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**Assessing the Nature of Regulatory Enforcement by the Council of
Legal Education and its Effect on Corporate Governance of Law
Schools in Kenya**

**By
Georgina Ziita Wabwire
120009**



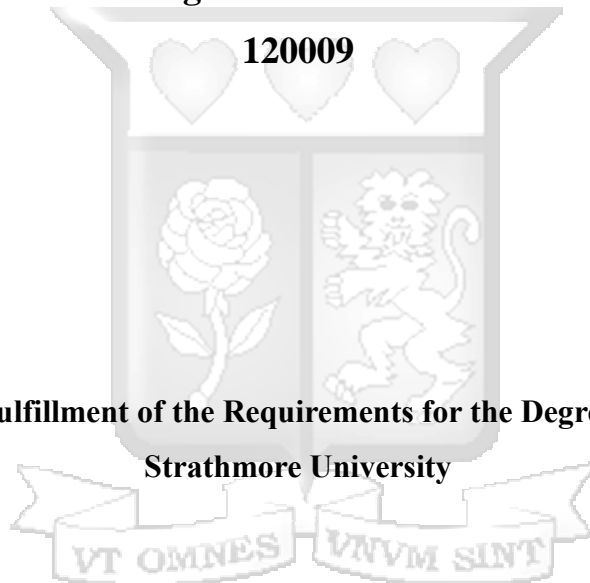
**Master of Laws
2022**

**Assessing the Nature of Regulatory Enforcement by the Council of
Legal Education and its Effect on Corporate Governance of Law
Schools in Kenya**

By

Georgina Ziita Wabwire

120009



**Submitted in Partial Fulfillment of the Requirements for the Degree of Master of Laws at
Strathmore University**

Strathmore Law School

Strathmore University

Nairobi, Kenya

October, 2022

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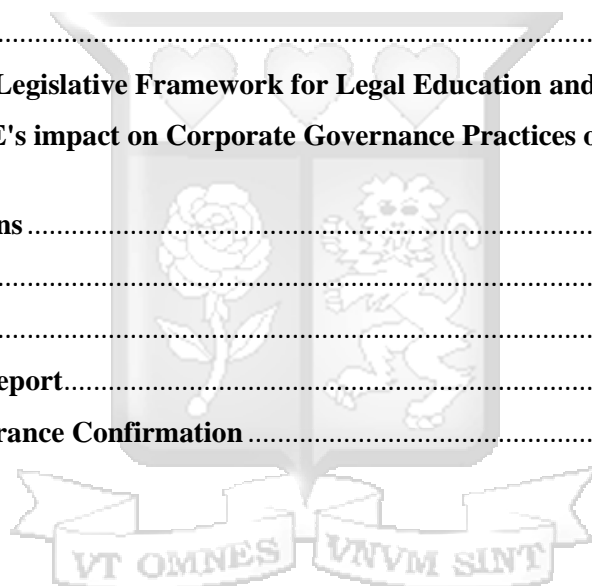
Abstract

There has been an uproar over the declining quality of legal professionals in Kenya that has got various stakeholders interrogating what the problem could be. The regulator of legal education and training in Kenya, the Council of Legal Education (CLE), has been steadily enforcing the regulatory framework in order to assure quality in Legal education and training, reckoning that legal education and training is the foundation of legal professionals. Regulatory intervention by the CLE has however been questioned in a myriad of cases. This study interrogates how the challenges faced by CLE in form of law suits and the gains made as a result of some of those suits have affected corporate governance in Law Schools and in the long run, the delivery of quality legal education in Kenya. Anchored on the stakeholder theory, the study reviews literature on corporate governance practices in universities and law schools in Kenya, and analyses statutes and regulations which prescribe the legal and institutional framework for legal education and training, while identifying the stipulated salient features of corporate governance. In doing so the study discusses the nature of regulatory intervention by CLE; interrogates some key cases that have influenced the type of corporate governance practices existent in law schools; and analyzes the challenges and achievements of regulatory implementation in legal education and training thus far. Based on the findings, the study proposes some recommendations for countering the challenges facing legal education and training in Kenya. Ultimately, it is anticipated that this study will contribute to the ongoing discourse on how to annul the criticism on the quality of legal professionals.

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List of abbreviations

Acronym	Name
ATP	Advocates Training Programme
CLE	Council of Legal Education
CUE	Commission for University Education
CLED	Clinical Legal Education
EAC	East African Community
HEIs	Higher Education Institutions
KUCCPS	Kenya Universities and Colleges Central Placement Service
KSL	Kenya School of Law
KCSE	Kenya Certificate of Secondary Education
LEPs	Legal Education Providers
LEA	Legal Education Act
LEAD	Legal Education and Development
LL.B	Bachelor of Laws
LSK	Law Society of Kenya
OECD	Organisation for Economic Cooperation and Development
SRA	Solicitors Regulation Authority



List of Cases

Adrian Kamotho Njenga v Kenya School of Law [2017] eKLR

Council of Legal Education (Petitioner); Kenya Law Reform Commission & 4 others (Interested Parties) [2020] eKLR

Eunice Cecilia Mwikali Maema v Council of Legal Education & 2 others [2013] eKLR

Gloria Munyiva Mbevi & another v Africa Nazarene University & 2 others [2019] eKLR

Kenya Medical Laboratory Technicians and Technologists Board & 4 others v Attorney General; Kevin K. Mwiti & Others v Kenya School of Law & 2 others [2015] eKLR

Moi University v Council of Legal Education & another [2016] eKLR

Ntele James Kipambi v Council of Legal Education & 2 others [2017] eKLR

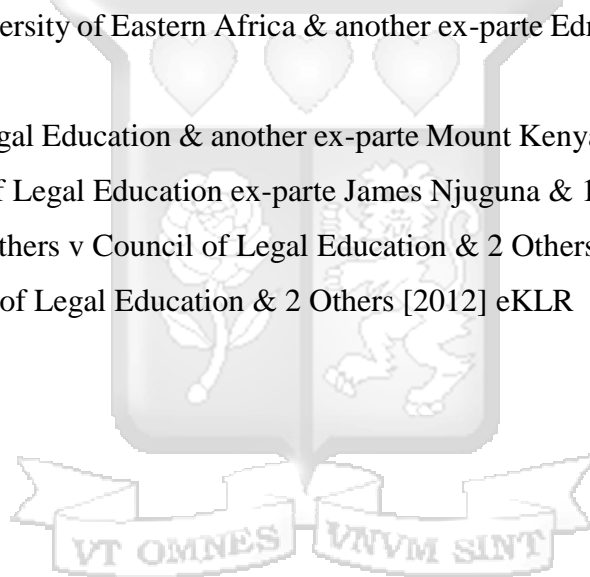
Republic v Catholic University of Eastern Africa & another ex-parte Edmund Kiiru Wambui & 41 others [2017] eKLR

Republic v Council of Legal Education & another ex-parte Mount Kenya University [2016] eKLR

Republic v the Council of Legal Education ex-parte James Njuguna & 14 Others [2007] eKLR

Steve Isaac Kawai & 2 Others v Council of Legal Education & 2 Others [2021] eKLR

Susan Mungai v Council of Legal Education & 2 Others [2012] eKLR



List of Statutes

a) National Laws

Constitution of Kenya (2010)

Advocates Act (Chapter 16 of the Laws of Kenya)

Council of Legal Education Act (Chapter 16A of the Laws of Kenya) (Repealed)

Council of Legal Education (Kenya School of Law) Regulations (2009) (Repealed)

Council of Legal Education (Accreditation of Legal Education Institutions) Regulations (2009) (Repealed)

Commission for Higher Education Standards and Guidelines for the Academic Programmes (2011)

Kenya School of Law Act (Act No. 26 of 2012)

Legal Education Act (Act No. 27 of 2012)

Law Society of Kenya (Act No. 21 of 2014)

Legal Education (Accreditation & Quality Assurance) Regulations (2016)

The Fair Administrative Action Act (Act No. 4 of 2015)

The Statute Law (Miscellaneous) Amendment Act (2014)

Universities Act (Act No. 42 of 2012)

Universities (Amendment) Regulations (2019)

Universities Standards and Guidelines (2014)

b) International Laws

American Bar Association (ABA) Standards and Rules of procedure for Approval of Law Schools (2017-2018)

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I thank my supervisor Dr. Elizabeth Mokeira for her invaluable support and guidance that made this work possible.

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“The old adage remains that law is an instrument of social engineering, and the addendum is that lawyers are part and parcel of agents of social engineering resulting to change. Therefore, legal education must diversify for law, law students and lawyers to impact positively in today's world”.

Orgugua V. C. Ikpeze

Chapter 1 : Introduction

1.1. Background to the study

Corporate governance in universities has gained momentum in the recent past as a result of failure of some corporations, partly attributed to poor governance practices.¹ It is imperative that universities as agents of achieving the sustainable development goals are governed properly, and this includes law schools, principally because legal education is the foundation of the legal profession.

The Organization for Economic Co-operation and Development (OECD) defines corporate governance as, “procedures and processes according to which an organisation is directed and controlled. The corporate governance structure specifies the distribution of rights and responsibilities among the different participants in the organisation such as the board, managers, shareholders and other stakeholders, and lays down the rules and procedures for decision-making”.²

The legal profession in Kenya has been under constant criticism for the declining quality of legal professionals in the labour market.³ This criticism is partly ascribed to the mass failure of the Bar

¹ Kariuki P, Ombaka B and Kiumbe P, ‘Influence of corporate governance on performance of public universities in Kenya’ 10 *International Journal of Research in Business d Social Science*, 7 (2021), 116.

² OECD glossary of statistical terms, <https://stats.oecd.org/glossary/detail.asp?ID=6778> on 14 August 2020.

³ Kenya Institute of Public Policy Research & Analysis (KIPPRA), ‘Factors influencing students’ performance in the Kenyan Bar Examination and proposed interventions’, *Final report*, September 2019, 2.

See also, Nyiha J, ‘A demand for excellence: the general aspirations of the public on ethical excellence in Advocates’ conduct in Kenya: A virtue ethics perspective’ Published Master of Applied Philosophy and Ethics Thesis, Strathmore University, June 2020, 1.

Notably, the legal profession has equally been faulted in other countries worldwide.

See Bugatti L, ‘Legal Education in the Next Future Special Issue: European Network for Clinical Legal Education 6th Conference’ 26 *International Journal of Clinical Legal Education* (2019), 17.

Examination. The main concern has been whether universities and Law Schools in particular are providing quality training to its graduates.⁴ To ameliorate this situation, the regulator of legal education and training in Kenya, the CLE, has been relentless in enforcing quality standards in legal education and training programmes as stipulated by various pieces of legislations governing legal education.⁵ Key among these legislations is the Legal Education Act (LEA)⁶ and attendant Regulations.⁷ The LEA establishes the CLE and mandates it to regulate, license and supervise Legal Education in Kenya.⁸ In the performance of its functions, CLE is empowered to set and enforce quality standards in Legal Education and Training.⁹ The quality standards relate to; accreditation of legal education providers (LEPs), also referred to as Law Schools in this thesis, for purposes of licensing; curricula and mode of instruction; mode and quality of examinations; harmonization of legal education programmes; and monitoring and evaluation of LEPs and programmes.¹⁰

In executing its mandate however, CLE has encountered various challenges, including multiple suits questioning various aspects of its mandate. Some of these suits eventually triggered reforms in law schools, although in certain instances they have adversely affected legal education and training. This thesis proffers that the enforcement of quality standards promotes or ought to promote good corporate governance in law schools.

See also Davies G and Woo M, 'Navigating Troubled Seas: The Future of the Law School in the United Kingdom and the United States Contemporary Issues in Legal Education' 5 *Journal of International and Comparative Law* (2018), 43.

⁴ Kenya Institute of Public Policy Research & Analysis (KIPPRA), 'Factors influencing students' performance in the Kenyan Bar Examination and proposed interventions', 1.

Davies G and Woo M, 'Navigating Troubled Seas: The Future of the Law School in the United Kingdom and the United States Contemporary Issues in Legal Education' 5 *Journal of International and Comparative Law* (2018), 46.

⁵ Legislations governing legal education and training in Kenya include the: *Constitution of Kenya* (2010); *Legal Education Act* (Act No. 27 of 2012); *Legal Education (Accreditation & Quality Assurance) Regulations* 2016; *Kenya School of Law Act* (Act No. 26 of 2012); *Council of Legal Education (Kenya School of Law) Regulations* (2009); *Universities Act* (Act No. 42 of 2012); *Universities Standards and Guidelines* (2014); *Standards and Guidelines for Academic degree programmes* (2011).

⁶ Act No. 27 of 2012.

⁷ *Legal Education (Accreditation & Quality Assurance) Regulations* (2016).

⁸ Section 8 (1) (a), (b) and (c) of the *Legal Education Act*.

⁹ Section 8(2) of the *Legal Education Act*.

¹⁰ Section 8(2) of the *Legal Education Act*.

1.2. Statement of the problem

As a fiduciary, a legal professional is required to have the best skill set to enable him or her undertake professional duties effectively and efficiently. Unfortunately, the legal profession in Kenya continues to be castigated for the declining quality of its professionals in terms of skills and ethics.¹¹ Legal professionals are trained in Law Schools. Therefore, it behooves Law Schools as trainers of legal professionals to ensure that they design and deliver quality legal education programmes which produce graduates with the desired labour market skills. CLE as the regulator of legal education in Kenya has endeavored to enforce the relevant regulatory framework in a bid to assure quality legal education, bearing in mind that regulatory enforcement has an effect on the delivery of legal education by Law Schools and ultimately on the quality of Law graduates who join the legal profession.

However, as aforementioned, regulation of legal education and training in Kenya by CLE has precipitated a myriad of law suits. This research examines the legal and regulatory foundation of the CLE's mandate so as to assess how and to what extent the execution of this mandate has affected corporate governance practices in law schools in Kenya. The study will also proffer some recommendations on how to address corporate governance challenges facing law schools in Kenya, considering that there is a correlation between institutional governance of law schools and the quality of legal education offered, which largely contributes to the quality of law graduates.

1.3. Research objectives

As mentioned above, this study analyses the legal and institutional framework for regulation of legal education and training in Kenya. In particular, it examines the nature of regulatory enforcement by the CLE and assesses the extent to which intervention by the CLE has affected corporate governance practices of Law schools in Kenya. Specifically, my research objectives are to;

¹¹ Osiemo L and Kok A, 'Promoting a Public Service Ethic in the Legal Profession in Kenya: The Imperative Role of Clinical Legal Education' 64 *Journal of African Law*, 2(2020), 174.

See also, Kenya Institute of Public Policy Research & Analysis (KIPPRA), 'Factors influencing students' performance in the Kenyan Bar Examination and proposed interventions', 1.

- a) Analyse the legal and institutional framework regulating legal education and training in Kenya.
- b) Examine corporate governance in law schools in Kenya.
- c) Examine whether and to what extent the intervention by CLE has affected corporate governance practices of law schools in Kenya.
- d) Based on the findings, make recommendations that will improve corporate governance of law schools in Kenya.

1.4. Research questions

- a) What is the legal and institutional framework for regulation of legal education and training in Kenya?
- b) What are the corporate governance practices applied in law schools in Kenya?
- c) To what extent has the intervention by the CLE affected corporate governance practices of law schools in Kenya?
- d) Based on the findings, what recommendations can be made to improve corporate governance in law schools?

1.5. Hypothesis

It is hypothesized that:

- a) Effective and efficient enforcement of the regulatory framework for legal education and training has a direct bearing on corporate governance in law schools.
- b) Good corporate governance in law schools leads to successful delivery of Law programmes and substantially contributes to production of well-skilled law graduates.

1.6. Justification of the study

Good corporate governance is critical to an institution's growth and success. Unfortunately, most of the scholarly writings on corporate governance tend to focus on corporate governance in profit making companies.¹² There is limited literature guiding the infusing of good corporate governance

¹²For instance, the G20/OECD Principles of Corporate Governance. Other articles include: Zhang L, 'Board Accountability in Corporate Governance' 46 *Hong Kong Law Journal* (2016), 379; Pargendler M, 'The Corporate Governance Obsession' 42 *Journal of Corporate Law* (2016), 359; McGrail MA, 'Corporate Governance and

in educational institutions.¹³ Accordingly, this study assesses how enforcement of the legal education regulatory framework has influenced corporate governance in law schools in Kenya. It is hoped that the study will inform stakeholders in legal education on how crucial it is to enforce standards in the management of law schools in order to assure quality of law programmes and eventually the legal profession. It is further anticipated that this study will contribute to the on-going discourse on how to turn the tide on the criticism surrounding the quality of legal professionals in the Kenyan labour market.

1.7. Theoretical framework

This study is anchored in the stakeholder theory. The theory was originally propagated by R. Edward Freeman in 1984.¹⁴ It emphasizes the interconnected relationships between an organization and its customers, suppliers, employees, communities and all other people who have an interest in the organization.¹⁵ The stakeholder theory holds that the leadership of an institution is obligated to manage these relationships with a view to creating value for stakeholders besides managing the distribution of this value.¹⁶ The theory recognizes stakeholders as principal members of a corporation who should be respected in the management of the corporation.¹⁷ It essentially differs with the shareholder primacy concept which propagates that managers of a corporation should run the corporation mainly for the purpose of maximizing the wealth of the shareholders.¹⁸ According to Zhao¹⁹ the theory aims at enhancing relations between a business and those affected

Compliance' 2016 *American Bar Association, Recent Developments in Public Utility, Communications & Transportation Industries* (2016), 107; Barker RM and Chiu Iris H-Y, 'Corporate Governance and Firm Innovation: Are Conventional Corporate Governance Standards a Hindrance' 9 *George Mason Journal of International Commercial Law* (2017-2018), 143; Srivastava V, Das N and Pattanayak JK, 'Corporate Governance: Mapping the Change' 60 *International Journal of Law & Management* (2018), 19.

¹³ For instance: Kariuki et al., 'Influence of corporate governance on performance of public universities in Kenya' 10 *International Journal of Research in Business and Social Science*, 7 (2021); Mwanzia MB, 'Corporate Governance in Kenya's Public Universities' 6 *Journal of Applied Research in Higher Education* (2014); Bird RC and Park SK, 'Organic Corporate Governance' 59 *Boston College Law Review* (2018), 21; Akanji B et al, 'The Influence of Organisational Culture on Leadership Style in Higher Education Institutions' 49 *Personnel Review*, 3 (2019).

¹⁴ <http://stakeholdertheory.org/about/> on 1 August 2022.

¹⁵ <http://stakeholdertheory.org/about/> on 1 August 2022.

