

**AN ANALYSIS OF THE SPECIALISED SYSTEM OF PENSION DISPUTE RESOLUTION IN KENYA**

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**DECLARATION OF ORIGINALITY**

I, **OKINYI WYCLIFFE JAKETCH**, do hereby declare that this Research Paper is my original work and that it has not been submitted for the award of any degree or other academic awards in any university or academic institution.



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## ACRONYMS AND ABBREVIATIONS

ACHPR	African Commission on Human and People's Rights.
AFCA	Australian Financial Complaints Authority.
APRA	Australian Prudential Regulatory Authority.
AU	African Union.
CBK	Central Bank of Kenya.
CEO	Chief Executive Officer.
CESCR	Committee on the Economic, Social and Cultural Rights.
CIO	Credit Investment Ombudsman.
CMA	Capital Markets Authority.
EDR	External Dispute Resolution.
ELRC	Employment and Labour Relations Court.
FCA	Financial Conduct Authority.
FOS	Financial Ombudsman Service.
FSCA	Financial Sector Conduct Authority.
GOK	Government of Kenya.
ICCPR	International Covenant on Civil and Political Rights.
IDR	Internal Dispute Resolution.
ILC	International Law Commission.



ILO	International Labour Organisation.
IRA	Insurance Regulatory Authority.
KLRC	Kenya Law Reporting Commission.
MOU	Memorandum of Understanding.
NSSF	National Social Security Fund.
ODR	Online Dispute Resolution.
OECD	Organisation for Economic Co-operation and Development.
OPFA	Office of the Pension Fund Adjudicator (OPFA).
OPRA	Occupational Pensions Regulatory Authority.
PO	Pensions Ombudsman.
RBA	Retirement Benefits Authority.
RBAT	Retirement Benefits Appeals Tribunal.
SASRA	Saccos Societies Regulatory Authority.
SCT	Superannuation Complaints Tribunal.
UDHR	Universal Declaration of Human Rights.
UN	United Nations.
UNGA	United Nations General Assembly.

## **LIST OF STATUTES**

### **Kenyan Statutes**

The Capital Markets Act, 1989.

The Constitution of Kenya, 2010.

The Employment Act, 2007.

The Fair Administrative Action, 2015.

The Insurance Act, 1985.

The Judicature Act, 1967.

The Retirement Benefits Act, 1997.

The Tax Appeals Tribunal Act, 2013.

### **United Kingdom Statutes**

The Pension Act 1995.

The Pension Schemes (Northern Ireland) Act 1993.

The Pension Schemes Act 1993.

The Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996.

### **South African Statutes**

The Financial Sector Regulation Act 2017.

The Pension Funds Act 1956.

The South Africa Constitutional Act 1996.

### **Australian Statutes**

The Australian Financial Complaints Authority Act 2018.

The Australian Prudential Regulatory Authority Act 1998.

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### **United Nations**

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

UN Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No. 19: The right to social security (Art. 9 of the Covenant)' (4 February 2008) UN Doc E/C.12/GC/19.

UN Congress on the Prevention of Crime and the Treatment of Offenders, 'Basic Principles on the Role of Lawyers' (27 August 1990).

UN Congress on the Prevention of Crime and the Treatment of Offenders, 'Basic Principles on the Independence of the Judiciary' (13 December 1985) UNGA Res 40/32 and 40/146.

UNGA International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003).

UNGA, 'Declaration of the High-Level Meeting of the 67<sup>th</sup> Session on the Rule of Law at the National and International Level' (30 November 2012 UNGA Res/67/1).

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*Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others* [2019] eKLR.

*Alnashir Popat & 7 others v Capital Markets Authority* [2020] eKLR.

*Amon O Chuchu & 39 others v Retirement Benefits Authority & 2 others* [2015] eKLR

*Ann Wangui Ngugi & 524 others v Kenya Commercial Bank Staff Pension Fund & 2 others* [2020] eKLR.

*Anne Wangui Ngugi & 2,222 Other v Edward Odundo, C.E.O Retirement Benefits Authority* [2015] eKLR.

*Bethwell Allan Omondi Okal v Telkom (K) Ltd (Founder) & 9 others* [2017] eKLR.

*Capital Markets Authority v Jeremiah Gitau Kiereini & Another* [2014] eKLR.

*Chadwick Okumu v Capital Markets Authority* [2018] eKLR.

*Jimmy R. Kavilu & 16 others v Stanbic Bank Kenya Limited & 7 others* [2019] eKLR.

*Kenya County Government Workers Union & another v Board of Trustees Local Authority Pension Trust & 2 others; Retirement Benefits Authority & another (Interested Parties)* [2021] eKLR.

*Kenya Ports Authority v Industrial Court of Kenya & 2 others* [2014] eKLR.

*Republic v Retirement Benefits Authority Ex Parte Moses O. Ondingo & 5 others* [2018] eKLR.

*Republic v Retirements Benefits Appeal Tribunal & another; Retirement Benefits Authority & 3 others (Interested Parties) Ex Parte Board of Trustees Teleposta Pension Scheme* [2019] eKLR.

*Solomon Muyeka Alubala v Capital Markets Authority; National Bank of Kenya Ltd (Interested Party)* [2019] eKLR.

*Staff Pension Fund & Kenya Commercial Bank Staff Retirement (DC) Scheme 2006 & another v Ann Wangui Ngugi & 524 other* [2018] eKLR.

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*Henderson v Eskom* [1999] BPLR 353 (PFA).

*IBM South Africa Pension Fund v IBM South Africa (Pty) Ltd* (2000) 21ILJ 1467 (PFA).

*Old Mutual Life Assurance Co. (South Africa) Ltd v Pension Funds Adjudicator and Others* (3) SA 458 (c).

*Sekele v Onon Money Purchase Pension Fund & Another* [2006] 6BPLR 2148 (PFA).

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*Civil Liberties Organisation v Nigeria* (ACHPR Communication No. 129/94 (1995).

*Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria* (ACHPR Communication No.218/98) (2001) para 7.

*Miguel Gonzalez Del Rio v Peru* (UN Human Rights Committee Communication No.263/1987 UN Doc CCPR/C/46/D/263/1987(1992).

*R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256.

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Organisation for Economic Co-operation and Development, 'Guidelines for the Protection of Rights of Members and Beneficiaries in Occupational Pension Plans' (OECD 2003).

US Agency for International Development (USAID), 'Guidance for Promoting Judicial Independence and Impartiality-Revised Edition' (Office of Democracy and Governance 2012).

# CHAPTER 1

## INTRODUCTION

### 1.1 Background and Context

The Kenyan pension sector is critical in providing national social and economic safety.<sup>1</sup> It has a huge economic base, which by June 2018 was Kenya Shillings 904.91 billion total funds under management.<sup>2</sup> This has since grown to Kenya Shillings 1,398.95 billion as at December 2020 and is projected to continue growing though sluggishly.<sup>3</sup> The sector comprises the National Social Security Fund (NSSF), Occupational Retirement Benefit Schemes, Individual Retirement Benefits Schemes and Civil Service schemes.<sup>4</sup> The Retirement Benefits Authority (the RBA) is mandated to regulate and supervise the sector with the exception of the latter category of schemes.<sup>5</sup>

As at June 2020 the sector had 31, 12 and 40 registered umbrella retirement benefit schemes, income drawdown funds and individual pension plans respectively.<sup>6</sup> By this time, the sector also had 33, 23, 11 and 16 registered administrators, fund managers, registered custodians and actuaries as the service providers.<sup>7</sup> In addition, the micro-pension products targeting informal sector have emerged.<sup>8</sup> However, pension coverage remains low at merely 22% of the total labour force.<sup>9</sup> Also,

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<sup>1</sup> Masinde Victoria and John Olukura, 'Impact of the Pension Reforms on the Kenya Pension Industry' (2014) 11 European Scientific Journal 168,176.

<sup>2</sup> RBA, 'Annual Report & Financial Report for the Year Ended 30<sup>th</sup> June 2018' (RBA 2018) 18 para.1.

<sup>3</sup> RBA, 'Retirement Benefits Industry Report for December 2020' (RBA 2020) 1 para.1.

<sup>4</sup> RBA, 'Strategic Plan 2019-2024' <<https://www.rba.go.ke/download/rba-strategic-plan/>> accessed 22 June 2021.

<sup>5</sup> Retirement Benefits Act, 1997 s 5.

<sup>6</sup> RBA, 'Registered Schemes' <<https://www.rba.go.ke/registered-schemes/>> accessed 22 June 2021.

<sup>7</sup> RBA, 'Registered Administrators' <<https://www.rba.go.ke/registered-administrators/>> accessed 22 June 2021; RBA, 'Registered Fund Managers' <<https://www.rba.go.ke/registered-fund-managers/>> accessed 22 June 2021; RBA, 'Registered Custodians' <<https://www.rba.go.ke/registered-custodians/>> accessed 22 June 2021; RBA, 'Actuaries' <<https://www.rba.go.ke/actuaries/>> accessed 22 June 2021.

<sup>8</sup> Charles Mwaniki, 'Zamara Launches Low-Cost Retirement Savings for Scheme Casuals' *The Pensioner* (Nairobi, January-July Issue, 2020).

