation.co.ke/news/Labour-Court-rules-Doctors-strike-is-illegal/1056-3484834-8h5ya8z/>; see also William Mwangi, *Labour Court Declares Doctors Strike Illegal*, STAR (Dec. 13, 2016), http://www.the-star.co.ke/news/2016/12/13/labour-court-declares-doctors-strike-illegal_c1472467.

²²⁰ *The Council of Cty. Governors v. Kenya Med. Practitioners Pharmacists and Dentists Union & 10 others*, (2017) 2486 K.L.R. 1 (Kenya).

²²¹ Maureen Kahkah, *KMPDU Officials found Guilty of Disobeying Labour Court Order*, BUS. DAILY (Dec. 20, 2016), <http://www.businessdailyafrica.com/KMPDU-chiefs-found-guilty-of-contempt/539546-3492812-rv4a7lz/>.

²²² *Judicial Serv. Comm'n v Speaker of the Nat'l Assembly & another* (2013) 518 K.L.R. 1 (Kenya). See also Linnet Ndolo in *Teachers Serv. Comm'n v Kenya Nat'l Union of Teachers & 2*

This was also echoed by Hon. Justice Lenaola in *Kariuki & 2 Others v. Minister For Gender, Sports, Culture & Social Services & 2 Others* where he stated:

Court orders must be obeyed whether one agrees with them or not. If one does not agree with an order, then he ought to, move the court to discharge the same. To blatantly ignore it and expect that the court would turn its eye away, is to underestimate and belittle the purpose for which courts are set up.²²³

In *Central Bank of Kenya & Another v. Ratilal Automobiles Limited & Others* it was stated:

Judicial power in Kenya vests in the Courts and other tribunals established under the Constitution and that it is a fundamental tenet of the rule of law that court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a Court of law.²²⁴

In *Econet Wireless Kenya Ltd v. Minister for Information & Communication of Kenya & Another* [2005] 1 KLR 828 Ibrahim, J (as he then was) stated that “[i]t is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times.”²²⁵

Despite the nature of the doctors’ grievances, whether justified or not, they had an obligation to obey the law and Court rulings. The law applies to them as it does to any other person, which is a key tenet of the Rule of Law.²²⁶ Hence their noncompliance was a violation of the

others (2013) 23 K.L.R. 1 (Kenya) (Depicting the reason why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law. A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option).

²²³ *Kariuki & 2 Others v. Minister For Gender, Sports, Culture & Soc. Serv. & 2 Others* (2004) 389 K.L.R. 1 (Kenya).

²²⁴ *See Judicial Service Comm’n v. Speaker of the Nat’l Assembly & another* (2013) 518 K.L.R. 1 (Kenya).

²²⁵ *Econet Wireless Kenya Ltd. v. Minister for Info. & Comm’n of Kenya & Another* (2005) 1640 K.L.R. 1 (Kenya).

²²⁶ *See BINGHAM, supra* note 6, at 73.

principle of the Rule of Law.²²⁷ Their noncompliance has had serious consequences in public hospitals as patients were turned away, some even succumbed to their illnesses.²²⁸ Failure by the doctors to comply with the court orders has also entrenched inequity in access to healthcare. This is based on the fact that private hospitals are still operational; hence, the rich who can afford to pay for services in these private hospitals continue to receive services. The poor, on the other hand, who are the majority users of public health facilities, were left without healthcare services with devastating consequences.²²⁹ The continued strike by doctors was clearly illustrative of how absence of Rule of Law leads to negative health outcomes.

D. MEDICAL MALPRACTICE

Medical malpractice is also another key concern in the Kenyan healthcare system. This is based on the fact the malpractice has resulted in numerous cases of medical complications, sometimes resulting in death.²³⁰ This is a manifestation of abrogation of the duty to protect human life and other fundamental human rights that the law protects by medical practitioners; an affront to the Rule of Law.²³¹ Malpractices in the health sector have taken various forms ranging from operating unlicensed clinics,²³² to pharmacies selling fake drugs,²³³ practicing without the relevant requirements,²³⁴ and medical negligence among

²²⁷ *Econet Wireless Kenya Ltd. v. Minister for Info. & Comm'n of Kenya & Another* (2005) 1640 K.L.R. 1 (Kenya).

²²⁸ See Jeckonia Otieno, *The Silent Victims of the 100 Days Doctors' Strike*, STANDARD (Apr. 18, 2017), <https://www.standardmedia.co.ke/health/article/2001236692/the-silent-victims-of-the-100-days-doctors-strike>.

²²⁹ *Address doctors' strike to avert suffering by poor Kenyans*, BUS. DAILY (Dec. 29, 2016), <http://www.businessdailyafrica.com/analysis/Address-doctors—strike-to-avert-suffering-by-poor-Kenyans/539548-3501698-13e095m/index.html>; Peter Oduor, *Patients continue to Suffer as Doctors' Strike Continues*, DAILY NATION (Jan. 21, 2017), <http://www.nation.co.ke/news/doctors—strike-rages-on/1056-3781074-p4rhunz/index.html>.

²³⁰ *Ricarda Njoki Wahome v. Attorney Gen. & 2 others* (2015) 792 K.L.R. 1 (Kenya).

²³¹ See BINGHAM, *supra* note 6, at 75.

²³² This is contrary to the Medical Practitioners and Dentists Act (1977), Medical Practitioners and Dentists (Private Medical Institutions) Rules (2000), Cap. 253 § 4 (Kenya).

²³³ Patrick Beja, *War Against Fake Drugs Intensified in Kenya*, STANDARD DIG. (Sept. 6, 2016), <https://www.standardmedia.co.ke/article/2000214654/war-against-fake-drugs-intensified-in-kenya>.

²³⁴ JEFF BAMES ET AL., PRIVATE HEALTH SECTOR ASSESSMENT IN KENYA 153, WORLD BANK WORKING PAPERS (2010).

other things.²³⁵ This section discusses how these practices persist despite having laws that protect the unsuspecting public against them.

The increase of rogue doctors practicing without licenses²³⁶ or running unlicensed clinics risking the lives of Kenyans sheds light on the inefficiency of the KMPDB in exercising its mandate to carry out inspections and ensure compliance with the law.²³⁷ Section 3 of the 2000 Medical Practitioners and Dentists (Private Medical Institutions) Rules, provides that no one is to offer medical services without appropriate license from the KMDPB.²³⁸ Section 11 of these regulations mandates the board to carry out inspections to enforce this requirement.²³⁹ In addition to this there is the Inspection and Licensing Committee which was established as part of the Board by the 2014 Medical Practitioners and Dentists (Inspections and Licensing) Rules.²⁴⁰ The Inspection and Licensing Committee (ILC) has a mandate to issue and revoke licenses and carry out inspections to ensure compliance with the laws and regulations.²⁴¹

The Kenya Medical Practitioners and Dentists Board, established by section 4 of the Medical Practitioners and Dentists Act, is mandated to carry out disciplinary proceedings against doctors who commit offences and medical malpractice.²⁴² Further, the 2013 Medical Practitioners and Dentists (Disciplinary Procedure Rules) mandates the Board to investigate cases of malpractice and give disciplinary orders.²⁴³ Examples of conduct that may give rise to disciplinary issues are:

²³⁵ Bitange Ndemo, *Our Medical Malpractice Crisis*, DAILY NATION (July 21, 2014), <http://mobile.nation.co.ke/blogs/1949942-2391482-format-xhtml-3cpf71/index.html>.

²³⁶ Eunice Kilonzo, *Police Arrest Fake Doctor who put Hundreds of Lives at Risk*, DAILY NATION (Nov. 22, 2016), <http://www.nation.co.ke/news/Bold-quack-delivered-babies—did-surgery-too/1056-3460280-y70iwoz/> (a rogue doctor who did not finish university was operating as a medical superintendent at a Sub County Hospital in Nandi).