¹⁶ Parmar B, Freeman R, Harrison J, Purnell A and De Colle S, 'Stakeholder Theory: The State of the Art' (2010) 3 *The Academy of Management Annals* 403.

¹⁷ Keay A, 'Stakeholder Theory in Corporate Law: Has It Got What It Takes' 9 *Richmond Journal of Global Law and Business* (2010), 254.

¹⁸ Keay A, 'Stakeholder Theory in Corporate Law,' 255.

¹⁹ Zhao J, 'The Curious Case of Stakeholder Theory: Calling for a More Realistic Theory' 17 *International Trade and Business Law Review* (2014), 4.

by the business. It strengthens trust and cooperative relations between a company and its stakeholders such as employees, in the result motivating the employees to work hard in enhancing a company's performance.²⁰ The theory is also said to make corporations to be socially responsible through undertaking corporate social responsibility (CSR), in terms of promoting fair labour practices and human rights, and protecting the environment while undertaking their functions.²¹

The theory has however been criticized on various grounds including that it does not indicate how a stakeholder should be defined and identified, neither does it show what weight ought to be given to each stakeholder in respect of being able to determine which stakeholders are more important than others.²² Similarly, the theory can make directors of a company to be accountable to an amorphous group.²³ Keay²⁴ further opines that besides the difficulty in balancing the interests of the various stakeholders, it is also intricate for a manager to know what each individual stakeholder deems to be his/her interest or what is beneficial to him/her, sentiments that are echoed by Parmar B *et al.*²⁵ Moreover, for large corporations that have potentially large numbers of stakeholders, the theory is almost unworkable as it becomes problematic determining the needs of the numerous stakeholders and addressing them.²⁶ The stakeholder theory has also been faulted for being ambiguous in the sense that it does not particularize; what kind of responsibilities managers of a corporation have towards stakeholders and whether the responsibilities should be substantial or procedural, who should enforce those responsibilities, and what remedy is available if the managers fail to perform the responsibilities.²⁷ Further, it may be necessary to change the law so as to force corporations to act in the interest of stakeholders because generally corporations are enjoined to prioritize shareholder interests.²⁸

Despite the foregoing criticism however, the theory is critical for this study in the sense that firstly, it will enable me examine the instrumental role that various stakeholders play in the success of law

²⁰ Zhao J, 'The Curious Case of Stakeholder Theory', 29.

²¹ Zhao J, 'The Curious Case of Stakeholder Theory', 30.

²² Keay A, 'Stakeholder Theory in Corporate Law', 270.

²³ Keay A, 'Stakeholder Theory in Corporate Law', 277.

²⁴ Keay A, 'Stakeholder Theory in Corporate Law', 278.

²⁵ Parmar B *et al*, 'Stakeholder Theory', 9.

²⁶ Keay A, 'Stakeholder Theory in Corporate Law', 290.

²⁷ Amy K Lehr, 'Fiduciary Duties for a Globalized World: Stakeholder Theory Reconceived' 27 *George Mason Law Review* (2019) 81.

²⁸ Parmar B *et al*, 'Stakeholder Theory', 9.

schools and secondly, the theory will be used to demonstrate how the nature of corporate governance practices existent in a law school affects the various stakeholders. Law schools are responsible to many stakeholders including lecturers, students, legal professionals, employers, clients and generally the society at large. According to Worsley²⁹ the failure or success of a project depends on how well stakeholders were engaged. The stakeholder theory has been linked to the academic fiduciary model³⁰ where, the leadership of academic institutions hold positions of trust as fiduciaries to stakeholders of such institutions.³¹ The leadership of law schools must always act for the good of the entire school community.³² Guthrie³³ proposes a stakeholder integration approach, where before a key decision is made, the maker should identify and consult all stakeholders that are likely to be affected by that decision, in a bid to explore outcomes that are beneficial to the majority of the stakeholders. It has been suggested that legal education should inculcate skills and competencies that are required by employers and clients as stakeholders in legal education.³⁴ Critics of the stakeholder theory however argue that there are instances where the interests of various stakeholders may conflict and the theory is silent on which interests should be given priority.³⁵ Parmar B *et al*³⁶ argue that in such a scenario, the executive must re-think ways of ensuring that the needs of the majority are addressed.

1.8. Research methodology

This is a doctrinal legal research. Both primary and secondary sources of data were used. Primary legal material like statutes and regulations on legal education and training in Kenya were analysed because they prescribe the regulatory and institutional framework for legal education and training as well as aspects of corporate governance. In addition, the study appraised cases that have arisen

²⁹ Worsley LM, *Stakeholder-Led Project Management: Changing the Way We Manage Projects*, Business Expert Press, 2016, 103-104.

³⁰ Drawing from the definition of a fiduciary, this model connotes the obligation to act in the best interest of an educational institution including any affiliate members of that institution.

³¹ Guthrie C, 'Conscious Deaning: The Academic Fiduciary Model and Stakeholder Integration Richard A. Matasar Symposium: The Future of Legal and Higher Education' 66 *Syracuse Law Review*, 3 (2016), 512.

³² Guthrie C, 'Conscious Deaning, 513.

³³ Guthrie C, 'Conscious Deaning, 519.

³⁴ Alexander J and Boothby C, 'Stakeholder Perceptions of Clinical Legal Education within an Employability Context Reviewed Article' 25 *International Journal of Clinical Legal Education*, 3 (2018), 57.

³⁵ Blount J, 'Creating a Stakeholder Democracy under Existing Corporate Law' 18 *University of Pennsylvania Journal of Business Law*, 2 (2015), 372.

³⁶ Parmar B *et al*, 'Stakeholder Theory', 5.

as a result of the exercise of the regulatory function by CLE. The cases identify some corporate governance issues and challenges facing law schools. Further, secondary legal material like scholarly writings were reviewed to supplement information drawn from primary material by for instance prescribing sound corporate governance practices.

1.9. Chapter breakdown

The layout of the chapters is as follows:

Chapter one covers the background of the study, the problem to be examined, the research objectives and questions, the justification of the study and the methodology to be applied.

Chapter two reviews literature on corporate governance of educational institutions. The aim is to illustrate good corporate governance practices in universities and law schools in particular.

Chapter three analyses the various laws governing legal education and training in Kenya, starting with legislation regulating university education generally and narrowing down to those governing legal education and training in Kenya. While undertaking this analysis, greater emphasis is placed on the mandate of CLE. The chapter also highlights corporate governance features as prescribed by legislation.

Using caselaw, chapter four examines how enforcement of the regulatory framework by the CLE has affected corporate governance in law schools. The chapter also analyses the challenges faced and achievements made in the regulatory process.

Chapter five concludes the thesis by reviewing the key findings of the study and based on those findings, giving recommendations.

Chapter 2: Corporate Governance of Educational Institutions

2.1. Introduction

Good corporate governance is integral to successful organizations.³⁷ It also ensures that corporations are responsive, accountable and they are managed with integrity, probity and transparency.³⁸ Drawing from the understanding that corporate governance relates to the procedures and processes by which an institution is governed, this chapter analyses scholarly work on corporate governance in relation to education generally, then narrows down to corporate governance in universities and law schools. The analysis discusses the pillars and values underlying good corporate governance, presents some of the challenges facing universities and law schools in the administration of law programmes, and proposes how to overcome poor corporate governance practices, and the role of the regulator in facilitating the same.

2.2. Corporate Governance and Education

A corporation that implements corporate governance principles guarantees recognition and protection of stakeholder rights and an inclusive management approach.³⁹ Corporate governance principles have been analyzed by various organisations, including OECD and the Kenya Private Sector Initiative for Corporate governance.⁴⁰ From those analyses, it emerges that corporate governance principles are founded on five pillars namely, accountability, efficiency and effectiveness, probity and integrity, responsibility, transparency and open leadership.⁴¹ Below is a brief overview of these pillars in the context of educational institutions.

³⁷ PricewaterhouseCoopers, 'The Eight Key Effective Corporate Governance Practices' (PwC) <https://www.pwc.ie/services/human-resource-services/insights/the-eight-key-effective-corporate-governance-practices.html> on 3 June 2022.

³⁸ Private Sector Initiative for Corporate Governance, *Principles for Corporate Governance in Kenya and a Sample Code of Best Practice for Corporate Governance*, 1.

³⁹ Private Sector Initiative for Corporate Governance, *Principles for Corporate Governance in Kenya*, 1.

⁴⁰ The analyses include the following publications: G20/OECD *Principles of Corporate Governance 2015* (OECD Publishing 2015) https://www.oecd-ilibrary.org/governance/g20-oecd-principles-of-corporate-governance-2015_9789264236882-en on 15 September 2022; Private Sector Initiative for Corporate Governance, *Principles for Corporate Governance in Kenya and a Sample Code of Best Practice for Corporate Governance*.

⁴¹ Private Sector Initiative for Corporate Governance, *Principles for Corporate Governance in Kenya*, 3.

a) Accountability

Accountability is key in education management for the reason that it ensures that schools achieve their goals and that there is quality delivery of services.⁴² It obligates the school administration to fulfill its responsibilities and be prepared to justify their actions or decisions to the relevant stakeholders.⁴³ According to United Nations Educational, Scientific and Cultural Organisation (UNESCO),⁴⁴ there are three main types of accountability in the discipline of education namely, compliance with regulations, adherence to professional norms and results driven.

Further, the leadership of educational institutions are expected to work in the interests of the institution, and avoid any situations where their personal interests might conflict with those of the institution.⁴⁵ Similarly, the supervisory and regulatory bodies are enjoined to be independent and accountable in undertaking their functions, noting that their decisions are subject to administrative and judicial review.⁴⁶ Moreover, it is critical for an educational institution to have in place a mechanism for annual performance evaluation of its management to ensure that they are fulfilling their responsibilities and reducing risk to the organization.⁴⁷

b) Efficiency and Effectiveness

Efficiency refers to a comparison of the inputs and their outputs in any given system.⁴⁸ Lockheed and Hanushek⁴⁹ posit that an institution should be able to obtain more outputs than its inputs, and in the education sector, the input could be monetary and output would be student growth and development. On the other hand, effectiveness relates to whether specific resources that have been utilized have had a positive impact and if so to what extent.⁵⁰

⁴² Dangara UY, 'Accountability in Education: An Imperative for Service Delivery in Nigerian School Systems' 1 *Akwanga Journal of Education and Research* (2016), 264.

⁴³ Dangara UY, 'Accountability in Education', 266.

⁴⁴ 'Accountability in Education - UNESCO Digital Library' <https://unesdoc.unesco.org/ark:/48223/pf0000140986> on 7 September 2022.

⁴⁵ Private Sector Initiative for Corporate Governance, *Principles for Corporate Governance in Kenya*, 9.

⁴⁶ OECD (2015), *G20/OECD Principles of Corporate Governance*, 16.

⁴⁷ Private Sector Initiative for Corporate Governance, *Principles for Corporate Governance in Kenya*, 25.

⁴⁸ Lockheed ME and Hanushek E 'Concepts of Educational Efficiency and Effectiveness' Human Resources Development and Operations Policy Working Papers, March 1994, 1.

⁴⁹ Lockheed ME and Hanushek E 'Concepts of Educational Efficiency and Effectiveness', 2.

⁵⁰ Lockheed ME and Hanushek E 'Concepts of Educational Efficiency and Effectiveness', 2.

Efficiency and effectiveness in educational institutions can be enhanced through the administration ensuring that there is a regular review of its systems, processes and procedures to guarantee their potency.⁵¹ The administration should also promote a culture and ethos upon which the institution can found its policies, actions and behaviours.⁵² Employees' rights to information, consultation and negotiation should also be recognized, in addition to other performance enhancing mechanisms.⁵³

c) Probity and Integrity

Although the two words have the same connotation in terms of obligating one to handle situations with care, consistency and honesty, they are applied differently.⁵⁴ Whereas integrity applies to both personal and professional affairs, probity mainly applies to professional circumstances.

To assure probity and integrity in educational institutions, it is helpful to create and implement a framework like a code of ethics which defines values that guide policy and conduct in the institution, besides prescribing the ethical standards that members of such institutions should comply with.⁵⁵ The code of ethics should be reviewed periodically to accommodate new circumstances and experiences.⁵⁶

d) Responsibility

Responsibility in this study refers to corporate responsibility where in addition to the managers of a corporation ensuring compliance with the applicable laws, they are also expected to meet the demands of society and build good relations with it.⁵⁷ Alzyoud and Bani-Hani⁵⁸ posits that universities should practice good corporate citizenship by undertaking social responsibility. Corporate Social Responsibility can be achieved through community outreach, conducting ethical

⁵¹ Private Sector Initiative for Corporate Governance, *Principles for Corporate Governance in Kenya*, 9.

⁵² Private Sector Initiative for Corporate Governance, *Principles for Corporate Governance in Kenya*, 10.

⁵³ OECD (2015), *G20/OECD Principles of Corporate Governance*, 35.

⁵⁴ <https://www.igi-global.com/dictionary/reflective-cycles-reflexive-learning-principles/23497> on 7 September 2022.

⁵⁵ Private Sector Initiative for Corporate Governance, *Principles for Corporate Governance in Kenya*, 20.

⁵⁶ OECD (2015), *G20/OECD Principles of Corporate Governance*, 13.

⁵⁷ Bill Witherell : Corporate governance and responsibility, Foundations of market integrity' *OECD Observer No. 234*, October 2002 <https://www.oecd.org/daf/inv/corporateresponsibility/1840502.pdf> on 7 September 2002.

⁵⁸ Alzyoud SA and Bani-Hani K, 'Social Responsibility in Higher Education Institutions: Application case from the Middle East' *11 European Scientific Journal* (2015), 124.

business practices, encouraging students and the faculty to provide social services to the community, protecting the environment as well as carrying out research to facilitate social economic development.

Additionally, it is upon academic staff and all other relevant stakeholders to ensure that they elect or appoint competent individuals in leadership positions, that is, persons who can add value to an institution and steer it to prosperity and sustainability.⁵⁹ Such leaders are also expected to ensure the interests of all stakeholders are respected, recognized and protected, for in the long run stakeholders contribute considerably to the success of an institution.⁶⁰

e) Transparency and Open Leadership

Transparency is making disclosure of plans, processes and actions taken by an organization.⁶¹ As a pillar of good corporate governance, it curtails corruption and other unethical practices in institutions by enabling the public to be vigilant as they follow the actions and performance of the respective institutions.⁶² Connected to the principle of transparency is the practice of open leadership which simply refers to acting in service to others in order to attain a common objective.⁶³

Every institution should have a board of directors or governors, or a council that is able to effectively direct the institution in the continued attainment of prosperity in a transparent and accountable manner.⁶⁴ It is particularly important for the management of educational institutions be keen on monitoring and evaluating the performance of their institutions periodically, including reviewing the financial viability of the institution.⁶⁵ They should ensure that their respective institutions are compliant with all relevant laws and regulations, and that they communicate effectively with stakeholders.⁶⁶ Full disclosure to relevant stakeholders is also key as regards

⁵⁹ Private Sector Initiative for Corporate Governance, *Principles for Corporate Governance in Kenya*, 7.

⁶⁰ Private Sector Initiative for Corporate Governance, *Principles for Corporate Governance in Kenya*, 7.

⁶¹ Nyangueso JA, Onditi A and Monari F, 'Influence of Transparency on Quality of Education in Institutions of Higher Learning: A Comparative Analysis of Selected Public and Private Universities in Kenya' 4 *International Journal of Social Sciences and Information Technology*, 8 (2018), 60.

⁶² Nyangueso JA, Onditi A and Monari F, 'Influence of Transparency on Quality of Education in Institutions of Higher Learning', 61.

⁶³ <http://theopenorganization.org/definition/open-leadership-definition/> on 7 September 2022.

⁶⁴ Private Sector Initiative for Corporate Governance, *Principles for Corporate Governance in Kenya*, 8.

⁶⁵ Private Sector Initiative for Corporate Governance, *Principles for Corporate Governance in Kenya*, 8.

⁶⁶ Private Sector Initiative for Corporate Governance, *Principles for Corporate Governance in Kenya*, 8.

providing information on the risk factors that could be affecting the performance of an institution and systems that may be in place to monitor and manage such risks.⁶⁷

Notably, corporate governance also entails creating and imparting values. This research argues that academics have a responsibility to nurture in students values that will enable them grow into professionals of integrity. Wegner⁶⁸ remarks that there is a link between how professionals conduct themselves and their educational preparation.⁶⁹ The importance of formal education in nurturing students in values was also recognized by John Locke who expressed himself as follows, “*I think I may say, that of all the men we meet with, nine parts of ten are what they are, good or evil, useful or not, by their education.*”⁷⁰ Indeed one of the ways of inculcating values is through mentorship. In the article, *Examining the Ethical Environment in Higher Education*, Richardson and Healy⁷¹ assert that the academic plays a critical role in maintaining an ethical environment by, for instance, nurturing in students values that foster academic integrity. In line with the Ubuntu maxim that, ‘a person is a person through other persons’, it has been argued that one can learn to be virtuous through being in communion with others.⁷²

Similarly, the values of solidarity or collectivism are enablers of good corporate governance. That is the wisdom behind the stakeholder theory discussed under the theoretical framework above. In this respect, the holy bible stresses the importance of solidarity in human relations. For instance the book of Ecclesiastes provides that “two are better than one, they get a good wage for their labour”.⁷³ The holy book of Psalms also states, “how good it is, how pleasant, where the people dwell as one”.⁷⁴ Indeed various African statesmen exemplified the value of solidarity in their leadership in various ways. Kwame Nkrumah for instance advocated for the idea of a United States of Africa as a way through which the African continent could develop socially, economically and

⁶⁷ OECD (2015), *G20/OECD Principles of Corporate Governance*, 41.

⁶⁸ Wegner JW, ‘The Value of Legal Education’ 24 *Nottingham Law Journal* (2015), 119.

⁶⁹ Wegner JW, ‘The Value of Legal Education’ 24 *Nottingham Law Journal* (2015), 119.

⁷⁰ Milligan L, ‘Natural Law, Commonwealths, and Higher Education Future of the Commonwealth Symposium’ 57 *University of Louisville Law Review* 3 (2018), 510.

⁷¹ Richardson M and Healy M, ‘Examining the Ethical Environment in Higher Education’ 45 *British Educational Research Journal* 6 (2019), 1093.

⁷² Molefe M and Magam N, ‘What Can Ubuntu Do? A Reflection on African Moral Theory in Light of Post-Colonial Challenges’, 7-8.

⁷³ Ecclesiastes 4:9.