<sup>9</sup> CMA, IRA, RBA, CBK and SASRA, 'The Kenya Financial Stability Report' (Financial Sector Regulators 2010) para.2.4.



the sector still operates on high risk level of 3.09 by 2019 which is beyond the desired risk score of 2.88.<sup>10</sup> As such, pension schemes in Kenya are exposed to various risks which make them vulnerable to poor performance or failure.<sup>11</sup> Such risks include disputes which largely emanate from non-payment of claims and mismanagement of the schemes.<sup>12</sup>

Disputes are generally inevitable, harmful and costly.<sup>13</sup> In the pensions sector, a suitable dispute resolution system is critical in ensuring that the rule of law is observed to enable pension schemes thrive.<sup>14</sup> Equally, a suitable system protects and enforces the special rights of the pension schemes' members.<sup>15</sup> A suitable system of pension dispute resolution is one that responds to the proper pension funds' administration and management.<sup>16</sup> A specialised system which is structured outside the normal court system is generally considered suitable for pension schemes because of its specialised expertise, effectiveness and efficiency.<sup>17</sup>

The International Labour Organisation (ILO) as the standard setting body in labour related matters, recommends a three-tier pension dispute resolution structure.<sup>18</sup> The structure comprises an internal

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<sup>10</sup> Ibid.

<sup>11</sup> Nzomo Mutuku, 'Need and Viability of a Benefit Protection Fund for Retirement Benefits' <<https://dx.doi.org/10.2139/ssrn.2060971>> accessed 22 June 2021.

<sup>12</sup> Lucy Jepcho Rono, Julius Kibet Bitok and Gordon N. Asamoah, 'Impact of Retirement Benefit Act (RBA) on Investment Returns to Pension Funds in Kenya' (2010) 9 International Business & Economics Research Journal 41, 54.

<sup>13</sup> Michael L. Moffit and Robert C. Bordone (eds), *Handbook on Dispute Resolution* (Jossey-Bass 2005) 11.

<sup>14</sup> International Labour Organisation (ILO), 'Social Security and Rule of Law: General Survey concerning social security instruments in the light of the 2008 Declaration on Social Justice for a Fair Globalization' (1 January 2011) ILC Geneva 100<sup>th</sup> Conference LC.100/III/1B.

<sup>15</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No. 19: The right to social security (Art. 9 of the Covenant)' (4 February 2008) UN Doc E/C.12/GC/19; Employment Act, 2007 s 10(3)(a)(iii).

<sup>16</sup> Robin Talbert and Naomi Karp, 'Collaborative Approaches: Aging, Disability, and Dispute Resolution' (1995) 29 Clearinghouse Review 638,642.

<sup>17</sup> *Kenya Ports Authority v Industrial Court of Kenya & 2 others* [2014] eKLR; *Abdallah Osman & 628 others v Standard Chartered Bank (K) Limited & 11 others* [2018] eKLR.

<sup>18</sup> ILO Social Security (Minimum Standards) Convention No.102 (adopted 28 June 1952) ILC (Convention No.102) art 70(3); ILO (Employment Promotion and Protection against Unemployment) Convention No.168 (adopted 21 June 1988) (entered into force 17 October 1991) ILO (Convention No.168) art 27.

mechanism, an independent tribunal and a special appeals tribunal.<sup>19</sup> The role of the independent tribunal is to review decisions that arise from internal mechanisms.<sup>20</sup> The role of the special appeals tribunal, on the other hand, is to determine appeals on the decisions of the independent tribunal.<sup>21</sup> The independence of the tribunal is chiefly critical as it is at that level that pension disputes require a neutral and impartial examination outside the schemes.<sup>22</sup>

An independent tribunal is free from bias and influence thus capable of not only rendering justice to all the parties but also in a manner that the parties perceive to be fair.<sup>23</sup> Countries such as South Africa,<sup>24</sup> United Kingdom (UK),<sup>25</sup> Australia,<sup>26</sup> the United States of America,<sup>27</sup> among others have adopted specialised systems which are independent of their regulatory agencies in compliance with the ILO recommendation.<sup>28</sup> Significantly, some of these countries have compressed their systems to a single and independent pension dispute resolution body.<sup>29</sup> That not only allows for independent adjudication but also saves on resources needed in pension adjudication.<sup>30</sup>

In Kenya, however, the Retirement Benefits Authority (the RBA) through its Chief Executive Officer (CEO) is mandated to resolve pension disputes which arise from internal mechanisms.<sup>31</sup> The CEO is also empowered to conduct investigations before determining disputes.<sup>32</sup> Appeals

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<sup>19</sup> Organisation for Economic Co-operation and Development, 'Guidelines for the Protection of Rights of Members and Beneficiaries in Occupational Pension Plans' (OECD 2003).

<sup>20</sup> Ibid.

<sup>21</sup> Ibid 3.

<sup>22</sup> Robert S Summers, 'A Formal Theory of the Rule of Law' (1993) 6 Ratio Juris 127, 142.

<sup>23</sup> *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256.

<sup>24</sup> Pension Funds Act 1956, s 30A (3).

<sup>25</sup> Pension Schemes Act 1993, Part X; Pension Schemes (Northern Ireland) Act 1993, Part X.

<sup>26</sup> Australian Financial Complaints Authority Act 2018.

<sup>27</sup> Josephine Cumbo, 'Pensions Complaints Procedure to Be Streamline' *Financial Times* (New York, 13 February 2018) <<https://www.ft.com/content/e3a47554-0fe6-11e8-8cb6-b9ccc4c4dbbb>> accessed 5 October 2020.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid 3.

<sup>30</sup> John Murphy, 'Alternative Dispute Resolution in South African Pension Funds Industry: An Ombudsman or a Tribunal?' (2001) 7 Pensions: An International Journal 28, 37.

<sup>31</sup> Retirement Benefits Act, 1997 ss 46, 47 And 48.

<sup>32</sup> RBA, 'Complaints and Procedures' <<https://www.rba.go.ke/complaints-and-procedures/>> accessed 22 August 2020.

from the CEO's decisions lie to the Retirement Benefits Appeals Tribunal (the RBAT) as the special appeals tribunal.<sup>33</sup> The system is three-tiered but could have another level should a party file a judicial review in court against RBAT decision.<sup>34</sup> However, the system must be exhausted before a party can access the courts.<sup>35</sup>

The most unique feature of this system is the involvement of the RBA, the sector regulator, in adjudication.<sup>36</sup> That is despite the fact that a regulator has a direct interest in the sector and is accountable to the executive arm of the government which is likely to compromise its independence and impartiality in adjudication.<sup>37</sup> For instance, there are occasions when the RBA has abused its adjudicatory powers by neglecting or inordinately delaying to process certain disputes without any justification.<sup>38</sup> The affected parties have in those instances felt treated unfairly and attributed the same to the incomplete independence in pension dispute resolution.<sup>39</sup> That is contrary to the constitutional and other legal requirements that disputes, including pension disputes, be resolved by an independent and impartial tribunal or body.<sup>40</sup> Yet it is this system which is expected to respond appropriately to the pension disputes in Kenya.<sup>41</sup>

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<sup>33</sup> Retirement Benefits Act, 1997 ss 47, 48.

<sup>34</sup> *Republic v Retirement Benefits Appeal Tribunal & another; Retirement Benefits Authority & 3 others (Interested Parties) Ex Parte Board of Trustees Teleposta Pension Scheme* [2019] eKLR

<sup>35</sup> *Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others* [2019] eKLR; *Ann Wangui Ngugi & 524 others v Kenya Commercial Bank Staff Pension Fund & 2 others* [2020] eKLR.

<sup>36</sup> Retirement Benefits Act, 1997 ss 9, 47.

<sup>37</sup> Macmillan, 'Dispute Resolution in Telecommunication Industry: The Role of Independent National Regulatory Authorities in Settlement of Disputes' <[https://www.itu.int/ITU-D/treg/publications/ITU\\_WB\\_Dispute\\_Res-E.pdf](https://www.itu.int/ITU-D/treg/publications/ITU_WB_Dispute_Res-E.pdf)> accessed 5 October 2020.

<sup>38</sup> *Republic v Retirement Benefits Authority Ex Parte Moses O. Ondingo & 5 others* [2018] eKLR; *Anne Wangui Ngugi & 2,222 Other v Edward Odundo, C.E.O Retirement Benefits Authority* [2015] eKLR.

<sup>39</sup> *Ibid.*

<sup>40</sup> Constitution of Kenya, 2010 art 50 (1); Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 10; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 14; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter) arts 7, 26.

<sup>41</sup> *Amon O Chuchu & 39 others v Retirement Benefits Authority & 2 others* [2015] eKLR; *Jimmy R. Kavilu & 16 others v Stanbic Bank Kenya Limited & 7 others* [2019] eKLR; *Bethwell Allan Omondi Okal v Telkom (K) Ltd (Founder) & 9 others* [2017] eKLR.

## **1.2 Statement of the Problem**

This paper investigates how the regulatory function of the RBA undermines its independence in pension dispute resolution which in turn renders the specialised system of dispute resolution unsuitable.