²³⁷ *Cases of Negligence in Kenya's Health Sector Alarming*, STANDARD DIG. (Sept. 14, 2015), <https://www.standardmedia.co.ke/article/2000176259/cases-of-negligence-in-kenya-s-health-sector-alarming>.

²³⁸ Medical Practitioners and Dentists Act (1977), Medical Practitioners and Dentists (Private Medical Institutions) Rules (2000), Cap. 253 § 3 (Kenya).

²³⁹ *Id.* at Rule 11.

²⁴⁰ Medical Practitioners and Dentists Act (1977), Medical Practitioners and Dentists (Inspections and Licensing) Rules (2014), Cap. 253 § 3 (Kenya).

²⁴¹ *Id.*

²⁴² The Medical Practitioners and Dentists Act (1983) Cap. 253 § 4 (Kenya).

²⁴³ Medical Practitioners and Dentists Act (1977), Medical Practitioners and Dentists (Disciplinary Proceedings) (Procedure) Rules (1979), Cap 254 §§ 3–4 (Kenya).

termination of pregnancy, gender reassignment, in-vitro fertilization, sex selection, drug prescription, and abuse of professional confidence.²⁴⁴

The medical profession has a three-tier disciplinary process. First, the Preliminary Inquiry Committee establishes whether *prima facie* case exists to necessitate the personal appearance of a practitioner or the Institution before the Board.²⁴⁵ Second, the Professional Conduct Committee, established under rule 4A of the Disciplinary proceedings rules,²⁴⁶ conducts an inquiry into the complaints submitted by the PIC and gives appropriate recommendations and sanctions to the Board. The committee is allowed to issue the following sanctions:

- (a) Levy reasonable costs of proceedings on the parties,
- (b) Order the practitioner to undergo further continuous professional development training,
- (c) Suspend the practitioner's license for not more than six months,
- (d) Order the closure of the institution until it is compliant,
- (e) Admonish the doctor, the dentist, or institution and close the case,
- (f) Make any relevant recommendations.²⁴⁷

Third, there is the tribunal which is the full board exercising judicial functions upon recommendations of the PIC and PCC.²⁴⁸ In making its decisions, the Board takes into consideration public interest and the best interest of the doctor.²⁴⁹ The tribunal can issue the following disciplinary orders in addition to the aforementioned penalties:

- (a) Suspension of the practitioner's license for not more than 12 months,
- (b) Removal of the practitioner from the register until the practitioner makes an application for restoration.²⁵⁰

Appeals from the Tribunal are to be filed at the High Court within thirty days of the Tribunal's decision.²⁵¹

²⁴⁴ See MED. PRACTITIONERS & DENTISTS BD., *Disciplinary Proceedings Statutory Provisions*, http://www.medicalboard.co.ke/resources/DISCIPLINARY_POWER_OF_MPDB.pdf.

²⁴⁵ Medical Practitioners and Dentists Act (1977), Medical Practitioners and Dentists (Disciplinary Proceedings) (2013) Cap 253 § 3 (Kenya).

²⁴⁶ *Id.* at § 4(1)(a).

²⁴⁷ *Id.* at § 4(3).

²⁴⁸ *Id.* at § 10A.

²⁴⁹ See MED. PRACTITIONERS & DENTISTS BD., *supra* note 244.

²⁵⁰ *Id.* at 5.

Despite these provisions, many rogue doctors continue with their practice with many also operating unlicensed clinics. For example, in 2015, an unlicensed gynecologist, Mugo Wa Wairimu, was found operating an unlicensed clinic where he was accused of taking advantage of his patients and raping them.²⁵² In 2016, Ronald Kelly, a medical superintendent at a Nandi Sub county hospital was discovered to be a fake doctor practicing without having graduated.²⁵³ Kelly treated patients and even performed surgeries without proper qualifications.²⁵⁴ Unfortunately, such cases are only brought to the public's attention after a long period of subjecting them to substandard and dangerous services.²⁵⁵ It is after such scandals that the KMPDB launched investigations and issued warnings on unlicensed clinics and doctors.²⁵⁶ Yet the law mandates the board to carry out routine inspections to ensure that only those doctors and facilities that are fit and licensed can offer medical services.²⁵⁷ KMPDB has in fact been complicit in dealing with cases brought before the Board and it has been reported that the Board has even allowed medics who have been found guilty of malpractice by Courts of law to continue practicing notwithstanding the charges/convictions.²⁵⁸ KMPDB seems to jealously protect the interests

²⁵¹ Medical Practitioners and Dentists Act (1977) Cap. 253 § 20 (Kenya).

²⁵² Vincent Agoya, *Fake Doctor in Rape Case Detained for Absconding Court*, DAILY NATION (Aug. 25, 2016), <http://www.nation.co.ke/news/Mugo-wa-Wairimu-detained-for-absconding-court/1056-3356556-uhjvf8/>; Nancy Agutu, *Mugo wa Wairimu Charged Afresh with Rape, Pretending to be Gynecologist*, STAR (Mar. 14, 2016), http://www.the-star.co.ke/news/2016/03/14/mugo-wa-wairimu-charged-afresh-with-rape-pretending-to-be_c1312544; Kenyan 'Fake Gynecologist' Charged with Raping Patients, BBC NEWS (Oct. 2, 2015), <http://www.bbc.com/news/world-africa-34425033>.

²⁵³ Rael Jelimo, *Nandi County Health Office Paid 'Fake' Doctor Sh.150,000 per month*, STANDARD (Nov. 23, 2016), <https://www.standardmedia.co.ke/health/article/2000224446/nandi-county-health-office-paid-fake-doctor-sh150-000-per-month>; Eunice Kilonzo, *Police Arrest Fake Doctor who put Hundreds of Lives at Risk*, DAILY NATION (Nov. 22, 2016), <http://www.nation.co.ke/news/Bold-quack-delivered-babies—did-surgery-too/1056-3460280-y70iwoz/>.

²⁵⁴ Canute Waswa, *Fake Dr Melly Saga: We are Dealing with Symptoms, Not the Problem*, BUS. DAILY (Nov. 28, 2016), <http://www.businessdailyafrica.com/Fake-Dr-Melly-saga/539444-3468012-item-0-11jqcyz/index.html>.

²⁵⁵ Kamweru James, *Let's All be Alert to Weed Out Bogus Health Practitioners*, STANDARD MEDIA (Sept. 10, 2015), <https://www.standardmedia.co.ke/ureport/story/2000175835/let-s-all-be-alert-to-weed-out-bogus-health-practitioners>.

²⁵⁶ *Id.*

²⁵⁷ Medical Practitioners and Dentists Act (1977), Medical Practitioners and Dentists (Private Medical Institutions) Rules (2000) Cap. 254 § 11 (Kenya).

²⁵⁸ Eunice Kilonzo, *Only One Doctor has Been Found Guilty of Misconduct in 19 years*, DAILY NATION (Feb. 29, 2016), <http://www.nation.co.ke/news/Only-one-doctor-has-been-found-guilty-of-misconduct/1056-3096208-17s5ww/index.html>.

of its members despite the fact that there may be glaring incompetence among these members that result in medical negligence cases. This is indicative of the fact that KMPDB may not be well suited to regulate the medical profession or that members of the Board may be compromised to overlook these incidences.²⁵⁹ This may also be illustrative of the Board's stance on the Geneva Declaration 1949 that its members take and are required to abide by.²⁶⁰ It may be inferred that the Board and its members chose to ignore the oath where it suits their convenience. As a body exercising quasi-judicial functions, KMPDB has a constitutional obligation to guarantee the right to a fair trial which it has failed to guarantee in some cases.²⁶¹ The right to a fair trial, as a building block for the Rule of Law, requires the decision-making body to act impartially and to be free from any extraneous influence.²⁶² The perception that the Board is usually biased in making decisions has seen numerous parties that have instituted claims before the Board subsequently institute claims in Courts leading to inordinate delays in resolving these disputes.²⁶³

Another illustration of malpractice takes the form of medical negligence. This is where the doctors breach a duty of care owed to the patients.²⁶⁴ It arises from the failure of healthcare professionals, like doctors, to provide the quality of care required by law.²⁶⁵ In *AAA v Registered Trustees – (Aga Khan University Hospital, Nairobi)*, the court stated that doctors “owe their patients the duty of care to perform those services to the professional standards expected of them. When they fall short they must bear the consequences.”²⁶⁶ The number of medical negligence cases has been on a constant rise and these have resulted in

²⁵⁹ *Cases of Negligence in Kenya's Health Sector Alarming*, STANDARD (Sept. 14, 2015), <https://www.standardmedia.co.ke/article/2000176259/cases-of-negligence-in-kenya-s-health-sector-alarming>.