⁷⁴ Psalm 133:1.

politically by harnessing its resources.⁷⁵ Related to solidarity is the value of collaboration. Collaboration, also referred to as collegial control⁷⁶ enables universities meet challenges of access to funding, quality, relevance, qualified academic staff and research.⁷⁷ According to Harding and Harrison⁷⁸ relational leadership is integral to a university in the sense that it builds trust and confidence in the membership of a university, enabling them to overcome challenges as a community. Undoubtedly, a team spirit and collaborative efforts highly contribute to the successful management of an institution. This research will demonstrate how strategic leadership and collegiality is critical in ensuring law in schools in Kenya are well governed.

2.3. Corporate Governance of Universities

In the article titled ‘Tracing accountability in higher education’, Macheridis and Paulsson⁷⁹ posit that Higher Educational Institutions (HEIs) are accountable to a host of actors including; students, parents, accrediting agencies, the government, other HEIs, the media and the business community. Further that the key area where HEIs are accountable for is quality assurance and performance measurement.⁸⁰ Equally important for efficient administration of higher education is the quality of transparency. Some of the challenges currently facing higher education have been attributed to imprecise transparency initiatives in HEIs. These challenges include; rapid expansion of universities that is unchecked, gender inequality, low research capacity, poor living conditions for students, deteriorating infrastructure, frequent student unrest and shortage of quality faculty.⁸¹ This study examines the stipulated transparency and accountability initiatives under the legal education and training legislation and their significance.

⁷⁵ Mawere M and Mubaya R, *African Philosophy and Thought Systems: A Search for a Culture and Philosophy of Belonging*, Langaa RPCIG, Capetown, 2016, 168-169.

⁷⁶ Dill DD, ‘Good Governance in Universities: The Challenge of Collegial Control’ 14 *International Journal for Education Law and Policy* (2018), 8.

⁷⁷ Knight J and Woldegiorgis ET, *Regionalization of African Higher Education: Progress and Prospects*, Sense Publishers, Netherlands, 2017, 67.

⁷⁸ Harding S and Harrison R, ‘Changing Times, Changing Universities: Leadership, Governance and Management in a Dynamic Environment’ 4 *International Journal of Chinese Education* (2015), 11.

⁷⁹ Macheridis N and Paulsson A, ‘Tracing Accountability in Higher Education’ 110 *Research in Education* (2021), 90.

⁸⁰ Macheridis N and Paulsson A, ‘Tracing Accountability in Higher Education’, 90.

⁸¹ Nyangueso JA, Onditi A and Monari F, ‘Influence of Transparency on Quality of Education in Institutions of Higher Learning’, 61.

Writing about the perception of corporate governance practices at the University of Nairobi, Monyoncho⁸² observes that some of the major problems facing universities are poor administration, inappropriate policies, politics, poor leadership, corruption and poor resource allocation, all of which can be attributed to the nature of the extant leadership. She premises her reasoning on the fact that members of governance bodies of universities and especially public universities are politically appointed hence they tend to represent the interests of their appointees rather than meeting their respective university's objectives.⁸³ Moreover, Sifuna⁸⁴ submits that in many African Universities leaders are appointed based on their academic qualifications and not on their leadership potential. Such leaders in most instances lack training in strategic planning, budgeting, human resource development and faculty management.⁸⁵ In addition, financial constraints in higher education institutions have affected quality assurance, including the ability of the institutions to attract and retain competent staff.⁸⁶ Infrastructural constraints like inadequate classrooms and accommodation have also limited students access to higher education.⁸⁷ According to Sifuna, one of the ways of curbing the foregoing problems is ensuring that decision making at the universities is devolved to operational units such as faculties, institutes and departments.⁸⁸ This study develops further Monyoncho and Sifuna's ideas on how to strengthen leadership and management capabilities of universities including law schools.

It is also important that universities observe the prescribed regulatory norms. Koebel⁸⁹ opines that compliance programmes in universities demonstrate an institution's commitment to ethical values,

⁸² Monyoncho RM, 'Perception of Corporate Governance Practices at the University Of Nairobi' 5 *DBA Africa Management Review* (2015), 101.

⁸³ Monyoncho RM, 'Perception of Corporate Governance Practices at the University of Nairobi', 102.

⁸⁴ Sifuna DN, 'Leadership in Kenyan Public Universities and the Challenges of Autonomy and Academic Freedom: An Overview of Trends Since Independence' 10 *Journal of Higher Education in Africa / Revue de l'enseignement supérieur en Afrique* (2012), 124.

⁸⁵ Sifuna DN, 'Leadership in Kenyan Public Universities and the Challenges of Autonomy and Academic Freedom', 124.

⁸⁶ Sifuna DN, 'Leadership in Kenyan Public Universities and the Challenges of Autonomy and Academic Freedom', 124.

⁸⁷ Sifuna DN, 'Leadership in Kenyan Public Universities and the Challenges of Autonomy and Academic Freedom', 125.

⁸⁸ Sifuna DN, 'Leadership in Kenyan Public Universities and the Challenges of Autonomy and Academic Freedom', 135.

⁸⁹ Koebel JT, 'Facilitating University Compliance Using Regulatory Policy Incentives' 44 *Journal of College and University Law*, 2 (2018-2019) 176-177.

and act as a shield against any potential risks such as litigation, fines and agency investigations occasioned by non-compliance. Compliance programmes can take the form of an overall compliance officer managing compliance matters throughout the university or a decentralized model where each department has a compliance officer responsible for departmental compliance.⁹⁰ Significantly, compliance should be taken as an institution wide responsibility in order for compliance programmes to be effective.⁹¹ Lack of coordination in these efforts may weaken a compliance programme.⁹² While Koebel proffers forms of compliance programmes and the limitations of failing to have one in place, this research will interrogate the nature of compliance programmes existent in law schools, and their impact on corporate governance of laws schools.

Further, in ensuring regulatory compliance, the regulator is expected to play a facilitative role. Fortney⁹³ proposes that one of the ways of improving regulatory compliance is by regulators facilitating training courses, seminars and continuing education programmes where institutions can share experiences of how they have handled problems successfully, and make recommendations on improving the legal education system.

2.4. Corporate Governance of Law Schools

The faculty have a role to play in mentoring both students and their colleagues in the profession to be ethical lawyers. In this regard, Ola⁹⁴ asserts that successful scholars should assist the upcoming scholars by providing them with opportunities and platforms to flourish. The academic's central role in molding the character of law students is also emphasized by Maleshin⁹⁵ in his article, 'The Crisis of Russian Legal Education in Comparative Perspective'. Maleshin opines that a law graduate's professional competence and ethical principles largely depend on how qualified the teachers are.⁹⁶ Mentorship is key for both law students and junior law teachers as it helps in honing their skills to be better professionals besides providing them with a support system. Ola and

⁹⁰ Koebel JT, 'Facilitating University Compliance Using Regulatory Policy Incentives', 179.

⁹¹ Koebel JT, 'Facilitating University Compliance Using Regulatory Policy Incentives', 192.

⁹² Koebel JT, 'Facilitating University Compliance Using Regulatory Policy Incentives', 192.

⁹³ Fortney SS, 'Designing and Improving a System of Proactive Management-Based Regulation to Help Lawyers and Protect the Public' *Journal of the Professional Lawyer* (2016), 105

⁹⁴ Ola K, 'Theories of Open Access' 6 *Journal of Open Access to Law* (2018), 13.

⁹⁵ Maleshin D, 'The Crisis of Russian Legal Education in Comparative Perspective' 66 *Journal of Legal Education* (2017), 289.

⁹⁶ Maleshin D, 'The Crisis of Russian Legal Education in Comparative Perspective', 298.

Maleshin however do not demonstrate how mentorship can be undertaken to get value out it, considering the large student numbers in HEIs. This study will propose how mentorship can be structurally done in order to be impactful.

It is also paramount that Legal Education goes beyond teaching principles of law and train students to be stewards of change and responsible professionals in future.⁹⁷ Bugatti⁹⁸ points out that legal education has been the subject of criticism all over the world indicating that there could be a disconnect between legal scholarship and society needs. In support of Bugatti's sentiments, Rosadi and Marwan⁹⁹ observe that legal education tends to ignore social justice while primarily concentrating on professional competence, possibly because the nature of social justice is not widely understood. Clinical Legal Education (CLED) is one way of ensuring that law graduates or students meet societal needs.¹⁰⁰ This is because it enables students to apply theory to real life situations, develop lawyering skills such as client interviewing, legal drafting, and ethical values.¹⁰¹ CLED also enables students to establish a close link with practicing lawyers as well as enhance access to justice through legal clinics.¹⁰²

Similarly, McFaul¹⁰³ posits that CLED enables students to reflect on the ethical and societal dimensions of applying legal knowledge and promotes the students employability by enhancing their professional skills. McFaul proposes that CLED programmes should engage more nuancedly with academic literature for insights on the nature of social justice and legal ethics, and the appropriate assessment methods.¹⁰⁴ However, it is not enough that Law schools simply have a CLED programme embedded in their Curriculum, the mode of implementation of such programmes determines how effective they are. For instance, in Indonesia, Clinical programmes are implemented through the Law faculty supervising students' interview techniques, case analysis

⁹⁷ Henrico R, 'Educating South African Legal Practitioners', 825.

⁹⁸ Bugatti L, 'Legal Education in the Next Future Special Issue: European Network for Clinical Legal Education 6th Conference' 26 *International Journal of Clinical Legal Education*, 3 (2019), 20.

⁹⁹ Rosadi O and Marwan A, 'Transformation of Legal Education in Indonesia Based on Social Justice' 13 *Journal of Politics and Law*, 1 (2020), 143.

¹⁰⁰ Bugatti L, 'Legal Education in the Next Future Special Issue', 22.

¹⁰¹ Bugatti L, 'Legal Education in the Next Future Special Issue', 23.

¹⁰² Bugatti L, 'Legal Education in the Next Future Special Issue', 24.

¹⁰³ McFaul H, 'Does Clinical Legal Education Need Theory?' 7 *Asian Journal of Legal Education*, 2 (2020), 156.

¹⁰⁴ McFaul H, 'Does Clinical Legal Education Need Theory?', 162.

techniques, negotiations approach as well as legal drafting.¹⁰⁵ Further, students are evaluated through field observations, daily activity notes, case study reports, as well as final semester examinations where they make presentations of the activity results.¹⁰⁶ From the foregoing analysis, it is plain that CLED plays a critical role in assuring socially responsible legal professionals. This research will contribute to the body of knowledge on how laws schools can effectively implement CLED programmes so that they can be impactful.

Writing on the topic ‘Employable Skills that Legal Education should impart in a 21st Century Attorney’, Adegbite and Uzoma¹⁰⁷ submit that society has advanced increasing the competitiveness of the labour market and requiring the contemporary lawyer to upgrade his/her skills in order to meet emerging challenges. In concurrence with Adegbite and Uzoma, Christensen¹⁰⁸ posits that some of the skills that are highly valued by law firms, and which should be taught by law schools include; team work and collaboration, and cultural competency and self-directness.¹⁰⁹ Teamwork and collaboration skills include the ability to; interact and communicate well with people, resolve conflicts, listen actively and give meaningful feedback.¹¹⁰ Students can learn these skills through for instance working with their peers in undertaking class assignments or projects,¹¹¹ and also through student-faculty interactions like collaborating in research projects.¹¹²

In the same breadth, cultural competency as a skill is manifested by the students’ ability to exhibit leadership skills, improved critical thinking, intellectual growth, reduced prejudices, and appreciation of the opinion of others.¹¹³ Christensen further notes that the foregoing competencies can be mastered through meaningful student interactions and exposure to different beliefs, values

¹⁰⁵ Rosadi O and Marwan A, ‘Transformation of Legal Education in Indonesia Based on Social Justice’, 149.

¹⁰⁶ Rosadi O and Marwan A, ‘Transformation of Legal Education in Indonesia Based on Social Justice’, 149

¹⁰⁷ Adegbite K and Uzoma VI, ‘Employable skills that legal education should impart in a 21st century Attorney’ 1 *International Review of Law and Jurisprudence* (2019), 83.

¹⁰⁸ Christensen C, ‘Preparing Law Students to Be Successful Lawyers LSSSE at Fifteen: Celebrating Our Success and Planning Our Future’ 69 *Journal of Legal Education* (2019), 502.

¹⁰⁹ Christensen C, ‘Preparing Law Students to Be Successful Lawyers LSSSE at Fifteen’, 503.

¹¹⁰ Christensen C, ‘Preparing Law Students to Be Successful Lawyers LSSSE at Fifteen’, 504.

¹¹¹ Christensen C, ‘Preparing Law Students to Be Successful Lawyers LSSSE at Fifteen’, 506.

¹¹² Christensen, ‘Preparing Law Students to Be Successful Lawyers LSSSE at Fifteen’, 508.

¹¹³ Christensen (n 84).’, 511.

and opinions.¹¹⁴ This way once the students qualify to be lawyers they can effortlessly defend clients from different backgrounds, including the marginalized.¹¹⁵ Additionally, self-directedness is a critical skill for law graduates as it enables them to be tactical and forward thinking, apart from empowering them to assess their strengths and weaknesses for purposes of enhancing their competencies.¹¹⁶ This study interrogates whether in the administration of law schools and in the delivery of the law programme, adequate opportunities have been provided for the students to learn the key professional skills of teamwork, cultural competency and self-directness.

On challenges facing legal education in Kenya, Kameri-Mbote¹¹⁷ observes that most law lecturers spend their time doing other things as opposed to teaching law. There are also very few law professors and career law teachers in Kenya, and to exacerbate the situation, majority of them are engaged in practice and consultancy services to supplement their income.¹¹⁸ Moreover, although law lecturers are enjoined to actively undertake research in addition to teaching, the amount, quality and extent of research is largely dependent on the funding available, which could be in the form of grants, sabbaticals, decreased workloads or provisions of other research services.¹¹⁹ This research examines how the leadership of law schools can strategically address the foregoing issue and facilitative role discharged by the regulator of legal education in training in discouraging the above stated poor corporate governance practices.

Still on the question of challenges assailing legal education, Clark¹²⁰ posits that as the world develops and evolves, there is need to change legal education to make it relevant and connected to the practice of law.¹²¹ These changes include law schools embracing online education or a blended programme of both face to face and online teaching, which methods are perceived to be cost-

¹¹⁴ Christensen (n 84).', 511.

¹¹⁵ Christensen, 'Preparing Law Students to Be Successful Lawyers LSSSE at Fifteen', 511.

¹¹⁶ Christensen (n 84).', 516.

¹¹⁷ Kameri-Mbote P, 'Legal Education and Lawyers' in Ghai Yash P, Cottrell Jill, (eds), *The Legal Profession and the New Constitutional Order in Kenya*, Strathmore University Press, 2014, 134.

¹¹⁸ Kameri-Mbote, 'Legal Education and Lawyers', 136.

¹¹⁹ Ogloff J RP et al, 'More than Learning to Think Like a Lawyer: The Empirical Research on Legal Education Annual Nebraska Survey & Survey of Legal Education' 34 *Creighton Law Review* (2000), 150.

¹²⁰ Clark E, 'Looking Forward: Challenges Facing Legal Education in the 21st Century The Nature of Legal Education: Past, Present, and Future' 3 *Phoenix Law Review*, 2 (2010), 461.

¹²¹ Clark E, 'Looking Forward: Challenges Facing Legal Education in the 21st Century The Nature of Legal Education', 471.

effective.¹²² Indeed at the on-set of the COVID-19 pandemic, most LEPs adopted the online teaching method, and thereafter when the pandemic subsided, a blend of both face to face and online teaching was utilized. The CLE was initially averse to virtual learning, but post the COVID-19 pandemic, it has recognized online teaching as a valid method of delivering the law course, subject to certain standards, which have not been made public.¹²³ The CLE's initial opposition to online teaching is justifiable in view of the provisions of the LEA and the Legal Education (Accreditation & Quality Assurance) Regulations, 2016. These legislations envisage a situation where legal education programmes are delivered physically through interactivity. For instance Regulation 5¹²⁴ requires the CLE to conduct an on-site inspection at the place where a proposed Law programme will be offered to inspect the facilities and check compliance with the legal requirements. To the contrary it could also be argued that the CLE can undertake inspection visits for purposes of checking the robustness of the Information and Communication Technology (ICT) equipment for purposes of online teaching. However, this study submits that in view of the fact that online learning can be taken from any location, it then becomes imperative for CLE to assess available infrastructure so as to ascertain whether all the students in various parts of the country are well supported with the requisite ICT equipment and services, considering that Kenya as a country is still developing its ICT infrastructure.

Additionally, the Third schedule to the Legal Education (Accreditation & Quality Assurance) Regulations, 2016, outlines conditions for curricula and mode of delivery, infrastructure and resources, library and library resources, student support services, all which contemplate face to face teaching. Having said the foregoing however, it is apparent that the use of technology in teaching is gaining visibility across the world and therefore it is important that law students are prepared to work in the digital world through the use of technology. This calls for law schools to adopt and expand online teaching models for the sake of being globally competitive.

¹²² Clark E, 'Looking Forward: Challenges Facing Legal Education in the 21st Century The Nature of Legal Education', 466.

¹²³ 'Challenges and Opportunities Posed by COVID-19 to Legal Education in Kenya' <https://www.africanwomeninlaw.com/posts/Challenges-and-Opportunities-Posed-by-COVID-19-to-Legal-Education-in-Kenya> on 1 August 2022.

¹²⁴ *Legal Education (Accreditation & Quality Assurance) Regulations, (2016).*

It is also noteworthy that the regulatory process of legal education in Kenya has been found wanting in some respects, in a manner that calls for consultations and/or reforms. For instance, Kameri-Mbote argues that some of the accreditation requirements are rigid.¹²⁵ Such requirements include, the criterion for a lecturer/student ratio of 1:15 and core text/student ratio of one copy for every five students.¹²⁶ According to Kameri-Mbote, the demand for a LEP to have one lecturer for every fifteen students is problematic since it does not take into account that generally there are fewer law teachers in the country, besides the fact that private practice and job opportunities in constitutional commissions and the judiciary seem more attractive to some potential lecturers.¹²⁷ In addition, the condition for an institution to have one copy of each core text for every five students seems to favour the young institutions which are still growing thus have fewer students.¹²⁸

Kameri-Mbote further submits that the overlap of the accreditation mandate between the CLE and the CUE is a matter of concern since it is not clear what the CLE looks for in addition to CUE.¹²⁹ The requirement for Law Schools to identify a *niche area* in their curricular is also problematic because Law Schools have to teach the 16 core courses as stipulated in the LEA,¹³⁰ the common courses offered by the universities, besides courses in *niche areas*.¹³¹ This has sometimes led to a heavy time-table with students being overburdened.¹³² Moreover, the definition of legal education under section 22 of the LEA does not envisage post graduate courses like Masters and PhD programmes.¹³³ To Kameri-Mbote, this scenario is proper since the mandate of CLE is limited to regulating programmes leading to admission to the legal profession, and given that the Masters and PhD programmes do not lead to admission as an advocate, they should not be within the regulatory function of the CLE.¹³⁴ In spite of the foregoing observation however, at least two LEPs, namely, Strathmore University and Mount Kenya University have been licensed by the CLE to

¹²⁵ Kameri-Mbote, 'Legal Education and Lawyers', 128.