## **1.3 Objectives**

This paper has the following four main objectives: the first one is to review the legal framework regarding an independent pension dispute resolution. The second one is to examine how the involvement of the RBA undermines the independence of the specialised pension dispute resolution in Kenya. The third one is to identify some of the best practices in pension dispute resolution in other jurisdictions. The last one is to provide recommendations for the reform of the specialised system for pension dispute resolution in Kenya.

## **1.4 Research Questions**

This paper seeks to answer the following four main questions: the first one is as to what the legal framework in Kenya for an independent pension dispute resolution is. The second one is as to how the involvement of the RBA undermines the independence of the specialised pension dispute resolution in Kenya. The third one is as to which are the best practices in pension dispute resolution. The last one is as to how can the pension dispute resolution system of Kenya be reformed.

## **1.5 Hypotheses**

This paper seeks to test the hypothesis that a suitable specialised pension dispute resolution system is one which is independent of the pension regulator, the RBA.

## **1.6 Theoretical Framework**

This paper is based on the theory of adjudication and the theory of separation of powers as below:

### *1.6.1 Theory of Adjudication*

In this theory, both Jeremy Bentham and Lon Luvois Fuller advance views on how and why disputes should be resolved. Bentham considers adjudication important in addressing disputes for the public good.<sup>42</sup> He places central focus on the suitability of the structures and procedures of an adjudication system.<sup>43</sup> According to him, an appropriate and effective adjudication is that which is conducted within the confines of suitable structures which are established by legislation to ensure fairness and impartial justice to all parties.<sup>44</sup> By structures, Bentham means the institutional outlook of a justice system that makes it respond to disputes.<sup>45</sup> He posits that adjudication is clearer and effective if the established structures and procedures do not undermine the decision-making process but rather promote fairer outcomes as per the legislative provisions.<sup>46</sup> To that end, Bentham advances that any unsuitable structures that lead to biased adjudication should be reformed to deliver public good.<sup>47</sup>

Considering that, the test of an appropriate adjudication is therefore the suitability of structures that can support fair outcomes.<sup>48</sup> Bentham's critics, however, consider his views to be addressing the workings of a court system and not alternative adjudication systems.<sup>49</sup> Nonetheless, his focus

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<sup>42</sup> William Twining, 'Alternative to What? Theories of Litigation, Procedure and Dispute Settlement in Anglo-American Jurisprudence: Some Neglected Classics' (1993) 56 *Modern Law Review* 381,392.

<sup>43</sup> Gerald J Postema, 'the Principle of Utility and the Law of Procedure: Bentham's Theory of Adjudication' (1977) 11 *Georgia Law Review* 1393, 1424.

<sup>44</sup> Francesco Ferraro, 'Direct and Indirect Utilitarianism in Bentham's Theory of Adjudication' (2010) 12 *Journal of Bentham Studies* 1, 24.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid* 7.

<sup>47</sup> Frederick N. Judson, 'A Modern View of the Law Reforms of Jeremy Bentham' (1910) 10 *Columbia Law Review* 41, 54.

<sup>48</sup> *Ibid.*

<sup>49</sup> Twining (n 42) 7.

on the relationships between structures of adjudication and fairness in adjudication is relevant to this paper in understanding the attributes of an appropriate system of pension dispute resolution.<sup>50</sup>

Like Bentham, Lon Fuller also acknowledges that the proper design of the structures of an adjudication system is crucial.<sup>51</sup> He suggests that only a suitably designed adjudication system should be deployed to address particular category of disputes that can sufficiently respond to it.<sup>52</sup> However, Fuller unlike Bentham, openly supports alternative adjudication where appropriate.<sup>53</sup> Additionally, Fuller discusses the moral and normative values that should guide adjudication.<sup>54</sup> He observes that an adjudicatory body should be independent and impartial.<sup>55</sup> Similarly, a decision maker must be impartial.<sup>56</sup> Fuller considers that as the only way to inspire public confidence and active participation in dispute resolution process.<sup>57</sup>

Fuller's critics, however, consider him to be more focused on procedure and structure than substantive adjudication.<sup>58</sup> Fuller himself replied to that criticism that procedures and structures must be good to produce good decisions.<sup>59</sup> Overall, Fuller's believe that a strong and suitable adjudication system is that which is independent and impartial is relevant in understanding that a specialised system of pension dispute resolution including the Kenyan system should basically reflect such values.<sup>60</sup> In this paper, therefore, both Bentham's and Fuller's perspectives are relevant and complementary, for two reasons. The first one is that both focus on the suitability of structural

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<sup>50</sup> Ferraro (n 44) 7.

<sup>51</sup> Lon L. Fuller and Kenneth I. Wiston, 'Forms and Limits of Adjudication' (1978) 92 Harvard Law Review 353,409.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid 7.

<sup>54</sup> Ibid 7.

<sup>55</sup> Ibid 7.

<sup>56</sup> Ibid 7.

<sup>57</sup> Robert G Bone, 'Lon Fuller's Theory of Adjudication and the False Dichotomy between Dispute Resolution and Public Law Models of Litigation' (1995) 75 Boston University Law Review 1273,1324.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid 8.

<sup>60</sup> Fuller and Wiston (n 51) 7.

design of an adjudication system in pursuit of a fair system that render justice.<sup>61</sup> The second reason is that Fuller's view also prescribes that the values of independence and impartiality as the moral test of a suitable system of dispute resolution.<sup>62</sup>

### ***1.6.2 Separation of Powers Theory***

In this theory, De Montesquieu identifies three powers of the government: that is, making the law, executing public resolutions, and judging other people disputes.<sup>63</sup> He advances the view that these powers must be separate and independent from each other for the suitable government operation.<sup>64</sup> He was emphatic that dispute resolution power must be independent from other government powers.<sup>65</sup> This is considered critical in ensuring there is no tyranny but justice to those whose liberties and rights are infringed.<sup>66</sup> The critics of this theory focus on interdependence of the governance functions and the need for checks and balances.<sup>67</sup> However, of principal note is that the judicial or dispute resolution function of the government must be separate from other functions of the government. That is to avoid the impression of bias on the part of the one judging disputes. This paper adopts the De Montesquieu's views on separation of government powers and argues further that regulation being a function of regulatory bodies annexed to the executive powers of the government should not be combined with the role of dispute resolution.<sup>68</sup> This theory supports

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<sup>61</sup> Ibid.

<sup>62</sup> Ibid 8.

<sup>63</sup> Anne M. Cohler, Basia C. Miller and Harold S. Stone, *Montesquieu: The Spirit of the Law* (Cambridge University Press, 1989) 157,169.

<sup>64</sup> Ibid.

<sup>65</sup> Stephen Holmes, 'Lineage of the Rule of Law' in Adam Przeworski & Jose Maria Maravall(eds), *Democracy & the Rule of Law* (Cambridge University Press,2003)26.

<sup>66</sup> K.K Ghai, 'Seperation of Powers: What is the Theory of Separation of Powers?' <<https://www.yourarticlelibrary.com/constitution/separation-of-powers-what-is-the-theory-of-separation-of-powers/40336>>accessed 16 November 2021.

<sup>67</sup> Ademola Oluborode Jegge and Sidogi Tendeni, 'Interdependence versus Checks and Balances of Power: A Reflection on the the Role of Constitutional Court in South Africa' in Michael Addaney, Michael Gyan Nyarko, Elsabe Boshoff(eds), *Governance, Human Rights and Political Transformation in Africa* (Palgrave McMillan,2020) 71,75.

<sup>68</sup> Ibid.

the claim the regulatory and adjudicatory in pension section should be performed by separate bodies which are linked to the executive and judiciary respectively.<sup>69</sup> As a result, the RBA should only perform regulatory function and not the dispute resolution function<sup>70</sup>.

## **1.7 Literature Review**

The literature review below is in two themes: the first theme is the suitability of the pension dispute resolution system. The second theme is the independence in pension dispute resolution. The third theme is the role of a regulator in dispute resolution. The literature reviewed is divided in three categories. The analysis of the literature is as follows:

### ***1.7.1 Suitability of the Pension Dispute Resolution System***

Dispute resolution is a central means of social ordering without which societies would disintegrate and degenerate into chaos and lawlessness.<sup>71</sup> It helps in the effective and efficient implementation and enforcement of the laid down legal framework.<sup>72</sup> Dispute resolution also provides a platform upon which structures, activities and systems within a state are validated.<sup>73</sup> Fuller observes that since dispute resolution is vital for the survival of society, it requires well-organised and efficient systems.<sup>74</sup> Further, the processes, designs and structures used in dispute resolution can strongly influence the level of satisfaction that parties to a dispute have in a dispute resolution system.<sup>75</sup> If

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<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

<sup>71</sup> Lon Luvois Fuller, *The Principle of Social Ordering: Selected Essays of Lon L. Fuller* (Bloomsbury Academic 2001) 42.

<sup>72</sup> Alan Uzalec, 'Goals of Civil Justice and Civil Procedure in the Contemporary World' in Alan Uzalec (ed), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer International Publishing 2014) 3.