²⁶⁰ The Code of Professional Conduct and Discipline, Medical Practitioners and Dentists Board 32 (2012), <http://medicalboard.co.ke/resources/Code-of-Professional-Conduct-and-Discipline-6th-Edition.pdf>.

²⁶¹ See *Andrew Kibet Charuiyot & Another v. Medical Practitioners & Dentists Board & 2 Others* (2014) 260 K.L.R.1 (Kenya).

²⁶² See BINGHAM, *supra* note 6, at 80.

²⁶³ See Judy Ogutu, *Court Declines to Strike Out Medical Suit*, STANDARD (Apr. 19, 2011), <https://www.standardmedia.co.ke/article/2000033552/court-declines-to-strike-out-medical-suit>.

²⁶⁴ *Sherlock v. Stillwater Clinic* (1977) 260 N.W.2d 169 (cited in *AAA v. Registered Trustees* (2015) 3 K.L.R.1 (Kenya)).

²⁶⁵ FURROW ET AL., *supra* note 1, at 304.

²⁶⁶ See *AAA v. Registered Trustees* (2015) 3 K.L.R.1 (Kenya).

the worsening of patients' conditions and even death.²⁶⁷ Many Kenyans have a family member, or at least know someone, who has been the subject of gross negligence during medical procedures which may have ended up with fatalities.²⁶⁸ This sad state is not helped by the low rates of prosecution and conviction of persons accused of malpractice.²⁶⁹ It is estimated that approximately 886 cases of medical malpractice have been lodged since 1997 with only one doctor being suspended for medical negligence within the past nineteen years.²⁷⁰ Malpractice cases have also arisen as a result of high levels of impunity in hospitals where administrators operate without accountability.²⁷¹ Laxity among healthcare professionals has been reported and this includes incidences where the professions fail to attach the necessary urgency to cases that are brought to them with such omissions leading to devastating consequences.²⁷² Out of the 886 cases lodged at the Board since 1999, 746 cases have been determined at the Preliminary Inquiry Level, fifteen determined at the Tribunal Level and thirteen at the Professional Conduct Committee level. Currently there are 115 pending cases.²⁷³

As already stated, despite many cases of medical practices being referred to the medical practitioners and dentists' board, they have ended with very lenient penalties from the Board, such as suspensions for not more than six months and pardons with recommendations for retraining, warnings, or probation.²⁷⁴ Notably, few of these cases are successful

²⁶⁷ *Amid Doctors' Strike, Let's Rid the Profession of Medical Negligence*, STANDARD (Jan. 14, 2017), <https://www.standardmedia.co.ke/article/2000229782/amid-doctors-strike-let-s-rid-the-profession-of-medical-negligence>.

²⁶⁸ See Mutuma Mathiu, *Doctors Deserve Fair Salaries but There's Sickening Impunity*, DAILY NATION (Feb. 16, 2017), <http://www.nation.co.ke/oped/Opinion/doctors-deserve-fair-salary-but-there-is-sickening-impunity/440808-3816306-xher8o/index.html>.

²⁶⁹ Isabella Mukumu, *Medical Board Plans to Overhaul Malpractice Rules*, BUS. DAILY (July 22, 2009), <http://www.businessdailyafrica.com/539444-627476-148815vz/index.html>.

²⁷⁰ Eunice Kilonzo, *Only one doctor has been found guilty of misconduct in 19 years*, DAILY NATION (Feb. 29, 2016), <http://allafrica.com/stories/201602291368.html>.

²⁷¹ *Mapping Accountability Mechanisms: A Review of In-Country Accountability in Health Systems*, AIDSPAN (2015), http://www.aidspan.org/sites/all/modules/custom/apw_zstatistic/publication_download.php?file=sites/default/files/publications/Accountability%20Mechanisms%20Review.pdf.

²⁷² See James Omoro, *Expectant Woman Dies of Excessive Bleeding After being Turned Away at Hospital*, STANDARD (Oct. 27, 2016), <https://www.standardmedia.co.ke/health/article/2000221199/expectant-woman-dies-after-being-turned-away-at-hospital>.

²⁷³ See Press Release, Medical Practitioners and Dentists Board, Cases of alleged Medical Negligence (Feb. 29, 2016).

²⁷⁴ Samuel Born, *Maina How Irresponsible Nurse cut Short Boy's Life with Lethal Injection*, DAILY NATION (July 17, 2014), <http://www.nation.co.ke/news/Ram-Hospital-Kisii-Malpractice-Health/>

completed in court.²⁷⁵ During a Continuing Professional Development seminar under the theme *Health Laws: Emerging Practice Areas & Opportunities* several lawyers raised concerns about the inadequacy of the laws to hold doctors accountable.²⁷⁶ The recently enacted Health Act is illustrative of this as it lacks proper standards to ensure that health care practitioners are held to the required standards. This is notwithstanding the demands of the Rule of Law that requires the availability and accessibility of law to enable persons know the standards that they are required to uphold in their conduct.²⁷⁷ Many of these cases are not completed because of lack of evidence as doctors would rarely give expert testimony against their colleagues.²⁷⁸ This is a clear manifestation of complicity by doctors to defeat justice and to prevent Kenyans from realizing their constitutionally guaranteed right to the highest attainable standards of healthcare services. This complicity inevitably translates to more cases of medical malpractice since most doctors know that it will not be easy to hold them accountable. The public, on the other hand, is left to bear the brunt where there is loss of life and also because malpractice translates to higher medical costs.²⁷⁹

Practices such as receiving kickbacks for services are also another manifestation of failure to uphold requisite standards in medical practice in Kenya. In early 2016, approximately 880 doctors were under investigations for intentionally misadvising patients to go abroad, especially India, for treatment in return for kickbacks.²⁸⁰ These arrangements end up fleecing patients as patients are made to pay more for their medical treatment in order to cater for the kickbacks. This goes against the doctor's Hippocratic Oath to uphold high ethical standards

/1056/2388242/-/81cyjyz/-/index.html; see also *Agony of IEBC boss Thomas Letangule as wife dies of negligence*, DAILY NATION (July 17, 2014), <http://www.nation.co.ke/news/IEBC-Thomas-Letangule-Family-Care-Medical-Centre/-/1056/2388254/-/r0l163z/-/index.html>.

²⁷⁵ Isabella Mukumu, *Medical Board Plans To Overhaul Malpractice Rules*, BUS. DAILY (July 22, 2009), <http://www.businessdailyafrica.com/539444-627476-148815vz/index.html>.

²⁷⁶ Harold Ayodo, *Why Courts Dismiss Medical Negligence Cases*, LAW SOC'Y OF KENYA, <http://www.lsk.or.ke/index.php/component/content/article/1-latest-news/511-why-courts-dismiss-medical-negligence-cases>.

²⁷⁷ See BINGHAM, *supra* note 6, at 70.

²⁷⁸ Ayodo, *supra* note 276.

²⁷⁹ Bitange Ndemo, *Our Medical Malpractice Crisis*, DAILY NATION (July 21, 2014), <http://mobile.nation.co.ke/blogs/1949942-2391482-format-xhtml-3cpf7l/index.html>.