¹²⁶ Kameri-Mbote, 'Legal Education and Lawyers', 128.

¹²⁷ Kameri-Mbote, 'Legal Education and Lawyers', 128.

¹²⁸ Kameri-Mbote, 'Legal Education and Lawyers', 128

¹²⁹ Kameri-Mbote, 'Legal Education and Lawyers', 128. The issue of the overlapping mandate between CLE and CUE was however settled by the introduction of section 5A to the Universities Act (2012).

¹³⁰ Act No. 27 of 2012.

¹³¹ Kameri-Mbote, 'Legal Education and Lawyers', 130.

¹³² Kameri-Mbote, 'Legal Education and Lawyers', 130.

¹³³ Kameri-Mbote, 'Legal Education and Lawyers', 129.

¹³⁴ Kameri-Mbote, 'Legal Education and Lawyers', 129.

offer Master of Laws programmes.¹³⁵ The University of Nairobi being the pioneer institution to offer the programme has not been licensed, probably due to the above-stated sentiments by Kameri-Mbote.

In concert with Kameri-Mbote, Okoth¹³⁶ points out some of the issues confronting legal education in Kenya as liberalization of legal education which has led to an increase in the number of Law Schools, as well as admission of large numbers of students.¹³⁷ To Okoth, this state of affairs has compromised the quality of Law graduates, especially because the training facilities like libraries are not adequate, and monitoring of LEPs to ensure maintenance of standards has also not been sufficient.¹³⁸ Moreover, most of the law teachers are also involved in private legal practice and therefore fail to adequately prepare for teaching.¹³⁹ Okoth proceeds to make a rather bold allegation, that the bar examinations are usually made difficult so as to reduce the number of students who can pass and gain entry to the profession.¹⁴⁰ The pupillage programme is also not well structured, in terms of setting up a system for placing students in appropriate firms or organisations.¹⁴¹ It is further concerning that very few senior lawyers have the time and dedication to train and mentor law students.¹⁴²

Although most of the foregoing issues are live issues especially for public universities which have large numbers of students and with limited funding from the exchequer, this research will demonstrate how some of these issues have been handled by the CLE and the outcome, noting that addressing all the concerns in legal education is a journey that will be realized progressively.

On the flipside, it is appreciated that regulation of legal education and training has resulted in many gains for the respective Law Schools. To mention just a few, the accreditation of law programmes, the entry requirement of grade C+(plus) for students desiring to take the LL.B programme and the

¹³⁵ See the CLE Institutional licensing status as at 30th June 2022 at <https://cle.or.ke/wp-content/uploads/2022/07/Status-of-LEPs.-as-at-30th-June-2022-FINAL.pdf>

¹³⁶ Okoth OG, 'The Legal Education in Kenya: An Appraisal' https://www.academia.edu/11300374/The_Legal_Education_in_Kenya_An_Appraisal on 2 August 2022.

¹³⁷ Okoth OG, 'The Legal Education in Kenya', 20.

¹³⁸ Okoth OG, 'The Legal Education in Kenya', 20.

¹³⁹ Okoth OG, 'The Legal Education in Kenya', 22.

¹⁴⁰ Okoth OG, 'The Legal Education in Kenya', 22.

¹⁴¹ Okoth OG, 'The Legal Education in Kenya', 23.

¹⁴² Okoth OG, 'The Legal Education in Kenya', 23.

prescription for LEPs to offer 16 mandatory courses, has enhanced standardization in legal education.¹⁴³ The CLE has also been successful in establishing benchmarks for legal education programmes. For instance, before a new programme is established, the institution in question is expected to undertake a feasibility study through which the institution identifies the *niche area* of the programme and justifies the establishment of the programme.¹⁴⁴ The need for a LEP to constantly update its curriculum is also an advantage as it encourages LEPs to undertake research with the intent of developing or enhancing their programmes.¹⁴⁵ Principally, the accreditation process has provided law schools with an opportunity to negotiate with their governing bodies for better facilities, more academic staff and investment in Law Schools.¹⁴⁶ The process has further emphasized the need to establish moot courts in a bid to balance academic and advocacy training.¹⁴⁷ Therefore, despite the criticism surrounding the regulatory process, the achievements made are significant, and this work will highlight some of those achievements.

2.5. Conclusion

This chapter has highlighted some of the challenges facing universities and law schools in the management of academic programmes and more specifically the law programme. The chapter has also discussed some of the corporate values and features that should be embedded in the administration of law programmes to guarantee good corporate governance, and eventually the production of competent and ethical law graduates that can meet societal needs. This research examines how some of the stated challenges are being resolved through the regulatory process and the effect of such intervention on corporate governance of law schools. The next chapter gives an overview of the legal and regulatory framework for legal and education and training, and dissects some of the salient stipulated corporate governance attributes.

¹⁴³ Kameri-Mbote, 'Legal Education and Lawyers', 138.

¹⁴⁴ Kameri-Mbote, 'Legal Education and Lawyers', 133.

¹⁴⁵ Kameri-Mbote, 'Legal Education and Lawyers', 133.

¹⁴⁶ Kameri-Mbote, 'Legal Education and Lawyers', 134.

¹⁴⁷ Kameri-Mbote, 'Legal Education and Lawyers', 135.

Chapter 3: Analysis of the Legal and Institutional Framework Governing Legal Education and Training in Kenya.

3.1. Introduction

This chapter examines the laws and regulations governing legal education¹⁴⁸ in Kenya. While analyzing these legislation, the prescribed corporate governance aspects are highlighted. The chapter begins by considering the laws generally regulating university education, for the reason that legal education in Kenya is largely offered by universities. These laws include; the Constitution of Kenya (2010), the Universities Act (Act No. 42 of 2012), the Universities (Amendment) Regulations 2019, and Universities Standards and Guidelines (2014). The chapter proceeds to narrow down to laws specifically governing legal education, namely, the Legal Education Act (Act No. 27 of 2012), the Legal Education (Accreditation & Quality Assurance) Regulations (2016), the Kenya School of Law Act (Act No. 26 of 2012), The Advocates Act (Chapter 16 of the Laws of Kenya), and the Law Society of Kenya (Act No. 21 of 2014). This analysis is carried out with the purpose of studying the nature of the regulatory powers of the regulator of university education and largely, the regulator of legal education and training. The study further identifies salient corporate governance features as stipulated by the above mentioned legislation.

3.2. The Constitution of Kenya

The Constitution of Kenya, promulgated in the year 2010, guarantees the right to education for everyone.¹⁴⁹ Notably however, it does not expressly mention higher education as a guaranteed right. Nevertheless, factually legal education is part of education, hence the right to pursue it is protected by the Supreme law of the land. Further, Article 10 of the Constitution outlines the national values and principles of governance to guide any person or organ, when interpreting or applying the Constitution or any law, and when making or implementing public policy.¹⁵⁰ By implication universities and their staff have to observe the national values and principles of

¹⁴⁸ The *Legal Education (Accreditation & Quality Assurance) Regulations*, (2016) define Legal Education as, “any qualification in law obtained after a training course or programme for the award of a certificate, diploma, post-graduate diploma, degree, or post-graduate degree or any other course or programme that the Council may declare to be legal education in accordance with the regulations”.

¹⁴⁹ Article 43(1)(f), *the Constitution of Kenya* (2010).

¹⁵⁰ Article 10(1), *the Constitution of Kenya* (2010).

governance in the management of university education. The national values and principles of governance as outlined in the Constitution are; patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability, and sustainable development.

3.3. Universities Act¹⁵¹

The Universities Act was enacted in the year 2012 to particularly provide for; the development of university education, and the establishment, accreditation and governance of universities. Pursuant to section 4 of the Act, the Commission for University Education (CUE) is established to undertake various functions including: promoting and setting standards for quality university education; developing the admission requirements for universities; recognizing and equating foreign qualifications; ensuring universities comply with the Act and its regulations through conducting inspections; approving universities, and regulating university education.¹⁵² In essence the CUE¹⁵³ is the regulator of university education in Kenya. Moreover, in 2016, an amendment was made to the Act, giving the CUE the exclusive mandate of licensing or accrediting university academic programmes.¹⁵⁴ The amendment makes it an offence for any person to license, inspect, charge any fee or undertake the functions that are the preserve of the CUE without consulting it.¹⁵⁵ The penalty for such an offence on conviction is a fine of two (2) million Kenya shillings or imprisonment for two (2) years or both.¹⁵⁶

The enactment of section 5A was however contested by a number of professional regulatory bodies in the case of *Kenya Medical Laboratory Technicians and Technologists Board & 4 others v Attorney General; Council of Legal Education (Petitioner); Kenya Law Reform Commission & 4 others (Interested Parties)*.¹⁵⁷ The Petitioners' argument was that section 5A is unconstitutional

¹⁵¹ Act No. 42 of 2012.

¹⁵² Section 5, *the Universities Act* (Act No. 42 of 2012).

¹⁵³ CUE was previously referred to as the Commission for Higher Education under the repealed Universities Act (Chapter 210B of the Laws of Kenya).

¹⁵⁴ Section 5A (2), *the Universities Act* (Act No. 42 of 2012).

¹⁵⁵ Section 5A (5), *the Universities Act* (Act No. 42 of 2012).

¹⁵⁶ Section 5A (5), *the Universities Act* (Act No. 42 of 2012).

¹⁵⁷ [2020] eKLR.

and unlawful as it criminalizes acts done under statutes that are in force. Further, that the section interferes with the role of professional regulatory bodies to enforce quality standards. In dismissing the petition, J. A. Makau, J. held that the petitioners had failed to demonstrate how section 5A was unconstitutional. Moreover, the Learned Judge determined that, by granting the CUE the sole mandate of regulating and accrediting universities, the section does away with the issue of the overlapping mandate between the CUE and the regulatory bodies.

Looking at the mandate of the CUE as discussed above, and that of regulatory bodies like the regulator of legal education, the CLE, as outlined below, there are indeed considerable similarities. Notably however, the functions of the CUE cover university education generally, with the reality that the institution may not be in a position to give detailed attention to the individual professional programmes as would be expected by the professionals themselves. This is evidenced by for instance the broad nature of the membership of the CUE itself. The membership comprises; the Principal Secretaries for the Ministries responsible for university education and the National Treasury, an academic scholar with experience in management of university education, a representative of Kenya employers, a representative of the Chairpersons of the Councils of Public universities and that of the Chairpersons of the Councils of Private universities, and the CUE secretary.¹⁵⁸

It is noted however, that the Act allows the CUE to choose to consult the respective statutory professional bodies mandated to regulate or accredit academic programmes in undertaking its functions.¹⁵⁹ Even so, the introduction of section 5A is likely to deny professional regulators the much required autonomy in enforcing standards in their respective professions. Further, best practices in other countries indicate the presence of autonomous statutory bodies regulating legal education. The Republic of South Africa for instance has a body named, the Legal Education and Development (LEAD) that is responsible for practical legal training courses, post-graduate legal training programmes offered in conjunction with universities, drafting of admission examination papers, and liaising with educational institutions.¹⁶⁰ Similarly, in the United Kingdom, there is the

¹⁵⁸ Section 6, *the Universities Act* (Act No. 42 of 2012).

¹⁵⁹ Section 5A (3) *the Universities Act* (Act No. 42 of 2012).

¹⁶⁰ <https://www.lssalead.org.za/about-us/overview/>

Solicitors Regulation Authority (SRA) with the mandate of setting standards for qualifying as a solicitor, and monitoring the performance of organizations that provide legal training.¹⁶¹

The Universities Act of Kenya further provides for the procedure for establishing and accrediting universities.¹⁶² A university in Kenya is established by applying to the CUE for accreditation and the grant of a charter.¹⁶³ Upon considering the application for accreditation, inspecting and assessing the resources of the applicant, if the CUE is satisfied that the applicant meets the stipulated requirements, it may recommend to the Cabinet secretary responsible for University education to issue a Letter of Interim Authority to the applicant.¹⁶⁴ The Letter of Interim Authority allows a university to operate for a period of four (4) years, unless extended by the Cabinet Secretary.¹⁶⁵ At least six(6) months before expiration of the Letter of Interim Authority, the CUE is enjoined to prepare an accreditation report to be submitted to the Cabinet Secretary indicating whether the university has met all requirements.¹⁶⁶ If the Cabinet Secretary is satisfied that the university meets all requirements, he may recommend to the President for the grant of the Charter.¹⁶⁷ The grant of a charter to a university allows it to operate fully, including mobilizing academic resources, developing new academic programmes, establishing campuses and colleges, and awarding degrees and postgraduate degrees, among other awards. Indeed, it is by virtue of the grant of a charter that legal education and training can be launched by a university either as an academic programme or as a campus or school of law.

In light of the fact that the government is the principal funder of university education, the Universities Fund (the Fund) is established pursuant to section 53 of the Act, to provide funds for financing of universities. The sources of funds are outlined to be monies allocated by parliament, donations, endowments, grants, gifts, and income generated by investments made by trustees of the fund.¹⁶⁸ However in view of the reported budgetary cuts for higher education, with various

¹⁶¹ <https://www.sra.org.uk/sra/how-we-work/what-we-do/>

¹⁶² Part III, *the Universities Act* (Act No. 42 of 2012).

¹⁶³ Section 13(2), *the Universities Act* (Act No. 42 of 2012).

¹⁶⁴ Section 14(1), *the Universities Act* (Act No. 42 of 2012).

¹⁶⁵ Section 16(1)(a), *the Universities Act* (Act No. 42 of 2012).

¹⁶⁶ Section 18(1), (2), *the Universities Act* (Act No. 42 of 2012).

¹⁶⁷ Section 19(1)(a), *the Universities Act* (Act No. 42 of 2012).

¹⁶⁸ Sect 53(3), *the Universities Act* (Act No. 42 of 2012).

universities running broke,¹⁶⁹ it remains to be seen what measures the Fund is putting in place to aid the management of universities, bearing in mind that the level of funding has a direct impact on the growth and administration of universities.

The Act also establishes the Kenya Universities and Colleges Central Placement Service¹⁷⁰ (KUCCPS) to oversee placement of government sponsored students to Universities and Colleges, and offer career guidance to learners, among other responsibilities.¹⁷¹ However, even though the Act envisions the placement of government sponsored students to both Public Universities and Private Universities, there has been a contestation in this respect with some Public Universities opposing the placement of government sponsored students to Private Universities, arguing that the funds allocated to Private Universities should be used to fill the financing gap in Public Universities.¹⁷²

3.4. The Universities (Amendment) Regulations, 2019

The regulations outline the mode of operation by the CUE. In accordance with Regulation 5(1), an applicant desiring to establish a university is required to attach to his/her application a proposal detailing the following: the vision, mission, diversity statement, philosophy and justification of the university; institutional ability and expertise of the sponsor for offering university education; the resources, including land, physical facilities, finances, staff, library services, teaching and research infrastructure, plant and equipment; an evaluation of the appropriateness and adequacy of the resources to support the proposed academic programmes to be conducted at the university, and the manner in which these resources shall be maintained on a long term basis; the proposed name, location and academic character of the university; functions, aims, objectives, strategies and domain of the university, which should be consistent with the needs of university education in Kenya; the form of governance through which the academic and administrative affairs of the university are to be conducted; an outline of the academic programmes intended to be offered at

¹⁶⁹ 'Paul Wafula: Kenya: Broke Public Universities Lose Sh9 Billion in Budget Cuts' *Daily Nation*, 21 May 2021 <https://allafrica.com/stories/202105210646.html> on 4 January 2022.

¹⁷⁰ Section 55, *the Universities Act* (Act No. 42 of 2012).

¹⁷¹ Section 56, *the Universities Act* (Act No. 42 of 2012).

¹⁷² Augustine Oduor, 'Government to continue placing students in private universities, says CS George Magoha' *The Standard Newspaper*, 14 October 2021 <https://www.standardmedia.co.ke/education/article/2001426200/government-to-continue-placing-students-in-private-universities> on 4 January 2022.

the university; a timetable indicating the steps to be taken in the next four years towards the realization of the aims and objects for which the university is to be established; proof of land ownership on which the university shall be located, and evidence that the subject land is not less than 10 acres, academic programmes, co-curricular activities, facilities for staff and student welfare; adequacy of academic resources for each academic programme; a Financial Management Strategy and Policy; a student management system; safety and security systems.¹⁷³

The Regulations also make provision for eligibility to establish a campus. A highlight of these requirements is key for this study for the reason that they guide in ensuring good corporate governance practices in an institution. Noteworthy, some law schools are set up as campuses. In this regard an application for creating a campus should be accompanied by documentary evidence of Senate and Council approval; a campus establishment policy statement; a campus profile with documentary evidence in a prescribed format highlighting the location and address; justification for establishment of the campus; the physical resources, library facility, and equipment available for the exclusive use of the campus; full time academic and administrative staff dedicated to the campus; the proposed quality assurance systems; student enrolment; and evidence of ownership of land on which the campus shall be situated; projection of academic programmes and student enrolment as prescribed by the Commission; the financial resources including the financial viability and a five (5) year financial projection plan.¹⁷⁴

From the foregoing, it is evident that the pre-conditions to establishing a university and/or a campus are quite comprehensive, and in a way, almost guaranteeing that all accredited universities and campuses that pass the accreditation test have the requisite resources to ensure the effective administration of academic programmes. To the contrary, in some cases, institutions qualify to be accredited but are unable to sustain the momentum. For instance, it appears that the requirement for financial strategy and policy, and financial projection has only been implemented on paper, but in practice it has failed for most universities. Considering that the management of a university or

¹⁷³ Pursuant to Regulation 5(2), the proposal should be accompanied by appendices such as a Trust deed for the University in case of a private University, a description of the University Library, a Master plan, Strategic plan and a five-year financial plan, computation of financial viability.

¹⁷⁴ Regulation 44, *the Universities (Amendment) Regulations*, (2019).

campus heavily depends on finances, it is doubtless that the challenge of finances has largely affected the delivery of quality university education.

