



Strathmore University

Law School

**The detrimental effects of invoking Moral Clauses as sufficient ground
for the termination of celebrity or talent endorsements**

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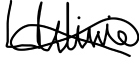
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Declaration

I, WINNIE IVY LUMONYA, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: 

Date: 16/07/2021

This dissertation has been submitted for examination with my approval as university Supervisor.

Signed: 

Anne Kotonya

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I would like to thank God, first for his never-ending grace and mercy,

A special feeling of gratitude to my parents, Sam and Olive Lumonya; who's words of encouragement and push for tenacity ring in my ear,

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Dedication

For my family and inner circle

ABSTRACT

The dissertation is a study of how the enforcement of moral clauses in endorsement contracts has led to the violation of the right to freedom of expression and privacy rights. For the last century, the inclusion of moral clauses has been a common norm in endorsement contracts in America. They are generally upheld by the courts and are added to contracts by endorsers in order to curb the risk of the celebrity's behaviour negatively affecting the consumption of the goods they endorse. The paper focusses on how America has treated the enforcement of the clauses, anticipating that with the growth of endorsements in Kenya, they will soon be implemented in celebrities' contracts. The objectives of this paper are to examine the justification of the inclusion of moral clauses in contracts and to analyse the uncertainties of the use of unrestricted moral clauses as a reason for termination of contracts. With the help of legal journal articles and case law, the research concludes that the unfettered enforcement of the ambiguous clauses places too much power in the hands of the endorser who in turn can use this power to terminate the contract which can infringe on the rights of endorsees. The research methodology specifically looks at how the clauses have been enforced in America and whether they can be used in the Kenyan contract law system. The research acknowledges the significant structural differences but also points to the links between the two systems. It further analyses the growth of endorsements in Kenya and how the inclusion of these clauses in Kenya can affect endorsees in the long run. This paper finds that well drafted moral clauses remain relevant and nuanced, however majority are poorly drafted and broad making it hard for an endorsee to know what behaviour amounts to violation of the clause.

List of Abbreviations

1. ICCPR -International Covenant for civil and political rights.
2. MBL-Major League Basketball.
3. NFL-National Football League.
4. NBA-National basketball league.
5. NHL-National Hockey league.
6. UDHR-Universal declaration of Human Rights.
7. UK-United Kingdom.
8. U.S -United States.

List of Cases

1. *Abrams v United States*.
2. *Galaviz v. Post-Newsweek Stations* (2010).
3. *Griswold v. Connecticut* (1965).
4. *Nader v. ABCTV* (2004).
5. *Republic v Kenya Cricket Association & 2 others* [2006] eKLR.
6. *Roe v. Wade* (1973), The Supreme court of the United States.
7. *Twentieth Century-Fox Film Corp. v. Lardner*.
8. *Morrison v State Board of Education*, Supreme Court of California, 1969.
9. *Stanley v Georgia*, Supreme court of the United States (1969)
10. *Scott v. RKO Radio Pictures, Inc.* (1957) 9th Circuit court, U.S
11. *Dias v. Archdiocese of Cincinnati* (2013) Ohio Southern Court.
12. *Republic v Kenya Cricket Association & 2 others* [2006] eKLR.
13. *Mendenhall v. Hanesbrands, Inc.* (2012) North Carolina District court.

List of legal instruments

1. Constitution of Kenya (2010).
2. Law of Contracts CAP 23 (1961)
3. International Convention of Civil and Political Rights (1966).
4. The first Amendment (1791) United States of America.
5. The Human Rights Act (1998)

CHAPTER ONE

Introduction to the research

Reputation takes years to build and seconds to destroy. A moral clause in contract law, is a provision in a contract that gives the endorser the permission to end the agreement when the endorsee behaves in a way that sheds negative light on his or her own public image and as a consequence, damages the reputation of the endorsee by association.¹ The consent to use a celebrity or talent's image for advertising is attained through these endorsement contracts. Celebrity endorsement is a kind of branding where a celebrity acts as the brand ambassador by lending their personality to the product.² A celebrity is someone who attracts great public interest from the sports or entertainment industries and will be highly seen in the media with their private life attracting greater public interest than their professional life.³ A talent is a person who has the skill to do something well i.e. an athlete.⁴ When at the top of their game, professional athletes, models, and celebrities can sign contracts with many companies forming a relationship between the two where duties arise on both ends. At the same time, it is very easy for the companies to terminate their contracts using moral clauses, for the benefit of the company and protection of their reputation. Companies add moral clauses that usually look like this,

*'The endorser agrees to conduct himself in line with public morals and agrees that he will not do or commit any act or thing that will bring him into public hatred, contempt, scorn or ridicule, or that will insult or offend the community, failure to uphold this clause will lead to termination.'*⁵

A moral clause is added into contracts where the contractor's behaviour in the public can greatly affect the contractor's reputation, a moral clause is an example of a risk avoidance

¹ Jihad S, 'Punishing Bad Actors: The Expansion of Morals Clauses in Hollywood Entertainment Contracts in the Wake of the #MeToo Movement' 43 *Nova Law Review*, 2019, 206.

² Jackinda R, 'The influence of celebrity endorsement on customers purchasing decisions of fast-moving consumer goods among low and middle social class in Nairobi County' University of Nairobi, Nairobi, 2017, 2.

³ Turner G, 'Understanding Celebrity' *Sage journals*, 2013, 3-https://us.sagepub.com/sites/default/files/upm-binaries/57767_Turner_Understanding_Celebrity.pdf on 27th December 2020.

⁴ Who is a talent? Workforce group, 1st June 2019 -<https://workforcegroup.com/articles/who-is-a-talent/> > on 27th December 2020.

⁵ Kressler B, 'Using the Morals Clause in Talent Agreements: A Historical, Legal and Practical Guide' 29 *Columbia Journal of Law and the Arts* 2, 2005, 235.

provision.⁶ Moral clauses give the endorser the right to terminate the contract when the other party behaves in a manner that attracts disrepute. They have largely escaped judicial scrutiny and yet their unrestricted use allows limitations on expression, privacy, and other liberties.⁷ Moral clauses often appear in sponsorship, endorsement, talent, sports contracts and have recently began to appear in Chief Executive Officer contracts.⁸

The ambiguity of moral clauses in contracts has been a big legal issue in all countries. Over time, the clauses have been intentionally drafted vaguely by the endorsee in order for them to have the discretion to choose when to invoke the clause, and this places the endorser in a detrimental position. The ambiguity is in the fact that the clauses are vague meaning celebrities have no knowledge of what conduct triggers the clause.⁹ With the growing and emerging rate of contracts dealing with endorsements and talents in Kenya, it is an issue that can affect Kenyans in time to come. Celebrity endorsement is not new in Kenya and can be seen in the 1970s when Kipchoge Keino, the 1968 Mexico Olympic gold medallist, was endorsed by Coca-Cola to feature in their advert, and celebrity endorsement has become one of the most used forms of advertising.¹⁰ Endorsement of Kenyan celebrities by established brands has gained immense attention in the past few years, for example Janet Mbugua was named brand endorsement by Lifebuoy soap, Jeff Koinange was named the face of Tusker Malt etc.

Therefore, although the issues regarding termination of contracts with regard to moral clauses in endorsements has not affected Kenya ,there is a high possibility that such issues will be seen in due time for example recently, the Cabinet Secretary of the Tourism board cancelled Pauline Njoroge’s appointment as a member of the tourism regulatory Authority

⁶ Kamenetzky C, ‘The need for strict morality clauses in endorsement contracts’7 *Pace Intellectual property, sports and entertainment law forum* 1,2017 ,296.

⁷ Green N, Sanchez P, ‘Contracting correctness: A rubric for analysing morality clauses’ 74 *Washington and Lee Law review* 1 ,2017, 3.

⁸ Green N, Sanchez P, ‘Contracting correctness: A rubric for analysing morality clauses’ 57.

⁹ Jihad Sheikha, 'Punishing Bad Actors: The Expansion of Morals Clauses in Hollywood Entertainment Contracts in the Wake of the #MeToo Movement' 227.

¹⁰ Njuguna Simon Peter, ‘Influence of Celebrity Endorsements on Young Consumers’ Brand recall Behaviour in Kenya A Case of Nairobi County’ *Strathmore University,Nairobi,2015* -< https://su-plus.strathmore.edu/bitstream/handle/11071/5167/Research%20paper_IAABD%20Conference%202015.pdf?sequence=2&isAllowed=y> on 6th September 2020.

Board.¹¹ In this case, Pauline lost the opportunity because the tourism board was in disagreement with her opinions on the park, she had posted them on her social media page a few years back. Termination for such reasons has raised legal issues concerning violation of the freedom of expression as the inclusion of vague moral clauses in contracts gives the contractor the absolute power to terminate the contract if according to their discretion, an act or expression violated their company morals or caused public disrepute.

Statement of Problem

In situations where a contract places a celebrity/talent as the representative of a company, moral clauses are used by the company to reduce on the risk of the company losing financially when the endorser acts in a manner that brings him public disrepute. In most cases, since the product is now tied to the endorser, consumption can be greatly affected, and companies try to mitigate this by immediate termination. The clauses permit the immediate termination in the event of such behaviour and this quickly disconnects the company and the endorser in the public mindset.¹² However, over time, these clauses have been ambiguous and are being used to the detriment of celebrities and talents. Many times, moral clauses result in immediate termination. Before they are included into contracts, they are heavily negotiated by the company and the person they wish to endorse. If invoked, they are heavily litigated in form of a suit for wrongful termination by those whom they are brought against.¹³ The use of unrestricted use of moral clauses can curtail two constitutional rights namely the right to freedom of expression and the right to privacy. The issues of their uncertainty and violation of rights through these clauses have been raised in many court cases in America. The research paper discusses the uncertainty and criticisms of the moral clauses as a basis for termination of contracts. It looks at the benefit of the clause to the contractor as well as the detriment of the clause to the contracting party.

¹¹ Vincent K , 'Balala revokes appointment of Pauline Njoroge over Facebook post' The Standard ,August 8th 2020 -< <https://www.standardmedia.co.ke/entertainment/news/2001381696/balala-revokes-appointment-of-pauline-njoroge-over-facebook-post>> on 6th September 2020.

¹² Greene N, 'Contracting correctness: A rubric of analysing morality clauses' 5.

¹³ Gallagher S, 'Who is really winning: The Tension of Morals Clauses in Film and Television' 16 *Virginia Sports & Entertainment Law Journal* 88,2016,88.

Rationale of Study

This research provides a critic to the unrestricted use of moral clauses because they place too much power in the hands of the contractor. Compliance with the clauses is difficult as the requirements are unpredictable and vague placing the endorsee in a position where they do not know what actions can amount to breach.

Significance of the study

The research will benefit endorsees in endorsements as they require moral clauses in their contracts. The importance of this research is to bring to light the detriments of the unrestricted use of these clauses to endorsees with regard to their constitutional rights as well as well as come up with solutions to their ambiguity.

Statement of aim and objectives

The aim of the study is to discourage the inclusion of moral clauses in endorsement contracts as well as promote the better drafting of the clauses if used. The following objectives would facilitate the achievement of this aim:

1. To examine the justification of the inclusion of moral clauses in contracts.
2. To analyse the uncertainties that arise from the unrestricted use of moral clauses as a basis for termination of contracts.
3. To analyse the overriding constitutional implications on the rights by the unrestricted use of moral clauses.
4. To examine the possible solutions and options to moral clauses in contracts.

Research questions

1. What is the justification of the inclusion of a moral clause in an endorsement contract?
2. To what extent can a moral clause be unfair and detrimental to a celebrity in the hands of the company?
3. How has the unrestricted use of moral clauses violated the right to privacy and freedom of expression?
4. What are the solutions to improving the application of moral clauses in contracts?

Hypothesis

Poorly drafted moral clauses place the celebrity/talent at the mercy of the company and can lead to the unfair termination of contracts. The way these clauses have been used over time,

with the growing era of rights, can lead to violation of certain rights, therefore there is need for an improvement in the policies guiding the inclusion of moral clauses in contracts as they have been one-sided for the longest time. Moral clauses should be fair, and contractors should be able to draft them in a way that does not immediately terminate but give the endorser opportunity to redeem his/her behaviour or to be proven guilty as many times social media bases its stories on suspicion. Since the drafting purely depends on the negotiation, specific guidelines for the drafting of such clauses should be put in place to improve certainty.

Theoretical framework

Kant deposits that freedom is an essential constituent of human beings, he states that when humans are subjected to domination and subjection, it tramples human dignity.¹⁴ According to Kant, to be dominated by others meant to be forced to follow their inclinations. Post added that each of us deserves self-realisation which means speech should be protected when citizens speak in the public sphere.¹⁵ Green defines positive liberty as personal moral capacity. He speaks of freedom as something to be so highly respected giving an individual power or capacity to do or enjoy something of their free choice, it means power which each man utilises through the help of security given by his fellowmen.¹⁶ Freedom can be seen in contracting, in speech, in religious choices etc.