²⁸⁰ Stella Murumba, *880 Doctors Under Probe in Referral-for-bribe Scandal*, BUS. DAILY (Feb. 1, 2016), <http://www.businessdailyafrica.com/880-doctors-under-probe-in-referral-for-bribe-scandal/-/539546/3056608/-/dn31h2/-/index.html>.

and act in the interests of the patients and the society.²⁸¹ This inevitably increases cost of healthcare, and those who cannot pay these high costs end up not being able to access healthcare services further rooting inequities.²⁸² Kickbacks also manifest themselves where doctors are paid by pharmaceutical companies to attend workshops and conferences held by the companies.²⁸³ This may be in return to the doctors prescribing medication manufactured by these pharmaceuticals without taking consideration of the best interest of their patients. There is, however, need for more research on the prevalence of this practice.

These practices have necessitated the prescription of a cocktail of rules and regulations to govern the conduct of medical practitioners. This includes rules that regulate doctors' referrals to patients to seek medical treatment abroad.²⁸⁴ The health cabinet secretary recently released the 2017 Medical Practitioners and Dentists (Referral of Patients Abroad) Rules.²⁸⁵ According to rule 3 of these rules, a doctor can only make an abroad referral where:

- (a) there is evidence that there is inadequate expertise or medical facilities to handle the condition locally;
- (b) there is evidence that the referral would be the most cost effective option for the patient,
- (c) the patient has opted to seek medical intervention or management abroad where public resources are not used.²⁸⁶

It is hoped that these rules will facilitate the prioritization of the interests of the patient as opposed to doctor's monetary interests.

²⁸¹ Pravin Bowry, *Taking Oath has Profound Legal Obligations*, STANDARD DIG. (Aug. 19, 2015), <https://www.standardmedia.co.ke/article/2000173331/taking-oath-has-profound-legal-obligations>.

²⁸² JENNIFER PRAH RUGER, HEALTH AND SOCIAL JUSTICE 81 (2010).

²⁸³ MILTON SILVERMAN, PRESCRIPTIONS FOR DEATH: THE DRUGGING OF THE THIRD WORLD 108 (1982); Muhoro.K1 & Wafula L M1, *Corruption in the Health Sector*, 1:4 PHARMACIST 13, 14 (2014); Stellar Murumba, *Makers of Drugs Restricted from Sponsoring Doctors*, BUS. DAILY (May 29, 2017), <http://www.businessdailyafrica.com/news/Makers-of-drugs-barred-from-sponsoring-doctors/539546-3947226-23woh6z/index.html>.

²⁸⁴ Elizabeth Merab, *New Rule to Prevent Unnecessary Referral of Patients Abroad*, DAILY NATION (Jan. 31, 2017), <http://www.nation.co.ke/news/1056-3793428-3qe18sz/>; see also Stellar Murumba, *Mailu Directs Counties to Classify All Health Facilities Afresh*, BUS. DAILY (Jan. 30, 2017), <http://www.businessdailyafrica.com/counties-to-classify-all-health-facilities/539546-3793452-k63q0e/index.html>.

²⁸⁵ The Medical Practitioners and Dentists Act, No. 2 (2017) KENYA GAZETTE SUPPLEMENT No. 6.

²⁸⁶ *Id.* § 3.

The law is also inadequate with regards to regulating healthcare financing and payment to doctors.²⁸⁷ The evident loopholes make it easy for doctors to engage in fraudulent activities especially with regard to billing.²⁸⁸ In the end, taxpayers have ended up paying for services that may not have been provided.²⁸⁹ Doctors have been reported in some cases to receive benefits in the form of salaries from the government despite the fact that they may not have provided the services they are contracted to provide.²⁹⁰ This amounts to unjust enrichment by these doctors which has profound effects on healthcare service delivery given the fact that the country already operates within a context of strained health resources.²⁹¹

V. ENGENDERING RULE OF LAW IN THE HEALTHCARE BUREAUCRACY

As the Kenyan population increases, propelled by industrialization and technological developments,²⁹² both levels of government in Kenya are now tasked with providing services that are expeditious, efficient, lawful, and procedurally fair.²⁹³ To provide services that are expeditious, efficient, lawful, procedurally fair, and affordable, both the national government and the county governments in Kenya must do away with rigid administrative practices and loopholes that may be exploited by rogue practitioners. To ensure that such objectives are met, Max Weber identified six central elements of bureaucracy: clearly defined division of labour and authority, hierarchical structure of offices, written guidelines prescribing performance criteria, recruitment to offices based on specialization and expertise, office holding as a career or vocation, and duties and authority

²⁸⁷ Kenya - New rules on sending patients to India, INT'L MED. TRAVEL J. (May 3, 2017), <https://www.imtj.com/news/kenya-new-rules-sending-patients-india/>.

²⁸⁸ See C. STOVER, *Background Document for End-of-Project Conference for the APHIA Financing and Sustainability Project*, in HEALTH FINANCING AND REFORM IN KENYA: LESSONS FROM THE FIELD (2001), <https://www.imtj.com/news/kenya-new-rules-sending-patients-india/>.

²⁸⁹ Merab, *supra* note 284, at 2.

²⁹⁰ Mutuma Mathiu, *Doctors Deserve Fair Salaries but There's Sickening Impunity*, DAILY NATION (Feb. 16, 2017), <http://www.nation.co.ke/oped/Opinion/doctors-deserve-fair-salary-but-there-is-sickening-impunity/440808-3816306-xher8o/index.html>.

²⁹¹ Majid Twahir, *Why the Cost of Health Care Remains High*, STANDARD DIG. (May 16, 2017), <https://www.standardmedia.co.ke/business/article/2001239908/why-the-cost-of-health-care-remains-high>.

²⁹² Nyamwange M., *Population Growth and Development: The Kenyan Experience*, 14 SCANDINAVIAN J. DEV. ALT. 149 (1995).

²⁹³ CONSTITUTION art. 47 (2010) (Kenya).

attached to positions, not persons.²⁹⁴ This is the Weberian theory of rational bureaucracy.²⁹⁵ From the elements of rational-bureaucracy described by Weber, the following principles emerge: formalization, instrumentalism, and rational-legal authority.²⁹⁶ Formalization requires that principles, rules, and procedures of operation be set out in written form before the organization starts to operate.²⁹⁷ Instrumentalism requires that the organization, through its agents, serve its intended purpose, and rational-legal authority requires that authority be tied to rational laws rather than through tradition or charismatic authority.²⁹⁸ It is this last limb of Weber's theory of rational bureaucracy that is important in assessing Kenya's adherence to rational-legal standards in the healthcare sector. This closes ties to both public and private administrative law.²⁹⁹

The 2010 Kenyan Constitution as an instrument of rational-legal standards introduces devolution as a form of governance.³⁰⁰ This means that governance is shared between the National government and the forty-seven Counties. Obligations to respect, promote, and fulfil human rights are also vested on the government at the two levels. The 2010 Constitution therefore transfers decision-making, functions and responsibilities, implementation and concomitant resources to elected local governments called counties.³⁰¹ This is the application of bureaucracy at a constitutional level. Here the law paints with wide strokes while delimiting and limiting state power under the concept of constitutionalism.³⁰² The two levels of government are envisaged to be co-ordinate, but not subordinate to each other.³⁰³ Article 6(2) of the 2010 Constitution captures this idea by stating that the governments at the

²⁹⁴ DAVID JAFFEE, ORGANIZATION THEORY: TENSION AND CHANGE 91 [89-91] (McGraw-Hill Higher Education eds., 2001).

²⁹⁵ See MAX WEBER, THE THREE TYPES OF LEGITIMATE RULE (1922).

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ See generally AKECH, *supra* note 37, at 59.

³⁰⁰ See CONSTITUTION, art. 1(4); 6; Ch. 11 (Kenya).