<sup>73</sup> William M Cohen, 'Principles for the Establishment of a Rule of Law Criminal Justice System (1993) 23 Georgia Journal of International & Comparative Law 269,287.

<sup>74</sup> Fuller (n 71) 9.

<sup>75</sup> William M O' Barr and John M. Conley, 'Lay Expectations of the Civil Justice Systems' (1988) 22 Law & Society Review 137,162.



parties perceive the procedures and structures to be fair, they get the motivation to accept and use the justice system hence its legitimacy.<sup>76</sup>

In the pensions sector, disputes tend to revolve around pension rights and obligations between the pension schemes and members.<sup>77</sup> Most of the pension disputes are based on justified claims which present financial risks both to the pension schemes and their members.<sup>78</sup> Some of the disputes involve large numbers of parties with modest means, others relate to contracts of employment, which complicates the motivation towards enforcement of pension rights.<sup>79</sup> A proper pension dispute resolution system must therefore take into consideration of such underlying issues.<sup>80</sup> There is a category of literature which considers a specialised system of pension dispute resolution to be appropriate.<sup>81</sup> The literature characterises an appropriate specialised system of pension dispute resolution to be that which can address pension disputes in simple, less formal, expert-based, impartial and independent manner.<sup>82</sup> The specialised system could take various forms but basically, it must have an independent tribunal established outside the schemes.<sup>83</sup>

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<sup>76</sup> Rebecca Hollander-Blumoff and Tom R Tyler, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution' (2011) 2011 *Journal of Dispute Resolution* 1, 20; Beverley McLachlan, 'Courts, Transparency and Public Confidence - To the Better Administration of Justice' (2003) 8 *Deakin Law Review* 1, 12.

<sup>77</sup> G L Clark, 'Restructuring, Workers' Pension Rights, and the Law' (1990) 22 *Environment and Planning A* 149,168.

<sup>78</sup> N.E Baaey, O. U Etim and F.A Asinya, 'An Overview of the Nigerian Pension Scheme from 1951-2004' (2008) *Global Journal of Humanities* 61, 70.

<sup>79</sup> *Ibid.*

<sup>80</sup> Tom Tyler, 'Procedure or Result: What Do Disputants Want from Legal Authorities' in Karl J Mackie and Karl Mackie (eds), *A Handbook of Dispute Resolution: ADR in Action* (Routledge 1991) 22.

<sup>81</sup> Naleem Jeram, 'The Pension Funds Adjudicator-A Jurisdictional Nightmare' (2005) 26 *Industrial Law Journal* 1825, 1852; Ian M. Aitken, 'South Africa: The Occupational Pension Scheme' (1999) 5 *Journal of Pension Management* 69, 75; Mtendeweka Mhango, 'Does the South African Pension Funds Adjudicator Perform an Administrative or a Judicial Function?' (2016) 20 *Law, Democracy & Development* 20, 45; Clement Marumoagane, 'The Need to Provide Members of Retirement Funds Which Are Not Regulated by the Pension Funds Act Access to a Specialised Dispute Resolution Forum' (2019) *De Jure Law Journal* 115,137.

<sup>82</sup> *Ibid.*

<sup>83</sup> Murphy (n 30) 3.

### *1.7.2 Independence in Pension Dispute Resolution*

The structure of a specialised pension dispute resolution should, therefore, be informed by the values of independence, impartiality and legitimacy.<sup>84</sup> These values are basic international legal standards which should be reflected in national structures.<sup>85</sup> Independence of institutions and systems is an essential mechanism that can ensure checks and balances amongst them.<sup>86</sup> Independence of a dispute resolution system in particular is considered vital in preventing negative influences on the course of justice.<sup>87</sup> It ensures that the process is fair for all the participants whose confidence is critical for the functioning of the system.<sup>88</sup> Further, it is suggested that functions and appointment of officers to an office are some of the structural considerations which determine whether a system is independent.<sup>89</sup> Some writers consider as fundamentally defective, a dispute resolution system which lacks independence and impartiality.<sup>90</sup>

Some other commentators, however, caution that principles of independence and impartiality are not absolute, for they must still permit a dispute resolution system to deliver and be accountable for their products.<sup>91</sup> Nonetheless, McAlister and Marumoagane strongly believe that an impartial,

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<sup>84</sup> Michael D. Bayles, *Procedural Justice: Allocating to Individuals* (Kluwer Academic Publishers 1990) 33.

<sup>85</sup> Ben Olbourne, 'Independence and impartiality: International Standards for National Judges and Courts (2003) 2 Law Practice International Courts & Tribunals 97,126.

<sup>86</sup> Tasneem Sultana, 'Montesquieu's Doctrine of Separation of Powers: A Case Study of Pakistan' (2012) 28 Journal of European Studies 51, 71.

<sup>87</sup> Trevor Buck, Richard Kirkham and Brian Thomson, *The Ombudsman Enterprise, and Administrative Justice* (Ashgate Publishing Ltd 1988) 155.

<sup>88</sup> Diana Gills, 'Closing on Administrative Loophole: Ethics for the Administrative Judiciary (2009) 22 Georgia Journal of Legal Ethics 863,876.

<sup>89</sup> Lorne Sosssin, 'Designing Administrative Justice' (2017) 34 Windsor Yearbook of Access to Justice 87,111.

<sup>90</sup> Joanna M. Shephard, 'Money, Politics, and Impartial Justice' (2009) 58 Duke Law Journal 623,685; Fransceco Contini and Richard Mohr, 'Reconciling Independence and Accountability in Judicial Systems' (2007) 3 Ustrecht Law Review 26,43; James E Molitemo, 'The Administrative Judiciary's Independence 'Myth' (2006) 41 Wake Forest Law Review 1191,1234; Richard W. Wright, 'The Principles of Justice' (2000)75 Notre Dame Law Review 1859,1894; Diego M. Papayannis, 'Independence, Impartiality and Neutrality in Legal Adjudication' (2016) 75 Journal for Constitutional Theory and Philosophy of Law 35,52.

<sup>91</sup> Suzannah Linton, 'Safeguarding the Independence and Impartiality of the Cambodian Extraordinary Chambers' (2006) 4 Journal of International Criminal Justice 327,341; Edward D. Re, 'Judicial Independence and Accountability: The Judicial Conduct and Disability Act of 1980 (1981) 8 Northern Kentucky Law Review 221,258.

independent and specialised pension tribunal can resolve pension dispute desirably.<sup>92</sup> In his rendition informed by practical experience, Murphy concludes that an appropriate specialised system of pension dispute resolution is that which has distinct independence.<sup>93</sup> He recommends a tribunal akin to the now defunct Australian Superannuation Complaints Tribunal supported by internal mechanism and special appeals body.<sup>94</sup> Noteworthy, however, the successor of this defunct tribunal, the Australian Financial Complaints Authority, retains a clear independence from sectors' regulators.<sup>95</sup>

### ***1.7.3 Role of a Regulator in Pension Dispute Resolution***

Some commentators consider the independence of regulators a necessary tool against the government and political excesses.<sup>96</sup> They believe that an independent regulator is one who has security of tenure, clear cut regulatory functions, self-sustaining budget and accountability channel that is protected from undue political influence.<sup>97</sup> This implies that a regulator if well-structured can be independent and impartial.<sup>98</sup> However, some writers doubt if the work of a regulator can completely be free from influences.<sup>99</sup> Muchado, Novaes and Ferreira observe that regulators are

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<sup>92</sup> Pamela McAlister, 'The Demise of the Superannuation Complaints Tribunal: The Decisions in Wilkinson v Care and Brekler v Leshner' (1998) 22 Melbourne University Law Review 281,309; Clement Marumoagane, 'The Need to Provide Members of Retirement Funds Which Are Not Regulated by the Pension Funds Act Access to a Specialised Dispute Resolution Forum' (2019) De Jure Law Journal 115,137.

<sup>93</sup> Murphy (n 30) 3.

<sup>94</sup> Ibid.

<sup>95</sup> Ian Ramsay and Miranda Webster, 'Court Review of the Decisions of the Australian Financial Complaints Authority and its Predecessors' (2019) 8 Journals of Civil Litigation and Practice 6, 30.

<sup>96</sup> Janice A. Beecher, 'The Prudent Regulator: Politics, Independence, Ethics and the Public Interest' (2008) 29 Energy Law Journal 577,614; Ahmed Badron, 'Does Formal Independence Matter for Regulatory Outcomes? Measuring Regulatory Interdependence in Networks: The Case of Telecoms Sector in Egypt' <[https://www.academia.edu/download/31861854/Does\\_Formal\\_Independence\\_Matter.pdf](https://www.academia.edu/download/31861854/Does_Formal_Independence_Matter.pdf)> accessed 9 October 2020.

<sup>97</sup> Katja Sander Johannsen, 'Regulatory Independence in Theory and Practice-Survey of Independent Energy Regulations in Eight European Countries' <[http://regulationbodyofknowledge.org/wp-content/uploads/2013/03/Johannsen\\_Regulatory\\_Independence\\_in.pdf](http://regulationbodyofknowledge.org/wp-content/uploads/2013/03/Johannsen_Regulatory_Independence_in.pdf)> accessed 9 October 2020.

