



STRATHMORE LAW REVIEW

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Legal Innovations
for a Progressive African Society

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Strathmore University

Press

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Editorial

There is a peculiar courage in looking back, pausing at a milestone, feeling the weight of the path behind, and of everything ahead as well. After an arduous journey, the Strathmore Law Review has, at last, arrived at ten. Ten years of gathering questions, sending them out into the world, and watching them take root in various conversations. Ten years of a sustained commitment to the idea that young African legal minds have something important to say about the problems facing our continent. Ten years of hoping to make a difference. This journal, sired on the conviction that it could be a sanctuary of legal thought in Africa, has really come a long way in those ten years.

But what does a decade actually mean? What difference have we made? Of course, measuring impact is never a precise science, especially for this kind of matter, where we clearly have a conflict of interest. However, I think at a conservative glance, if we look at the simplest yardsticks, our achievements matter more than we might imagine. First, if we consider our output, in the decade since Volume I appeared in 2016, the SLR has seen ~70+ papers in 9 volumes by undergraduate and master's students, each offering thoughtful and compelling perspectives on law and society. However, one might, quite rightly, wonder how influential these articles have been. Admittedly, the influence of those articles has been modest so far. Citations data shows SLR articles are not heavily cited. In fact, many garner single-digit citations in scholarly works, and virtually none have become go-to references in jurisprudence or policy. This isn't entirely unexpected; as a student-run journal, SLR faces an uphill battle for credibility. It lacks the international indexing of older law journals, and some scholars or judges may view it as less authoritative.

However, impact isn't only measured in citations. There's an intangible but important influence SLR appears to have within Strathmore Law School and the Kenyan legal academia: it has revitalised a culture of research and writing among students. The evidence is partly anecdotal (e.g., the enthusiasm around our calls for papers), and partly inferred from outcomes. For example, within SLS (and perhaps even Kenya post-2016), a generation of authors – many of whom have

gone on to further research or teaching – trace their first publication back to this very journal. In addition, among past SLR editors, a significant proportion now hold influential positions across academia, government (legal) departments, and international organisations. While this isn't a huge number of students overall (as most of our alumni are only 0-8 years out of school), evidence from the past leads us to expect that many more SLR alumni will secure positions in academia (LL.M. programs, research roles), elite legal practice, public service, and policy work.

Third, in a context where, a decade ago, student scholarship was rare, we have done what many said was impossible – we have published consistently. This has, arguably, set a precedent in Kenya given that many legal journals often flicker and die. Thus, that consistency itself can be viewed as a form of impact. Indeed, beyond our walls, the spark has caught elsewhere: other Kenyan universities like JKUAT, Kabarak, and Embu have since launched their own student-led law reviews, inspired, if modestly, by the SLR's consistency. Given the absence of student journals pre-2016 and the proliferation by 2023, and the fact that this change is contemporaneous with the SLR's rise, we can infer from this correlation, quite plausibly, that the journal has thus far played an important role in widening the Kenyan academic landscape.

If we are being honest in our appraisal, however, the SLR is not (yet) a journal that will be cited in Kenya's Parliament or by the Supreme Court as authority on a point of law. Our articles rarely, if ever, 'move the needle' in public policy immediately. However, we have succeeded in planting the seeds of a scholarly culture in Kenyan law. Thus, if impact is viewed in terms of gently changing the trajectory of legal scholarship and creating a pipeline of legally trained intellectuals, then the SLR's impact, while growing, is significant.

In this landmark volume, we look into a number of pertinent legal issues, in the hope, still, of making a difference. The papers assembled embody our theme – *'legal innovations for a progressive African society'* – and explore their respective issues with the depth and scholarly rigour that has come to be associated with the SLR.

Khushboo Shah opens our volume with a searing examination of cultural restitution under Article 11 of Kenya's Constitution. Her paper, *'32,000 € Counting: Article 11 of the Constitution of Kenya and the Restitution of Cultural Property'*, confronts a truth we have been too polite to name: that European museums remain, in essence, repositories of colonial theft. Shah reminds us that colonialism was not only a machinery of violence and subjugation, but a system of erasure, a systematic alienation of cultural heritage. From it came the pillaging of totems, sculptures and relics deemed 'savages' curiosities,' only to be paraded in European

museums. After demonstrating the emotional and spiritual violence of cultural alienation, she attempts to offer a solution. Shah anchors her analysis in the State's duty under Article 11 of the Constitution of Kenya (the duty to promote cultural heritage), and compellingly weaves together constitutional interpretation with the lived reality of cultural dispossession. She argues that Article 11 calls for concrete restitution efforts, including having a policy to facilitate the active pursuit of the same.

Next, Vianney Sebayiga and Fiona Mwaura tackle a contentious area in their paper, *'The Place and Limits of Arbitration in Resolving Employment Disputes in Kenya'*. Their work affirms the viability of arbitration in employment disputes, but then notes a crucial tension that makes such arbitration difficult: the asymmetry of power between employers and employees often undermines contractual freedom as employers routinely shoehorn arbitration clauses into employment contracts, rendering such clauses coercive. Owing to this, employees are likely to be disenfranchised if employment arbitration was left entirely up to the parties. Through an incredibly detailed examination of Kenyan statutes and case law, they argue that arbitration can be both permissible and protective, provided courts carefully assess the fairness of each agreement. In addition, they provide valuable recommendations regarding specific considerations the court should make before referring such disputes to arbitration in order to level the playing field.