³⁰¹ *Id.* ch. 11.

³⁰² H.W.O. Okoth-Ogendo, *Constitutions without Constitutionalism: Reflections on an African Political Paradox*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 65, 66 (Douglas Greenberg et al. eds., 1993) (exploring the concept of constitutionalism pre the Constitution of Kenya, 2010); see also Godfrey M. Musila, *The State of Constitutionalism in Kenya in 2012: Embarking on a Journey to Reestablish a New Order*, in THE ANNUAL STATE OF CONSTITUTIONALISM IN EAST AFRICA 2012 36, 38 (Christopher Mbazira ed., 2013).

³⁰³ CONSTITUTION art. 6(2) (2010) (Kenya).

national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation.³⁰⁴ How these levels of government perform their functions and where they get the specific mandate to perform those functions is a question of a part constitutional nature and mainly administrative law character.³⁰⁵

It would be important to point out the intersection between administrative law and health law or healthcare bureaucracy. “The jurisprudential core of public law is administrative law,”³⁰⁶ which according to Migai comprises a set principles and procedures for regulating or circumscribing the exercise of public and private power.³⁰⁷ According to Richards, public health law was the first administrative law.³⁰⁸ Regulations of food, water, sanitation, communicable diseases, and housing conditions are all related to the task of ensuring better life expectancy,³⁰⁹ which is at the core of healthcare law. Such regulations would include mandatory communicable disease measures such as, mandatory vaccinations sanctioned by governmental bureaucracies.³¹⁰ Administrative law principles and procedures are therefore vital in the general regulation of issues of public health hence the basis for this paper reasserting the place of the Rule of Law in the health care bureaucracy. All governments are interested in regulating the well-being of its citizens. Legislatures delegate some of their rule-making, adjudicative, and policy powers to administrative healthcare agencies in the healthcare sector. This is done through appropriate bureaucratic procedures. This delegation in effect vests certain powers on healthcare agencies, powers which must be exercised in accordance with the demands of the Rule of Law.³¹¹ One particular demand is the requirement that power vested in

³⁰⁴ *Id.*

³⁰⁵ YASH P. GHAI & PATRICK W. B. MCAUSLAN, PUBLIC LAW AND POLITICAL CHANGE IN KENYA: A STUDY OF THE LEGAL FRAMEWORK OF GOVERNMENT FROM COLONIAL TIMES TO THE PRESENT 178 (Oxford University Press, 1970) (explaining that “*Majimbo* is a Swahili word which means an ‘administrative unit’ or ‘region,’ and is generally used to refer to those provisions of the Constitution which established the [independence] regional structure”).

³⁰⁶ Edward P. Richards, *Public Health Law as Administrative Law: Example Lessons*, 10 J. HEALTH CARE L. & POL’Y 61, 61 (2007).

³⁰⁷ AKECH, *supra* note 37, at prolegomenon.

³⁰⁸ Richards, *supra* note 306, at 61.

³⁰⁹ See generally WORLD HEALTH ORG., HEALTH CONDITIONS IN THE OCCUPIED PALESTINIAN TERRITORY, INCLUDING EAST JERUSALEM, AND IN THE OCCUPIED SYRIAN GOLAN 2–3 (2017).

³¹⁰ See LAWRENCE GOSTIN & LINDSAY WILEY, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 168, 348 (3d ed. 2016).

³¹¹ See generally BINGHAM, *supra* note 6.

these agencies be exercised in good faith without the entities wielding such powers exceeding the defined limits.³¹² Devolution can particularly play a key role in enabling the various agencies tasked with healthcare delivery play their role effectively while ensuring that the demands of the Rule of Law are met.

A. DEVOLUTION AND HEALTH CARE

The fourth schedule to the 2010 Constitution provides the different functions between the National government and the County government.³¹³ The function of healthcare is divided between the National Government and the County government, with the National government tasked with overseeing national referral health facilities while County governments deal with county health facilities and pharmacies, ambulance services, promotion of primary healthcare, licensing and control of undertakings that sell food to the public, veterinary services (excluding regulation of the profession), cemeteries, funeral parlors and crematoria, and refuse removal, refuse dumps and solid waste disposal.³¹⁴

The assigning of these roles means that there is an increased level of responsibility that ought to be demanded from the government at each of these levels. Accountability is a key safeguard in ensuring the betterment of service delivery and better health outcomes among consumers of these services.³¹⁵ This increased level of responsibility arises from the fact that the government, at these two levels, is the custodian of resources to be consumed by locals.³¹⁶ Professor Gostin argues that “those who exercise authority to expend resources and make policies have a duty of stewardship, a personal responsibility to act on behalf, and in the interests, of those whom they serve.”³¹⁷ Strong governance systems in the health care sector are key in availing access to health services and also building public trust in the systems in place.³¹⁸ This can be accomplished through the enactment of effective policies and seeing to it that these policy recommendations are implemented. It is

³¹² *Id.* at 78.

³¹³ CONSTITUTION sched. 4 (2010) (Kenya).

³¹⁴ *Id.*

³¹⁵ *Id.* art. 174.

³¹⁶ JOHN MUTAKHA KANGU, CONSTITUTIONAL LAW OF KENYA ON DEVOLUTION 241 (2015).

³¹⁷ Gostin, *supra* note 105, at 9.

³¹⁸ *Id.*

upon this basis that this section makes proposals on how counties can play a role in strengthening the health systems in place.

VI. RECOMMENDATIONS

The following section discusses certain recommendations that can be employed to ensure strengthening of Rule of Law in health care systems in the country. These are based on the preliminary assessments that have been discussed in this paper that indicate glaring gaps that have been exploited to the detriment of performance by the health sector. It is important to note that our preliminary assessment indicates that there is need for a more comprehensive study to shed more light on some of the areas discussed in this paper. Certain pertinent questions still linger which can only be answered through a detailed assessment of the health systems in place and how Rule of Law plays into the healthcare bureaucracy at both the national and county levels. Notwithstanding, we discuss some recommendations in the section below.

A. STRENGTHENING ACCOUNTABILITY

The above discussions are clearly illustrative of the need to have an effective institutional framework that ensures accountability of government agencies, county governments, health care providers, health care professionals, and other relevant stakeholders in the health sector, such as KMPDU. To achieve this, this paper proposes the establishment and use of community accountability systems in the health sector. This ensures that users of health systems are empowered to hold the service deliverers accountable where they fail to meet their obligations.³¹⁹ This involves facilitating monitoring and control, and ensuring answerability of these institutions to the public and public health consumers.³²⁰ For a long time the objectives of community accountability have been care for the poor, access to emergency care and ensuring high quality care.³²¹ The

³¹⁹ WORLD VISION, INTERNATIONAL COMMUNITY-LEVEL ACCOUNTABILITY MECHANISMS (2012), http://www.who.int/pmnch/topics/part_publications/pmnch2012report_community_accountability.pdf.

³²⁰ Jeffrey A. Alexander et al., *Community Accountability among Hospitals Affiliated with Health Care Systems*, 78:2 THE MILBANK Q. 157, 158 (2000); cf. Chisolm, L.B., *Accountability of Nonprofit Organizations and Those Who Control Them: The Legal Framework*, 6:2 NONPROFIT MGMT. & LEADERSHIP 141, 154 (1995).