Therefore, the theory of freedom of speech is a very significant and fundamental right that should be protected. It is upheld in the Universal Declaration of Human rights, the Magna Carta and the ICCPR. All forms of opinions like political, religious or moral are protected but it can be restricted under specific conditions.¹⁷ Free speech can be curtailed by censorship which means imposing restrictions direct or indirect on the exercise of free speech.¹⁸ One of the justifications of free speech is the discovery of truth. According to John Stuart Mill, the diversity of opinions expressed in the public freely is essential to truth discovery and he

¹⁴ Demenchonoke E, 'Learning from Kant: On Freedom.' 75 *Revista Portuguesa De Filo*s 1, 2019,192.

¹⁵ Thomas J, 'Robert Post's theory of freedom of speech: critique of the reductive conception of political liberty' 40 *Philosophy and social criticism* 1 ,2014,116.

¹⁶ Horacio S, 'Philosophical foundations of labour law' 33 *Florida State Law review* 1119 ,2006,1122.

¹⁷ Shameek S, 'Right to Free speech and censorship: A Jurisprudential analysis' 56 *Journal of the Indian Law Institute* 2,2014,188.

¹⁸ Shameek S, 'Right to Free speech and censorship: A Jurisprudential analysis' 1.

justifies this by saying an opinion that is silenced by a more powerful party may be true.¹⁹ This is discussed in *Abrams v United States* saying that the freedom to share ideas helps to promote knowledge and truth as people are subjected to many ideas for public debate.²⁰ Another ground for free speech is personal development as formulated by Barendt who says that restrictions of what we want to say or write will curtail our personal growth meaning free speech is necessary for intellectual and emotional development of personality.²¹ Meiklejohn and Sunstein argue that democratic participation is fuelled by the protection of freedom of expression as its necessary for political participation of citizens. This is because citizens have a right to political participation and therefore any censorship will amount to violation of political participation.²² Meiklejohn emphasizes political participation as the main means to democracy which can only be attained through freedom of expression as citizens need to be able to genuinely express themselves without fear of bad consequences.²³ Barendt criticises this view because it mainly focuses on political speech ignoring the protection of non-political speech like literary and commercial speech.²⁴ According to Dworkin free speech can be supported on the basis of moral independence recognising the autonomy of a person to make a decision or an opinion without being forced or censored.²⁵ Paul O'Higgins mentions the different types of censorship that can occur namely; autonomous, legal, voluntary, subterranean and social. The censorship brought about

¹⁹ Devrim K, 'Justifications of freedom of speech: Towards a double-grounded non-consequentialist approach' 41 *Philosophy and social criticism* 9, 2014, 911.

²⁰ David E, 'Philosophy and Theory of freedom of expression' DePaul University college of Law, 2005, 5- <<file:///C:/Users/winni/Downloads/SSRN-id801344.pdf>> on 20th January 2021.

²¹ Devrim K, 'Justifications of freedom of speech: Towards a double-grounded non-consequentialist approach' 912.

²² Devrim K, 'Justifications of freedom of speech: Towards a double-grounded non-consequentialist approach' 915.

²³ Devrim K, 'Justifications of freedom of speech: Towards a double-grounded non-consequentialist approach' 915.

²⁴ Devrim K, 'Justifications of freedom of speech: Towards a double-grounded non-consequentialist approach' 915.

²⁵ Devrim K, 'Justifications of freedom of speech: Towards a double-grounded non-consequentialist approach' 918.

through inclusion of moral clauses can be termed as social as it's the discouragement of the expression of specific ideas through sanctions.²⁶

The research is justified by the meaning transference theory. McCracken proposed the theory and explained it as the transfer of meaning from a society to a product brands through advertisements, and eventually to the consumers by consumption.²⁷ Celebrities have meanings that have developed from their roles portrayed and personal achievements which bring them a public following. Once a company associates their product with a celebrity, mostly their public following will consume the product because of that celebrity association.²⁸ Therefore, companies invest billions of dollars in signing celebrities to endorse their products. In this case, if a celebrity is portrayed in bad light or involved in anything that brings public disrepute him, his or her public following will most likely try to disassociate themselves with him and will not buy the products he or she endorses since meaning transference would have happened. This is why companies have moral clauses, in order to cut their connection with a celebrity as soon he or she gets involved in any negative scandals so that they do not make losses. In contract law, general clauses protect contracting parties in circumstances which cannot be foreseen by either parties or the legal system. Thus, general clauses tend to be open-ended and vague.²⁹ Moral clauses in contracts can be termed as general clauses as they are vague and for something that cannot be foreseen.

Literature review

The historical case that activated the use of morals clauses in talent contracts, was the Fatty Arbuckle case.³⁰ In 1921, a female guest at Roscoe Arbuckle's party was found injured in his hotel suite just after he had signed a three-year, three-million-dollar contract with Paramount Pictures. Universal Studios were not involved but the fallout after made them begin including morals clauses in all of their talent contracts. Over time, the issues arising from moral clauses have been seen in many American courts and to date it is still an unresolved issue. The issue of termination of celebrities or talents on the basis of moral

²⁶ Hameek S, 'Right to Free speech and censorship: A Jurisprudential analysis' 181.

²⁷ Greene N, 'Contracting correctness: A rubric of analysing morality clauses' 14.

²⁸ Greene N, 'Contracting correctness: A rubric of analysing morality clauses' 14.

²⁹ Hawthorne, 'Public policy: the origin of a general clause in the South African law of contract, 19 *Fundamina*, Pretoria 2, 2013, 4.

³⁰ Epstein C, 'Morals clauses: Past, present and future, 5 *Journal of Intellectual Property and Entertainment Law* 1, 2016, 76.

clauses has not really been seen in Kenya but with the rising growth of endorsement deals, it is an issue that will soon affect Kenya. Enforcing a moral clause can either be necessary for protecting a legitimate business aim or is simply in bad faith or discrimination therefore, courts have debated over the issue for a while now³¹ Social media has introduced instant communication as we see that one tweet can immediately expose a celebrity's unpopular views and send his or her career to the pits. Any example is the case of Pauline Njoroge whose appointment on the tourism board was reversed because of a remark she made on social media reflecting parks as wastes of resources.³² The remarks had been made on her Facebook several years back and they went against the goal of the tourism and for this reason her appointment was revoked. There is no clear-cut criteria for assessing the extent to which moral clauses can be enforced and fairly imposed. This is why the legality of these clauses has been questioned by many scholars and courts in America.

In different litigation cases, the decisions have been one sided and moral clauses have been upheld for example in *Nader v. ABCTV case*, when Michael Nader an actor on the television soap opera was terminated for violations of his ambiguous, overbroad, and vague moral clauses, the termination was upheld.³³ In *Galaviz v. Post-Newsweek Stations*, Virginia Galaviz, a television news reporter, was terminated for breaching her morals clauses after a domestic personal dispute led to her arrest bringing her into public disrepute and scandal.³⁴ The cases show how courts have upheld morals clause as valid grounds for termination.

The law requires a high degree of certainty as a key point to determining when a contract has been breached, it doesn't have to be absolute but should not be ambiguous or leading to two conflicting understandings, followed by dispute resolution, and finally, a soured relationship.³⁵ Many moral clauses are ambiguous and are sometimes not fair and reasonable but the power of negotiation in the contract drafting is entirely on the employee's and the

³¹ Green N, 'Contracting correctness: A rubric for analysing morality clauses', 8.

³² Vincent K, 'Balala revokes appointment of Pauline Njoroge over Facebook post' Standard media group, September -< <https://www.standardmedia.co.ke/entertainment/news/2001381696/balala-revokes-appointment-of-pauline-njoroge-over-facebook-post>>on 5th December 2020.

³³ Zariello A, 'A Call to the Bullpen: Alternatives to the Morality Clause as Endorsement Companies' Main Protection against Athletic Scandal' 56 *Boston College Law Review* 1,2015,399.

³⁴ J Haskell Murray, 'Morality Clauses and Escrow Accounts in Sports Contracts' 17 *Virginia Sports & Entertainment Law Journal*,2018,136.

³⁵Gallagher S, 'Who's really winning, 99.

employer's respective lawyers so many a time the negotiated agreement might be to the disadvantage of the employee.³⁶ A morals clause generally seeks to cover conduct that goes against social conventions offending the community which places an endorser in a bad light due to the association.³⁷ This raises issues because morals are subjective and putting someone's source of livelihood on the line because of the public's view of what is moral and what isn't would be erroneous.

In a Kenyan aspect, one could argue that a moral clause can be unconstitutional because of the bill of rights. *Article 33* expounds on freedom of expression³⁸, and a moral clause can limit a celebrities' social expression and political beliefs because of the fear to be terminated. It also curtails the right to privacy in *Article 31* as their contract can be terminated because of their private communications and activities.³⁹ The different liberties at stake when companies use moral clauses as a justification for termination stem all the way from international law treaties in 1996. The International Convention for Civil and Political Rights (ICCPR) recognized rights that derive from the inherent human dignity of a person. *Article 5* starts by saying no State, group or person has any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized.⁴⁰ Some of the rights recognized are the right to privacy, the right to expression and the right to equality and non-discrimination.

Many of these liberties have been recognized in different countries across the world for example in America, the first amendment of its constitution recognizes the right to expression as an important one that ought to be protected.⁴¹ The right to Privacy is not notably stated in the United States (U.S) Constitution but can be inferred from the *Griswold v Connecticut* case.⁴² The same was is *Roe v Wade* case where the Supreme Court used privacy rights to overturn most laws against abortion in the U.S.⁴³

³⁶Gallagher S, 'Who's really winning, 99.

³⁷ Gallagher S, 'Who's really winning, 97.

³⁸ Article 33, Constitution of Kenya (2010).

³⁹ Article 31, Constitution of Kenya (2010).

⁴⁰ Article 15, International Convention of Civil and Political Rights (1966).

⁴¹ *The first Amendment* (1791) The supreme court of the U.S.

⁴² *Griswold v. Connecticut* (1965) The Supreme court of the U.S.

⁴³ *Roe v. Wade* (1973), The Supreme court of the United States.

Research methodology

The research is centred around qualitative doctrinal research, looking into primary and secondary sources. It will be a comparative study of how moral clauses have affected America, looking into decisions made by courts and the issues brought out concerning balancing of rights and how they can affect Kenyan celebrities and talent contracts in the long run. A comparative study has been used because it helps to enhance ones understanding of their society by placing its structures against those of other systems. America has had many difficulties concerning the legality of moral clauses and a lot of these issues discussed can affect Kenya in the long run as many athletes, public figures, and celebrities are getting endorsed for large amounts of money. America's legal system is different from Kenya's but has some intertwining aspects with regard, this is because contract law in America grew out of the system of common law which has its roots in English customs and court decisions. The differences in their contract laws are significant but have a few points where they meet hence my study of how America has treated moral clauses and how the same issues can affect Kenya if moral clauses are added to these contracts. The research will mainly be based on information from legal journals and articles as well as institutional reports and legislation. This approach fits the research because various researchers have written on the issues being discussed by the paper and have fed into this research. The sources have helped in research development in order to come up with solutions to the problems involved in such contracts.

Chapter Breakdown

Chapter one gives an introduction and background to the research topic by stating the research aims, objectives and questions. The overall aim is to discourage the unrestricted application of moral clauses. Chapter Two gives a background of moral clauses and their evolution up to date; it further explains their framework and legal enforceability Chapter Three justifies the inclusion of a moral clause in a contract and critiques their inclusion in endorsement contracts. Chapter four analyses the extent to which the unrestricted application of these clauses has been detrimental to celebrities and talents in America and how the same can affect Kenya in the long run. It focusses specifically on the violation of the right to Privacy and the right to freedom of expression.

CHAPTER TWO

Evolution of moral clauses and their framework

This chapter will contain a study and analysis of the history of moral clauses in contracts and their enforceability to date.

History of moral clauses

A morals clause is a clause that gives one party the one-sided right to discontinue the agreement or take disciplinary action against the other party in the event that such other party engages in behaviour that may bring public disrepute upon himself and the public image of the contracting company.⁴⁴ There has been an increase in the cases involving morals clauses in the public recently, however the clauses are not new, and history helps us understand them better.⁴⁵ Talent has been prey to this moral scrutiny for more than a century, they are not a new legal development and have evolved over time despite the recent rise of issues concerning the clauses.⁴⁶ The understanding of the current legal issues surrounding morals clauses is best done by examining the history of morals clauses in the United States as it shed more light on the context in which they are presently viewed.⁴⁷

The first instance of moral clauses appeared on the scene in the Fatty Arbuckle case is 1921. Comedian Roscoe Arbuckle had just signed a sweet contract with Paramount Pictures when a female guest at his party was found severely injured in his hotel room and she eventually died from her injuries. He was arrested on rape and murder charges, which brought him immense public disrepute.⁴⁸ Eventually, he was acquitted at trial, but public opinion had already made its judgment which affected paramount pictures. This case inspired Universal Studios to begin including moral clauses in all of their talent contracts.⁴⁹ Directly from the

⁴⁴ Fernando, Pinguelo, 'Morals? Who Cares About Morals? An Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know', 19 *Seton Hall Journal of Sports and Entertainment* 2 ,2009, 351.