<sup>98</sup> Jon Stern, 'What Makes an Independent Regulator Independent?' (1997) 8 Business Strategy Review 67, 74.

<sup>99</sup> Susana Coroado, 'Does formal independence of regulators change? Evidence from Portuguese agencies' (2020) 33 Wiley Governance 61,77; Nelly Godlays, 'The Efficacy of the Regulatory Authorities in Dispute Resolution in Telecommunication Industry in Tanzania Communication Regulatory Authority' (LLM Thesis, Open University of

highly vulnerable to the interest groups and political capture.<sup>100</sup> That may influence regulators to unfairly and unjustly favour some players over others.<sup>101</sup> This makes it difficult for any regulator to conduct dispute resolution fairly.<sup>102</sup> The regulatory processes can contradict the basic values required in an appropriate dispute resolution.<sup>103</sup> As a result, it is important to separate sectorial regulation from specialised dispute resolution.<sup>104</sup>

Susskind and Weinstein support the separation of the adjudicatory and regulatory functions to avoid bias in dispute resolution.<sup>105</sup> That therefore concurs with Murphy's recommendation for independent tribunal for pension dispute resolution.<sup>106</sup> However, Murphy's recommendation presents the benefits of an independent tribunal over a court system unlike in this paper where the focus is on the involvement of a regulator in pension dispute resolution.<sup>107</sup> Equally, other existing literature address the involvement of regulator in general dispute resolution and not specific to the involvement of a regulator in pension dispute resolution which is the thrust of this paper.<sup>108</sup>

Overall, the above literature examines the purpose of a dispute resolution system including a specialised system. Also, the literature review above highlights briefly the features of an appropriate pension dispute resolution system. Further, the literature addresses the significance of

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Tanzania 2011); Dhanaraj Thakur, Michael L Best and Kipp Jones, 'Regulatory Independence and the Development of the Telecommunication Sector: The Liberian Telecommunication Authority' <<https://www.cc.gatech.edu/home/mikeb/papers/lta.pdf>> accessed 9 October 2020.

<sup>100</sup> Edwardo Luiz Machado, Lucas Martins Novaes and Carla Beatriz Guimaraes Ferreira, 'Aspects of the Independence of Regulatory Agencies and Competition Advocacy' <[http://www.icn2005.de/NGA\\_Submission\\_Aspects\\_of\\_Independence.pdf](http://www.icn2005.de/NGA_Submission_Aspects_of_Independence.pdf)> accessed 5 October 2020.

<sup>101</sup> Macmillan (n 37) 4.

<sup>102</sup> Beecher (n 89) 12.

<sup>103</sup> Cary Coglianese, 'Litigating within Relationships: Disputes and Disturbance in the Regulatory Process' (1999) 30 *Law & Society* 735,766.

<sup>104</sup> Rory Macmillan, 'Reflections on Regulation and Dispute Resolution in the Indian Telecommunication Sector' (2005) *Journal of the Indian Law Institute* 29, 52.

<sup>105</sup> Lawrence Susskind and Alan Weinstein, 'Towards a Theory of Environmental Dispute Resolution' (1980) 9 *Boston College Environmental Affairs Law Review* 311,358.

<sup>106</sup> Murphy (n 30) 3.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid* 13.

impartiality and independence in a justice system such as a specialised pension dispute resolution system. Finally, the review reveals that mandating a regulator with pension dispute resolution offends the said principles hence contradicts the appropriate system. However, none of the literature has specifically addressed the structure of the specialised system of pension dispute resolution in Kenya. Accordingly, this paper extends the literature by narrowing to that.

## **1.8 Justification**

The existing literature discusses dispute resolution generally. Also, the focus of the existing literature regarding specialised systems of pension dispute resolution is in diverse contexts. This research paper, however, focuses on the Kenyan context of which there has been minimal academic analysis. This paper singles out the regulatory role of the RBA undermines its independence and impartiality in pension dispute resolution. Further, this paper makes recommendations in relation to the design of the specialised system of pension dispute resolution in Kenya, over and above what is suggested in the existing literature. Therefore, this paper is useful in providing insights and basis for future legal reform regarding the establishment of a more independent and effective specialised system of pension dispute resolution in Kenya.

## **1.9 Methodology**

The research that informs this paper is doctrinal in nature. The data was collected and analysed by way of qualitative research method; from the law libraries and internet supported sources through desktop research as follows:

### ***1.9.1 Location of the Study***

The study was conducted within the Republic of Kenya and data was collated and tested in Nairobi, Kenya. However, data from the United Kingdom, South Africa and Australia were also used to show the best practices in pension dispute resolution. These jurisdictions were selected for this

purpose because first they share the common law legal system and tradition with Kenya. Secondly, these countries have progressive legal regimes and are thriving democracies whose systems can influence global practices. Finally, these jurisdictions have systems that comply with the international legal standards and recommendations hence informative in structural and institutional reform. Any other foreign data was only used to supplement the existing local data.

### ***1.9.2 Period of the Study***

The data collected for the research was for the period between 2014 and 2021, which period was considered sufficient to monitor trends, variables, patterns regarding pension dispute resolution in Kenya hence useful to measure and support the claims in the study.

### ***1.9.3 Sampling***

Due to the diversity and volume of the data collected, the research sampled about twenty case law that were filed with the RBA, the RBAT and were later escalated to the courts of law about the role of the RBA in pension dispute resolution system. These cases were later reported at the website of the National Council of Law Reporting(eKLR) where they were obtained. The study also reviewed a sample size of about seven annual reports of the RBA in which the RBA reported on its mandate on pension dispute resolution. The sample size was carefully selected from the available data to give a correct reflection on the practice and trend in pension dispute resolution in Kenya.

### ***1.9.4 Data Analysis and Testing***

Other than the sampled data above, the data from the international and national legal instruments was also collected to test the legal position necessary to support the claim in the paper. In addition, data from published books, journal articles, theses, newspaper articles, hyperlinks and websites

were used after a careful and critical sorting out on the relevance and currency in support of the claims made and in testing the forgoing hypothesis.

The study analysed the emerging jurisprudence within the Kenyan jurisdiction as supported by the international standards as well as the data appearing in most current scholarship. The study compared the circumstances under which different data were published and critically compared with the current circumstances in Kenya and applied the data which were most relevant and supportive of the claims in the study. The study also critically appreciated the data that were contrary to the claims in the study.

#### ***1.9.5 Ethical and Legal Compliance in Data Collection***

The study has duly acknowledged all the authors whose materials have been used as sources of data for this research. All the data were collected lawfully from the materials which were freely available in public domain and in compliance with the copyright laws and data collection regulations applicable in Kenya.

### **1.10 Chapter Outline**

#### **1.10.1 Chapter 1: Introduction**

Chapter one gives an overview of the entire Paper. It sets the background of the paper and locates the problem. With a bid to diagnose the problem of the paper, research questions, objectives, hypotheses, and the methodology are framed here. In addition, this chapter gives the theoretical framework and a review of literature relied upon as well as the justification, scope, and the limitations of the paper.

#### **1.10.2 Chapter 2: Legal Framework on Independent Pension Dispute Resolution**

Chapter two reviews the legal framework regarding an independent pension dispute resolution.

### **1.10.3 Chapter 3: Specialised System of Pension Dispute Resolution in Kenya**

Chapter 3 examines the independence of the RBA in the specialised pension dispute resolution.

### **1.10.4 Chapter 4: Best Practices in Pension Dispute Resolution**

Chapter 4 identifies some of the best practices in pension dispute resolution in other jurisdictions.

### **1.10.5 Chapter 5: Conclusion and Recommendations**

Chapter 5 provides recommendations for the reform of the Kenyan pension dispute resolution system.

## **1.11 Scope and Limitation**

This Research Paper addresses the Kenya's specialised pension dispute resolution system established under the Retirement Benefits Act; 1997. The focus of this paper is the involvement of the RBA, the regulator, in pension dispute resolution. The paper does not address the capability of the RBA in pension dispute resolution. Rather, this paper addresses the independence and impartiality of the RBA in pension adjudication.

This research paper has two main limitations. The first one is that this paper is largely archival which may not precisely reflect the actual position. Nonetheless, to mitigate the disparity, veracity and depth of the data, the paper has sampled some of the available data from the law reports and the annual reports of the RBA to support the claims in the paper. The second limitation is that the paper relies heavily on foreign literature due to insufficient relevance of the local literature to this paper. However, the foreign literature has been carefully selected and only applied to support practical claims applicable to the local context.



## CHAPTER 2

### LEGAL FRAMEWORK ON INDEPENDENT PENSION DISPUTE RESOLUTION

#### 2.1 Introduction

This chapter reviews the legal framework on independent pension dispute resolution. To begin with, the chapter introduces the role that law plays in creating rights and establishing independent institutional frameworks for adjudication and redress and shows what constitutes independence in dispute resolution. The focus of this chapter is therefore a discussion on the provisions of the international treaties, customary international law, international standards and recommendations, declarations, resolutions, the African regional law, and the Kenyan domestic statutes, caselaw and practice that demand that a dispute resolution system should be independent and impartial. The discourse revolves around the legal requirement that a pension dispute resolution must be completely independent and impartial to permit access to adequate pensions and to justice as a right to the parties in a pension dispute.