³²¹ Alexander et al., *supra* note 320, at 159.

concept has, however, broadened to include improvement of overall community health care, reducing the health care gap between the rich and the poor, and supporting the link between health and community development.³²²

Community accountability first involves community participation in the health sector.³²³ Community participation in the health sector means that members of the community will no longer be passive recipients of health care, but active participants in the creation of health care systems that will serve their specific needs.³²⁴ Participation in this case can be multifaceted in nature. First, this could be accomplished through community representation in policy making agencies in the health sector or in the board management of health facilities.³²⁵ Second, through community organizations in the health sector whose actions seek to have an impact on large segments of the public or population.³²⁶ These community organizations provide much needed support and initiate and maintain concerted community based actions.³²⁷ Some of the activities include building information capacity on health rights and duties of relevant stakeholders, maintaining of community clinics, campaigning for prevention of certain diseases and community health counseling groups.³²⁸ Examples of such initiatives include the Kenya Community Health Network,³²⁹ Health Rights Advocacy Forum (HERAF),³³⁰ another NGO which deals with educating the community on health rights and participating in national health policy formation and implementation, and the Community Health Program under the Mamelani Projects in South

³²² *Id.*

³²³ B. N. Khumalo, *Embrace The Change: How Local Accountability Mechanisms Can Improve Primary Health Care Services* (Sept. 2007), <http://www.chp.ac.za/PolicyBriefs/Documents/Embrace%20the%20change%20-%20how%20local%20accountability%20mechanisms%20can%20improve%20primary%20health%20care%20services.pdf>.

³²⁴ Leslie London et al., *Filling the Gap: A Learning Network for Health and Human Rights in the Western Cape, South Africa*, 14 HEALTH & HUMAN RIGHTS 1, 97 (2012).

³²⁵ Alexander et al., *supra* note 320, at 168.

³²⁶ Cf. Anne MacFarlane et al., *A Framework for Implementation of Community Participation in Primary Healthcare*, U. LIMERICK & HEALTH SERV. EXECUTIVE COLLABORATION 1, 4 (2014).

³²⁷ *Id.*; see also Fe Espino et al., *Community Participation and Tropical Disease Control in Resource-poor Settings*, 2 SOC., ECON. & BEHAV. RES. 1, 9 (2004).

³²⁸ Cf. *Community Empowerment Programme*, CTR. FOR HEALTH & HUM. RTS. DEV. (CEHURD), <http://www.cehurd.org/programmes/community-empowerment/> (last visited 2017).

³²⁹ *Our work*, KENYA CMTY. HEALTH NETWORK, <http://kchn.weebly.com/our-work.html> (last visited 2017).

³³⁰ *What We Do*, HEALTH RTS. ADVOC. F. (HERAF), <http://www.heraf.or.ke/what-we-do.html> (last visited 2017).

Africa.³³¹ HERAF for example plays the important role of ensuring accessibility of the law by citizens by engaging in activities such as civil education that seek to make the law clear to citizens.³³² This is an important element that contributes to the strengthening of the Rule of Law.³³³

The third mode of participation is through consumer movements which “demand quality assurance, public accountability and patients’ rights.”³³⁴ These movements are established to protect consumers from neglect and abuse from health-sector stakeholders.³³⁵

Community participation is an essential element of community accountability as it provides a platform for the community to bring insight in the health sector and enable the relevant stakeholders to address the community’s needs for their health care system.³³⁶ They provide a system by which the community can monitor and control what other stakeholders do. They are able to ask questions and demand justifications for the acts or omissions of the stakeholders. An example of an instance where this can arise is where the management of a health care facility fails to allocate requisite resources for services in the facility.³³⁷ Users of these facilities can mobilize and hold the authorities accountable for failing to perform the responsibilities that they have been tasked with.

As much as promoting public participation through building information capacity is essential in ensuring community accountability in the health sector, it is also imperative that mechanisms that enforce accountability are also established.³³⁸ This could be done through

³³¹ *Community Health Programme*, MAMELANI PROJECTS, <http://www.mamelani.org.za/what-we-do/community-health/> (last visited 2017).

³³² Cf. HERAF, *supra* note 330.

³³³ See BINGHAM, *supra* note 6, at 70.

³³⁴ Elena Padilla, *Community Participation in Health Affairs*, 32:3 ACAD. POL. SCI. 227, 227 (1977).

³³⁵ *Id.* at 232.

³³⁶ Sassy Molyneux et al., *Community Accountability at Peripheral Health Facilities: A Review of the Empirical Literature and Development of a Conceptual Framework*, 27 HEALTH POL’Y & PLAN. 541, 542 (2012).

³³⁷ INT’L DEV. RESEARCH CTR. (IDRC), *Improving Local Government Accountability for Poor and Marginalized Communities in Uganda*, <https://www.idrc.ca/en/project/improving-local-government-accountability-poor-and-marginalized-communities-uganda> (last visited 2017).

³³⁸ DERICK BRINKERHOFF, ACCOUNTABILITY AND HEALTH SYSTEMS: OVERVIEW, FRAMEWORK, AND STRATEGIES 9 (2003), <http://www.who.int/management/partnerships/accountability/AccountabilityHealthSystemsOverview.pdf>.

advocacy to enlighten the health service consumers of their rights. This is especially true in light of the fact that the right to health, together with other social economic rights, is justiciable,³³⁹ and hence some tangible steps have to be made to ensure their attainment. Through advocacy the community is not only informed of their rights, but also provided with a mechanism to enforce these rights and ensure that the relevant stakeholders meet the requirements provided for in the law.³⁴⁰ This is an essential component of the Rule of Law as it gives the end users the tools to ensure that they benefit from the safeguards of the law.³⁴¹ It provides the health users with an opportunity to have the court determine their rights, and the obligations and liabilities of health care providers.

In Uganda, community accountability mechanisms have been adopted through organizations such as the Uganda National Health Consumers Organization and the Centre for Human Rights development in Uganda.³⁴² These organizations have achieved significant milestones in the health care system in Uganda.³⁴³ These include influencing formulation of policies, increasing awareness on health rights and health policies at the community level and promoting health advocacy.³⁴⁴ Through this they are establishing a framework for community accountability in the health sector in Uganda.³⁴⁵ The Center for Health,

³³⁹ *Mitu-Bell Welfare Society v. Attorney General & 2 Others* (2013) 164 H.C.K. 12, 17 (Kenya)

(The argument that socio-economic rights cannot be claimed at this point, two years after the promulgation of the Constitution, also ignores the fact that no provision of the Constitution is intended to wait until the state feels it is ready to meet its constitutional obligations. Article 21 and 43 require that there should be 'progressive realization' of socio-economic rights, implying that the state must begin to take steps, and I might add be seen to take steps, towards realization of these rights. . . . Granted, also, that these rights are progressive in nature, but there is a constitutional obligation on the state, when confronted with a matter such as this, to go beyond the standard objection. . . . Its obligation requires that it assists the court by showing if, and how, it is addressing or intends to address the rights of citizens to the attainment of the social economic rights, and what policies, if any, it has put in place to ensure that the rights are realized progressively.).

³⁴⁰ BRINKERHOFF, *supra* note 338, at 15.

³⁴¹ See BINGHAM *supra* note 6, at 77.

³⁴² *Background*, UGANDA NAT'L HEALTH CONSUMERS ORG. (UNHCO), (<http://unhco.or.ug/> (last updated 2017); *Organisational Description*, CTR. FOR HEALTH, HUMAN RIGHTS & DEV. (CEHURD), <https://www.cehurd.org/about/> (last updated 2017).

³⁴³ UNHCO, *supra* note 342; CEHURD, *supra* note 342.

³⁴⁴ *Achievements*, UGANDA NAT'L HEALTH CONSUMERS ORG. (UNHCO), <http://unhco.or.ug/achievements/> (last updated 2017).

³⁴⁵ *Id.*

Human Rights & Development plays a critical role in advocacy.³⁴⁶ The Organization continues to play a critical role empowering communities to demand for policy change in health and human rights, and this has been achieved by involving Health Unit Management Committees (HUMCs) in these initiatives.³⁴⁷

The Health Unit Management Committees have played a key role in ensuring accountability of health care providers in Uganda and in effect improving service delivery.³⁴⁸ These committees are tasked with, among other things, managing some health facilities on behalf of local authorities and supervising management of finances and accounting and to encourage community participation in health activities.³⁴⁹ It has been observed that HUMCs have encouraged community participation in health governance despite some setbacks experienced in their operations.³⁵⁰ Community participation is key in ensuring accountability by those tasked with health care delivery.