⁴⁵Caroline Epstein, 'Morals Clauses: Past, Present and Future' 5 *New York University Journal Intellectual Property & Entertainment Law* 1,76.

⁴⁶ Fernando, Pinguelo, 'Morals? Who Cares About Morals? An Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know', 353.

⁴⁷ Fernando, Pinguelo, 'Morals? Who Cares About Morals? An Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know',353

⁴⁸ Carol Epstein, 'Morals Clauses: Past, Present and Future',76.

⁴⁹ Carol Epstein, 'Morals Clauses: Past, Present and Future',71.

Arbuckle case scandal, Universal film company introduced a new policy stating that moral clauses would be added to all existing and new agreements and they gave the studio the unilateral power to terminate contracts and salaries discontinued if the talents got involved in public scandals.⁵⁰ Thus, after the Fatty Arbuckle scandal, moral clauses began to increase on the talent scene. Companies that dealt with talents where image was involved now began to add moral clauses to the contracts with the parties in order to protect themselves in case the talent misbehaved.

The McCarthy Era saw a big alteration to the way in which companies used moral clauses against talent. It introduced the aspect of curtailing of expression. During the 1940s and 1950s, the clauses were used to censor political expression.⁵¹ For example, moral clauses were used as grounds for dismissal of the Hollywood Ten who were influential actors that were blacklisted by big movie studios for failing to publicly denounce their communist activities before the House Committee on Un-American Activities (HUAC) during its investigation of Communist influence in Hollywood.⁵² This was the earliest manifestation of how moral clauses were a violation of the right to freedom of expression. In 1947, Congress created the HUAC to subpoena several Hollywood figures to question their political beliefs and when they declined to testify were held in contempt.⁵³ Three of the ten, Lester Cole, Ring Lardner, and Robert Adrian Scott, were terminated under their moral clauses by their respective studios and as a result, they brought wrongful termination suits against their companies, this was the first time that moral clauses had been litigated in the courts.⁵⁴

In *Loew's v. Cole*, Cole, a screenwriter, had been terminated under his moral clause when he was found a hostile witness for failure to testify on issues of his membership in the communist party so his company invoked the moral clause in his contract suspending it

⁵⁰ Stephen M Gallagher, 'Who's Really Winning: The Tension of Morals Clauses in Film and Television' 16 *Virginia Sports & Entertainment Law Journal* 1, 2016, 93.

⁵¹ Fernando, Pinguelo, 'Morals? Who Cares About Morals? An Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know' 355.

⁵² Sarah D Katz, 'Reputations - A Lifetime to Build, Seconds to Destroy: Maximizing the Mutually Protective Value of Morals Clauses in Talent Agreements' 20 *Cardozo Journal of International & Comparative law* 185, 2011, 203.

⁵³ Stephen M Gallagher, 'Who's Really Winning: The Tension of Morals Clauses in Film and Television' 94.

⁵⁴ Stephen M Gallagher, 'Who's Really Winning: The Tension of Morals Clauses in Film and Television' 95.

claiming that his actions brought public disrepute to the company.⁵⁵ The ninth circuit ruled in favour of the company claiming that since there was evidence of damage caused by Cole's failure to declare he was not communist, invoking the moral clause to terminate the contract was justified. In the second case, *Twentieth Century-Fox Film Corp. v. Lardner*, Lardner refused to tell the HUAC whether or not he was a communist and was later convicted of contempt resulting into his termination by Fox.⁵⁶ The Ninth Circuit stated that being held in contempt breached the Lardner's moral clauses hence the termination was justified.⁵⁷ Finally, in *Scott v. RKO Radio Pictures Inc*, Adrian Scott was terminated pursuant to a moral's clause in his contract after HUAC cited him for contempt of court.⁵⁸ The trial judge found that Scott's actions breached his contract, and his termination was justified. Thus, these cases showed that a breach of an express moral's clause on the judgement of the company, is just cause for terminating a talent agreement where the conduct at issue is against the company's views.⁵⁹

After the McCarthy Era, the use of moral clauses changed back from censoring political opinions, to curbing immoral behaviour and protecting a company's image.⁶⁰ From the 1980s to the present, moral clauses have been used with increasing frequency in numerous contracts, including athlete, celebrity endorsement contracts etc. Another case addressing moral clauses in talent agreements is *Nader v. ABC Television, Inc.* where Michael Nader who was an actor on a popular soap opera produced by ABC Television had his contract terminated because his arrest for selling cocaine to an undercover police officer was largely publicised by the media.⁶¹ Nader brought suit against ABC for breach of contract but the Circuit held that Nader's arrest and the media attention brought his conduct within any

⁵⁵ Sarah D Katz, 'Reputations - A Lifetime to Build, Seconds to Destroy: Maximizing the Mutually Protective Value of Morals Clauses in Talent Agreements' 203.

⁵⁶ Haskell Murray, 'Morality Clauses and Escrow Accounts in Sports Contracts' 17 *Virginia Sports & Entertainment Law Journal* 2, 2018, 122.

⁵⁷ Stephen M Gallagher, 'Who's Really Winning: The Tension of Morals Clauses in Film and Television' 95.

⁵⁸ *Scott v. RKO Radio Pictures, Inc* (1957) 9th Circuit court, U.S.

⁵⁹ Fernando, Pinguelo, 'Morals? Who Cares About Morals? An Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know', 361.

⁶⁰ Fernando, Pinguelo, 'Morals? Who Cares About Morals? An Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know', 356.

⁶¹ *Nader v ABC Television Inc* (2004) 2nd circuit, U.S.

reasonable interpretation of the moral's clause.⁶² The judgement in this case is in line with the Hollywood three cases and in all ,no particular attention was given to showing how the talents behaviour was detrimental to the company or how proportionate the reason for termination was.

This paper focuses on how moral clauses are detrimental to particularly the right to privacy and freedom of expression of celebrities and talents when invoked. Moral clauses have grown in the endorsement industry where they remain key to the contract because of the strength of the celebrity-product association.⁶³ When companies are signing endorsement contracts, the financial and reputational costs on the line are high and therefore moral clauses give them some form of protection. They are heavily negotiated as both parties want to be in the best position at the end with the talent wanting specific language while the endorsement companies prefer broad language so that the company can maximize potential protection. This gives the company so much power and discretion to determine if the athlete's actions fit within their proscribed conduct.⁶⁴

Moral clauses in the twentieth century and their framework

There is no set law or requirement that a moral clause must meet, the basic rules of contract apply as it must be comprehensive clearly defining the scope of its application and conditions of termination.⁶⁵ There are two kinds of moral clauses namely implied and express. With implied, a duty can be inferred from common law refraining the talent from activities that are detrimental to the endorser.⁶⁶ Express moral clauses on the other hand are drafted as a part of the endorsement contract. Express moral clauses vary based on the talent and contracting company involved but the basic punishment for violation of a clause is termination of the agreement.⁶⁷ Express moral clauses are advantageous because the attempt

⁶² Fernando, Pinguelo, 'Morals? Who Cares About Morals? An Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know' 362.

⁶³ Stephen M Gallagher, 'Who's Really Winning: The Tension of Morals Clauses in Film and Television' ,99

⁶⁴ Zarriello, 'A Call to the Bullpen: Alternatives to the Morality Clause as Endorsement Companies' Main Protection against Athletic Scandal' 397.

⁶⁵ Navin K, 'The Anatomy of the morals clause in endorsement agreements by celebrity athletes' LinkedIn, 24th August 2018 -< <https://www.linkedin.com/pulse/anatomy-morals-clause-endorsement-agreements-celebrity-jaggi>> on 2nd January 2021.

⁶⁶Carol Epstein, 'Morals Clauses: Past, Present and Future' ,80.

⁶⁷ Carol Epstein, 'Morals Clauses: Past, Present and Future' 78.

to remove ambiguity associated with acceptable behaviour. However, they lack predictability as to when they might be triggered which is a problem because social norms continue to differ and evolve. These clauses can either be specific or vague, companies generally want broad clauses in order to have the discretion to determine which actions can lead to a termination while a specific narrow clause will specify the situations that lead to termination.⁶⁸ Since so many actions can fall short of the public morality, companies prefer to have broad clauses, and this is solely to their interest and since they are open to interpretation are more prone to litigation.⁶⁹ In the case of Chris Webber, FILA terminated his contract for something that wasn't explicitly mentioned in the clause and he was successful in a suit for unlawful termination because his clause required conviction of a crime for it to be invoked.⁷⁰

Moral clauses have been seen in different areas concerning celebrities; on television the problematic issues of moral clauses were addressed in the Charlie Sheen case involving a prominent TV star who was fired from his show because he had publicly ridiculed the TV shows' producer.⁷¹ However, his case became complicated when he got fired because he claimed that his contract had no moral clause but instead had a moral turpitude clause which required felony conviction before it could be triggered and in this case there was no felony.⁷² Some celebrities have successfully challenged their terminations while others have failed. In 1999, Chris Webber successfully challenged the discontinuance of his endorsement agreement with sportswear brand Fila pursuant to the moral's clause. He brought an arbitration claim against Fila for wrongful termination and he was successful arguing that since the language of the clause permitted termination only if he were convicted of a crime, his payment of a fine could not amount to violation of the clause.⁷³ However, when Kobe Bryant was charged with sexual assault in 2003, he lost endorsement with McDonald's, Nutella, Spalding, and Coke, all totalling to \$4 million and when he challenged them on

⁶⁸ Navin K, 'The Anatomy of the morals clause in endorsement agreements by celebrity athletes'

⁶⁹ Navin K, 'The Anatomy of the morals clause in endorsement agreements by celebrity athletes'

⁷⁰ Carol Epstein, 'Morals Clauses: Past, Present and Future'94.

⁷¹ Sarah D Katz, 'Reputations - A Lifetime to Build, Seconds to Destroy: Maximizing the Mutually Protective Value of Morals Clauses in Talent Agreements' 193.

⁷² Sarah D Katz, 'Reputations - A Lifetime to Build, Seconds to Destroy: Maximizing the Mutually Protective Value of Morals Clauses in Talent Agreements' 193.

⁷³ Fernando, Pinguelo, 'Morals? Who Cares About Morals? An Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know'378.

similar reasons with Chris Webber, the courts upheld the termination.⁷⁴ The two cases showed the inconsistency in courts' decisions in such cases. In 1997, very few sports endorsement contracts had moral clauses, but by 2003 it was at least seventy-five percent that had.

Over the years, the endorser's success in cases involving moral clauses has greatly discouraged celebrities from questioning these clauses and it is not shocking that there is little litigation over moral clauses.⁷⁵ As applied in most cases, the validity of the clauses has been upheld regardless of how broad or vague they are, therefore there is no doubt that these clauses have a strong effect on the entertainment industry and negatively on talent.

Enforceability of moral clauses

Many courts have ruled in favour of the company claiming that the termination was justified, and from time to time, enforceability of moral clauses has been greatly challenged.⁷⁶ If they are properly drafted, they can be upheld. However, many a time they are ambiguous and can be challenged on the grounds of adhesion, unconscionability, illusory promise, breach of public policy, intrusion on the right to privacy and freedom of expression.⁷⁷ Some athlete contracts could be called contracts of adhesion which are contracts drafted by one party, to be signed by another party in a weaker position who signs the contract with no choice about the terms.⁷⁸ The terms are non-negotiable and are often offered on a "take-it-or-leave-it", therefore the talent or athlete as the weaker party is forced to sign the contract which in most cases is drafted to the advantage of the endorser and can raise issues once such a contract is terminated on the basis of a moral clause.⁷⁹ Moral clauses may be unconscionable and in such a case, it is clearly unfair so the courts must assess the circumstances with a purpose to prevent oppression of one side.⁸⁰ Courts look at the relative fairness of the obligations, the manner in which the contract was negotiated and the circumstances of the parties.⁸¹

⁷⁴ Caroline Epstein, 'Morals Clauses: Past, Present and Future' 94.

⁷⁵ Stephen M Gallagher, 'Who's Really Winning: The Tension of Morals Clauses in Film and Television' 98.

⁷⁶ Twentieth Century-Fox Film Corp. v. Lardner, Scott v. RKO Radio Pictures, Inc, Nader v. ABC Television.

⁷⁷ Haskell Murray, 'Morality Clauses and Escrow Accounts in Sports Contracts' 124.