#### 2.2 Law and Independence in Adjudication

In any sector, a legal framework is vital in setting out rules of conduct and governance for the realization of what is desired especially economic development.<sup>109</sup> The more there is need for economic expansion and stability, the more the need for a legal framework for the protection of individual rights.<sup>110</sup> That is because the rights can be violated by forces that seek to take advantage of others.<sup>111</sup> It prescribes the types of disputes which deserves adjudicatory attention and

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<sup>109</sup> Clearance Morris, 'Peace through Law: The Role and Limits of Adjudication' (1960) University of Pennsylvania Law Review 218,222.

<sup>110</sup> Wangtan Tan, 'Rule of Law and Dispute Resolution: Evidence from Survey Data' (2009) 9 The China Review 73, 96.

<sup>111</sup> Donald Clarke, Peter Murrel and Susan Whiting, 'The Role of Law in China's Economic Development' in Thomas Rawski and Loren Brandt(eds), *China's Great Economic Transformation* (Cambridge University Press 2008) 11.

establishes the institutional structure for their settlement.<sup>112</sup> It is this framework that creates entitlements, rights, interests and obligations whose breach result into a legal dispute.<sup>113</sup> The framework further spells out how the substantive law, regulations and policies can be enforced in case of violations.<sup>114</sup> That is, it establishes a suitable dispute resolution institutional framework for dispute resolution.<sup>115</sup> However, the adjudicatory system as established in the law may not be as suitable as it is supposed to be.<sup>116</sup> That is because the law may create an institutional structure that is devoid of basic adjudicatory principles and values such as independence and impartiality.<sup>117</sup>

Independence in adjudication refers to handling of disputes without any external influences which may cause bias and unfairness.<sup>118</sup> It is the foremost attribute of a dispute resolution system.<sup>119</sup> It is an underlying normative value that influences the perception of justice and acceptability of outcomes of dispute resolution.<sup>120</sup> It safeguards the impartiality and neutrality of the adjudicator.<sup>121</sup> It ensures that justice is served to all without undue interference.<sup>122</sup> Hence, it is fundamental to the main objective of a dispute resolution system.<sup>123</sup> It flows from the institutional framework as

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<sup>112</sup> David Polland, *Pensions, Contracts and Trusts: Legal Issues for Decision Making* (Bloomsbury Academic 2020) 10.

<sup>113</sup> Joyles L. Coleman, 'Rethinking the Theory of Legal Rights' (1986) 95 Yale Law Journal 1335,1372.

<sup>114</sup> C. W. Everett, 'The Constitutional Code of Jeremy Bentham' in Bihikhu C. Parekh (ed), *Jeremy Bentham: Critical Assessment* (Routledge 1950) 513.

<sup>115</sup> Ibid.

<sup>116</sup> Timothy Endicott, 'Adjudication and the Law' (2007) 27 Oxford Journal of Legal Studies 311,326.

<sup>117</sup> Analia Amaya, 'Virtuous Adjudication: Or the Relevance of Judicial Character to Legal Interpretation' (2019) 40 Statute Law Review 87,95.

<sup>118</sup> Papayannis (n 90) 11.

<sup>119</sup> A T Denning, 'The Independence and Impartiality of the Judges' (1954) 71 South African Law Journal 345,358.

<sup>120</sup> Shimon Shetreet, 'Creating a Culture of Independence: The Political Challenge and the Conceptual and Constitutional Infrastructure' in Shimon Shetreet and Christopher Forsyth (eds), *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* (Martinus Nijhoff Publishers 2012) 3,17,19.

<sup>121</sup> Jose Zeitune, 'International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors: A Practitioners' Guide' <<https://www.refworld.org/pdfid/4a7837af2.pdf>> accessed 9 February 2021.

<sup>122</sup> Robert Gregory, 'Political independence, operational impartiality, and the effectiveness of anti-corruption agencies' <<https://www.emerald.com/insight/content/doi/10.1108/AEDS-10-2014-0045/full/html>> accessed 9 February 2021.

<sup>123</sup> US Agency for International Development (USAID), 'Guidance for Promoting Judicial Independence and Impartiality-Revised Edition' (Office of Democracy and Governance 2012).

enabled by the architectural guarantees for the adjudicator against external influences.<sup>124</sup> Security of tenure, separation of functions, non-political accountability and independent budget are some of the guarantees to the independence in adjudication<sup>125</sup> Independence of an adjudication system is not just a mere rhetoric but should be a mandatory legal requirement in a civilized society.<sup>126</sup>

### 2.3 International Legal Standards

The International Labour Organisation (ILO) is the standard setting institution in labour matters including pension benefits.<sup>127</sup> It recommends that pension disputes should first be resolved internally by the pension schemes' management, if not resolved at that level the dispute is to be referred to an independent body outside the schemes.<sup>128</sup> According to ILO again, such a body should preferably be a specialised body.<sup>129</sup> The structure of the system must be fair and transparent.<sup>130</sup> An independent mechanism supported by an internal resolution mechanism is considered ideal.<sup>131</sup> Also, good practice is that the structure should be user friendly and inspire aggrieved parties to readily assert their claims.<sup>132</sup> It could be in the form of a pension ombudsman, a board or an independent tribunal supported by a specialised appellate mechanism.<sup>133</sup>

Internal Dispute Resolution mechanism (IDR) is the first level where pension disputes are addressed, sieved and if possible, resolved with finality.<sup>134</sup> Although trustees of the pension

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<sup>124</sup> Lorne Neudorf, *The Dynamics of Judicial Independence: A Comparative Study of Courts in Malaysia and Pakistan* (Springer International Publishing 2017) 30.

<sup>125</sup> Sujit Choudhry, 'International Standards for the Independence of the Judiciary' <[https://www.researchgate.net/publication/319403225\\_International\\_Standards\\_for\\_the\\_Independence\\_of\\_the\\_Judiciary/citation/download](https://www.researchgate.net/publication/319403225_International_Standards_for_the_Independence_of_the_Judiciary/citation/download)> accessed 9 February 2021.

<sup>126</sup> Papayannis (n 90) 11.

<sup>127</sup> Guy Standing, 'The ILO: An Agency for Globalization' (2008) 39 *Development & Change* 355,384.

<sup>128</sup> ILO (n 18) 2.

<sup>129</sup> ILO (n 14) 2.

<sup>130</sup> OECD (n 19) 3.

<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid.* 19.

<sup>133</sup> Murphy (n 30) 3.

<sup>134</sup> *Ibid.*

schemes have wide discretions, they are still bound by legal obligations.<sup>135</sup> Scheme fiduciaries are thus obligated to address the grievances of their members.<sup>136</sup> Besides, regulators have powers to issue guidelines on the mandate of pension scheme management and administration.<sup>137</sup> These guidelines sometimes require the fiduciaries to address disputes that are filed with them by the aggrieved members.<sup>138</sup>

At the second level, if pension disputes are not resolved at the IDR level they are referred to an independent tribunal or body outside the pension schemes for an impartial determination.<sup>139</sup> That is because under the IDR, even though the trustees are duty-bound to be fair, the resolution is one sided since the same fiduciaries who are complained against, are also the judges.<sup>140</sup> At the second stage, the disputes have been sieved and issues for determination are clearer hence should be addressed expeditiously.<sup>141</sup> The adjudicator here is under a duty to give disputing parties a fair hearing before rendering a well-informed and legitimate decision.<sup>142</sup> In light of that, an adjudicator at this level should be independent from other players in the sector and must be impartial to all parties.<sup>143</sup> If the disputes are resolved here, it helps in saving resources needed at the appellate level and enables parties to access pension benefits faster.<sup>144</sup>

At the third and preferably the final level of the specialised system, a disputant who is aggrieved by the decision of the independent tribunal can file an appeal within a specialised appellate

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<sup>135</sup> Tim Cox, 'Should Trustees Give Reasons for Decisions? The Argument for' (2003) 9 Pensions 118,123.

<sup>136</sup> Mary Thomas and Brian Dowrick, 'More Stormy Weather for the Pension Ombudsman: Jurisdiction and Trustees' Powers' Revisited (1999)8 Nottingham Law Journal 60,67.

<sup>137</sup> Hugh Arthur, 'Internal Dispute Resolution: Is this the Best We Can Do?' (1998)5 Journal of Pension Management 37,44.

<sup>138</sup> Ibid.

<sup>139</sup> ILO (n 18) 2.

<sup>140</sup> Arthur (n 137) 21.

<sup>141</sup> Muthundinne Sigwadi, 'Dispute Resolution and the Pensions Funds Adjudicator' (2004) 12 Juta's Bus Law 2,9.

<sup>142</sup> Mhango (n 81) 10.

<sup>143</sup> OECD (n 19) 3.