Following the promulgation of the 2010 Constitution, transparency and accountability has attained a significant place in all aspects of governance, including the health sector.³⁵¹ Taking into consideration the role of public participation enhancing transparency and accountability, the 2010 Constitution provides for public participation in the legislative process both at the national and county assemblies.³⁵² Pursuant to this, the County Government Act has included public participation in legislation at the county levels and the planning processes of all county authorities.³⁵³ This paper argues that public participation should not be limited to the legislative process. Neither should it be limited to county planning as provided in the County

³⁴⁶ *Strategic Litigation Programme*, CTR. FOR HEALTH, HUMAN RIGHTS & DEV., <https://www.cehurd.org/programmes/strategic-litigation/> (last updated 2017).

³⁴⁷ See *Community Empowerment Programme*, CTR. FOR HEALTH, HUMAN RIGHTS & DEV., <http://www.cehurd.org/programmes/community-empowerment/> (last visited Oct. 7, 2017).

³⁴⁸ Moses Mulumba et. al., *Community Participation in Health System Governance: Experience with the Health Unit Management Committee Approach in Kiboga and Kyankwanzi Districts*, CTR. FOR HEALTH, HUMAN RIGHTS & DEV. (Feb. 2014), <https://www.cehurd.org/wp-content/uploads/downloads/2016/02/Community-Participation-in-Governance-.pdf>.

³⁴⁹ See Republic of Uganda, *Guidelines on Health Unit Management Committees for Health Center III*, DEP'T OF QUALITY ASSURANCE, MINISTRY OF HEALTH (2003), <http://www.health.go.ug/docs/Guidelines%20on%20Health%20Unit%20management%20committees%20for%20Health%20Centre%20III%20%282003%29.pdf>.

³⁵⁰ Mulumba et al., *supra* note 348, at 1–2.

³⁵¹ See CONSTITUTION art. 10 (2010) (Kenya).

³⁵² *Id.* art. 196.

³⁵³ The County Government Act, No. 17 (2012) THE LAWS OF KENYA § 104.

Government Act. Public participation should also be taken into consideration in policy formulation, implementation, and decision making at the county level, and in all areas of development, including health.³⁵⁴

Kenya has not adopted the community representation for hospital management except for the Hospital/Health Facility Management Committees, which largely are tasked with management responsibilities at local levels.³⁵⁵ The meager community member representation in hospital management has been attributed to, inter alia, the illiteracy of local communities. The members of the local communities do not have the capacity to objectively influence decisions especially on the allocation of resources.³⁵⁶ Some hospitals have community representation in hospital management committees (HMC), which is an oversight committee.³⁵⁷ One of their key roles is to supervise and control the administration of funds.³⁵⁸ However, some of these committees are often toothless because their membership is not fair and independent.³⁵⁹ They merely rubberstamp hospital management decisions.³⁶⁰ Other challenges faced by hospital management committees include lack of training of members and lack of clarity in the roles of HMCs.³⁶¹ In order to increase the effectiveness of HMCs, the government needs to strengthen

³⁵⁴ See Republic of Kenya, *Cty. Pub. Participation Guidelines*, MINISTRY OF DEVOLUTION AND PLANNING & COUNCIL OF GOVERNORS (Jan. 2016), <http://www.devolutionplanning.go.ke/wp-content/uploads/2016/04/County-Public-Participation.pdf>.

³⁵⁵ See Evelyn Waweru et al., *Are Health Facility Management Committees in Kenya Ready to Implement Financial Management Tasks: Findings from a Nationally Representative Survey*, 13 BMC HEALTH SERVICES RES. (2013) (reiterating that counties such as Kitui County have led initiatives to establish these Committees to among others oversee accounting by health facilities and provide oversight to respective hospitals); see also Joyce Mutemi, *Kitui Cty. Health Facilities Mgmt. Committees Bill*, BMC HEALTH SERVS. RES. (Oct. 10, 2013), <http://www.kituicountyassembly.org/userfiles/THE%20KITUI%20HEALTH%20FACILITIES%20MANAGEMENT%20COMMITTEES%20BILL%202014.pdf>; Republic of Kenya, *Guidelines for Dist. Health Mgmt. Boards, Hosp. Mgmt. Boards, and Health Ctr. Mgmt. Committees* (Dec. 2002), <http://www.policyproject.com/pubs/policyplan/KENGuidelines.pdf>.

³⁵⁶ See Edwine Barasa et al., *The Influence of Power and Actor Relations on Priority Setting and Resource Allocation Practices at the Hospital level in Kenya: a Case Study*, BMC HEALTH SERVS. RES. (2016), <https://bmchealthservres.biomedcentral.com/articles/10.1186/s12913-016-1796-5>.

³⁵⁷ *Id.*

³⁵⁸ See *Health Facility Management Committees Involving Communities in Healthcare Delivery in Kenya*, KEMRI WELLCOME TR. RESEARCH PROGRAMME (2014), http://resyst.lshtm.ac.uk/sites/resyst.lshtm.ac.uk/files/docs/reseources/HFMC%20brief_final.pdf.

³⁵⁹ Edwine Barasa et al., *supra* note 356.

³⁶⁰ *Id.*

³⁶¹ *Id.*

community awareness of the committees,³⁶² train committees members, especially on accounting and financial management, and widen representation to ensure all members of a community, including the very poor, are represented.³⁶³ Further, initiatives ought to be made to ensure that the existing health facility management committees in place are representative to ensure that concerns of all health users are taken into account.³⁶⁴

In providing for consumer rights to access of quality goods and services and to compensation or injury arising from defective goods and services, the 2010 Constitution has significantly empowered consumers of health services, whether provided by public or private entities.³⁶⁵ Health services consumers are able to hold health care providers accountable for defective and substandard services.³⁶⁶ Many health services consumers in Kenya may not be able to individually institute a suit. This is either due to lack of the knowledge or relevant resources. The high cost of legal proceedings and the lengthy process impede the accessibility of courts which is a basic right as envisaged in Lord Bingham's conception of the Rule of Law.³⁶⁷ It is therefore important to have organizations that collectively act as watch dogs over services provided by health care providers, receive complaints from consumers, and pursue legal causes of actions where necessary.

The main consumer organization in Kenya is the Consumer Federation of Kenya (COFEK),³⁶⁸ a Non-governmental organization. COFEK deals with consumer capacities in a wide range of areas including banking, automobiles, health and drugs, water, energy, and education.³⁶⁹ It has pursued several legal actions on behalf of

³⁶² See Catherine Goodman et al., *The Influence of Power and Actor Relations on Priority Setting and Resource Allocation Practices at the Hospital level in Kenya: a Case Study*, BMC HEALTH SERVS. RES. (2016), <https://bmchealthservres.biomedcentral.com/articles/10.1186/1472-6963-11-229>.

³⁶³ Waweru et al., *supra* note 355.

³⁶⁴ See *Best Practices in Community-Based Health Initiatives*, AKHS KENYA CMTY. HEALTH DEP'T., <http://www.who.int/management/healthfacilitycommitteesgovernance.pdf>.

³⁶⁵ See CONSTITUTION art. 40 (2010) (Kenya).

³⁶⁶ *Id.* art. 46.

³⁶⁷ See BINGHAM *supra* note 6, at 77; see also CONSTITUTION art. 48 (2010) (Kenya).

³⁶⁸ See generally CONSUMER FEDERATION OF KENYA (COFEK), <http://www.who.int/management/healthfacilitycommitteesgovernance.pdf> (last visited Oct. 7, 2017).