⁷⁸ Haskell Murray, 'Morality Clauses and Escrow Accounts in Sports Contracts' 125.

⁷⁹ Haskell Murray, 'Morality Clauses and Escrow Accounts in Sports Contracts' 124-125.

⁸⁰ Sean M. Hanlon, 'Athletic Scholarships as Unconscionable Contracts of Adhesion: Has the NCAA Fouled Out?' 13 Sports Law Journal 41, 2006.

⁸¹ Haskell Murray, 'Morality Clauses and Escrow Accounts in Sports Contracts' 125

Overly vague moral clauses could make the athlete contracts illusory in nature. Such will make it hard for the talent or athlete to adhere as most times these clauses are broadly drafted allowing expansive interpretations.⁸² The word moral could be interpreted in any way that the sponsor wants, an athlete could be terminated for tweeting in favour or against homosexuality, it all depends on the company to decide. Therefore, when these clauses are enforced and litigated all this is put to question in court. Talents are forced to live according to the morals of their companies and it's very hard for them to weigh since morality is subjective.⁸³ The public eye is their judge especially in this social media-saturated world where any expressed opinion on either side of a controversial issue could be seen as bringing the employer into a bad light.⁸⁴ With such discretion, the employer can use a broad moral clause as an unrestrained option to terminate the athlete whenever need arises, using the moral clause as an excuse. It can be argued that these clauses can go against public policy as any clause that has the effect of restricting civil rights should not stand, especially when imposed on parties with little bargaining power.⁸⁵ An example would be a clause that is enforced for something that the talent could have expressed as this limit's freedom of expression, presumption of innocence, discrimination etc.

In order to be enforced, American courts have agreed on the following conditions; the clause should have a business interest and there must be a connection between the public minds, the endorser and the endorsee in order to justify termination.⁸⁶ There should be a nexus between the alleged public misconduct and the business in that the sales of the business substantially reduced as a result of the endorsee's behaviour.⁸⁷ The test should also prove that the clause was definite in that the endorsee knew exactly what acts would lead to the termination of his/her contract. The clause should be balanced against the company's rights.⁸⁸ If an endorser has specific expectations, they should be mentioned in the clause to avoid confusion and unenforceability due to ambiguity.⁸⁹ The courts in the Hollywood ten

⁸² Illusory Promise, Black's Law Dictionary (10th ed. 2014).

⁸³ Haskell Murray, 'Morality Clauses and Escrow Accounts in Sports Contracts' 176.

⁸⁴ Haskell Murray, 'Morality Clauses and Escrow Accounts in Sports Contracts' 176.

⁸⁵ Green N 'Contracting correctness: A rubric for analysing morality clauses' 7-8.

⁸⁶ Green N 'Contracting correctness: A rubric for analysing morality clauses' 50.

⁸⁷ Green N 'Contracting correctness: A rubric for analysing morality clauses' 51.

⁸⁸ Green N 'Contracting correctness: A rubric for analysing morality clauses' 51.

⁸⁹ Haskell Murray, 'Morality Clauses and Escrow Accounts in Sports Contracts' 130.

cases not only upheld that the moral clauses were enforceable but that the companies also had discretion to determine what could amount to violation of the clause. This has met judicial criticism as there is now need for the mentioned test in order to protect public policy.⁹⁰

⁹⁰ Stephen M Gallagher, 'Who's Really Winning: The Tension of Morals Clauses in Film and Television'96.

CHAPTER THREE

Chapter three will discuss the reasons as to why endorsers have continuously added moral clauses to their contracts despite the legality issues that the clauses face as well as a critic of the use of moral clauses.

Justification of the inclusion of a moral clause in a contract

The growth of social media, the increased publicity given to private information, and the speed with which private information is shared have been some of the key catalysts to the increasing need for moral clauses.⁹¹ In this day and era, it is unlikely for a company to enter into an agreement with talent without seeking the inclusion of a moral's clause. Companies first began including moral clauses in their talent contracts for corporate protection in 1921 when the Universal Studio's lawyers, Stanch field & Levy advised it to include moral clauses in its talent agreements as a recourse to the immoral conduct of its actors and actresses so as to protect its investments.⁹² Advertisers use moral clauses to quickly cut the celebrity to product association in the mind of the consumer as soon as they are involved in a public scandal while motion picture studios use them to ensure that their films are not compromised by the publicly unacceptable conduct of talent associated with them.⁹³ Moral clauses have been widely upheld because they provide additional protection for entertainment and endorsement investments, so long as they do not compromise constitutional rights to free speech or violate public policy.⁹⁴ This additional protection is form of a fall back for when a celebrity's behaviour is wrong in the eyes of the public, giving the permission to end the endorsement.

Moral clauses give the company power to immediately cut ties with talent if he or she engage in immoral conduct that can hurt the brand by association and result in large financial loss as a result of that public disrepute.⁹⁵ Companies usually have the power to decide whether an act violates the clause. The only way companies are able to have this broad interpretation

⁹¹ Caroline Epstein, 'Morals Clauses: Past, Present and Future',78.

⁹² Fernando M. Pinguelo & Timothy D. Cedrone, 'Morals - Who Cares About Morals - Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know' 366-367.

⁹³ Fernando M. Pinguelo & Timothy D. Cedrone, 'Morals - Who Cares About Morals - Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know'363.

⁹⁴ Daniel Auerbach, 'Morals Clauses as Corporate Protection in Athlete Endorsement Contracts, 3 DePaul Journal of Sports Law 1,2005.

⁹⁵ Kressler B, 'Using the Morals Clause in Talent Agreements: A Historical, Legal and Practical Guide'243.

is through having vague broad clauses. During negotiations, endorsers prefer that moral clauses have a very broad scope which gives them the discretion to determine which acts will trigger the termination for example it can be moral felony, an act against public morals etc. Such vaguely worded clauses are not to the interest of the endorsee but the company endorser.⁹⁶ This is justified by the argument that moral clauses provide remedies and protections against bad imaging and encourage moral behaviour. Moral clauses not only cut off compensation to athletes, but they terminate the association between the athlete and the company.⁹⁷ Negative associations are more prone to transfer to a brand meaning that consumers can reject products because of the endorsee, therefore a company representative who behaves badly will bring negative associations in consumers' minds who will most likely reject the goods.⁹⁸ The clauses protect the company from such mishaps by allowing it to disassociate itself with the talent to sever the relationship in the public's mind.⁹⁹ Weinstein Termination shows just how much a Hollywood company can lose because of immoral acts of a talent. He was terminated as chairman of the Weinstein Company after many women accused him of sexual misconduct bringing bad light towards the company making it lose many viewers and income.¹⁰⁰ Moral clauses in television contracts show the company's concerns with the public since television depends on good ratings which could be greatly affected by the actor's comments or behaviour.¹⁰¹

The rise of the Internet and social media has made moral clauses more important in today's society since talented individuals are now under more scrutiny.¹⁰² In the past, minor wrongs by talent went unnoticed by the public for example, America ignored Mickey Mantle's drinking problem but in 2007, when St. Louis Cardinals endorser Tony La Russa was arrested for drunken driving, reports of the incident went viral hours after it happened.¹⁰³ The association of a celebrity with the product brand has led to the increased need for moral

⁹⁶ Navin K, 'The Anatomy of the Morals clause in endorsement agreements by celebrity athletes'

⁹⁷ Green N 'Contracting correctness: A rubric for analysing morality clauses,14.

⁹⁸ Green N 'Contracting correctness: A rubric for analysing morality clauses,14.

⁹⁹ provisions ,396

¹⁰⁰ Jihad Sheikha, Punishing Bad Actors: The Expansion of Morals Clauses in Hollywood Entertainment Contracts in the Wake of the #MeToo Movement' ,219.

¹⁰¹ Caroline Epstein, Morals Clauses: Past, Present and Future'85-87.

¹⁰²Caroline Epstein, Morals Clauses: Past, Present and Future'100.

¹⁰³ Fernando M. Pinguelo & Timothy D. Cedrone, Morals - Who Cares About Morals - Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know' 367.

clauses. In the event of a celebrity's image being involved in scandal, these clauses allow for immediate termination before the brand can be hurt and so moral clauses in the endorsement industry have flourished, expanded and been upheld.¹⁰⁴ This is because they provide protection of the company since it gains the power to terminate the contract as soon as the talent or athlete is in public disrepute. The developing dynamics and character of talent has also given companies reason to put more emphasis on moral clauses. One reason is the age and maturity level of professional athletes because of the increase in athletes entering professional sports at a younger age than before. This has boosted the desire for more protection in endorsement agreements because of the unpredictable character of athletes and the amount of money at stake.¹⁰⁵ The companies take high financial risks and must do anything to cushion any mishaps that could happen as a result of the talents behaviour. For example, as of 2008, Nike owed more than \$3.8 billion in endorsement deals, by 2010, when Tiger Woods got into infidelity scandals, he had \$1 billion in career earnings with about 90% attributable to endorsements.¹⁰⁶ The total of sponsorship deals for the 2008 Beijing Olympics was approximately \$2.5 billion.¹⁰⁷ Therefore, with such large amounts of money directly linked to the talent, companies protect themselves in the event of talent's image being tarnished. With such large sums involved, once a celebrity associated with the product is involved in public disrepute, there are high chances consumers will disassociate themselves and yet the company is injecting a lot of money into the endorsements with the aim of increasing sales. In the case of Lance Armstrong who admitted to using performance enhancement drugs during his professional sports career, most of his endorsement companies terminated the contracts but were still not able to recoup what they had lost as most as many had paid him for winning races.

The clauses have become important because of the way in which social media spreads information. The public scrutinizes celebrities, and anything said or done by talent is

¹⁰⁴ Daniel R Avery and Joseph S Rosen, 'Complexity at the Expense of Common Sense: Emerging Trends in Celebrity Endorsement Deals' 23 Entertainment & Sports Law journal 2,2005,5.

¹⁰⁵ Fernando M. Pinguelo & Timothy D. Cedrone, 'Morals - Who Cares About Morals - Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know' 368.

¹⁰⁶ Fernando M Pinguelo and Timothy D Cedrone, 'Morals - Who Cares About Morals - Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know' 369.

¹⁰⁷ Fernando M Pinguelo and Timothy D Cedrone, 'Morals - Who Cares About Morals - Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know' 369.

broadcast to millions of people in seconds.¹⁰⁸ Moral clauses give leverage to the company to be able to terminate a contract as fast as the spread of the demoralizing comment or statement or video of the talent and therefore companies are now able gain control over the personal lives of talent.¹⁰⁹ The scrutiny from social media is also on a rampant growth placing the endorser at risk since any slight public disrepute by the talent can cost the company a lot of money simply because of the association hence the need for these clauses.¹¹⁰ Social media now spreads information instantly in that if a talent is involved in a scandal, the world will immediately learn about it via a tweet or post therefore, talent driven businesses that endorse are using aggressive means to protect themselves like the use of these clauses.¹¹¹ One issue that arises is once a scandal hits, the enforcement of these clauses requires the acquisition of information that is private and this can raise issues on violation of privacy.

Moral clauses in athletes' contracts are added in contracts to control the athletes' off-duty behaviour to ensure that they keep within the required morals. For example, in 2007, Adam Pacman was suspended for an entire season by the NFL after being arrested five times in less than two years.¹¹² Such behaviour is a justification for the need of moral clauses in that without them, companies would have no recourse for when talents misbehaved affecting the company and yet their endorsements were still running. Behaviour that affects the endorser can be both off-duty and on-duty therefore, there is need to ensure that talents maintain socially acceptable behaviour even in their private lives. Since endorsements tie the public perception of the celebrity and the product into one, any time the celebrity offends the public, this negative perception can affect the demand of the product.¹¹³ Therefore, companies often include moral clauses within contracts to protect themselves from these risks since these endorsement adverts aim to appeal to a wide audience and sell products to the public who are likely to have lower tolerance for controversies.¹¹⁴

¹⁰⁸ Caroline Epstein, 'Morals Clauses: Past, Present and Future' 102.

¹⁰⁹ Stephen M Gallagher, 'Who's Really Winning: The Tension of Morals Clauses in Film and Television' 105.

¹¹⁰ Daniel A, 'Moral clauses as corporate protection in Athlete endorsement contracts' 17.

¹¹¹ Sergio H, 'Moral turpitude clauses in the time of social media' JRG Attorneys at Law, 26th February 2018- < <https://www.jrgattorneys.com/blog/2018/february/moral-turpitude-clauses-in-the-time-of-social-me/>> on 4th January 2020.

¹¹² Caroline Epstein, 'Morals Clauses: Past, Present and Future' 91.

¹¹³ Caroline Epstein, 'Morals Clauses: Past, Present and Future' 92.

¹¹⁴ Caroline Epstein, 'Morals Clauses: Past, Present and Future' 95.