<sup>144</sup> Sigwadi (n 141) 21.

mechanism.<sup>145</sup> Parties should only have limited access to the specialised appellate mechanism.<sup>146</sup> The purpose of the specialised appellate mechanism is to correct errors of the independent body or tribunal.<sup>147</sup> The specialised appellate mechanism, however, may fail to address the structural causes of unfairness and biases at the second level.<sup>148</sup> As a result, it is important to focus on the suitability of the independent tribunal to ensure that many pension disputes are resolved at that level.<sup>149</sup> It is important that all the disputants at this stage are enabled to enforce their rights and access justice fairly without fear or perception of bias so that they can access their pension quickly.<sup>150</sup>

The right to fair hearing before an independent and impartial body or tribunal is a universally accepted norm.<sup>151</sup> It is not only found in international treaties with wider applications but also it has attained the status of international customary law.<sup>152</sup> It is considered an absolute right that should suffer no limitation.<sup>153</sup> It is a right that is applicable to all adjudication systems including specialised ones.<sup>154</sup> It prevents the presiding adjudicator from being biased against any disputing party.<sup>155</sup>

At the global level, the International Convention on Civil and Political Rights (ICCPR) provides that all parties shall be equal before all courts and tribunals, and that everyone shall be entitled to

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<sup>145</sup> OECD (n 19) 3.

<sup>146</sup> Murphy (n 30) 3.

<sup>147</sup> OECD (n 19) 3.

<sup>148</sup> Thomas W Merrill, 'Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law' (2011) 111 Columbia Law Review 939,1003.

<sup>149</sup> Jeram (n 81) 10.

<sup>150</sup> UNGA, 'Declaration of the High-Level Meeting of the 67<sup>th</sup> Session on the Rule of Law at the National and International Level' (30 November 2012 UNGA Res/67/1) para 13.

<sup>151</sup> Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 10.

<sup>152</sup> Zeitune (n 121) 19.

<sup>153</sup> *Miguel Gonzalez Del Rio v Peru* (UN Human Rights Committee Communication No.263/1987 UN Doc CCPR/C/46/D/263/1987(1992).

<sup>154</sup> *Ibid.*

<sup>155</sup> Universal Declaration on The Independence of Justice adopted by the First World Conference on the Independence of Justice (Montreal 10 June 1983) (Montreal Declaration).

a fair and public hearing by a competent, independent and impartial tribunal established by law.<sup>156</sup> The United Nations (UN) supports this position in principle.<sup>157</sup> In addition, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides that migrant workers and members of their families shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.<sup>158</sup>

At the regional level, African Charter on Human and Peoples' Rights (ACHPR) enshrines the right to a fair hearing before an impartial court or tribunal and the state has the onus to ensure that such a court or tribunal is independent.<sup>159</sup> That provision is the minimum protection among the Africa member states and as such is non-derogable.<sup>160</sup> In principle, African Union (AU) supports this provision and encourages members to guarantee resolution of disputes by independent judicial bodies or tribunals through their constitutions and laws.<sup>161</sup>

In fact, African states are encouraged to embrace independent adjudications and be confident about their independent justice systems.<sup>162</sup> It remains the role of the national laws to ensure that a justice system is independent from other branches or bodies of the state.<sup>163</sup> The African states have resolved to ensure that every person whose rights are violated are properly tried in a fair process.<sup>164</sup>

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<sup>156</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 14art 14(1), (3)(d).

<sup>157</sup> UN Congress on the Prevention of Crime and the Treatment of Offenders, 'Basic Principles on the Role of Lawyers' (27 August 1990) principle1; UN Congress on the Prevention of Crime and the Treatment of Offenders, 'Basic Principles on the Independence of the Judiciary' (13 December 1985) UNGA Res 40/32 and 40/146.

<sup>158</sup> UNGA International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) art 18.

<sup>159</sup> African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter) arts 7, 26.

<sup>160</sup> *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria* (ACHPR Communication No.218/98) (2001) para 7.

<sup>161</sup> Africa Commission on Human & People's Rights, 'Principles and Guidelines on The Right to A Fair Trial and Legal Assistance in Africa' (2003) ACHPR DOC/OS(XXX) 247 para.4.

<sup>162</sup> *Civil Liberties Organisation v Nigeria* (ACHPR Communication No. 129/94 (1995).

<sup>163</sup> Zeitune (n 121) 19.

<sup>164</sup> African Commission on Human & People's Rights, '4 Resolutions on the Right to Recourse and Fair Trial' (1992) (ACHPR) Res.4 (XI).

Nonetheless, the international and regional legal standards can inform the national law, practice and structures on adjudication.<sup>165</sup> For instance, the foregoing legal standards which emphasize on independent and impartial adjudication is a compelling yardstick in domestic pension adjudication.<sup>166</sup> Indeed, the general rules of international law and treaties ratified by Kenya form part of the Kenyan law.<sup>167</sup> The international standards also provide benchmarks for the national law and practice.<sup>168</sup>

## 2.4 National Law and Practice

In Kenya, it is the constitutional duty of the state to ensure that all person's access justice without impediment.<sup>169</sup> Fair hearing is a key ingredient of access to justice.<sup>170</sup> Every person has a right to fair hearing which includes hearing before an independent and impartial tribunal or body where appropriate.<sup>171</sup> Independent and impartial dispute resolution is one way of ensuring that the constitutional right to human dignity of the aggrieved parties are protected.<sup>172</sup> All adjudicatory bodies are also understood to be part of the judicial system and must exercise judicial power fairly.<sup>173</sup> Besides, every person in Kenya including parties to a pension dispute are equal before the law, and are entitled to protection and equal benefits of the law.<sup>174</sup>

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<sup>165</sup> Kestiantyn Gorobets, 'The International Rule of Law and the Idea of Normative Authority' (2020) 12 Hague Journal on the Rule of Law 227,249.

<sup>166</sup> Mathias Nyenti, 'Developing an Efficient and Effective Social Security Adjudication Framework in South Africa: The Role and Impact of International Standards' (2015) 1 Strathmore Law Journal 59, 89.

<sup>167</sup> Constitution of Kenya, 2010 art 2(5), (6)

<sup>168</sup> Nyenti (n 166) 24.

<sup>169</sup> Constitution of Kenya 2010 art 48.

<sup>170</sup> Kariuki Muigua, 'Improving Access to Justice: Legislative and Administrative Reforms under the Constitution' <<http://kmco.co.ke/wp-content/uploads/2018/08/A-Paper-on-Improving-Access-to-Justice-2.pdf>> accessed 11 February 2020.

<sup>171</sup> Constitution of Kenya, 2010 art 50(1).

<sup>172</sup> Ibid art 28.

<sup>173</sup> Ibid art 169(1)(d).

<sup>174</sup> Ibid art 27(1).

The agencies which exercise adjudicatory powers are required to be procedurally fair and compliant with principles of natural justice.<sup>175</sup> The principles of natural justice require that a party must be given fair hearing and that one should not be a judge in his own case.<sup>176</sup> In Kenya, this is not only an applicable as a common law principle but a mandatory constitutional dictate.<sup>177</sup> Consequently, a dispute resolution system which is not foolproof of external influences contravenes the applicable law.<sup>178</sup>

The practice in the Kenyan financial sector shows the establishment of independent appeals tribunals for the various segments in the sector.<sup>179</sup> For instance, Insurance Appeals Tribunal,<sup>180</sup> Tax Appeals Tribunal,<sup>181</sup> Capital Markets Tribunal<sup>182</sup> which are established outside the businesses in the sector and they are not part of the regulatory bodies.<sup>183</sup> However, the practice of vesting the regulatory heads with adjudicatory powers over the initial complaints in a specific sector appears to be common in the financial sector.<sup>184</sup> For example, the Commissioner of Insurance has powers to resolve policy disputes at the first stage before appeals are filed at the Insurance Appeals tribunal.<sup>185</sup> Also, the Commissioner-General of the Kenya Revenue Authority (KRA) has powers to make decisions on initial complaints before appeals are filed with the Tax Appeals Tribunal.<sup>186</sup> Further, the Capital Markets Authority (CMA) also has adjudicatory powers over the complaints

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<sup>175</sup> Ibid art 47; Fair Administrative Action, 2015 s 4.

<sup>176</sup> Shreya Srivastava and Pratyosha Das, 'Rules of Natural Justice with Emphasis on Nemo Judex in Cause Sua: An Insight into Administrative Law' (2020) 1 Journal of Legal Studies and Criminal Justice 23,35.

<sup>177</sup> Constitution of Kenya, 2010 art 47; Judicature Act, 1967 s 3.

<sup>178</sup> Ibid.

<sup>179</sup> Kenya Law Reform Commission, 'Report of The Committee on The Review of The Rationale for The Establishment of Tribunals in Kenya' (KLRC 2015).

<sup>180</sup> Insurance Act, 1985 s 169.

<sup>181</sup> Tax Appeals Tribunal Act, 2013.

<sup>182</sup> Capital Markets Act, 1989 s 35A.

<sup>183</sup> Ibid ss 330,331, 333.

<sup>184</sup> Insurance Act, 1985 s 112; Capital Markets Act, 1989 s 35; Tax Appeals Tribunal Act, 2013 s 13.

<sup>185</sup> Insurance Act, 1985 s 112.