The requirement for universities to institutionalize quality assurance mechanisms in academic programmes is also critical. This is because its only by promoting and attaining quality that universities can have quality outcomes in the form of professional and skilled graduates. In this respect the regulations enjoin universities to entrench quality in academic programmes through forming a curriculum development committee to guide curriculum development;¹⁷⁵ ensuring approval of the academic programme by relevant academic organs like the departmental board, the faculty or school board and the senate;¹⁷⁶ reviewing the curriculum;¹⁷⁷ ensuring the security and integrity of the examination processes;¹⁷⁸ and carrying out a self-assessment of the academic programmes for every cohort.¹⁷⁹

3.5. Universities Standards and Guidelines¹⁸⁰

The Universities Standards and Guidelines, established in 2014, set out key benchmarks that should be met by an institution mounting or managing an academic programme. Primarily, a university is enjoined to have a vision, mission and philosophy that clearly indicates its strategic direction.¹⁸¹ In terms of human resources, a university should have adequate and competent human resources who meet the prescribed qualifications.¹⁸² Further, a university is required to have at least a 10 year master plan¹⁸³ that outlines its physical, academic, financial and human development and at least a 5 year strategic plan indicating its development plans with respect to academic programmes, physical facilities, student enrolment, staff and staff development, ICT research and community service.¹⁸⁴

¹⁷⁵ Regulation 52(2), *the Universities (Amendment) Regulations*, (2019).

¹⁷⁶ Regulation 52(4), *the Universities (Amendment) Regulations*, (2019).

¹⁷⁷ Regulation 52(5), *the Universities (Amendment) Regulations*, (2019).

¹⁷⁸ Regulation 52(6), *the Universities (Amendment) Regulations*, (2019).

¹⁷⁹ Regulation 52(7), *the Universities (Amendment) Regulations*, (2019).

¹⁸⁰ October 2014.

¹⁸¹ INST/STD/01, *Universities Standards and Guidelines*, (2014).

¹⁸² INST/STD/01, *Universities Standards and Guidelines*, (2014).

¹⁸³ A master plan is not defined by the university legislations, but according to online platforms like <https://www.collinsdictionary.com/dictionary/english/master-plan>, it is a general plan for achieving an objective(s).

¹⁸⁴ INST/STD/07, *Universities Standards and Guidelines*, (2014).

Universities are also required to carry out their operations in accord with the national values and principles of governance as set out in article 10 of the Constitution.¹⁸⁵ Moreover, it is mandatory that a university sets up appropriate and adequate facilities to cater for the programmes on offer and the students enrolled.¹⁸⁶ Where a campus¹⁸⁷ is established, the campus should have the same standard of facilities and services as those in the main university.¹⁸⁸ With respect to academic staff, it is a requirement that an academic programme be headed by a senior lecturer who is a doctorate holder in the field of study.¹⁸⁹ Further, the ratio of full-time to part-time academic staff is pegged at 2:1.¹⁹⁰ Similarly, the recommended full-time academic staff to student ratio for arts and humanities is 1:15.¹⁹¹

The foregoing sections have attempted to examine the legislation that governs university education, while highlighting some of the salient corporate governance requirements, as well as challenges encountered in regulatory enforcement. The next sections scale down to legal education in particular, and analyse the leading legislation governing legal education.

3.6. Legal Education Act¹⁹²

The Legal Education Act (LEA) came into force in the year 2012 with the aim of making provision for the regulation and licensing of LEPs. This Act repealed the Council of Legal Education Act, 1995.¹⁹³ The Act also establishes the CLE¹⁹⁴ as the regulator of legal education. The functions of the CLE are outlined as licensing and supervising LEPs, advising the government on matters relating to legal education and training, recognizing and approving foreign qualifications in law and administering the bar examination.¹⁹⁵ The composition of the CLE is set out in section 4(5) to be:

¹⁸⁵ INST/STD/016, *Universities Standards and Guidelines*, (2014).

¹⁸⁶ PHYL/STD/01, *Universities Standards and Guidelines*, (2014).

¹⁸⁷ *The Universities Act*, (Act No. 42 of 2012) defines a campus as an extension of a university set up by the university pursuant to its statutes and established in accordance with section 20 of the same Act. Section 20 makes provision for the powers of a University with a Charter.

¹⁸⁸ PHYL/STD/03, *Universities Standards and Guidelines*, (2014).

¹⁸⁹ PROG/STD/17, *Universities Standards and Guidelines*, (2014).

¹⁹⁰ PROG/STD/17, *Universities Standards and Guidelines*, (2014).

¹⁹¹ PROG/STD/17, *Universities Standards and Guidelines*, (2014).

¹⁹² Act No. 27 of 2012.

¹⁹³ Chapter 16A of the Laws of Kenya.

¹⁹⁴ Section 4(1), *Legal Education Act*, (Act No. 27 of 2012).

¹⁹⁵ Section 8(1), *Legal Education Act*, (Act No. 27 of 2012).

- a. The chairperson, who shall be a person with at least fifteen years' experience in matters relating to legal education and training, appointed by the President;
- b. The Principal Secretary of the Ministry for the time being responsible for legal education;
- c. The Principal Secretary of the Ministry for the time being responsible for finance;
- d. The Attorney-General;
- e. The Chief Justice;
- f. Two advocates, nominated by the Council of the Law Society of Kenya;
- g. One person who teaches law in a public university, nominated by public Universities; and
- h. The Secretary to the Council;
- i. One person who teaches law in a private university nominated by private universities.

The Act makes it mandatory for an institution desiring to offer any qualification in law to apply to CLE for a license.¹⁹⁶ Where however after issuance of the license CLE finds that a LEP is in breach of the conditions of the licence, or is not carrying out its functions in a proper manner, it may cancel,¹⁹⁷ or suspend the licence for such period as it deems fit or revoke the licence all together.¹⁹⁸ In any case the CLE can only proceed to cancel, suspend or revoke a LEP licence upon giving it an opportunity to be heard and issuing it a notice to take corrective action within a specified period, and the institution failing to comply with such notice.¹⁹⁹ The foregoing provisions of section 21 are the enforcement mechanisms for CLE should a law school fail to comply with the statutory requirements. However, in the wake of the introduction of section 5A to the Universities Act²⁰⁰ it appears like the CLE has become a toothless dog so to speak. This is because section 5A gives the CUE the exclusive mandate of licensing university education and all attendant functions. Even though the law allows consultation between the two bodies, as already indicated above, the law implies that CLE can no longer independently undertake its regulatory function.

The Second schedule of the Act makes provision for the core courses that have to be offered by any LEP depending on the qualification being offered.²⁰¹ The rationale behind prescription of core

¹⁹⁶ Section 18(1), *Legal Education Act*, (Act No. 27 of 2012).

¹⁹⁷ Section 21(2), *Legal Education Act*, (Act No. 27 of 2012).

¹⁹⁸ Section 21(3), *Legal Education Act*, (Act No. 27 of 2012).

¹⁹⁹ Section 21(1), (2), *Legal Education Act*, (Act No. 27 of 2012).

²⁰⁰ Act No. 42 of 2012.

²⁰¹ The core courses are as follows; Certificate and Diploma level: Elements of Contract, Principles of the Law of Torts, Elements of Commercial Law, Elements of Property Law, General Principles of Constitutional Law and Legal

courses seems to be to ensure that learners have at least some specific foundational knowledge and skills that are required in their career. Pursuant to section 29, the Legal Education Appeals Tribunal “the tribunal” is established as an *ad hoc* tribunal with the mandate to hear appeals from the decisions of the CLE or references by the CLE.²⁰² Although the tribunal exists, it appears that a majority of people prefer filing their grievances against decisions of the CLE directly to the High Court. This is evidenced by the multiplicity of High Court cases against CLE as reported on the Kenya Law Reports website. The foregoing status could be occasioned by the fact that the tribunal is not well known to the public or maybe because majority of the citizenry believe the Courts adjudicate matters more effectively. Another basis may be because the High Court has original jurisdiction to determine all nature of suits. Regardless, the tribunal though *ad hoc* needs to enhance its visibility and its processes.

3.7. Legal Education (Accreditation & Quality Assurance) Regulations, 2016

The regulations prescribe the manner in which the CLE carries out its mandate including; the licensing process,²⁰³ recognition and approval of foreign qualifications in law,²⁰⁴ quality standards²⁰⁵ to be enforced and circumstances under which a LEP’s licence can be terminated, suspended or revoked.²⁰⁶ Pursuant to regulation 3(2), a person can only apply to the CLE for accreditation to offer legal education if he/she has been registered as an educational institution by the CUE. It therefore follows that the regulatory checks by the CUE precede those of the CLE, in a way making CLE’s work easier.

Systems, Family Law and Succession, Elements of the Law of Business Associations, Civil Procedure, Criminal Procedure, Fundamentals of Book-keeping and Accounting, Fundamentals of Office Practice and Management.

Degree level: Legal Research, Law of Torts, Law of Contract, Legal Systems and Methods, Criminal Law, Family Law and Succession, Law of Evidence, Commercial Law (including Sale of Goods, Hire Purchase and Agency), Law of Business Associations (to include Insolvency), Administrative Law, Constitutional Law, Jurisprudence, Equity and the Law of Trusts, Property Law, Public International Law, and Labour Law.

Post graduate (professional) diploma level: Civil Litigation, Criminal Litigation, Probate and Administration, Legal Writing and Drafting, Trial Advocacy (including clinical programme), Professional Ethics, Legal Practice Management, Conveyancing, Commercial Transactions, and Pupilage (six months attachment)

²⁰² Section 31, *Legal Education Act*, (Act No. 27 of 2012).

²⁰³ Regulations 4,5,6, *Legal Education (Accreditation & Quality Assurance) Regulations*, (2016).

²⁰⁴ Regulation 7, *Legal Education (Accreditation & Quality Assurance) Regulations*, (2016).

²⁰⁵ Third schedule, *Legal Education (Accreditation & Quality Assurance) Regulations*, (2016).

²⁰⁶ Regulation 11, 12, 13, 14, 15, *Legal Education (Accreditation & Quality Assurance) Regulations*, (2016).

An application for accreditation is required to be accompanied by a feasibility study of the legal education programme, a strategic plan, supporting policy documents, a detailed curriculum of the programme and any other relevant document.²⁰⁷ These documents are critical in mounting a new programme, for the reason that the feasibility study- for instance - enables a Law School assess the viability of the programme it intends to start and whether it has enough resources to support the programme. The strategic plan on the other hand lays out the objectives of the Law School for a specific period and how they will achieve them. The Curriculum is vital as it guides instruction and learning in an endeavor to deliver quality education.

Where the CLE has reviewed the application for accreditation, and found it compliant with the regulations, it is expected to conduct an inspection at the place where the legal education shall be offered to confirm whether an applicant has complied with the stipulated requirements, including those set out in the third schedule of the regulations.²⁰⁸ The quality standards that a LEP is required to comply with are as follows; a vision and mission statement that is aligned to the university-wide vision and mission, and clearly stated objectives,²⁰⁹ a governance structure that is linked to that of the parent university,²¹⁰ and a Dean of the rank of an Associate Professor who is a fulltime staff member.²¹¹ A LEP is also expected to institutionalize quality control mechanisms as a matter of policy.²¹²

Further, part II of the Third Schedule prescribes the admission requirements for the various law qualifications. Indeed, the enforcement of minimum entry requirements in the legal profession is vital as underscored by G. V. Odunga J. in the case of *Republic v Catholic University of Eastern Africa & another Ex-parte Edmund Kiiru Wambui & 41 others*²¹³ as follows;

“43. In my view minimum qualification requirements serve very useful purposes. It is meant to ensure that standards are maintained within the profession. In the legal profession in particular it is geared towards ensuring that those whom the

²⁰⁷ Regulation 4(3), *Legal Education (Quality Assurance & Accreditation) Regulations*, (2016).

²⁰⁸ Regulation 5(1), *Legal Education (Quality Assurance & Accreditation) Regulations*, (2016).

²⁰⁹ Third schedule, Rule 1, *Legal Education (Quality Assurance & Accreditation) Regulations*, (2016).

²¹⁰ Third schedule, Rule 2, *Legal Education (Quality Assurance & Accreditation) Regulations*, (2016).

²¹¹ Third schedule, Rule 2, *Legal Education (Quality Assurance & Accreditation) Regulations*, (2016).

²¹² Third schedule, Rule 2, *Legal Education (Quality Assurance & Accreditation) Regulations*, (2016).

²¹³ [2017] eKLR.

institutions offering courses in legal education unleash on the public are those who have the necessary professional and ethical qualifications necessary in carrying out their mandate as advocates. The role of an advocate in society is that of trust as between the advocate and the client as opposed to that of a businessman. He or she is expected to possess certain standards as expected from him or her by the society. The client entrusts him or her with execution of the client's lawful instructions in accordance with certain standards and also expects him or her to be a safe repository of the client's confidential information as well as the client's funds. The need for proper training both theoretically and practically cannot be therefore be overemphasized".

However, despite the central role that minimum admission requirements play in assuring quality in legal education, compliance with the stipulated requirements has been problematic resulting in multiple cases.²¹⁴ These cases shall be analyzed in chapter four (4) which examines how regulatory enforcement has affected corporate governance practices of law schools.

The quality standards also require a LEP to set the class size in consultation with the CLE bearing in mind the available resources, that is, the infrastructure, academic staff and other academic resources.²¹⁵ Moreover, a LEP is required to have a curriculum development policy that enunciates its strategy on curriculum development²¹⁶ and outlines the systems and structures for; stakeholders' engagement, the curriculum review cycle, and strategies for sustaining and growing the legal education programme.²¹⁷ A LEP is enjoined to ensure that it appoints qualified academic staff to guarantee quality outcomes for the legal education programme.²¹⁸ The ratio of full-time academic staff to students is pegged at 1:15,²¹⁹ and the workload of full-time staff is expected to be allocated as follows; teaching 60%, research 30%, and professional services 10%.²²⁰ Further it

²¹⁴ Some of the cases arising from enforcement of admission requirements include: *Republic v Catholic University of Eastern Africa & another Ex-parte Edmund Kiiru Wambui & 41 others* [2017] eKLR; *Ntele James Kipambi v Council of Legal Education & 2 others* [2017] eKLR; *Kevin K. Mwiti & Others v Kenya School of Law & 2 others* [2015] eKLR.

²¹⁵ Third schedule, Rule 12, *Legal Education (Quality Assurance & Accreditation) Regulations*, (2016).

²¹⁶ Third schedule, Rule 13(1), *Legal Education (Quality Assurance & Accreditation) Regulations*, (2016).

²¹⁷ Third schedule, Rule 13(3), *Legal Education (Quality Assurance & Accreditation) Regulations*, (2016).

²¹⁸ Third schedule, Rule 21, *Legal Education (Quality Assurance & Accreditation) Regulations*, (2016).

²¹⁹ Third schedule, Rule 24, *Legal Education (Quality Assurance & Accreditation) Regulations*, (2016).

²²⁰ Third schedule, Rule 24, *Legal Education (Quality Assurance & Accreditation) Regulations*, (2016).

is mandatory for a LEP to ensure that their academic staff undertake pedagogic training and upgrade their teaching and academic skills, in addition to undertaking research and publication.²²¹

It is worth noting that the foregoing quality standards for legal education were largely drawn from the Universities Standards and Guidelines, 2014. The same were developed into, ‘*Inspection criteria and guidelines for legal education programmes*’, a tool that the CLE uses to assess and evaluate legal education programmes during inspections. The tool is available on the CLE’s website.²²² The Inspection criteria and guidelines are effective in terms of ensuring that every aspect of the legal education programme is evaluated and the institution informed on non-compliance areas for the necessary corrective action to be taken. However conversely, the Inspection criteria and guidelines would be more effective if they were reviewed and improved on in some aspects. For instance, the criteria seems designed for a degree programme, and does not envisage other law programmes like post-graduate studies. Case in point, the planning process and governance structure once assessed at the degree level, does not need to be assessed at the Masters or PhD level again because ordinarily the same institution would be offering the qualifications. Further the criteria does not envision new law programmes. Such programmes will normally not have students at the accreditation stage in order to provide student enrolment data, nor will they have conducted examinations for them to give information on examination administration. It would also be worthwhile to know how the CLE arrived at a percentage of 67 as the pass mark for an institution to be accredited under the LEA. The same is not explained in the document.

The Regulations further empower the CLE to suspend or revoke the license of an accredited LEP where the institution is deemed to be carrying out its functions in an improper manner or not in compliance with the conditions of a licence.²²³ Where a LEP’s license is revoked, it is required to submit a closure plan²²⁴ to the CLE within two(2) months of such revocation. However, the few instances when the CLE has attempted to effect its powers of suspension and revocation, the same has been challenged in court by the aggrieved parties. This was the scenario in, *Moi University v*

²²¹ Third schedule, Rule 28, *Legal Education (Quality Assurance & Accreditation) Regulations*, (2016).

²²² <https://cle.or.ke/downloads/> on 12 January 2022.

²²³ Regulation 12, *Legal Education (Quality Assurance & Accreditation) Regulations*, (2016).

²²⁴ According to Regulation 14, a closure plan details the management plan and the process of transfer of students, the management plan for staff, and the end of the academic year in which revocation is made which is designated as the actual date of closure, among other matters.

Council of Legal Education & another,²²⁵ and *Republic v Council of Legal Education & another Ex-Parte Mount Kenya University*.²²⁶ In a nutshell the court in both cases observed that the CLE does not have powers to accredit an institution of higher learning nor to withdraw such accreditation, in effect weakening the influence of the CLE. A detailed study of these cases and their impact will be done in chapter four (4).

3.8. The Kenya School of Law Act²²⁷

The Kenya School of Law Act (KSL Act) came into effect in 2013, with the central purpose of establishing the Kenya School of Law (KSL), its functions and powers. Pursuant to section 4(1) of the Act, the KSL is established as a LEP responsible for professional legal training, commonly known as the Advocates Training Programme (ATP). In particular it is mandated to train persons to be advocates under the Advocates Act (Chapter 16 of the Laws of Kenya).²²⁸ A person cannot be admitted to the KSL unless he has met the admission requirements set out in the second schedule of the Act.²²⁹ The admission requirements aspect has however been particularly thorny because the Legal Education Act also stipulates admission requirements for the ATP, which requirements differ slightly from those prescribed by the KSL Act. The second schedule of the KSL Act outlines that for one to be admitted to the ATP programme, he/she has to qualify as follows:

- a. Pass the relevant examination of a university recognized in Kenya or recognized by the CLE, and hold or be eligible for the award of a Bachelor of Laws (LL.B) degree, or
- b. Having passed the relevant examination of a university or institution recognized by the CLE, hold or be eligible for the award of a Bachelor of Laws (LL.B) degree, and should have:
 - i. Met the minimum entry requirements for a university in Kenya;
 - ii. Obtained grade B (plain) in English or Kiswahili language, and a mean grade of C+(plus) in the Kenya Certificate of Secondary Education (KSCE);
 - iii. Sat and passed the pre-bar examination set by the KSL.