Moral clauses do not stop at personal contracts only but can be included in agreements between companies as well. Before the 2002 Olympic Games, corporate sponsors threatened to withdraw their sponsorship of the Olympics because of the Salt Lake City Winter Games bribery scandal.¹¹⁵ IOC's solution was to add moral clauses in sponsorship agreements allowing the corporate sponsors to terminate their sponsorship agreements with the IOC if the it engaged in activities that would harm the image of the Olympics. This was the first time a major sports organization or league had subjected itself to a moral's clause.¹¹⁶ Talents make mistakes and unfortunately, in this era, these are broadcasted into the limelight hence the need for the protection of the endorser. Companies believe the harm to their image begins at publicity and therefore, companies do not wait for conviction to disassociate from the athlete and places them in an unfair advantage.¹¹⁷

A critique of moral clauses in endorsement contracts

Moral clauses have always protected the stronger party's business interests and curtailed the other subject's rights since they tend to be broad and lacking in consideration.¹¹⁸ Most times they are imposed in inherently-coercive settings meaning one party is coerced against their will.¹¹⁹ Therefore, the negotiating power of an endorser can over power that of the endorsee forcing him or her to accept unfair clauses like a moral clause.¹²⁰ This places the endorsee in a powerless position and they end up signing unfair agreements. Moral clauses have become even more common in talent contracts, but the subjectivity of morality and its changing ways have posed challenges to their efficiency and legality. This is because their invocation can raise many constitutional issues concerning expression, privacy, discrimination, presumption of innocence etc. Moral clauses are in most cases to the benefit of the endorser and it is to a greater extent justified on one side. They promote the interests of the company only and do not consider the interests of the talent yet these endorsements are most times their source of livelihood. Endorsements are the biggest source of income for many

¹¹⁵ Fernando M Pinguelo and Timothy D Cedrone, 'Morals - Who Cares About Morals - Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know'366.

¹¹⁶ Fernando M Pinguelo and Timothy D Cedrone, 'Morals - Who Cares About Morals - Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know'366.

¹¹⁷ Caysee K, 'The need for strict morality clauses in endorsement contracts'296.

¹¹⁸ Caysee K, 'The need for strict morality clauses in endorsement contracts'296.

¹¹⁹ Caysee K, 'The need for strict morality clauses in endorsement contracts'296.

¹²⁰ Green N, Sanchez P, 'Contracting correctness: A rubric for analysing morality clauses'35.

celebrities i.e. Rodger Federer and Cristiano Ronaldo have been great beneficiaries of large Nike endorsements but all can be terminated on the basis of morality through the clauses.¹²¹ Many companies terminate their endorsements on the basis of moral clauses and this can cost endorsees a source of a living that they most probably already planned for.¹²² Termination of a source of living on the basis of mere suspicions from the public can therefore raise many questions.

These clauses tend to over-restrict talents which ends up curtailing some freedoms. While the reasons for moral clauses are somewhat justified, the good does not outweigh the tension that they create in the lives of talents and athletes who can no longer live-in peace because of public scrutiny and a moral clause.¹²³ On the other hand, moral clauses have also appeared contradictory. New York law prohibits discrimination against any individual for engaging in activities like political activities during non-working hours however this is washed down the drain as the law recognizes an employer's right to limit the lawful off-duty conduct through a professional contract hence moral clauses.¹²⁴ There is no law that governs how the limiting happens and it leaves it all entirely to the discretion of the company who can take advantage of his/her power against the talents. Critics have argued that vague moral clauses can lead to discrimination.¹²⁵ Moral clauses may be used as a cover-up for discrimination, such as religious or racial discrimination as their improper use will most likely happen if the clause is vague.¹²⁶

Companies tend to make judgements from the moral ground of the public when the talent has not been convicted of any wrongdoing, but the endorser is simply bowing to media pressure by reacting to suspicion and this robs a talent of the innocence presumption.¹²⁷ When the Arbuckle incident that drove universal studios to have moral clauses happened,

¹²¹ Alec D, '6 largest Athlete Endorsement deals in the Modern era' Man of Many 2nd March 2020-<<https://manofmany.com/entertainment/sport/athlete-endorsement-deals>> on 28th December 2020.

¹²² Alec D, '6 largest Athlete Endorsement deals in the Modern era' 2nd March 2020.

¹²³ Stephen M Gallagher, 'Who's Really Winning: The Tension of Morals Clauses in Film and Television' 104.

¹²⁴ Overlayer, 'Risqué Business: Controlling Employee Conduct Through Morality Clauses', HR Legalist, 19th February 2014 --< <https://www.hrlegalist.com/2014/02/risque-business-controlling-employee-conduct-through-morality-clauses>> on 11th August 2020.

¹²⁵ Haskell Murray, 'Morality Clauses and Escrow Accounts in Sports Contracts' 30.

¹²⁶ Haskell Murray, 'Morality Clauses and Escrow Accounts in Sports Contracts' 30.

¹²⁷ Turner A, 'Morality clauses -who sets the standards?' hughes-paddison solicitors ,2018,

this man was acquitted at court, however the public had already made their judgement.¹²⁸ In the event that his contract already had a moral clause, he would have been terminated immediately. This would have taken away the presumption of innocence for this man as he would have been terminated for a public scandal over crimes he did not commit.¹²⁹ The studio would have benefited but the talents career would have been shattered. Various celebrities like Tiger woods have lost endorsement deals on the premise of news from social media with no confirmation as to the truths of the social media stories. Under a fair trial, each person is entitled to the presumption of innocence.¹³⁰ Therefore, the termination of a contract on the basis of an unproven suspicion robs the endorsee of the presumption of innocence in that by the end of any trials concerning the scandal, even if he is found innocent would have already lost the endorsement deal.

It has been argued that termination on the basis of moral clauses has long term effects on the career of the affected party. In case of *Nader v. ABC Television*, the last sentence of Nader's moral clause permitted ABC to keep his screen credits. In the entertainment industry, a talents ability to get work is based on the drawing power of their name through screen credits therefore, his termination damaged his prospects of future employment.¹³¹ The same happened to the Hollywood ten who have been mentioned in chapter two, these talents not only lost their jobs but any future opportunities to.¹³² In conclusion, the law generally requires terms to be reasonably certain and definite meaning that they show a basis for determining the existence of a breach and for giving an appropriate remedy therefore, ambiguous language should not be used in contract drafting.¹³³ Moral clauses are broad, indefinite making it hard for the endorsee to adhere to the contract. A party needs to know what conduct will trigger termination under a moral clause for example in *Dias v. Archdiocese of Cincinnati*, a school fired a lady for becoming pregnant through artificial

¹²⁸ Allyn Davidson, '#Morals Too: The Film Industry Must Implement an International Morals Clause'380.

¹²⁹ Kira N, 'Athletes Sacked by Moral Turpitude Clauses: Presumed Guilty Unless Proven Innocent', 41 *New England Journal on Criminal & Civil Confinement* 1,2015,379.

¹³⁰ Kira N, 'Athletes Sacked by Moral Turpitude Clauses: Presumed Guilty Unless Proven Innocent'379.

¹³¹ Sarah D Katz, 'Reputations - A Lifetime to Build, Seconds to Destroy: Maximizing the Mutually Protective Value of Morals Clauses in Talent Agreements'199.

¹³² Sarah D Katz, 'Reputations - A Lifetime to Build, Seconds to Destroy: Maximizing the Mutually Protective Value of Morals Clauses in Talent Agreements'203.

¹³³ Green N 'Contracting correctness: A rubric for analysing morality clauses' '37.

insemination as she had violated a moral clause requiring her to abide by Catholic doctrine.¹³⁴ In her suit for breach of contract, the plaintiff claimed the moral clause was invalid and illegal because it did not address the specific issue and courts upheld it.¹³⁵ The next chapter criticises moral clauses specifically analysing how their enforceability has violated the right to privacy and freedom of expression of the endorser.

¹³⁴ *Dias v. Archdiocese of Cincinnati* (2013) Ohio Southern Court.

¹³⁵ Green N 'Contracting correctness: A rubric for analysing morality clauses' 38.

CHAPTER FOUR

Introduction

The lack of predictability of moral clauses presents challenges to talents' compliance so talents all over America have been forced to live their lives according to what the company expects of them regardless of their standing. Therefore, the inclusion of morality as a condition of maintaining contracts raise significant constitutional concerns regarding their validity. Chapter four discusses the overriding implications of moral clauses on two important human freedoms. It then analyses the contract law systems that govern America and Kenya and whether moral clauses can fit in Kenya's contract system and how they can affect Kenyan celebrities

The overriding implications of imposing unrestricted moral clauses on talents or celebrities

Freedom of expression

Freedom of expression is the right to hold your own opinions and to express them freely with no government interference.¹³⁶ This means expressing yourself freely through all means.¹³⁷ Freedom of expression is a human right under *article 19* of the UDHR and is recognized in the ICCPR. Article 19 of the UDHR states that "everyone shall have the right to hold opinions without interference" and "everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."¹³⁸ This right can be limited when it is necessary, proportionate and there is need for protection of the public.¹³⁹ *Article 33* of the constitution of Kenya establishes freedom of expression and it is a right that can be limited.¹⁴⁰ The first Amendment of the United States protects this right and it has been further discussed in different cases. The constitutionally protected right to free speech may be regulated carefully

¹³⁶ Article 10, The Human Rights Act, 1998.

¹³⁷ Article 10: Freedom of expression, Equality and Human rights commission ,12th June 2020 -<
<https://www.equalityhumanrights.com/en/human-rights-act/article-10-freedom-expression>> 10th Dec 2020.

¹³⁸ Article 19, Universal declaration of Human rights (1948).

¹³⁹ Article 10: Freedom of expression, Equality and Human rights commission ,12th June 2020 -<
<https://www.equalityhumanrights.com/en/human-rights-act/article-10-freedom-expression>> 10th Dec 2020.

¹⁴⁰ Article 33, Constitution of Kenya (2010).

but this does not remove the potential of freedom of speech issues when there is a requirement to comply with moral clauses for continuance of a contract.¹⁴¹

Morality can be a reason for a limitation if it is for protection of the public however it is a very subjective area so any restrictions must not be based on the company's tradition, religion and must not discriminate against anyone because morality differs. When moral clauses are invoked against talents because of an expression of an opinion, this can be seen as an infringement on their freedom of expression because most companies' base morality on their own traditions.¹⁴² An example is if a company is pro-homosexuality and a talent publicly expresses their homophobic views, they will most probably lose their contract deal. A recent example is Kevin Hart who was scheduled to be the host of the 2019 Academy Awards but lost the opportunity because of his previous tweets in 2010 about his anti-gay ideology.¹⁴³ Hart also faced the risk of losing his Nike endorsements since Nike had publicly stated its standing behind values such as fair treatment of LGBTQ people.¹⁴⁴ Nike had earlier ended its eight year endorsement with Manny Pacquiao, a boxer after a video surfaced of the champion calling gay people animals.¹⁴⁵ Twitter provides a useful case study for the violation of freedom of expression when the contracts are terminated. With the increase in social media trends, companies have added social media restrictions in moral clauses for example, ABC guidelines have specific prohibited practices on twitter.¹⁴⁶ These make a talent more mindful of their expressions on these platforms leading to limitation of freedom of expression and individual autonomy since a talent is now forced to live according to what is acceptable by the company.¹⁴⁷ Twitter use for talents with moral clauses in their endorsement deals has led to a lot of tension and fear due to its potential to terminate talents'

¹⁴¹Marka B. Fleming, 'Morals Clauses for Educators in Secondary and Postsecondary Schools: Legal Applications and Constitutional Concern' 1 Brigham young university education and Law journal 4' 2009, 98.

¹⁴² Fernando M Pinguelo and Timothy D Cedrone, 'Morals - Who Cares About Morals - Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know' 35.

¹⁴³ Casey Newton, 'How Kevin Hart tweeted himself out of a job hosting the Oscars' The Verge ,2018 -< <https://www.theverge.com/2018/12/8/18131221/kevin-hart-oscar-hosting-homophobia-twitter-tweets>>

¹⁴⁴ Marc Bain, 'Kevin Hart's past homophobic comments are a problem for brand partners like Nike too' Quartz ,2018 -< <https://qz.com/quartz/1487811/will-nike-cancel-its-deal-with-kevin-hart/>> on

¹⁴⁵ Marc Bain, 'Kevin Hart's past homophobic comments are a problem for brand partners like Nike too' Quartz ,2018 -< <https://qz.com/quartz/1487811/will-nike-cancel-its-deal-with-kevin-hart/>> on

¹⁴⁶ Caroline Epstein, 'Morals Clauses: Past, Present and Future' 102.