Following this, Austin Ouma then steers us towards property rights with his paper: *'Good Faith, Bad Fate: A Critique of the Dina Management Decision on the Limits of Constitutional Property Rights Protections in Kenya'*. This article presents a robust critique of the Supreme Court's Dina Management decision, focusing on its interpretation of Article 40 of the Constitution. Ouma contends that, by interpreting Article 40 too narrowly, the Court saddles bona fide purchasers with undue burdens, effectively making them bear the consequences of historical land injustices and flawed land registry practices under the guise of title sanctity. The paper culminates in impactful legal and administrative reforms designed to fortify property law in Kenya and ensure a more secure legal framework for landowners.

In perhaps the most forward-looking piece in this volume, Sanjana Ragu grapples with synthetic biology's promise and peril. Her paper, *'The Double Edged Bio Tech' Sword – Proposing Legal Solutions for Responsible Synthetic Biology Development in Kenya'*, recognises that Kenya cannot afford to be a passive observer in the biotechnology revolution. She observes that there are immense benefits from this technology, including the promise of engineered organisms for agriculture

and medicine. However, she also warns of catastrophic risks from accidental or malicious release (e.g., engineered pandemics). Given these two extremes, she confronts the regulatory gaps in Kenya's approach to synthetic biology and proposes various legal interventions that could properly and responsibly balance bio-innovation with caution (a necessity in the imperative to prevent catastrophic risks).

Turning to the digital sphere, Eileen Mogeni addresses a contemporary dilemma in her paper: *'A Legal Analysis of Sharenting: Balancing Between Parental Freedom of Expression and Minors' Right to Digital Privacy in Kenya'*. She argues that the digital age has created new forms of vulnerability, particularly for children whose parents share their lives online. Through the lens of interest theory, she demonstrates how this phenomenon of 'sharenting', where parents share their children's details online, is in conflict with the children's right to digital privacy. In particular, owing to the fact that children develop autonomy gradually, their future interests may conflict with their parents' present desires to share family experiences online. Thus, to avert this, she advocates for a balanced approach that prioritises the child's best interests without unduly restricting parental freedom of expression.

Finally, construction law receives attention from Alex Kamau, in his paper: *'Enduring Transience: The Illusion of 'Temporary Finality' in Construction Adjudication Decisions'*. Here, he examines the notion of 'temporary finality' in adjudication decisions and contends that although intended to deliver swift remedies, adjudicators' awards can, under certain circumstances, effectively become final and binding, thus trapping parties in adverse outcomes without meaningful recourse. He argues that such design flaws in legal procedures can have large consequences for access to justice. In a bid to curb this, the paper urges caution while establishing a statutory adjudication regime to ensure robust safeguards are incorporated to mitigate these risks. It also encourages legislation that is customised to the specific and unique attributes of the Kenyan construction industry.

Collectively, the papers in Volume X exemplify the diverse, impactful, and deeply contextualised legal scholarship that the SLR has consistently championed for the past ten years. This monumental achievement would not have been possible without the tireless efforts of many. We extend our sincerest gratitude to our esteemed panel of expert reviewers, Dr. Nelly Cherotich, Dr. Melissa Muindi, Nicholas Cheruiyot, and Jade Makory whose invaluable insights and rigorous scrutiny were instrumental in upholding the high academic standards of this volume. We also express our profound appreciation to the authors

themselves. You accepted the feedback from editors and expert reviewers with grace and your dedication towards scholarly excellence is truly commendable. To the dedicated team behind the scenes, the Volume X editors, I am profoundly grateful to every single one of you. We made progress because you all poured yourselves into this journal. You are the very sinews of this publication and it has been an honour to lead such a talented and passionate group of individuals. In addition, I would like to thank our wonderful Volume X Communications and Public Relations Manager, Afua Keddey. We are really grateful for the critical role you have played in enhancing the SLR's online presence. It was a huge pleasure having you in the SLR team as well.

On a broader level, I would also like to thank Dr. Lynette Osiemo (the SLS Research Director), Macharia Kaguru, and Wesley Ooro (the SLS Manager), whom I worked with closely in my role as Editor-in-Chief. You believed in our mission and your support for the SLR over the past year is deeply appreciated. I am also grateful to Strathmore Law School faculty and administration by extension, especially Dr. Jane Wathuta (the Dean, Strathmore Law School), Dr. Francis Kariuki, Allan Mukuki, and Eva Maina for their support at various points in this journey. Thank you to Hon. Gitobu Imanyara and Prof. Joel Trachtman for their support of the SLR this year as well. You've both fueled our pursuit of excellence, and we are very grateful. Furthermore, special thanks to Cecil Abungu, our founding Editor-in-Chief, whose support for this journal has never once waned, even years later. Thank you for staying close, for reminding us of where this journal began, and for guiding us on how we can shape it for posterity.

Over the past ten years, the Strathmore Law Review has been fortunate to receive generous support from partners such as Bowmans, CMS Daly Inamdar Advocates, IKM Advocates, and KM Law LLP, whose contributions helped bring earlier volumes to life. Your support has been essential in our effort to make a difference as a journal and we are immensely grateful.

To our readers, thank you for embarking on this intellectual journey with us. We once again invite you to engage with the articles in Volume X and hope you will find them not only informative but also thought-provoking in a way that encourages you to join these conversations with your own questions and analyses.

Finally, to all the SLR alumni, those still with us and those who have departed, we remember you, and we thank you for every shred of brilliance and heart that you've all poured into this journal over the past ten years. Your legacy endures in every volume we publish.

To everyone who's supported us in ways seen and unseen, thank you.

To the incoming Volume XI team and future editors at the SLR, you are inheriting a journal with a rich legacy, it is now yours to shape, and we have no doubt you will continue to steer it with the same passion and excellence. We wish you all the best as you embark on this exciting new chapter. May the SLR continue to flourish under your guidance. We will be cheering you on every step of the way.

The Strathmore Law Review's second decade begins. If the first ten years are any indication, the best is yet to come.

Mark Lenny Gitau,
Editor in Chief, Volume X.