²²⁵ [2016] eKLR.

²²⁶ [2016] eKLR.

²²⁷ Act No. 26 of 2012.

²²⁸ Section 4(2)(a), *Kenya School of Law Act*, (Act. No. 26 of 2012).

²²⁹ Section 16, *Kenya School of Law Act*, (Act. No. 26 of 2012).

Firstly, it would seem that the drafting of this particular section was not done properly. For instance, paragraph (a) appears to suggest that the Bachelor of Laws degree does not have to be awarded by an institution recognized by the CLE, it can be from any university that is recognized in Kenya, in the result negating the mandate of CLE of licensing and regulating all LEPs. It is also not clear why paragraph (b) requires additional qualifications numbering one (i) to three(iii), whereas the same is omitted in paragraph (a). The second schedule of the KSL Act needs to be reviewed and maybe just retain paragraph (b) which is more comprehensive. This revision is critical in ensuring clarity and standardization of the qualifications for persons desiring to be join the legal profession. This might have an impact on the quality of graduates who finally graduate from these law schools.

Further, there is also need to harmonize the aspect of the Legal Education Regulations, 2016 which recognize progression from the certificate level to the degree level as a qualification for entry to the ATP, and the KSL Act does not recognize this position.

Thirdly, the requirement for sitting and passing the pre-bar examination was challenged in court in *Adrian Kamotho Njenga v Kenya School of Law*,²³⁰ successfully, with Mwita J. holding that those students who attained KCSE certification and are holders of the LL.B degree from Kenyan universities should be excluded from sitting and passing the pre-bar examination. Despite this decision, it is important to note that pre-bar examinations were introduced to improve on the quality of graduates enrolling at the Advocates Training Programme. The argument made by the KSL on this matter was that Pre-bar exams was a good corporate practice intended to ensure that only eligible candidates are admitted into the programme and this eventually improves the quality of the graduates who are released to the market as legal professionals.

3.9. The Advocates Act²³¹

This Act provides for the regulation of the legal profession generally. However, for purposes of this study, it stipulates the qualifications for admission as an advocate. For one to be admitted as an advocate, he/she has to be a Kenyan, Rwandan, Burundian, Ugandan or Tanzanian.²³² This

²³⁰ [2017] eKLR.

²³¹ Chapter 16 of the Laws of Kenya.

²³² Section 12(a), *Advocates Act*, (Chapter 16 of the Laws of Kenya).

provision seems to have anticipated that all persons from the East African Community (EAC) would be eligible to be admitted as advocates in Kenya. However, the Republic of South Sudan later joined the EAC but the Act has not been amended to include it, hence occasioning a bit of confusion and eventually law suits, for example, *Steve Isaac Kawai & 2 others v Council of Legal Education & 2 others*.²³³ This is a case where the petitioners who were South Sudanese residents studied in Kenya from primary level to university level, and eventually were admitted to the ATP programme. However, when the time came for them to sit the bar examination, the CLE precluded them from sitting on grounds that they were South Sudanese citizens, and section 12(a) of the Advocates Act does not list South Sudanese as one of the nationalities eligible to be admitted to the Roll of Advocates in Kenya. In his judgment, Korir J. determined that section 12(a) of the Advocates Act was contrary to Article 27 of the Constitution in so far as the South Sudanese persons were excluded from the provisions of section 12(a), positing that the legislature should harmonise the provision with the Constitution and the Treaty of Establishment of the East African Community.

In addition to the nationality requirements, the Advocates Act also sets out the professional and academic qualifications to be met by a person desiring to be admitted as an Advocate as follows;²³⁴

- a. Pass the relevant examinations of a university recognized in Kenya and hold or become eligible for the conferment of a Bachelor of Laws degree; or
- b. Pass the relevant examinations of a university approved by the CLE, and hold or be eligible for the conferment of a Bachelor of Laws degree, and:
 - i. Attend the pupillage and ATP programmes for a period of eighteen (18) months;
 - ii. Pass the Bar examination; or
- c. Possess any qualifications recognized by the CLE.
- d. Be an advocate of the High Court of Uganda, the High Court of Rwanda, the High Court of Burundi or the High Court of Tanzania.

²³³ [2021] eKLR.

²³⁴ Section 13(1), *the Advocates Act*, (Cap 16) of the Laws of Kenya.

- e. Be an advocate of any country in the commonwealth, and have practiced in such country for a period of not less than five (5) years, and a member in good standing of the relevant professional body in that country.

3.10. The Law Society of Kenya Act²³⁵

The Law Society of Kenya Act was enacted in the year 2014 principally to establish the Law Society of Kenya (LSK) as the professional body that fosters standards, competence and good conduct in the profession.²³⁶ Pursuant to section 41 of the Act, the Law Society of Kenya (General) Regulations, 2018 are established to govern the affairs of the LSK. Considering that the focus of this study is legal education and not the legal profession generally, analysis of this Act shall be very thin. It is however important to highlight it in view of the fact that eventually the outcome of legal education is the law graduates who end up in the legal profession. Collaboration between the various actors in the legal education and the profession is therefore essential.

3.11. Conclusion

This chapter has examined some of the critical legislation guiding the regulation of university education and legal education in particular. Significantly, the chapter has brought out some of the corporate governance practices that are expected to be implemented by universities and LEPS, in form of quality standards in order to assure quality education outcomes. The chapter has also made several findings, including that the introduction of section 5A to the Universities Act has negatively affected the mandate of statutory professional regulatory bodies, especially the regulator of legal education, contrary to best practices in other counties which indicate the existence of stand-alone bodies that enforce standards in legal education. Further, despite the legal framework requiring universities to have a financial strategy and policy, and a financial projection plan, most universities are reportedly financially broke and struggling, with the result that the delivery of quality education is affected.

Moreover, it is evident that the tool used for assessing and evaluating legal education programmes by the Council is in need of improvement, possibly with the input of legal education stakeholders, to suit the various types of legal education programmes. Another critical area highlighted in this chapter is the challenge of enforcing the minimum admission requirements as stipulated under the

²³⁵ Act No. 21 of 2014.

²³⁶ Section 4(c), *the Law Society of Kenya Act*, (Act No. 21 of 2014).

Legal Education Act and the Kenya School of Law Act. Enforcement of these requirements has been riddled with law suits partly contributed to by gaps in the law, but also caused by the inattention of LEPs, the regulator and the students themselves. In view of the significance of the admission requirements in maintaining standards in the legal profession, this is an area that needs to be relooked at by all stakeholders in the sector with a view to taking a common but effective stand.



Chapter 4: CLE's Intervention in the Governance of Law Schools: Challenges and Opportunities for Good Corporate Governance Practices

4.1. Introduction

This chapter analyses caselaw with the objective of illustrating the extent to which, if any, the implementation of the legal education regulatory framework has affected corporate governance practices in law schools. The chapter also highlights the critical role of the regulator of legal education in assuring good corporate governance practices. The analysis is done under three main themes or pillars of corporate governance principles that are discernible from the caselaw. The pillars were discussed in chapter two of this study. These are transparency and open leadership; accountability, and probity and integrity. The aim of the chapter is to assess whether there has been compliance with these broad principles of corporate governance in the management of law schools in terms of the challenges encountered and the achievements realized by both the regulator and LEPs.

4.2. Transparency and Open Leadership

As aforementioned in chapter two of this study, the leadership of higher education institutions (HEIs) are enjoined to ensure long-term viability of their respective institutions, and this includes ensuring compliance with relevant laws and regulations. For purposes of this study, observance of the regulatory environment for legal education and training is critical as it prescribes corporate governance practices that are directed at ensuring good governance and proper management of the law programmes, and eventually a high caliber of law graduates. Failure to comply with the legislative framework governing legal education has occasionally resulted in the CLE taking some stern actions against the respective institutions. Aggrieved by such decisions, the said institutions have lodged law suits challenging the CLE's actions. Key among those law suits is the case of *Moi University v Council of Legal Education & another* (the Moi University case).²³⁷

The brief facts of the Moi University case is that, the University sued CLE following its decision directing that the University had ceased to be a LEP under the LEA and requiring it to prepare a closure plan for its School of Law within two months.²³⁸ The main reason for CLE's decision was

²³⁷ [2016] eKLR.

²³⁸ Para. 4.

the University's failure to address the issue of infrastructure and resources vis-à-vis the student ratio.²³⁹ Other concerns raised by CLE included the need for the University to recruit additional staff, especially at the senior level and reduce the number of students admitted into the bachelor of laws programme, stalled infrastructural development, and an inadequately stocked library.²⁴⁰ The University complained that CLE's directive that it had ceased to be a LEP violated Articles 43(1)(f)²⁴¹ and 55(a)²⁴² of the Constitution that guarantee the right to education.²⁴³ In addition, the University argued that the right to education is to be realized progressively and at the time the impugned decision was issued, the University was progressively complying with the CLE's recommendations based on the standards set.

The University further contended that CLE's actions breached Article 47²⁴⁴ of the Constitution, Section 5²⁴⁵ of the Fair Administrative Action Act and section 21²⁴⁶ of the LEA in a number of respects including failure to disclose the names of the experts who reviewed its curriculum and share with them the report thereof, reviewing its application for accreditation using the draft 2015 regulations which had not been published, and failing to issue a public notice inviting members of the public to give their views on the intended closure.²⁴⁷ In its judgment the court (Odunga J.) found that there was no fair administrative action in the decision of the CLE.²⁴⁸ Further that the CLE does not have powers to accredit institutions of higher learning, and therefore no power to close down any university without involving the CUE, which body the court held to have exclusive mandate to accredit universities in Kenya.²⁴⁹

²³⁹ Para. 13.

²⁴⁰ Para. 14.

²⁴¹ The provision provides that; "Every person has the right to education".

²⁴² The sub-article states; "The State shall take measures, including affirmative action programmes, to ensure that the youth, access relevant education and training".

²⁴³ Para. 19.

²⁴⁴ The Article provides for Fair Administrative Action.

²⁴⁵ The section requires that in instances where an administrative action is likely to affect the interests or rights of a group of persons or the general public, the administrator should issue a notice inviting views from the said persons or the public, with respect to the proposed action, and such views should be considered before taking the administrative action.

²⁴⁶ This is the section that mandates CLE to revoke or cancel a licence of a LEP.

²⁴⁷ Para. 17.

²⁴⁸ Paras. 131, 135.

²⁴⁹ Para. 197.

Despite the court's holding however, it is important to note that the court was categorical that institutions of higher learning must comply with the prescribed standards in order to assure quality education. Odunga J. expressed himself as follows;

“127.It is however my view that the right to education must necessarily encompass the right to quality education. Therefore, there must be standards to be met by those institutions which set out to impart knowledge to its students”.

Consequently, apart from the procedural lapses by the CLE in exercising its mandate, which ultimately seem to have resulted in the court deciding in favour of the University, it is plain that there was a gap at the University with respect to the available infrastructure and resources as compared to the high number of students that were being enrolled into the bachelor of laws programme. Other challenges at the University included; inadequate faculty, stalled infrastructural development and an inadequately stocked library. These deficient corporate governance practices were definitely bound to affect the effective and efficient administration of the Law programme offered by the institution. It follows therefore that the management of HEIs have a duty of ensuring that they impart quality education to their students, including implementing strategies and mechanisms to enable their respective institutions to be compliant with the stipulated quality standards.

It is indeed commendable that despite the legal tussle between Moi University School of Law and the CLE, some good results followed: the School of Law eventually took remedial action as recommended by the CLE and in 2018, it submitted an application for licensing of its LL.B Programme.²⁵⁰ The application was processed, an inspection was conducted to verify compliance, and the University is now a licensed LEP as published by CLE on its website.²⁵¹

Similarly, Mount Kenya University School of Law had a related case in *Republic v Council of Legal Education & another Ex-Parte Mount Kenya University*.²⁵² In this matter, Mount Kenya University challenged the CLE's intention to inspect its Law School and the direction requiring

²⁵⁰ <https://www.businessdailyafrica.com/bd/news/moi-university-applies-for-law-course-licence-2217828> on 8 July 2022.

²⁵¹ See list of licensed LEPs at <https://cle.or.ke/institutional-licensing-status-2/> on 1 August 2022.

²⁵² 2016 [eKLR].

the University to suspend the admission of students to its LL.B programme for the year 2016, arguing that it was not appropriate for the University to be subjected to two parallel accreditation procedures by the CUE and the CLE.²⁵³ Ultimately the court held that even though the CLE was mandated to undertake inspections of LEPs for purposes of its distinctive roles, where an institution was found to be undeserving of accreditation, the CLE could only make such recommendation to the CUE. The court was emphatic that the role of the CLE in the accreditation process is merely to “*set and enforce standards relating to the accreditation of legal education providers for the purposes of licensing*”. Mount Kenya University nevertheless later complied with the legal requirements and was licensed as an LEP as published on the CLE website.²⁵⁴

Notably however, the question of the competing functions of the two bodies, was settled in the case of *Kenya Medical Laboratory Technicians and Technologists Board & 4 others v Attorney General; Council of Legal Education (Petitioner); Kenya Law Reform Commission & 4 others (Interested Parties)*.²⁵⁵ In this matter, three petitions by various statutory regulatory bodies suing the Attorney General were consolidated. The statutory regulatory bodies included the Kenya Medical Laboratory Technicians and Technologists Board, the Kenya Medical Practitioners and Dentists Board, the Kenya Pharmacy and Poisons Board, The Nursing Council of Kenya and the Council of Legal Education. The contention before court was the amendment of the Universities Act, 2016 introducing section 5A,²⁵⁶ which gave the CUE the exclusive mandate of recognizing, licensing, approving or accrediting any academic programme including postgraduate degrees, diplomas and other academic certificates. The petitioners contended that section 5A was unconstitutional and unlawful for criminalizing acts done by the petitioners under un-repealed Acts of Parliament, the National Assembly while enacting the Universities Amendment Act 2016 violated its duty to facilitate public participation, and Articles 10 and 232 of the Constitution.²⁵⁷ The petitioners further argued that the amendment would have far reaching implications on them by interfering with their role of enforcing standards in their respective professions.²⁵⁸

²⁵³ Paras. 2, 3.

²⁵⁴ See list of licensed LEPs at <https://cle.or.ke/institutional-licensing-status-2/>.

²⁵⁵ [2020] eKLR.

²⁵⁶ Paras. 2 and 5

²⁵⁷ Para. 4.

²⁵⁸ Para. 7.

The respondents in the matter opposed the petitions asserting that the petitioners did not demonstrate how the amendment violated the Constitution. They affirmed that the amendment was done according to law, including the undertaking of public participation. In his decision, Makau, J. found that the National Assembly had carried out public participation through a public notice that was issued in the Daily Nation on 25th February 2016, inviting members of the public to give their views on the proposed amendments.²⁵⁹ On whether section 5A was unconstitutional, the court held that the petitioners had failed to demonstrate how the amendment was unconstitutional,²⁶⁰ moreover, by granting the CUE the sole mandate of regulating and accrediting universities, the section does away with the issue of the overlapping mandate between the CUE and the professional regulatory bodies.²⁶¹

In spite of the court's holding in the matter however, it is important to mention that at some point in the judgment, in a rather confusing observation, the court appeared to suggest that the introduction of section 5A had created a vague and confusing situation as compared to other provisions of the Universities Act, and functions of regulatory bodies as established by various statutes. The court stated;

*“40. I find from the aforesaid that Section 5A contradicts the other provisions of the Act and it does not meet the test of the Rule of Law prescribed under Article 10 of the Constitution which militates against contradiction and inconsistency. I further find that Section 5A though the object of the amendment was introduced to create certainty, it has created a vague and confusing situation as it has not clearly contradicted any provisions. In the case of **Law Society of Kenya v. Kenya Revenue Authority & Another (2017) eKLR** the court upheld its jurisdiction to declare as unconstitutional a legislation that is vague and contradictory and infringing or threatening to infringe Constitutional rights”.* (Emphasis mine)

Despite stating the foregoing, the court in the end had a change of mind and concluded that in accordance with the principle of ‘implied repeal’ where provisions of a recent statute are in conflict with those of an earlier statute(s), the provisions of the recent statute are taken to have repealed

²⁵⁹ Para. 25.

²⁶⁰ Para. 57.

²⁶¹ Para. 56.

those of the earlier statute(s). In this case therefore the court determined that the Universities (Amendment Act), 2016 being the recent statute, it had repealed the earlier legislation with respect to accreditation and approval of university academic programmes. In effect, as opined in chapter three of this study, this decision took away the enforcement powers of the statutory regulatory bodies for various professions, including the CLE and their autonomy in implementing standards, contrary to best practices in other countries. This means that CLE can no longer independently enforce standards that direct corporate governance in law schools. It remains to be seen whether there will be effective collaboration between the CLE and the CUE to ensure continued compliance with the legal requirements that assures quality law programmes and quality outcomes.

It is worth mentioning that in undertaking its duties, the regulator is also enjoined to be open and transparent. In the *Moi University* case, Odunga J. was emphatic that where an adverse administrative action was likely to be made against an institution, the respective institution should be given information used to arrive at such a decision so that it can respond to it, and that failure to do so violates section 4(3)(g)²⁶² of the Fair Administrative Action Act.²⁶³ This finding by the learned Judge followed the University's contention that the CLE had contracted a team of experts to review its curriculum, but the identities of the experts were never disclosed to it, and neither was the report of the review shared with it, yet that information was used against it.²⁶⁴ The court affirmed the holding in *Geothermal Development Company Limited v. Attorney General & 3 others*²⁶⁵ to the effect that:

“As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response...”

²⁶² The section provides; “Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person- information, materials and evidence to be relied upon in making the decision or taking the administrative action affected by the decision”.

²⁶³ Act No. 4 of 2015.

²⁶⁴ Para. 131.

²⁶⁵ (2013) eKLR.

In the end it is important that law schools elevate a culture of transparency and open leadership which includes sharing information on compliance with the stipulated requirements, a culture which in the result nurtures trust and productivity. This will contribute greatly to good corporate governance in law schools.