¹⁴⁷ Caroline Epstein, 'Morals Clauses: Past, Present and Future' 102.

endorsement deals. For example, when Gilbert Gottfried tweeted jokes about a tsunami in Japan, the insurance company terminated his contract and when Olympic swimmer Stephanie Rice tweeted homophobic content, Jaguar dropped their endorsement with her.¹⁴⁸ From all these examples, it can be inferred that moral clauses are beginning to censor celebrities, and thereby withholding their rights to free speech. The case of *Mendenhall v. Hanesbrands Inc* is a landmark case, it involved an endorsement contract between the two and it contained a moral clause, he alleged that the use of the clause to terminate his agreement with Hanesbrands was unreasonable and violated Mendenhall's freedom of expression since it was terminated because of tweets.¹⁴⁹ Because of a vague clause, Hanesbrands had broad discretion as to whether to continue or to end its relationship with Mendenhall and they decided to end it. He alleged that its interpretation of the clause was inconsistent with good faith hence the termination was wrong. They violated the implied covenant of good faith and fair dealing because they did not use their discretionary power in a reasonable manner and in a way that was consistent with the parties' reasonable expectations.¹⁵⁰ In this case, the endorsee argued that the endorser had used its wide discretionary power to infringe on his rights therefore arguing that the termination was a result of ulterior motives. Invoking the clause because of past tweets was infringing on freedom of expression because the company claimed that it did not agree with Mendenhall's tweets about Osama Bin Laden. This case shed more light on the inconsistency and the loopholes in the litigation of moral clauses, this is because one of the strong arguments was a comparison between the case and the famous Charlie Sheen case. The facts in both were similar as well as the endorsee company being the same but only one endorsement was terminated.¹⁵¹ Mendenhall was successful with his case as courts held that the negative comments were not sufficient to show that the company had been affected by his tweets but terminated the agreement simply because they disagreed with his views. To solve such an issue, while terminating an endorsement, endorsers should act consistently by taking similar actions in similar issues¹⁵² By showing differences, the athlete-endorsee may be able to show that the endorser acted unreasonably. This was an attempt at censorship of a talent's

¹⁴⁸ Caroline Epstein, 'Morals Clauses: Past, Present and Future' 104

¹⁴⁹ *Mendenhall v. Hanesbrands, Inc.* (2012) North Carolina District court.

¹⁵⁰ Lauren R, '140 Characters or less: A look at morals clauses in Athlete endorsements' 11 DePaul Journal of sports law 1 ,2015, 147.

¹⁵¹ Lauren R, '140 Characters or less: A look at morals clauses in Athlete endorsements' 148.

¹⁵² Lauren R, '140 Characters or less: A look at morals clauses in Athlete endorsements' 151.

opinions. Looking back into the film and television specifically, Hollywood has already used moral clauses before in an attempt to censor talent. The curtailing of freedom of expression isn't something that is new with regard to moral clauses, For example, in 1947, Congress created a committee to subpoena several Hollywood figures in order to question their political beliefs and loyalties.¹⁵³ The contracts of the Hollywood ten talents were terminated on the basis of their failure to testify against communism.¹⁵⁴ Three of the ten, Lester Cole, Ring Lardner, and Robert Adrian Scott, were terminated under their moral's clauses by their respective studios for refusal to testify before the HUAC and as a result they brought wrongful termination suits.¹⁵⁵ The courts in the three cases ruled in favour of the companies and the termination was justified. The clauses were being used to censor political conduct and expression rather than challenge immoral conduct and courts upheld the terminations.¹⁵⁶ It did not end at termination as the Waldorf-Astoria Policy Statement was released and it condemned the Hollywood Ten, declaring them Communists as unwelcome in the motion picture industry which killed their career. ¹⁵⁷ In *Pickering v. Board of Education*, a Board of Education of a school dismissed a high school teacher for writing and publishing in a local newspaper that was against their tax policy and she took them on for wrongful termination.¹⁵⁸ The Supreme Court agreed that they had infringed on her freedom of expression rights by dismissing her because of her opinion in a newspaper.¹⁵⁹ This case justifies that termination of a contract through a moral clause because of an expression of an opinion is a constitutional violation. Recently, the Tourism Cabinet Secretary Najib Balala revoked the appointment of Pauline Njoroje as a member of the Board of Tourism Regulatory Authority because of an old post expressing her views on Nairobi National Park. The Cabinet Secretary Balala confidently expressed that the ministry was unaware of

¹⁵³ Stephen M Gallagher, 'Who's Really Winning: The Tension of Morals Clauses in Film and Television'94.

¹⁵⁴ Stephen M Gallagher, 'Who's Really Winning: The Tension of Morals Clauses in Film and Television' 93

¹⁵⁵ Stephen M Gallagher, 'Who's Really Winning: The Tension of Morals Clauses in Film and Television' 94.

¹⁵⁶ Fernando M Pinguelo and Timothy D Cedrone, 'Morals - Who Cares About Morals - Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know' 355.

¹⁵⁷ Sarah D Katz, 'Reputations - A Lifetime to Build, Seconds to Destroy: Maximizing the Mutually Protective Value of Morals Clauses in Talent Agreements' 203.

¹⁵⁸ Marka B. Fleming, 'Morals Clauses for Educators in Secondary and Postsecondary Schools: Legal Applications and Constitutional Concern'98.

¹⁵⁹ Marka B. Fleming, 'Morals Clauses for Educators in Secondary and Postsecondary Schools: Legal Applications and Constitutional Concern' 98.

Njoroge's views and were not in agreement with them because it put the Ministry in bad light.¹⁶⁰ In this case, Pauline expressed her opinion in the past, it was dug up and it cost her an opportunity. Talents should be able to voice their opinions on controversial subjects freely regardless of the company's stand in the issue and these clauses should only terminate on suspicions that have been proven guilty.¹⁶¹ Courts should scrutinize moral clauses enforcement when issues of free speech arise. The protection of this right is strong when dealing with political and religious matters, therefore, a clause that prohibits significant political opinions should be closer to unenforceability.¹⁶²

Celebrity endorsement is unexplored in the Kenyan market, but it is growing at a fast rate and will soon be susceptible to moral clauses in the contracts as companies will need them to mitigate risks. Therefore, the inclusion of moral clauses is one of the easiest ways in which companies can censor and infringe on the expression rights of their endorsees.

The right to privacy

Celebrities are entitled to the same right of privacy that extends to all individuals. Privacy is being in condition where undocumented personal knowledge about one is not possessed by others and therefore, it is diminished exactly to the degree that others possess this kind of knowledge.¹⁶³ It's basically facts about someone which that person does not want known about them. Privacy is a basic human value because we live in a society where individuals do not tolerant lifestyles and habits that differ from their own therefore, we desire for privacy because we differ.¹⁶⁴ We need privacy because there are certain facts about us which other people, particularly strangers are not entitled to know, and we should not be put in situations where our private matters can affect our livelihood once they get exposed most especially issues of moral standing, opinions etc.¹⁶⁵

¹⁶⁰ Jael Mboga, 'Pauline Njoroge Tourism board job revoked' The Standard ,2020, <https://www.standardmedia.co.ke/nairobi/article/2001381686/pauline-njoroge-tourism-board-job-revoked>.

¹⁶¹ Haskell Murray, 'Morality Clauses and Escrow Accounts in Sports Contracts'128.

¹⁶² Green N 'Contracting correctness: A rubric for analysing morality clauses' 61.

¹⁶³ W A Parent, 'Privacy, Morality, and the Law' 12 *Philosophy and public affairs* 4 ,1983,269.

¹⁶⁴ W A Parent, 'Privacy, Morality, and the Law' 276.

¹⁶⁵ Emmaline Soken, '10 reasons why privacy rights are important' Human rights career-
<https://www.humanrightscareers.com/issues/reasons-why-privacy-rights-are-important/> on 8th December 2020.

The right to privacy refers to the protection of one's personal information from public scrutiny.¹⁶⁶ Internationally, this right is upheld under *article 12* of the UDHR.¹⁶⁷ *Article 17* of the ICCPR protects the right as well.¹⁶⁸ All signatories to these two international documents must ensure that the right is protected, and legislation is put up to protect the right. Privacy is a fundamental human right found in many national documents and constitutions, it is key to the protection of human dignity as it supports other rights like freedom of expression, information, and association.¹⁶⁹ The US constitution does not expressly mention this right, however it can be inferred from parts of it like the *fourth amendment* that states that people have the right to be secure in their persons, houses, papers against unreasonable search.¹⁷⁰ The right can also be seen in many decided cases for example in *Griswold v Connecticut*, the Court identified a constitutionally protected right to privacy, which the court reasoned prohibited states from denying birth control to married couples.¹⁷¹ Justice Douglas held that the Bill of Right's specific freedoms like the spirit of free speech, freedom from searches and seizures as applied against the states by the Fourteenth Amendment, established a general right to privacy.¹⁷² In *Stanley v Georgia*, Justice Marshall stated that the amendment meant that a State has no business telling a man what books he may read or what films he may watch.¹⁷³ This meant that a governing power had no right to control how a person operated in his or her private life. *Article 31* of the Constitution of Kenya protects the rights to privacy.¹⁷⁴ In the case of *Barber v Times Inc*, a photographer took pictures of Dorothy Barber during her delivery and she filed a suit of invasion of privacy against Time Inc for unauthorized entry into her hospital room and for photographing her

¹⁶⁶ Tim Sharp, 'Right to privacy: Constitutional rights and privacy laws' Live science, 2013 - <https://www.livescience.com/37398-right-to-privacy.html#:~:text=The%20right%20to%20privacy%20refers,is%20protected%20from%20public%20scrutiny.&text=The%20right%20to%20privacy%20often,improving%20the%20quality%20of%20life> on 8th December 2020.

¹⁶⁷ Article 12, Universal Declaration of Human Rights (1948).

¹⁶⁸ Article 17, International Covenant for civil and Political Rights (1966).

¹⁶⁹ Privacy International and the National Coalition of Human Rights Defenders in Kenya, *The right to privacy in Kenya, universal periodic review*, 21st session, 2017, 2.

¹⁷⁰ Fourth amendment, Constitution of the U.S.

¹⁷¹ *Griswold v Connecticut* (1965) Supreme court of the U.S.

¹⁷² W A Parent, 'Privacy, Morality, and the Law' 283.

¹⁷³ *Stanley v Georgia*, Supreme court of the United States (1969)

¹⁷⁴ Article 31, Constitution of Kenya (2010).

despite her protests and she was successful.¹⁷⁵ This is a clear example of privacy rights being upheld.

Should Celebrities, talents and athletes have a right to privacy? Yes, they should as all human beings are entitled to the right and this particular group of people's rights is under siege because of the increase in social media over time.¹⁷⁶ As a result of this, when social media exposes celebrities private matters, their companies are quick to invoke moral clauses to rid of them and this shows how moral clauses can indirectly infringe and add to the curtailing of their rights. Before the internet, people were not exposed to endless stories about celebrities but today the media fills us with information about each and every celebrity and this puts many at risk because of the existence of moral clauses in their contracts with endorsers, sponsors etc. From the different cases, we are able to establish that the judge as to what amounts to immorality is entirely in the hands of the endorser and this gives them excessive power over the private lives of the talent or celebrity. In the *Galaviz v. Post-Newsweek Stations*, domestic violence and a fight with her husband was all over social media because the press happened to record it just outside her house and this led to the termination of her contract as a newscaster.¹⁷⁷ This issue, which is a matter that is private, amounted to immorality in the eyes of her company. The fact that it was filmed and shared infringed greatly on her privacy, but her employer used it to enforce a moral clause in her contract and this indirectly violated her privacy rights. As stated in the first paragraph, we desire privacy because we human beings tend to differ in morality, what's right to me might be wrong to someone else. When a moral clause is ambiguous, it is difficult for a talent to know what amounts to moral or not and leaving the company wide discretion to decide what is immoral and what is not.¹⁷⁸ To what extent can a company dig into the personal lives of talents in order to enforce these moral clauses and is there a realm of privacy that a talent in fact has, where his or her conduct should not constitute immoral behaviour amounting to breach of the moral clause? ¹⁷⁹ In *Eisenstadt v. Baird*, Justice Brennan stated that the right to privacy meant an individual,

¹⁷⁵ Tabriz A, 'Celebrity rights: Protection under IP Laws' 16 *Journal of intellectual property rights* 1,2011,8.

¹⁷⁶ Tabraz A, 'Celebrity rights: Protection under IP Laws'9.

¹⁷⁷ Stephen M Gallagher, 'Who's Really Winning: The Tension of Morals Clauses in Film and Television' 98.

¹⁷⁸ Fernando M Pinguelo and Timothy D Cedrone, 'Morals - Who Cares About Morals - Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know'375.