³⁶⁹ See *What we do*, CONSUMER FEDERATION OF KENYA, <http://www.cofek.co.ke/index.php/who-we-are/what-we-do> (last visited Oct. 7, 2017).

consumers.³⁷⁰ However, most of these actions have not been in the health sector despite a lot of grievances in the sector.³⁷¹ This necessitates a specialized consumer organization for the health sector that will be able to seek remedies for grievances giant health care providers and other stakeholders, such as the Ministry of Health, and county governments to enforce the rights to health and quality services.

B. OUTCOME-BASED FINANCING

Outcome/result-based financing is now a widely acceptable approach to funding the provision of basic services, such as health care.³⁷² This approach links financing to pre-determined results and payment is only made once the agreed-upon results have been verified and have been actually delivered.³⁷³ This means that health care providers are compensated based on outcomes that result from procedures and not merely based on procedures performed on patients.³⁷⁴ It has been established that a clear nexus exists between outcome-based financing and accountability of health care systems.³⁷⁵ This is based on the fact that this model of financing is instrumental in strengthening the governance of health systems as it allows for monitoring of how the services are being provided and linking payment to the same.³⁷⁶ Accountability is also ensured by the fact that consumers are empowered on the expected outcomes and this enables them to verify results and provide feedback on the quality of services received.³⁷⁷

This approach has been adopted mainly by development agencies with the goal of improving the effectiveness and efficiency of

³⁷⁰ Consumer Federation of Kenya (COFEK) v. Attorney General & 4 Others (2012) eKLR (Kenya); Consumer Federation of Kenya (COFEK) v. Public Service Commission & Another (2013) eKLR (Kenya); Consumer Federation of Kenya (COFEK) v. Attorney General & 2 Others (2012) eKLR (Kenya).

³⁷¹ CONSUMER FEDERATION OF KENYA (COFEK), *supra* note 368.

³⁷² See *Result-Based Financing for Health*, WORLD BANK, <http://siteresources.worldbank.org/INTAFRICA/Resources/AHF-results-based-financing.pdf> (last visited Oct. 7, 2017).

³⁷³ *Id.*

³⁷⁴ *Id.*

³⁷⁵ *Id.* at 2.

³⁷⁶ *Id.*

³⁷⁷ Bruno Meessen et al., *Performance-based Financing: Just a Donor Fad or a Catalyst Towards Comprehensive Health-care Reform*, 89 BULLETIN THE WHO 153–56 (2011).

development aid.³⁷⁸ Proponents of this approach also hold the view that this method can be used to easily measure performance of the various sectors funded and also monitor the improvements in health outcomes.³⁷⁹ Development partners have also favored this approach based on the fact that it maintains the autonomy of service providers by giving them substantial decision rights over the resources at their disposal.³⁸⁰ This is key in ensuring that the service providers come up with home-grown approaches to enable them to effectively provide the services that they have been tasked with.³⁸¹ It is, however, important that focus is not overly put on the quantity of services delivered by those tasked to do so, but on the quality of these services. This means that outcome-based financing can lose its goal of improving health outcomes if the financing agency does not establish proper quality assessment mechanisms to guide delivery by health care providers.³⁸²

This form of financing has been adopted in a number of African countries such as Uganda with tremendous success.³⁸³ In Uganda, it has been established that the adoption of outcome-based financing provides incentives to health service providers to focus on health outputs and outcomes and this potentially increases accountability.³⁸⁴ In Uganda, it has also been observed that the adoption of outcome-based financing leads to increased accountability in the manner in which health care services are provided as there is increased adherence to treatment guidelines by providers.³⁸⁵ This is key in preventing adverse outcomes from arising based on failure by health care professionals to adhere to the requisite practice guidelines. Similarly, in Rwanda the adoption of this

³⁷⁸ See Amanda Melina Grittner, *Results-Based Financing: Evidence from Performance-based Financing in the Health Sector*, 25 GERMAN DEVELOPMENT INSTITUTE DISCUSSION PAPER 6 (2013).

³⁷⁹ *Id.* at 6.

³⁸⁰ Meessen et al., *supra* note 377.

³⁸¹ *Id.*

³⁸² Grittner, *supra* note 378.

³⁸³ See *An Assessment of Whether Results-based Financing can Strengthen Governance and Improve Health Outcomes in Post-conflict Northern Uganda* 3, NU HEALTH, <http://www.montroseint.com/wp-content/uploads/2015/07/Results-based-financing-for-the-Uganda-health-sector2.pdf> [hereinafter NU HEALTH].

³⁸⁴ See *Result-based Financing for Quality Health Care*, MONSTROSE (Nov. 2015), <http://www.montroseint.com/projects/results-based-financing-delivers-better-quality-health-care>; see also Jurrien Toones et al., *Results-Based Financing in healthcare: Developing an RBF approach for healthcare in different contexts: the cases of Mali and Ghana* (2012), <http://www.lmpublishers.nl/assets/ResultsBased.pdf> (discussions on Mali and Ghana).

³⁸⁵ NU HEALTH, *supra* note 383.

model has bolstered user confidence in the health systems in place and this has seen increased usage of health care facilities and services.³⁸⁶

It is instructive to note that outcome-based financing is also key in improving performance of the health sector in Kenya. This model is not only suitable for ensuring fiscal accountability, but also for improving quality as has been illustrated by the examples from Uganda and Rwanda.³⁸⁷ For example, outcome-based financing means that a practitioner will not be compensated for a procedure that leads to adverse outcomes on a patient.³⁸⁸ This departs from the current practices where practitioners are paid notwithstanding the fact that a patient may have been harmed as a result of the procedures performed on them by the practitioner.³⁸⁹ The adoption of this method of financing also means that government agencies will no longer have room to misappropriate funds channeled through them by donors for certain projects.³⁹⁰ Allocation of these funds will be contingent on certain outcomes that have been made known prior.

VII. CONCLUSION

This paper has attempted to wade into an area that has relatively been underappreciated despite its significance in improving health outcomes in the country. The Rule of Law, as we have established, is not an alien concept, but an instrumental tool in ensuring fairness (equitable distribution of resources), human rights (right to health) and human dignity (the ability of individuals to access services whenever they need them, e.g through health care). This is especially the case where there is manifestation of the existence of the various sub-rules of the Rule of Law espoused by Lord Bingham in health care delivery. As indicated in this paper, there is need for continued promotion of adherence to the Rule of

³⁸⁶ Louis Rusa et al., *Rwanda: Performance-based Financing in Health*, <http://www.mfdr.org/sourcebook/2ndedition/4-3rwandapbf.pdf>.

³⁸⁷ NU HEALTH, *supra* note 383.

³⁸⁸ See *Result-based Financing for Health*, WORLD BANK, <http://siteresources.worldbank.org/INTAFRICA/Resources/AHF-results-based-financing.pdf> (last visited Oct. 7, 2017).

³⁸⁹ See Majid Twahir, *Why the Cost of Health Care Remains High*, STANDARD (May 16, 2017), <https://www.standardmedia.co.ke/business/article/2001239908/why-the-cost-of-health-care-remains-high>.

³⁹⁰ See Gatonye Gathura, *Kenya Classified As A High Risk Environment For Donors*, STANDARD (May 20, 2017), <https://www.standardmedia.co.ke/article/2001240444/kenya-classified-as-high-risk-environment-for-donor-funds>.

Law to ensure that health systems in the country are more responsive and able to deliver on the expected outcomes. This notwithstanding, there is also need for the establishment of accountability mechanisms within the health delivery systems in place while guaranteeing user oversight in the same. It is also critical that a system is established with the existing health systems to encourage and ensure protection of whistle blowers. Encouraging insiders to reveal matters of public concern is seen to be an important tool that can be used to ensure that accountability is guaranteed within the agencies tasked with the delivery of health care services.³⁹¹ The discussions in this paper are, however, not conclusive given the complex nature of the health care system in Kenya, and therefore, we call for further studies in the areas canvassed in this contribution.

³⁹¹ GOSTIN & WILEY, *supra* note 310.