4.3. Accountability

Accountability as a pillar of corporate governance principles require one to take responsibility for his/her/its decisions and actions. In the *Moi University* case, Odunga J. was categorical that HEIs owe students a duty to provide quality education. He also emphasized the need for public participation where an administrative body's decision is likely to affect the general public. The learned Judge observed that considering that CLE's decision of the intended closure of the University was bound to affect members of the public including students and parents/guardians, CLE had a responsibility to inform the public and collect their views on the same in line with the requirement for public participation as stipulated in Article 10 of the Constitution.²⁶⁶ The court made this determination in answer to the University's claim that the CLE had not issued a public notice inviting members of the public to make representations on the proposed closure of the University yet that decision was certainly going to adversely affect interests of members of the public.²⁶⁷

In the same vein however, this study argues that the CLE's action was also aimed at protecting the same members of the public who include parents of law students, clients of legal professionals, and the legal profession itself from possibly not getting value for their investments in the Law School in terms of fees, or by eventually consuming services rendered by legal professionals who are not well trained because of inadequate infrastructure and resources that make it difficult to render quality law courses. Ultimately law schools generally have a duty in upholding strong governance practices like accountability that consider the best interest of its stakeholders.

4.4. Integrity and Probity

The values of integrity and probity require that institutions of higher learning, in this case LEPS in Kenya, demonstrate propriety and ethical conduct in exercise of their functions. Issues like

²⁶⁶ Para. 135.

²⁶⁷ Para. 134.

admitting students who do not meet the stipulated minimum entry requirements would therefore be a breach of these values. This was the case in *Republic v Catholic University of Eastern Africa & another Ex-parte Edmund Kiiru Wambui & 41 others*.²⁶⁸ In this matter, the *ex-parte* applicants who were students of the Catholic University of Eastern Africa sued the University, contesting its decision to discontinue their legal studies pursuant to the Legal Education Regulations.²⁶⁹ The genesis of this suit was that the University had admitted students with foreign qualifications in law without first having the said qualifications equated by the Kenya National Examinations Council (KNEC) as required by the Regulations. CLE learnt about this irregularity and when it queried this lapse, the University informed it that it was in the process of obtaining the certifications from KNEC.²⁷⁰ In the circumstances, CLE advised the University to pause the studies of the affected students until such a time as the equation from KNEC would be obtained and the qualifications confirmed by CLE.²⁷¹

The concerned students contended that having met the basic requirements as per the admission letters of the University, they were entitled to be allowed to pursue their Bachelor of Laws degree.²⁷² The students further claimed that the CLE acted *ultra vires* as it did not have powers to accredit universities or academic programmes following the amendment of the Universities Act in 2016.²⁷³

On the other hand the CLE denied discontinuing the students deposing that as a regulator it had written to the University asking it to take corrective action with respect to students who had been irregularly admitted to the LL.B programme in compliance with the Council of Legal Education (Accreditation of Legal Education Institutions) Regulations, 2009 which Regulations were applicable at the time.²⁷⁴

²⁶⁸ [2017] eKLR

²⁶⁹ Para. 2.

²⁷⁰ Para. 20.

²⁷¹ Para. 20.

²⁷² Para. 3.

²⁷³ Para. 8.

²⁷⁴ Para. 20.

Sadly, the University did not respond to the matter.²⁷⁵ Upon evaluation of submissions by the respective counsel, Odunga, J. determined the case in favour of the applicants, stating that the action of the University to unilaterally discontinue its students based on a purported communication from the regulator, when it had already admitted those students, was not reasonable.²⁷⁶ Further that the University ought to have taken into account the interests of third parties who were likely to be affected by that decision pursuant to sections 4(3)(g) and 5(1)²⁷⁷ of the Fair Administrative Action Act.

It is worth noting that despite the court's holding, the court pointed out that its concern in the matter was the manner in which the decision to discontinue the applicants was reached and not whether the applicants met the minimum admission requirements for an LL.B programme. The court went ahead and reproached the University for failing to verify whether students met the admission requirements before enrolling them to the programme, noting the importance of minimum qualification requirements in maintaining standards in the profession.²⁷⁸ The court expressed itself as follows;

“42. In my view an institution of higher learning that prides itself as a citadel of legal education must appraise itself of all the minimum requirements for admission of students to a degree programme and in this case the LLB Degree programme. To just admit all and sundry to a course with a view to raising finances for the running of an institution is, in my view improper, unethical and inhuman as it amounts to reducing students to mere money minting contraptions or devices for the sustenance of the institution”.

The question of implementation of minimum admission requirements for the LL.B programme again arose in the case of *Gloria Munyiva Mbevi & another v Africa Nazarene University & 2*

²⁷⁵ Para. 23.

²⁷⁶ Para. 33.

²⁷⁷ The section provides that where an administrative action is likely to affect the interest of the general public, the administrator is enjoined to issue a public notice of the proposed action, consider all the views submitted thereof and all relevant materials. And where the decision is taken, give reasons for the decision and the appeal mechanism available.

²⁷⁸ Para. 43.

*Others.*²⁷⁹ In the matter, the 1st petitioner, a former student of Africa Nazarene University (ANU) stated that she was admitted to ANU for the LL.B programme based on her International General Certificate of Secondary Education, Ordinary level (IGCSE, O level).²⁸⁰ Upon completion of her studies, she applied for the ATP programmes at KSL and was given a provisional admission in the academic year 2018/2019, but to her dismay, later her admission was revoked.²⁸¹ The 1st petitioner complained that the respondents failed to promote her right to access education and training, and that ANU should not have been allowed to operate as a LEP by the 2nd respondent, CLE, without compliance with the law.²⁸² The 1st petitioner however acknowledged on a without prejudice basis that CLE had communicated to all law schools all the minimum admission requirements for LL.B.²⁸³

The 1st respondent, ANU, opposed the petition arguing that the petitioner had been admitted to the University based on clause 7 of the Commission for Higher Education Standards and Guidelines for the Academic Programmes, 2011.²⁸⁴ The clause provides the admission guidelines for an undergraduate programme to be;

- i. *C+ for Kenya Certificate of Secondary Education (KCSE) holders;*
- ii. *5 credits for International General Certificate of Secondary Education (IGCSE) holders;*
- iii. *A minimum of 24 out of 45 points for International Baccalaureate (IB) holders;*
- iv. *Two (2) principle passes for 'A' Levels qualification holders;*
- v. *C in KCSE for recognized pre-university qualification holders or recognized diploma holders with a minimum of credit C (of 2.50 on a scale of 4.00) from a recognized institution; and*
- vi. *Any other equivalence as determined by the Kenya National Examination Council. (Emphasis mine)*

²⁷⁹ [2019] eKLR.

²⁸⁰ Para. 6.

²⁸¹ Para.7.

²⁸² Para. 9.

²⁸³ Para. 9.

²⁸⁴ Para. 18.

ANU further contended that it was not until the year 2014 that CLE was mandated to recognize, approve and equate foreign qualifications for persons seeking admission to the law programme.²⁸⁵ On its part, CLE argued that in making its decision it was guided by provisions of the Kenya School of Law Act, 2012, the Legal Education Act 2012, and the Council of Legal Education (Kenya School of Law) Regulations, 2009.²⁸⁶ Similarly, the 3rd respondent, the KSL resisted the petition claiming that the CLE had written to it informing it that an ‘O’ level/IGCSE qualification without an ‘A’ level qualification is not adequate for entry into the undergraduate law programme and so it had to comply by deregistering unqualified persons.²⁸⁷

In her judgment, Okwany, J. held in favour of the 1st petitioner, observing that according to the second schedule of the KSL Act, persons with alternate qualifications other than KCSE were eligible for admission to ATP so long as that qualification is equivalent to the mean grade C(plus).²⁸⁸ The learned judge further held that IGCSE is a system of education that is accepted under the Kenyan educational system, that is why it is recognized under the Commission for Higher Education Standards and Guidelines.²⁸⁹ The judge concluded that the 1st petitioner met the minimum university entry requirements at the time she joined the University and was therefore eligible to join the ATP.²⁹⁰

Noticeably, as pointed out by the learned judge, many cases have arisen from the failure of LL.B graduates to meet minimum entry requirements for the course, possibly indicating that there could be a disconnect between the Law Schools and the regulator, with respect to the qualifications for admission into the LL.B programme. However, I believe that most of the issues arising with regard to the minimum entry requirements occurred during the transitional period when the new laws were coming into force, namely, the Kenya School of Law Act, 2012 and the Legal Education Act, 2012 (LEA). At that point the former legislation, the Council of Legal Education Act, 1995²⁹¹ was repealed and the CLE was re-established with a robust mandate of regulating and supervising legal

²⁸⁵ Para. 18.

²⁸⁶ Para. 20.

²⁸⁷ Para. 21.

²⁸⁸ Para. 36.

²⁸⁹ Para. 39.

²⁹⁰ Para. 40.

²⁹¹ Chapter 16A of the Laws of Kenya.

education, and recognizing and approving qualifications obtained outside Kenya for purposes of admission to the roll of advocates.²⁹² Later in 2016, new Regulations were also promulgated being, the Legal Education (Accreditation & Quality Assurance) Regulations, 2016. The new Regulations replaced the earlier Regulations, that is, The Council of Legal Education (Kenya School of Law) Regulations, 2009. The 2016 Regulations prescribed minimum entry requirements for all Law courses which differed from those in the 2009 Regulations.²⁹³ As such during this transition there was a lot of push and pull, between the regulator and LEPs in enforcing the new law, resulting in the aggrieved persons suing the regulator

A leading case that was lodged during these transition was the case of *Kevin K Mwiti & others v Kenya School of Law & others*.²⁹⁴ The applicants in the matter were Law students who were already admitted to various universities before the KSL Act, 2012 came into force.²⁹⁵ In recognizing that such students had a legitimate expectation of completing their studies which would be adversely affected by the KSL Act, the KSL published guidelines for admission to the ATP “the ATP guidelines”.²⁹⁶ However in 2014, parliament enacted the Statute Law

²⁹² Section 8, *Legal Education Act, 2012*.

²⁹³ See chapter three for an analysis of the stated legislations.

²⁹⁴ [2015] eKLR

²⁹⁵ Para.1.

²⁹⁶ The guidelines stated as follows; “Accordingly, the following categories of persons will be admissible to the ATP at the Kenya School of Law for the academic year 2014/2015:

- I. Having passed the relevant examinations of any recognized university in Kenya holds, or have become eligible for the conferment of the Bachelor of Laws Degree (L.L.B) of that university; or
- II. Having passed the relevant examinations of a university, university college or other institutions prescribed by the council, holds or have become eligible for the conferment of a Bachelor of Laws Degree (L.L.B) in the grant of that university, university college or other institution and had prior to enrolling to that university/university college or other institution:
 - i. Attained a minimum entry requirement for admission to a university in Kenya; and
 - ii. Obtained a minimum grade of B(plain) in English language or Kiswahili and a mean grade of C(plus) in Kenya Certificate of Secondary examinations or its equivalent.
- III. Having passed the Bachelor of Laws (L.L.B) examinations of a recognized university and having attained a minimum of C (plus) in English and a minimum of an aggregate C (plain) in the Kenya Certificate of Secondary Examination and hold a higher qualification e.g ‘A’ Levels, ‘IB’, relevant ‘diploma’ other ‘undergraduate degree’ or have attained a higher degree in law after the undergraduate studies in Bachelor of Laws (L.L.B) programme.
- IV. Having passed the relevant Bachelor of Laws (L.L.B) examinations of a recognized university and having attained a minimum of C (minus) in the Kenya Certificate of Secondary Examinations sit and pass the Pre-Bar examination set by the Kenya School of Law.

PROVIDED that persons who were eligible to sit for the Pre-Bar examinations but did not do so in 2013 will be given an opportunity to do so when the examination is next offered.

(Miscellaneous) Amendment Act, 2014 which amended the second schedule of the KSL Act and made it mandatory for all persons desiring to join the ATP to sit and pass the pre-bar examination.²⁹⁷ Pursuant to that amendment, the KSL published a notice in the daily newspapers inviting applicants to apply for the pre-bar examination as a prerequisite for admission to the KSL to undertake the ATP.²⁹⁸ The petitioners sued the KSL, the CLE and the Attorney General accusing them of having created a legitimate expectation that the second schedule of the KSL Act would not apply to students who were already admitted before it came into force.²⁹⁹ Further, that the respondents were subjecting them to an examination over subjects that they had already been taught and examined at the university level.³⁰⁰ Moreover, when the students began the LL.B programme, they had a legitimate expectation that the criteria for qualifying as an advocate would not change or if changed would not be applied retrospectively.

In his decision, Odunga J. agreed with the petitioners, holding that there was no express intention by parliament for the Statute Law (Miscellaneous) Amendment Act, 2014 to apply retrospectively. The learned Judge ordered that the petitioners who were already in class prior to the enactment of the KSL Act, were to be treated in the manner contemplated before the amendment.

Whereas Odunga J. recognized and upheld the fundamental rights of students who were already undertaking the programme before the amendment, the learned judge's interpretation of legitimate expectation has largely been misused by aspiring ATP students, in a way that has hindered the application of the new legal education legislations, several years down the line especially as concerns implementation of the minimum entry qualifications for the LL.B course.³⁰¹ However, this position changed in *Ntele James Kipambi v Council of Legal Education & 2 others*³⁰² when Nyakundi J. clarified that, '*...legitimate expectation cannot subsist contrary to clear statutory*

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- V. This admission criterion will operate for a transitional period of three (3) years from January 2013 to allow applicants who had joined the university system before the coming to force of the Kenya School of Law Act 2012 to complete their study programmes.

²⁹⁷ Paras. 6 and 7.

²⁹⁸ Para. 8.

²⁹⁹ Para. 12.

³⁰⁰ Para. 12.

³⁰¹ Such cases include: *Adrian Kamotho Njenga v Kenya School of Law* [2017] eKLR; *Republic v Kenya School of Law Ex Parte Kyalo Kennedy Maweu & another* [2018] eKLR; *Sydney Douglas Webuye v Kenya School of Law* [2018] eKLR; *Jemimah Nyambura Mwangi v Kenya School of Law* [2022] eKLR.

³⁰² [2017] eKLR.

provisions'.³⁰³ In this matter, the petitioner sued the CLE, the KSL and the Attorney General for the CLE's decision declining to recognize and approve his LL.B degree from the Open University of Tanzania, thus denying him the chance to join the ATP.³⁰⁴ According to the petitioner, having passed the pre-bar examination, he had met all the requirements for admission into the ATP, which at the time were prescribed under the Council of Legal Education Act, 1995 (Repealed) and the Council of Legal Education (Kenya School of Law) Regulations, 2009.³⁰⁵ The petitioner further argued that the respondent's actions had infringed on his legitimate expectation to be an advocate.³⁰⁶

In answer to the petition the CLE asserted that in making its decision it was guided by the existing law resting with the provisions of the LEA.³⁰⁷ Further that, in order for it to recognize the petitioner's degree, which was done by long distance learning, it had to be satisfied that the standards set out in the third schedule to the Legal Education (Accreditation of Legal Education Institutions) Regulations, 2009 were met.³⁰⁸ Similarly, the KSL submitted that passing of the pre-bar examination was only one of the steps for eligibility to join the ATP, and hence there was no legitimate expectation that by passing that examination the petitioner would be admitted to the ATP.³⁰⁹ The court ultimately found that there was no evidence to show that the petitioner's rights had been infringed by the respondents and thus he dismissed the petition.

Apparently, most of the above analyzed cases were judicial review cases, which do not go to the merits of a decision. Rather, the court reviews the means of arriving at that decision. Various explanations can be given for this situation, including that the decisions of administrative bodies or public authorities are out rightly amenable to judicial review, but also more critically, it could be that the CLE has in the past failed to adhere to fair administrative practices in certain instances while making its decisions, even though the decisions are merited. This results in most of its

³⁰³ Para. 57.

³⁰⁴ Para. 4.

³⁰⁵ Para. 14.

³⁰⁶ Para. 16.

³⁰⁷ Para. 18.

³⁰⁸ Para. 21.

³⁰⁹ Para. 32.

decisions being quashed at judicial review, which, in the long-run, affects its effectiveness in ensuring good corporate governance practices in Law Schools.

However, in a few cases, the courts have validated CLE's actions and affirmed its mandate as the enforcer of standards in legal education and training. Key among the cases is the Court of Appeal decision in *Eunice Cecilia Mwikali Maema v Council of Legal Education & 2 others*.³¹⁰ In the matter, the appellant, a graduate with a Bachelor of Laws in Law and Business from the Coventry University in England and a Master of Laws in International Economic Law from the University of Warwick in England sued the CLE, the KSL and the Attorney General following the refusal by the KSL and the CLE to admit her to the ATP programme on grounds that she had not taken all the sixteen (16) core courses in her LL.B studies as prescribed by the Legal Education Regulations.³¹¹ The appellant first petitioned the High Court claiming that she had met all the admission requirements as prescribed in Legal Notice No. 169 of 2009, which was the law then and hence she sought that the decision by the CLE and the KSL declining her admission be quashed.³¹² The High Court dismissed the petition, prompting the appellant to approach the Court of Appeal for a remedy.

At the Court of Appeal, the appellant argued that the requirement for one to take 16 core courses came into force pursuant to the LEA, way after she had graduated and therefore the legislation could not apply retrospectively.³¹³ Further that, Legal Notice No. 170 of 2009 following which the High Court determined that she had not met the threshold of the 16 mandatory courses was not applicable to admissions to the ATP.³¹⁴ For the CLE and the KSL, it was submitted that prior to enactment of the KSL Act and the LEA, the procedure for admission to the ATP was governed by the repealed Council of Legal Education Act, and the Advocates Act, and the prescribed examinations for purposes of admission to the ATP were set out in Legal Notice No. 170 of 2009.³¹⁵

³¹⁰ [2013] eKLR.

³¹¹ Para. 3.

³¹² Para. 8.

³¹³ Para.11.

³¹⁴ Para.12.

³¹⁵ Para.16.