¹⁷⁹ Marka B. Fleming, 'Morals Clauses for Educators in Secondary and Postsecondary Schools: Legal Applications and Constitutional Concern'88.

married or single, being free from unwarranted government invasion into matters so fundamentally affecting a person.¹⁸⁰ The inclusion of moral clauses into these contracts curtails the right to privacy because talents are not able to make free decisions because they have to live up to the standards of the company.¹⁸¹ In the event that an action within their realm of privacy is captured by camera and spread, companies can terminate due to breach of moral clauses. This means that conduct within the privacy of the talents is not protected either.¹⁸² This also touches on liberty, a person the law prohibits from making certain choices has been denied the liberty or freedom to make them leading to deprivation of autonomy.¹⁸³ The way moral clauses have largely curtailed the right to privacy of many talents in that they are not able to freely make decisions about their life without the fear of their contracts being terminated. They control the personal and private lives of individuals, unfortunately in the event of termination, a talent's career and livelihood is at stake for something done within their private realm.¹⁸⁴ With the increase in the dominance and speed of social media, it's very easy for private matters to be leaked at no fault of the talent and yet companies use this information to invoke the clauses and terminate the contracts.

Moral clauses restrict and infringe on legal acts that are deemed private. When assessing their breach, there is an automatic intrusion into the subject's private life as questions like, did he commit adultery, did she post a racist meme on her private Facebook page etc. are put into question.¹⁸⁵ It is possible for an endorser acting on rumour or suspicion to search into the private life of the talent for something objectionable in order to enforce a moral clause for example through social media background checks and this access into the lives of others can amount to a privacy breach.¹⁸⁶

¹⁸⁰ Marka B. Fleming, 'Morals Clauses for Educators in Secondary and Postsecondary Schools: Legal Applications and Constitutional Concern'96.

¹⁸¹ W A Parent, 'Privacy, Morality, and the Law'283.

¹⁸² Marka B. Fleming, 'Morals Clauses for Educators in Secondary and Postsecondary Schools: Legal Applications and Constitutional Concern'88.

¹⁸³W A Parent, 'Privacy, Morality, and the Law'273.

¹⁸⁴ Stephen M Gallagher, 'Who's Really Winning: The Tension of Morals Clauses in Film and Television'102.

¹⁸⁵ Greene N, 'Contracting correctness: A rubric of analysing morality clauses'49.

¹⁸⁶ Greene N, 'Contracting correctness: A rubric of analysing morality clauses'49.

Contract law in Kenya and America

Kenya and America are both governed by the common law contract law system, however there are some notable differences in the two. Common law under contract is a family of legal systems in English law that originated from the ancient customs of English people.¹⁸⁷ Eventually, with the development of the writ system, common law developed an equity system with guiding principles that guided the decisions of the court.¹⁸⁸ The most common sources of contract law are case law and the State's statute. In America, the different States have different Statutes governing how contracts are made and work.¹⁸⁹ According to the Kenyan Law of Contract CAP 23, English law of contract as modified by the doctrines of equity, by the acts of the UK will apply in Kenya.¹⁹⁰ Section 3 states that a contract must be in writing and the terms of the contract may be incorporated in the document.¹⁹¹ America's contract law is governed by common law as well as the different State and Federal laws, the Uniform Commercial code and the Statute of Frauds.¹⁹² The contract law in America is governed differently, it is persuaded by the second restatement of the Law of Contracts which informs judges of the general principles of contract common law that they ought to follow.¹⁹³ The restatement is made up of a detailed analysis of decided contract law cases to guide the courts.¹⁹⁴

However, the two different contract law systems meet in a number of ways; both countries uphold the doctrine of Stare Decisis that develops the law of precedent.¹⁹⁵ This doctrine means a court has to stand by a precedent while making decisions regardless of suspicions of it being wrong.¹⁹⁶ Since contract is a fruit of common law court-room by Judges as they

¹⁸⁷ Stephen N, 'How equity conquered common law: The federal rules of civil procedure in historical perspective' 135 University of Pennsylvania Law review, 1987,915.

¹⁸⁸ Stephen N, 'How equity conquered common law: The federal rules of civil procedure in historical perspective' 918.

¹⁸⁹ Don M, Warner D, 'Introduction to Contract law' 2012,325 -< <https://2012books.lardbucket.org/pdfs/legal-basics-for-entrepreneurs.pdf>> on 20th January 2021.

¹⁹⁰ Law of Contract Act Cap 23 (1961).

¹⁹¹ Section 3, Law of Contract Act (1961).

¹⁹² Don M, Warner D, 'Introduction to Contract law' 326.

¹⁹³ Don M, Warner D, 'Introduction to Contract law' 325.

¹⁹⁴ Don M, Warner D, 'Introduction to Contract law' 325.

¹⁹⁵ Randy K, 'Stare decisis as Judicial doctrine' 67 Washington and Lee Law review 1,2010.

¹⁹⁶ Randy K, 'Stare decisis as Judicial doctrine' 412.

tried to solve disputes, the many decided cases form precedent to date for both America and Kenya.¹⁹⁷ Under the common law contract system, there is extensive freedom on contract when forming the contractual relationship and all terms governing the contract need to be added to the agreement.¹⁹⁸ When there is a question of legality, it is decided upon by the courts with the ruling becoming universally recognized.¹⁹⁹ Similarly, American contract law has been concerned with the increase in contracts of adhesion where the contracts are beneficial to the stronger parties in a case to force the terms or a term on the weaker party. Courts have looked at such legal issues with scrutiny to the possibility of unequal bargaining power and unfairness.²⁰⁰ Under the doctrine of discharge, both England and America have acknowledged the decision of *Taylor v Caldwell* where the destruction of a music hall that had been hired out rendered the contract discharged as it could not be performed.²⁰¹ In England, it came to be known as the discharge by frustration while in the USA, it was the discharge by impossibility.²⁰² An endorser can argue for discharge by impossibility or frustration once an endorsee acts in a way that brings their personal image disrepute meaning they cannot use the endorser to advertise anymore.²⁰³

Lastly, English common law considers four elements namely; offer of the conditions, acceptance, consideration and an intention to enter a legally binding agreement which is a mirror of the conditions.²⁰⁴ American contract law requires the same conditions and has

¹⁹⁷ Don M, Warner D, 'Introduction to Contract law' 325.

¹⁹⁸ Yana W, 'Basic differences between a common law system and a civil law system in terms of contracts and business' 31st May 2016 -< <https://slcpas.com/basic-differences-common-law-system-civil-law-system-terms-contracts-business/>> on 19th January 2021.

¹⁹⁹ Yana W, 'Basic differences between a common law system and a civil law system in terms of contracts and business' 31st May 2016.

²⁰⁰ Blokina G, 'Contract' Legal information institute Cornell Law School, 2019 -< <https://www.law.cornell.edu/wex/contract>> on 19th January 2021.

²⁰¹ Guenter T, 'Some comparative notes on English and American contract law' 55 *SMU Law review* 1, 2002, 360.

²⁰² Guenter T, 'Some comparative notes on English and American contract law' 360.

²⁰³ Lauren R, '140 Characters or less: A look at morals clauses in Athlete endorsements' 138.

²⁰⁴ Allen & Overy, 'Basic principles of English Contract Law' *Advocates for International Development*, 2016, 1 -< <http://www.a4id.org/wp-content/uploads/2016/10/A4ID-english-contract-law-at-a-glance.pdf>> on 19th January 2020.

parties come up with the terms to be followed as well.²⁰⁵ In both legal regimes, parties are free to contract according to their terms hence the inclusion of moral clauses as a result of negotiations between the parties. Therefore, when companies are entering into endorsements in Kenya, they can add moral clauses during the negotiation process. How the moral clause will be treated in Kenya will be discussed later in the chapter. Endorsement contracts would fall under advertising contracts as a seller of goods signs one with a celebrity to market their goods in exchange for a fee.²⁰⁶ The contract shows the intention to create legal relations, it entails an offer from the endorser which is unequivocally accepted by the prospective endorsee and then issues like consideration and terms to govern the contract are discussed and agreed upon. When drafting an endorsement in America, substantial risks that the company could face are put into consideration hence the inclusion of a moral clause.²⁰⁷ A moral clause has become a constant in America because of the growth of celebrity endorsement and high financial investments at stake. Similarly, in Kenya celebrity endorsements are drafted to include model release agreements that cover the responsibilities of the parties, the Intellectual property rights, the scope release and the rights granted. Moral clauses haven't yet been litigated in Kenya, but with the growth of celebrity endorsement and risks involved, it is only a matter of time.²⁰⁸

Endorsements in Kenya: Do moral clauses fit in Kenya's contract system

Celebrity endorsement is slowly becoming a key method of advertising in Kenya as companies are using it to promote their brands in order to target many market groups.²⁰⁹ For example a young celebrity would promote an item for her age group. In January this year, Kenya's tourism board signed an endorsement contract that appointed British super model Naomi Campbell as Kenya's tourism ambassador.²¹⁰ Her appointment weighed some lessons for businesses on endorsements and the risks raised included the likelihood of the bad image

²⁰⁵ Blokina G, 'Contract' Legal information institute Cornell Law School ,2019 -<
<https://www.law.cornell.edu/wex/contract>> on 19th January 2021

²⁰⁶ Jackinda R, 'The influence of celebrity endorsement on customers purchasing decisions of fast-moving consumer goods among low and middle social class in Nairobi County'2.

²⁰⁷ Thomson Reuters Practical Law, Drafting with the stars: Celebrity endorsement agreements, 31st October 2016,

²⁰⁸ Ann M, 'Celebrity endorsements and model release agreements' Venture Law,23rd May 2019-<
<https://venturelawkenya.com/when-do-you-need-a-model-release/>> on 28th December 2020.

²⁰⁹ Ann M, 'Celebrity endorsements and model release agreements'

²¹⁰ Valente O, 'Naomi Campbell's Kenya tourism role causes row' BBC news,8 days ago,

of the celebrity rubbing onto the country in the event of any public scandal.²¹¹ Endorsement is not new in Kenya; however, it has grown at a slow rate. It can be traced back to the 1970s when Kipchoge Keino, an Olympic gold medallist was signed by the Coca-Cola to feature in adverts.²¹² This strategy has grown fairly and many companies in Kenya are now turning towards well-known musicians, sport personalities, comedians, media personalities etc. to endorse their products and services.²¹³ The endorsement concept isn't exactly popular but marketers are trying to explore this avenue since there is need for advertising many brands in the Kenyan market, however a couple of companies have endorsed different celebrities.²¹⁴ For example Joseph Kinuthia who acts as Omosh in the popular local school drama has featured in several Tusky's Supermarket adverts, EABL signed local musician Nameless to publicise their Jitolee campaign against drunk-driving etc.²¹⁵ A hypothetical example is in the event that Nameless that was advertising against drunk-driving was arrested for the same and the scandal went public, EABL would require a quick way of terminating his endorsement. This would be done easily through a moral clause. The sports fraternity in Kenya has had Kenyan athletes on cover of local dailies for their brilliant performance for decades now for example Kipchoge for Safaricom etc. ²¹⁶ However, a Kenyan article mentioned that companies in Kenya fear endorsement deals because they are risky with the biggest threat being the celebrity as he/she must be appealing, relatively scandal-free and credible.²¹⁷ This is a sign that the era of celebrity endorsements in Kenya is growing and companies have acknowledged the risks involved. There are higher chances of companies in Kenya adding moral clauses to their contracts in order to mitigate some of these risks. A big endorsement in Kenya has been Julius Yego who represented Kenya in javelin in the 2012

²¹¹ Mputhia C, 'Picking right celebrity influencer for a brand' Business Daily, 18th January 2021.

²¹² Njuguna S, Hellen O, 'Influence of Celebrity Endorsements on Young Consumers' Brand Recall Behaviour in Kenya a Case of Nairobi County' Strathmore University, Nairobi, 2015, 2

²¹³ Njuguna S, Hellen O, 'Influence of Celebrity Endorsements on Young Consumers' Brand Recall Behaviour in Kenya a Case of Nairobi County, 2.

²¹⁴ Job Ochieng, 'Investigating celebrity endorsement in relation to consumer behaviour (A survey of Rexona deodorant of unilever Kenya)' Kenyatta University, 2013, 2.

²¹⁵ Job Ochieng, 'Investigating celebrity endorsement in relation to consumer behaviour (A survey of Rexona deodorant of unilever Kenya)' 3.

²¹⁶ Esther Karuku, 'Celebrity endorsements: a Kenyan guide, Biz community', 5th March 2010 - <https://www.bizcommunity.co.ke/Article/111/423/45404.html> 2010 on 9th December 2020.

²¹⁷ Esther Karuku, 'Celebrity endorsements: a Kenyan guide, Biz community', 5th March 2010 - <https://www.bizcommunity.co.ke/Article/111/423/45404.html> 2010 on 9th December 2020.

London Olympics, he became the brand ambassador for Orange Telkom appearing on a 30 second- advert featuring Yego talking about his javelin journey while promoting Orange's Internet services and in 2009, orange signed a Sh10 million deal with Paul Julius Nunda, popularly known as Jua Cali, to promote its campaign.²¹⁸ The use of celebrities to promote products is quickly catching on in Kenya with companies using musicians, athletes and actors to endorse their products. In 2011 Singer Wahu was signed by Unilever as the new face of its Rexona antiperspirant brand and over the years many companies like safari com, Nokia etc have been able to endorse talents for large sums of money.²¹⁹ Since a lot of money is at stake during the signing of endorsements, companies have to protect themselves hence need for moral clauses. Since endorsements are worth large sums of money, celebrities make very good income and many a time, the endorsements are their biggest source of livelihood. King Kaka, a famous Kenyan musician is the first from East Africa to be named the face of a worldwide campaign by Premium cognac brand Rémy Martin where he earned millions of shillings.²²⁰ Eric Omondi has landed several endorsement deals with top brands in Kenya including Safaricom, Silverstone air, Bonfire adventures and Uber Taxi where he earned huge amounts of cash.²²¹ These examples show how these contracts are celebrities' largest source of income complimenting the income made from their talents. To date, Kenya has not had any direct terminations of endorsements as a result of immoral behaviour, but many famous people have lost other deals as a result of immorality. As endorsements grow hand in hand with social media, there are high chances that the inclusion and the use of these clauses in contracts in Kenya will be seen. Under Kenyan law, article 28 and 31 of the constitution provide for protection of privacy hence a celebrity's image cannot be used without consent and in order to get consent companies make model release clauses that expound on the agreement, the duration, the responsibilities and the expectations.²²²

²¹⁸ Situma E, 'Celebrities find fortune in corporate endorsements' Business daily, May 2nd 2013 - <<https://www.businessdailyafrica.com/bd/lifestyle/celebrities-find-fortune-in-corporate-endorsements-2031122>> on 3rd January 2021.

²¹⁹ Job Ochieng, 'Investigating celebrity endorsement in relation to consumer behaviour; A survey of Rexona deodorant of unilever Kenya' 3.

²²⁰ Kokan K, 'Kenyan celebrity's who have landed lucrative endorsement deals' Biggest Kaka,2019-<<https://biggestkaka.co.ke/kenyan-celebrities-who-have-landed-lucrative-endorsement-deals/>> on

²²¹ Kokan K, 'Kenyan celebrity's who have landed lucrative endorsement deals' Biggest Kaka,2019.

²²² Ann M, 'Celebrity endorsements and moral release agreements'

In Kenyan contract law, contracts have conditions. Contract principles provide the key to analysing moral clauses in endorsement agreements and determining whether a clause is enforceable. As a result of freedom of contract, individuals are allowed to contract for the gain or loss of rights for example the restrictions on an endorsee's conduct in an endorsement agreement. However, these restrictions should not limit the contractor's rights. A condition can be defined as a term that qualifies a contractual obligation so as to make its operation and consequences dependent on some uncertain future event.²²³ In Kenya, a condition must be stated in a specific way therefore, it should be drafted in a specific language.²²⁴ A Moral clause can be termed as a resolutive condition meaning the parties agree that the obligations under a contract should operate in full but will come terminate once an uncertain future event either does or does not happen.²²⁵ The ambiguity in the uncertain future event raises many questions. From American decisions, endorseees are facing the issue of vague clauses that do not specifically mention the uncertain event leaving the discretion to decide in the power of the company once an event occurred placing the endorsee in an unfair position. A moral clause usually states that the contract will be fully operative, however in the event that the endorser causes any public disrepute, it will be terminated. Therefore, endorseres in Kenya can add moral clauses to their contracts however, their enforcement can be questioned. This is because they tend to be broad and vague in drafting leaving a lot of room for litigation when enforced.²²⁶ Therefore, they need to be drafted properly with specific language in order for them to be easily enforced in Kenya. Due to the broad nature of many moral clauses, the Kenyan courts may find that the clause is too ambiguous hence unenforceable ruling in favour of the endorsee however, courts in America have upheld clauses even in their ambiguous form.

For a contract to be terminated in Kenya, the breach must be material meaning a party does not perform a key element of the contract, defeating the main purpose of the agreement. This can be interpreted to mean that if the endorsee fails to perform a specific term of the contract

²²³ Kenya laws online, Kenya contract law, <https://kenyalawsonline.blogspot.com/2013/06/kenya-contract-law.html.2013>> on 4th January 2021.

²²⁴ Kenya laws online, Kenya contract law, <https://kenyalawsonline.blogspot.com/2013/06/kenya-contract-law.html.2013>> on 4th January 2021.

²²⁵ Kenya laws online, Kenya contract law,2013-<https://kenyalawsonline.blogspot.com/2013/06/kenya-contract-law.html.2013>> on 4th January 2021.

²²⁶ Greene N, 'Contracting correctness: A rubric of analysing morality clauses'30.

like complying with the moral clause which is so essential to the agreement. The endorsee's reputation makes it impossible for the endorser's company to use him as a representative of the brand or product.²²⁷ This can amount to legal termination however, once an endorsee proves that the enforcement violated his privacy rights and freedom of expression, it can be wrongful termination.²²⁸ Freedom of expression in Kenya is a protected right that can only be limited under specific conditions therefore, its enforcement in some circumstances can be questioned in Kenyan law.²²⁹ The infringement of privacy and expression through enforcement of moral clauses has been discussed in the section above and such can apply in Kenya as it protects the rights as well. Therefore, Moral clauses can apply in Kenya however they risk heavy litigation if they are drafted in broad and vague language.

²²⁷ Lauren R, '140 Characters or less: A look at morals clauses in Athlete endorsements' 138

²²⁸ Lauren R, '140 Characters or less: A look at morals clauses in Athlete endorsements' 138.

²²⁹ Article 33, Constitution on Kenya (2010)

CHAPTER FIVE

Introduction

This chapter intends to conclude the arguments made throughout the paper and suggest recommendations that can better the position of endorsees during the enforcement of moral clauses.

Restating the initial problem

The research paper discusses the uncertainty and criticisms of the moral clauses as a basis for termination of contracts. It looks at the justification and critics of moral clauses as well as how detrimental they have been to the privacy and expression rights of endorsees.

Research findings

The research is set to answer three main questions.

1. What is the justification of the inclusion of a moral's clause in an endorsement contract?
2. To what extent can a moral clause be unfair and detrimental to a celebrity in the hands of the company?
3. How has the unrestricted use of moral clauses violated the right to privacy and freedom of expression?

In analysing the why behind moral clauses, the research concludes that considering the risk involved in an endorsement, they are necessary for the protection of the large sums of money at stake as well as corporate protection of the company.

On the second question, it can be concluded that over years, the drafting of the clauses has been very poor giving the endorser a lot of power that is used to the detriment of the endorsee. Once the clauses hit the Kenyan scene, it will be hard for them to be enforced in their ambiguous nature.

On the last question, different cases and endorsement deals have shown that the unrestricted use of moral clauses tends to infringe on the privacy and expression rights of endorsees. Since these rights are protected in Kenya, any moral clause that is terminated on the basis of an invasion of privacy or a violation of expression would not stand.

Recommendations

Moral clauses should not be done away with entirely, however their drafting should be improved and a standard should be set on how they should be implemented. This chapter discusses a few recommendations that could improve moral clauses.

The language of the clause greatly influences the enforcement of the clause and this determines whether the allegedly offending behaviour falls within the clause. This means that the decision as to whether an act triggers the clause is based on how well it is drafted.²³⁰ The parties to an endorsement agreement should agree upon measures for determining how the company can terminate the athlete using moral clauses.²³¹

There should be a nexus in the immoral act and the endorsement, and this should be taken up by courts while deciding cases of termination on the basis of a moral clause.²³² For one to be terminated on that basis, a test can be used. This test was established in *Morrison v State Board of Education*²³³, where the courts were deciding whether a teachers conduct had a connection with his duties. The test was; the likelihood that the conduct affected the endorser in any way, the degree of damage anticipated, the conditions surrounding the conduct, the extent to which disciplinary action cause a negative impact on the constitutional rights of the parties involved.²³⁴ Endorsers should be able to carry out this test before terminating the contracts because the mere excuse of an immoral activity as a reason to terminate can be termed as unfair, the activity done should have had a direct effect on the endorser's interests in the contract. An alternative way to avoid termination may include the talent's attempt to disprove the allegation of bad behaviour meaning they should be heard.²³⁵ Endorsers should be able to give talents or celebrities the opportunity to disapprove the allegation as opposed to terminating on the basis of suspicion.²³⁶ Companies should be able to establish a proper

²³⁰ Greene N, 'Contracting correctness: A rubric of analysing morality clauses' 40.

²³¹ Daniel Auerbach, 'Morals Clauses as Corporate Protection in Athlete Endorsement Contracts' 212.

²³² Flemming B, 'Moral Clauses for educators in secondary and post-secondary schools; legal applications and constitutional concerns', 3 Brigham young university education and law journal 1, 2009, 77.

²³³ *Morrison v State Board of Education*, Supreme Court of California, 1969.

²³⁴ Flemming B, 'Moral Clauses for educators in secondary and post-secondary schools; legal applications and constitutional concerns', 78.

²³⁵ Stephen M Gallagher, 'Who's Really Winning: The Tension of Morals Clauses in Film and Television' 102. Daniel Auerbach, 'Morals Clauses as Corporate Protection in Athlete Endorsement Contracts' 10.

²³⁶ Stephen M Gallagher, 'Who's Really Winning: The Tension of Morals Clauses in Film and Television' 102.

standard operating procedure to be followed when issues concerning moral conduct arise in a company. Most moral clauses advocate for immediate termination on suspicion without considering any other factors and this can lead to unfair termination. If you look at Kenyan law, it establishes the right for the employee being terminated to be heard and this should also be required when issues concerning their moral conduct out arise in endorsements. Endorsers should be given the chance to be heard as opposed to automatically terminating the contract. Courts need to consider the burden that the clause places upon the endorsee balancing it against the interests of the endorser since these clauses significantly restrain endorsees.²³⁷

Another solution to the one-sided nature of these clauses is the inclusion of a reverse moral clause in all contracts that have moral clauses since talents or celebrities also have reputations to protect. Reverse moral clauses protect the celebrity in the event that the endorser acts in a manner that can affect is or reputation. For example, in 2009 Golfer Vijay Singh was caught in a situation when his endorser was implicated in a Ponzi scheme scandal and he was able to terminate the contract and in 2013, Jay-Z faced public backlash for his endorsement ties to Barneys when allegations of racism at the store were made public.²³⁸ Once reverse clauses are added, celebrities will also have recourse for when their endorser's behaviour affects their reputation negatively since these talents also have a reputation to uphold. Moral clauses should have a specific timeline as to when they apply. For example, a celebrity's contract should not be terminated because of statements he made before the contract was signed just because social media has brought them to light during the time of the endorsement agreement. Termination of a contract for some past bad statements could significantly impact one's future prospects, even if the statements were minor and made years earlier and this should be done away with.²³⁹

Conclusion

Companies use the clauses to cut the link between themselves and talent, controlling their behaviour and protecting themselves from their potential misbehaviour of the talents. Over

²³⁷ Greene N, 'Contracting correctness: A rubric of analysing morality clauses' 64.

²³⁸ Miller C, 'Is it time for athletes to demand reciprocal morals clauses in their endorsement deals' lexology, 2017, -<https://www.lexology.com/library/detail.aspx?g=dcc355a2-d48c-4134-a8fe-d2aad278cdf0> on 4th January 2021.

²³⁹Green N 'Contracting correctness: A rubric for analysing morality clauses,67.

the years, it has been unclear when these clauses have been triggered because they are drafted vaguely, morals are diverse, opposition to inhibiting freedom of expression etc.²⁴⁰ The moral clauses protect the endorsers in certain cases when an endorsee's conduct can damage their reputation, however, they should be legally expounded on to make them consider both parties' interests. Although moral clauses have played an important role in endorsement contracts for over a century, it is unclear what effect they will have in the future. Courts need to ensure that the enforceability of these clauses does not infringe on the privacy and expression rights of the weaker party. The judgement in *Mendenhall v. Hanesbrands, Inc* showed signs of great improvement in the enforcement of moral clauses therefore, in order to curb the malicious intentions of companies that have a lot of power, courts should be able to place the burden of proof to show how a talent's behaviour affected the company negatively in order to uplift good faith in contracts. The mere difference in opinions between the talent and the company should therefore not be enough to result into termination. Since Endorsement is a growing field in Kenya, moral clauses could find their way into the agreements as the money at stake increases, the paper has tried to discuss Kenya's readiness for the clauses and whether the clauses would fit into the Kenyan legal system. This has been done through an analysis on how the clauses tend to infringe on the rights of celebrities leaving them with no recourse. As per the practice now, moral clauses place the endorsee at the will of the endorser who can terminate him/her for the reason of immorality. The heart of contract law is the weaker party who we must always remember is a human being and should be protected.

²⁴⁰ Caroline Epstein, 'Morals Clauses: Past, Present and Future' ,105.

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