The Court held that under section 14 of the repealed Council of Legal Education Act,³¹⁶ the CLE had the power to make regulations to give effect to the provisions therein, and as a result the Council of Legal Education (Accreditation of Legal Education Institutions) Regulations, 2009 were published under Legal Notice No. 170 of 2009.³¹⁷ Under the Third schedule to these Regulations, the training standards for all LEPs were outlined including the 16 core subjects that were to be mandatorily offered in the LL.B programme.³¹⁸ To the court therefore, it was part of the regulating standards for the CLE to demand that any person wishing to join the ATP had to take the 16 identified core subjects.³¹⁹ The court further decided that degrees obtained from foreign universities must for purposes of admission to the ATP be subjected to the standards stipulated by the CLE.³²⁰ In addition, the Court of Appeal endorsed the High Court decision in *Susan Mungai v Council of Legal Education & 2 others*³²¹ where Mumbi Ngugi J. (as she then was) emphasised that the CLE is mandated to ensure that the highest professional standards are maintained and the courts ought not be concerned about the efficacy of the CLE's decisions.³²²

The brief facts of the *Susan Mungai* case are that, the petitioner sued the CLE, the Director of the KSL in his personal capacity and the Attorney General, for declining to admit her to the KSL.³²³ She claimed that the qualifications for admission to the KSL were laid out in sections 12 and 13 of the Advocates Act, and not the Council of Legal Education(Admission) Regulations, 1997 and the Council of Legal Education (Kenya School of Law) Regulations, 2009.³²⁴ The petitioner contended that the CLE did not have the power to make such rules.³²⁵ On the other hand, the CLE among other submissions, asserted that admissions to the KSL had always been done pursuant to the Council of Legal Education(Admission) Regulations, 1997 which were later promulgated in the 2009 Regulations, and so the petitioner could not seek preferential treatment.³²⁶ The court

³¹⁶ Chapter 16A of the Laws of Kenya.

³¹⁷ Para. 30.

³¹⁸ Para. 31.

³¹⁹ Para. 33.

³²⁰ Para. 35.

³²¹[2012] eKLR.

³²² Para. 40.

³²³ Para. 4.

³²⁴ Para. 9.

³²⁵ Para. 9.

³²⁶ Para. 13.

dismissed the petition, concurring with the decision in *Republic v the Council of Legal Education ex-parte James Njuguna & 14 others*.³²⁷ In that matter the High Court reasoned that the Legal Education Regulations had been legitimately made by the CLE in consonance with its mandate of ensuring the highest professional standards are maintained, and where CLE had made a decision on merit, the courts could not interfere with that decision.³²⁸

4.5. Conclusion

This chapter has interrogated caselaw arising from enforcement of the legal education regulatory scheme. It has demonstrated the achievements that have been made and the challenges that arise in enforcing the regulatory laws, in terms of three pillars of the principles of corporate governance. In particular, the chapter has demonstrated the need for law schools practice transparency and open leadership, attributes which can enhance productivity and trust with its stakeholders, especially the regulator. The need for law schools to be accountable to the consumers has also been emphasized, besides the obligation for probity and integrity which demand compliance with the stipulated legislative provisions on good corporate governance practices. Moreover, the chapter has addressed the need to have adequate infrastructure and resources that are commensurate to the number of students enrolled for the LL.B programme. Equally crucial is the need for institutions of higher learning and indeed law schools to only enroll students who qualify in order to maintain standards in the profession as rightly observed by Odunga, J.

³²⁷ [2007] eKLR.

³²⁸ Para. 29

Chapter 5: Analysis of the Research Findings, Conclusion and Recommendations

5.1. Introduction

This chapter provides the findings of the study, specifically concerning the legislative environment for legal education and training, and corporate governance practices of Law Schools in Kenya. Drawing from those findings, the chapter makes recommendations.

5.2. Findings on the Legislative Framework for Legal Education and Training

In accordance with Article 10 of the Constitution, HEIs and their staff are obligated to observe the national values and principles of governance in the performance of their duties. These national values and principles of governance include; patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability; and sustainable development. Essentially adoption of these values and principles nurtures good corporate governance practices.

Whereas Article 10 of the Constitution promotes the observance of good corporate governance practices, the findings of this research reveals that pursuant to an amendment that was effected to the Universities Act in 2016, being section 5A, CUE has the exclusive mandate of licensing or accrediting university academic programmes, including Law programmes. This, effectively takes away the authority of the CLE to enforce standards in LEPs, contrary to best practices in other countries where there exist stand-alone bodies that effectuate standards in legal education.

Concerning funding of higher education, even though most of the public universities are reportedly broke, budgetary allocation to HEIs has been reduced considerably. In the result, lack of or reduced funding for the universities is likely to adversely impact the administration of academic programs.

Regarding accreditation of universities, findings revealed that prior to the establishment of a university or a campus, including a law school, an applicant is expected to meet certain robust and comprehensive conditions like having a financial strategy and policy, and a financial projection plan. The accreditation conditions laid by CUE go a long way to promote corporate governance of universities and by extension LEPs in Kenya. However, after accreditation, most universities and

Law Schools have struggled to sustain their programmes, possibly indicating that once an institution is licensed, there is not much effort by the management and membership of the institution to ensure adherence to standards, sustainability and excellence.

Further, as illustrated by the analysis in chapter 3, the CLE ‘Inspection Criteria and Guidelines for Legal Education Programmes’, a tool used by CLE to evaluate legal education programmes during inspection visits is good but it needs improvement.³²⁹ The criteria seems to have been mainly created for the LL.B programme, and does not envisage post-graduate law programmes nor does it envision new programmes, which do not have certain information like, student enrolment data, examination administration data and research and publications outputs.

Lastly, the drafting of the second schedule to the KSL Act on admission requirements for the LL.B programme is problematic. While part (a) of that schedule simply requires the passing of relevant examinations from a recognized university and the eligibility for conferment of an LL.B degree, part (b) has additional requirements including attainment of minimum requirements for admission to a university in Kenya, a minimum grade B(plain) in English or Kiswahili languages and grade C(plus) in KCSE, as well as sitting and passing of the pre-bar examination

5.3. Findings on CLE's impact on Corporate Governance Practices of Law Schools in Kenya

The right to education includes the right to quality education. Consequently, the management of HEIs have a duty of ensuring that they impart quality education on their students, in addition to implementing strategies and mechanisms that can enable their respective Law Schools to be compliant with the set standards and to guarantee sustainability of the Law programmes.

As demonstrated by literature, especially the writings of Ola³³⁰ and Maleshin,³³¹ a law graduate’s professional competence and ethical principles largely depend on how qualified the teachers are. Law teachers can inculcate in their students as well as their juniors in the profession values of integrity through undertaking effective mentorship. Further, collegiality among the faculty and the administration of Law Schools is paramount for the successful management of respective Law

³²⁹ The criteria is found at <https://cle.or.ke/downloads/>

³³⁰ Ola K, ‘Theories of Open Access’ 6 *Journal of Open Access to Law* (2018), 13.

³³¹ Maleshin D, ‘The Crisis of Russian Legal Education in Comparative Perspective’, 289.

Schools. It enables an institution to meet challenges of access to funding, quality, qualified academic staff and research.

Compliance programmes in an institution show the institution's commitment to ethical values, and protect it against potential risks, such as agency investigations and litigation. Additionally, Clinical Legal Education (CLE) has been proposed by various scholars as a way of ensuring that Law graduates meet societal needs and possibly settle the criticism on the quality of legal professionals. However, even though many Law Schools may have CLE programmes, they cannot be effective unless properly implemented. Moreover, according to Ojienda and Oduor,³³² CLE programmes come with various challenges including allegations of students compromising standards in offering legal aid, inadequate funding of legal aid clinics and lack of commitment by faculty in supervising students. It is therefore a finding of this study that CLE programmes enhance the professional skills of law graduates. However, the manner of its implementation and the level of commitment by both faculty and students determine its efficacy.

Further, where the CLE has attempted to enforce its powers of revocation or cancellation of a licence for a LEP found in violation of the licence conditions, it has been sued largely on the basis that the CUE is the only body mandated to accredit universities, and thus the only body empowered to reprimand or close down such institutions. However, the same LEPs have in the end still subjected their LL.B programmes to scrutiny by CLE after taking remedial action, perhaps indicating that the CLE is still recognized as the regulator of legal education. Further, this state of affairs goes to show that sometimes it takes some stern action to compel the administration of some LEPs to act and comply with the regulatory environment. As rightly put by Kameri-Mbote the accreditation process has provided Law Schools with an opportunity to negotiate with their governing bodies for better facilities, more academic staff and investment in Law Schools.³³³ The process has also asserted the need to establish moot courts in order to balance academic and advocacy training.³³⁴ Moreover, it is apparent that most HEIs including LEPs are embracing online

³³² Ojienda TO and Oduor M, 'Reflections on the implementation of Clinical Legal Education in Moi University, Kenya' *Journal of Clinical Legal Education* (2002), 58-62.

³³³ Kameri-Mbote, 'Legal Education and Lawyers', 134.

³³⁴ Kameri-Mbote, 'Legal Education and Lawyers', 135.

teaching methods, which is commendable as it enables the formation of tech-savvy law students who can effectively work in the evolving legal field.

It is also noteworthy that the regulator of legal education, just like all administrative bodies should be accountable for its actions, and more particularly, it ought to observe the principles of fair administrative action in decision making.

5.4. Recommendations

1. The legal education legislation should be reviewed in order to correct errors and inconsistencies, and to harmonise them. In particular, the second schedule of the KSL Act should be amended to the effect that part 1(a) should be deleted, and part 1(b) which is a more comprehensive provision on admission requirements for the ATP retained. Additionally, the Advocates Act³³⁵ needs to be revised to accommodate new occurrences. For instance, sections 12(a) and 13(1)(d) prescribe the nationalities that are eligible to apply for admission as advocates being; Kenya, Rwanda, Burundi, Uganda and Tanzania. The Act seems to have envisioned that citizens of the said countries as members of the East African Community (EAC) would be the only ones eligible for admission as advocates in Kenya. However, the EAC is continually growing, the Republic of Sudan having joined lately.

In my opinion, a citizen from any country in the commonwealth should be eligible to apply for admission as an advocate in Kenya, so long as he/she possesses such qualifications that are acceptable and recognized by the CLE. Indeed, section 13(1)(a) of the Advocates Act envisages such a situation by providing that advocates of good standing of a country in the Commonwealth who have practiced in that country for a period of not less than 5 years qualify to apply for admission as Advocates in Kenya. The basis of this suggestion is that the legal systems of all commonwealth countries including Kenya are based on English common law, therefore it is expected that the principles of law that are taught in the Commonwealth countries are largely similar, and hence the qualifications of legal professionals should be comparable, with minimal variations.

³³⁵ Chapter 16, Laws of Kenya.

2. In view of the overlapping mandate between the CUE and the professional regulators like the CLE, it would be helpful if the CLE was represented in the membership of the CUE board so as to enhance collaboration between the two bodies in performing their functions. To this extent, section 6 of the Universities Act on the Composition of the board of the CUE needs to be amended to provide for a representative of CLE. But more importantly it is critical that the CLE maintains its regulatory role in legal education. This is because even the Advocates Act, which is the principal legislation on qualifications of an advocate in Kenya, provides that one cannot be admitted as an advocate until his/her qualifications are approved by the CLE, and the institution in which he/she studied recognized by the CLE.
3. The question of financial constraints can be addressed by institutions using the limited resources for optimal benefits. The Legal Education (Accreditation and Quality Assurance) Regulations, 2016 give guidance on how finances of law schools should be apportioned. The Regulations require that a law school assigns its recurrent budget for each year academic year as follows; 10% for capital infrastructure development, 5% for library services, 5% for research and publication activities, 5% for student support services, and 2½% for staff development. It is also important that HEIs enhance conducting other income generating activities like research, consultancy and publication.
4. The importance of CLED Programmes has been emphasized by many scholars as a way of enabling students to apply theory to real life situations and develop lawyering skills such as client interviewing, legal drafting, and ethical values, among other attributes. It is noted however that no legal education legislation requires a CLED programme to be implemented by LEPs. The only provision to that effect is found in the CLE 'Inspection Criteria and Guidelines for Legal Education Programmes'. The criteria simply asks the question, "*Does the Institution have a legal clinic or conduct clinical studies?*". It is important that the regulator goes beyond asking this question and interrogates the implementation mechanism of the programme, because whereas most LEPs have CLED programmes, for instance Moi University School of Law as mentioned by Ojienda and Oduor in their article, 'Reflections on the implementation of Clinical

Legal Education in Moi University, Kenya',³³⁶ the faculty need to make deliberate efforts to supervise students in offering legal aid. Borrowing from the Indonesian illustration, Clinical programmes³³⁷ should be implemented through the Law faculty supervising students' interview techniques, case analysis techniques, negotiations approach as well as legal drafting. Students should be evaluated through field observations, daily activity notes, case study reports, and final semester examinations where they make presentations of the activity results.

Christensen C³³⁸ observes that some of the skills that are highly valued by law firms, and which should be taught by Law Schools include team work and collaboration, and cultural competency and self-directness. It is upon Law Schools to adopt effective modes of imparting these skills upon their students in delivery of their curriculum. Indeed, the CLE 'Inspection Criteria and Guidelines for Legal Education Programmes' inquires into whether an institution has a diversified mode of delivery of its programme and whether tutorials and seminars are employed. It is suggested that CLED programmes are an effective way of inculcating the said skills of teamwork and collaboration, cultural competency and self-directness. This is because through offering legal aid, students learn to communicate effectively and interact well with people from all walks of life. They are also able to appreciate different beliefs and opinions, and while advising clients they develop their critical thinking skills.

5. In view of the importance of compliance programmes for HEIs, Koebel JT³³⁹ recommends the various forms that compliance programmes can take. For most public universities in Kenya, compliance programmes take the form of a Company secretary and although the Companies Act requires all public companies to recruit a Company Secretary,³⁴⁰ their roles are not stipulated therein. The 'Mwongozo: the Code of Governance for State Corporations'³⁴¹ however stipulates that a Company Secretary is responsible for the efficient administration and

³³⁶ Ojienda TO and Oduor M, 'Reflections on the implementation of Clinical Legal Education in Moi University', Kenya', 62.

³³⁷ Rosadi O and Marwan A, 'Transformation of Legal Education in Indonesia Based on Social Justice', 149.

³³⁸ Christensen C, 'Preparing Law Students to Be Successful Lawyers LSSSE at Fifteen: Celebrating Our Success and Planning Our Future' 69 *Journal of Legal Education* (2019), 502.

³³⁹ Koebel J T, 'Facilitating University Compliance Using Regulatory Policy Incentives', 179.

³⁴⁰ Section 244, the *Companies Act* (Act No. 17 of 2015).

³⁴¹ January 2015.

statutory compliance of a state corporation, among other duties. It is recommended that in addition to the recruitment of a Company Secretary, as suggested by Koebel JT,³⁴² compliance should be an institution wide responsibility where every member of the institution takes the initiative to comply with the relevant laws. Such initiatives if well-coordinated will enable LEPs succeed in their functions.

6. The CLE should improve the inspection criteria and guidelines for them to suit the various types of LEP programmes. Specifically, there is need to have some different criteria for the; certificate and diploma programmes, post-graduate programmes, and new programmes. This is because as already highlighted in my findings, the requirements for the different law programmes differ in some respects. For instance, information on the governance structure of a LEP once established at the diploma level or degree level is not necessary at the Masters level. The level of research and publications required at the certificate and diploma level is also obviously not the same as that at the post-graduate level. Further, a new programme in its initial stages will not have some of the requirements as enumerated in the criteria, like information on admission requirements, class size and enrolment data.
7. In view of the finding on the use of technology in teaching across the world and its effectiveness, it is important that even as LEPs in Kenya adopt virtual learning, they also embrace appropriate pedagogical approaches. The pedagogical approach should one that among other things encourages interaction of law students with law teachers. Corbin L and Bugden L³⁴³ suggest the use of instructional videos from the lecturers, as well as animations or simulations, which enables students get immediate feedback as they analyze issues.
8. From my findings in chapter four, it is evident that most of the cases against the CLE are due to procedural lapses. In this regard the CLE should ensure that before it takes any action it adheres to the fair administrative action practices so that it can be effective in undertaking its mandate.

³⁴² Koebel J T, 'Facilitating University Compliance Using Regulatory Policy Incentives', 192.

³⁴³ Corbin L and Bugden L, 'Online Teaching: The Importance of Pedagogy, Place and Presence in Legal Education' 28 *Legal Education Review*, 1 (2018), 20.

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Appendices

Appendix A: Similarity Report



Document Information

Analyzed document	ASSESSING THE NATURE OF REGULATORY ENFORCEMENT BY THE COUNCIL OF LEGAL EDUCATION AND ITS EFFECT ON CORPORATE GOVERNANCE OF LAW SCHOOLS IN KENYA.docx (D144392281)
Submitted	9/19/2022 8:46:00 PM
Submitted by	
Submitter email	Georgina.Wabwire@strathmore.edu
Similarity	4%
Analysis address	library.strath@analysis.urkund.com

Sources included in the report

W

URL: <http://repository.riarauniversity.ac.ke/xmlui/bitstream/handle/123456789/1061/Simon%20Kabiru.pdf?sequence=1&isAllowed=y>

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URL: <http://www.kenyalaw.org/kl/index.php?id=701>

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URL: <http://quincykiptooslawsolutions.blogspot.com/2016/10/legal-framework-governing-higher.html>

Fetches: 8/15/2022 9:40:33 AM

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URL: http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/170-Legal_Education_Accreditation_of_Legal_Education_Institutions_Regulations_2009.doc

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URL: <https://cmj.riarauniversity.ac.ke/accreditation-legal-education-institutions-kenya/>

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Appendix B: Ethical Clearance Confirmation



4th April 2022

Ms Wabwire Georgina,
georgina.wabwire@strathmore.edu

Dear Ms Wabwire,

RE: Assessing the impact of regulatory enforcement on corporate governance of Law Schools

This is to inform you that SU-IERC has reviewed and **approved** your above **SU masters'** research proposal. Your application reference number is **SU-IERC1293/22**. The approval period is **4th April 2022 to 3rd April 2023**.

This approval is subject to compliance with the following requirements:

- i. Only approved documents including (informed consents, study instruments, MTA) will be used
- ii. All changes including (amendments, deviations, and violations) are submitted for review and approval by SU-IERC.
- iii. Death and life-threatening problems and serious adverse events or unexpected adverse events whether related or unrelated to the study must be reported to SU-IERC within 48 hours of notification
- iv. Any changes, anticipated or otherwise that may increase the risks or affected safety or welfare of study participants and others or affect the integrity of the research must be reported to SU-IERC within 48 hours
- v. Clearance for export of biological specimens must be obtained from relevant institutions.
- vi. Submission of a request for renewal of approval at least 60 days prior to expiry of the approval period. Attach a comprehensive progress report to support the renewal.
- vii. Submission of an executive summary report within 90 days upon completion of the study to SU-IERC.

Prior to commencing your study, you will be expected to obtain a research license from National Commission for Science, Technology, and Innovation (NACOSTI) <https://research-portal.nacosti.go.ke/> and obtain other clearances needed.

Yours sincerely,

for: **Dr Ben Ngoye,**
Secretary; SU-IERC



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