<sup>186</sup> Tax Appeals Tribunal Act, 2013 s 13.



arising from the capital markets, from which appeals is entertained at the Capital Markets Tribunal.<sup>187</sup>

This practice can be justified on the basis of maximum utilisation of the limited resources; this paper however questions if that justification is valid enough even at the expense of the constitutional and fundamental right to fair hearing.<sup>188</sup> The involvement of a regulator in dispute resolution opens room for a legitimate doubt as to their impartiality and independence owing to the possible outside influences.<sup>189</sup> Some judges have correctly observed that vesting a regulator with adjudicatory function is antithetical to rules of natural justice and adjudication.<sup>190</sup> However, there is an attempt to develop a jurisprudence to give credence to the practice of using regulators in adjudication through statutory delegation powers.<sup>191</sup>

This Paper respectfully disagrees with that approach because even in delegation, the regulator remains the principal of the delegated power and can influence it in whichever manner that suits it.<sup>192</sup> As a result, the same cannot be used as the best practice to inform adjudication of pension disputes.<sup>193</sup> Instead, pension disputes have an internationally recommended specialised structure which is independent and purely adjudicative.<sup>194</sup>

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<sup>187</sup> Capital Markets Act, 1989 s 35.

<sup>188</sup> Jaime Flattery, 'Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and their Impact on the Right to a Fair Hearing' (2010) 7 The Competition Law 53,81.

<sup>189</sup> *Findlay v The United Kingdom (Findlay)* (1997) 24 EHRR 221.

<sup>190</sup> *Chadwick Okumu v Capital Markets Authority* [2018] eKLR; *Solomon Muyeka Alubala v Capital Markets Authority; National Bank of Kenya Ltd (Interested Party)* [2019] eKLR.

<sup>191</sup> *Alnashir Popat & 7 others v Capital Markets Authority* [2020] eKLR; *Capital Markets Authority v Jeremiah Gitau Kiereini & Another* [2014] eKLR

<sup>192</sup> Carl Dahlstrom and Mikael Holmgren, 'The Link between Appointments and appropriations in the Politics of Administrative Design' < [https://gupea.ub.gu.se/bitstream/2077/52185/1/gupea\\_2077\\_52185\\_1.pdf](https://gupea.ub.gu.se/bitstream/2077/52185/1/gupea_2077_52185_1.pdf) > accessed 30 August 2021.

<sup>193</sup> *Olbourne* (n 85) 11.

<sup>194</sup> ILO (n 6) 1.

## **2.5 Summary**

A legal framework is critical in the protection and enforcement of rights including those that are related to management of pension schemes. The law establishes the adjudication system for the enforcement of the rights. The system must however be informed by the basic principles of adjudication such as independence and impartiality. These principles are recognized in international, regional, and national law as fundamental and mandatory. The law requires that dispute resolution should be handled by an independent and impartial body.

International standards also require that pension disputes arising out of pension scheme's internal mechanisms should be addressed by an independent body or tribunal. The law frowns upon an institutional framework of adjudication which potentially courts external influences and creates an impression of bias of any magnitude. That is because such a system is likely to discourage parties from enforcing their rights. The legal texts reviewed are emphatic that an independent pension adjudication is compulsory to ensure the fundamental human rights of access to justice, equality, human dignity, and access to adequate pensions of the parties to a dispute, to be realized.

## CHAPTER 3

### SPECIALISED SYSTEM OF PENSION DISPUTE RESOLUTION IN KENYA

#### 3.1 Introduction

This chapter examines how the involvement of the RBA undermines the specialised pension dispute resolution of Kenya. In particular, the chapter addresses the challenges of vesting adjudicatory powers in the regulator of the industry like is the case in Kenya. It looks at the disputes in the pension sector and why their resolution system should be specialised. It then addresses in detail the institutional structure of the pension dispute resolution system in Kenya where it locates the role of the RBA. Th chapter shows how the regulatory function of the RBA undermines its independence in pension dispute resolution thereby making the whole specialised system unsuitable.

#### 3.2 Disputes in the Pension Sector

Disputes occur whenever individuals or entities make claims on others who in turn reject or fail to satisfy them.<sup>195</sup> A dispute starts off as a belief that a person or entity is entitled to something which the other can grant or deny.<sup>196</sup> That then escalates into a dispute when a person or entity is denied that which the person or entity believes to be their entitlement.<sup>197</sup> Generally, disputes have negative effects to a society.<sup>198</sup> They are costly to resolve.<sup>199</sup> Additionally, disputes strain relationships.<sup>200</sup>

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<sup>195</sup> Willima L. Ury, Jeanne M. Brett and Stephen B. Goldberg, *Getting Disputes Resolved Designing Systems to Cut the Costs of Disputes* (Jossey-Bass Inc. Publishers 1988) 4.

<sup>196</sup> Richard E Miller and Austin Sarat, 'Grievances, Claims and Disputes: Assessing the Adversary Culture' (1981) 15 Law & Society Review 525,566.

<sup>197</sup> Marc Galanter, 'Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society' (1983) 31 UCLA Law Review 4, 71.

<sup>198</sup> Francis Miller, *Disputes: The Avoidance and Resolution of Disputes* (Rittatrek Ltd 1995) 1, 2.

<sup>199</sup> Hugh Miall, *The Peacemakers: Peaceful Settlement of Disputes since 1945* (Palgrave Macmillan 1992) 60, 63.

<sup>200</sup> Lynn Matter and Barbara Yngvesson, 'Language, Audience and the Transformation of Disputes' (1980) 15 Law & Society Review 775,822.

However, disputes are inevitable and are likely to occur in any sector.<sup>201</sup>As a result, pension schemes normally generate disputes.<sup>202</sup> Even those schemes whose management is best occasionally experience disputes.<sup>203</sup> A pension dispute can easily precipitate if a scheme's service provider denies an entitlement to a scheme member.<sup>204</sup> However, it is imperative that pension schemes are stable.<sup>205</sup> Such stability is only realisable where disputes are minimised. <sup>206</sup>

Pension disputes strain relationships among the scheme stakeholders and allow selfish interests to survive in pension schemes which are risky for their stability<sup>207</sup> Pension disputes are also costly to the schemes since they are complex to handle.<sup>208</sup> Further, the fiduciary relationships involved are very volatile in case of a conflict.<sup>209</sup> That necessitates a system of disputes resolution in the pension sector.<sup>210</sup> It is through such a system that a structured processing of pension disputes is done so as to forestall their negative effects.<sup>211</sup> An effective and efficient enforcement framework in the pension sector reduce disputes and prevent future disputes.<sup>212</sup> In doing that, it promotes and strengthens working relationships in pension schemes.<sup>213</sup> It also improves the governance of the

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<sup>201</sup>Kariuki Muigua, 'Dealing with Conflicts in Project Management' (2018) 6 *Alternative Dispute Resolution* 1, 36.

<sup>202</sup> Michael Asimow, 'Five Models of Administrative Adjudication' (2015) 63 *The American Journal of Comparative Law* 2, 32.

<sup>203</sup> Robin Ellison, *The Pension Trustee's Handbook: The Definitive Guide to the Trustee's Role and Obligations* (5<sup>th</sup> Edn, Thorogood Publishing Ltd 2007) 214.

<sup>204</sup> Elizabeth Hoffman and Matthew L Spitzer, 'Entitlements, Rights, and Fairness: An Experimental Examination of Subjects' Concepts of Distributive Justice' (1985) 14 *Journal of Legal Studies* 259,298.

<sup>205</sup> Monika Quesser, 'Regulation and Supervision of Pension Funds: Principles and Practices' (1998) 51 *International Social Security Association* 39, 55.

<sup>206</sup> Benjamin J. Richardson, 'From fiduciary duties to fiduciary relationships for socially responsible investing: responding to the will of beneficiaries' (2011) 1 *Journal of Sustainable Finance & Investment* 5, 19.

<sup>207</sup> James M. Buchanan, *The Limits of Liberty: Between Anarchy and Leviathan* (University of Chicago Press 1975) 4, 7.

<sup>208</sup> Law Commission, 'Fiduciary Duties of Investments Intermediaries' (January 2014).

<sup>209</sup> Eillen E Gillese, 'Pension Plans and the Law of Trusts' (1996) 17 *Canadian Bar Reviews* 221,250.

<sup>210</sup> Adam Clanton, 'Enforcing Individual Rights in an Industrial World: Legal Rules and Economic Consequences' (2006) 4 *Georgetown Journal of Law & Public Policy* 165,198.

<sup>211</sup> Simon Roberts, *Order and Disputes: An Introduction to Legal Anthology* (Quid Pro Books 2013) 4

<sup>212</sup> Helen Thorton, *State of Nature or Eden? Thomas Hobbes and His Contemporaries on the Natural Condition of Human Beings* (University of Rochester Press 2005) 1, 3.

<sup>213</sup> Kariuki Muigua and Francis Kariuki, 'ADR, Access to Justice and Development in Kenya' <<http://kmco.co.ke/wp-content/uploads/2018/08/ADR-access-to-justice-and-development-in-Kenya-Revised-version-of-20.10.14.pdf>> accessed 19 January 2021.

schemes and the public confidence in pension saving.<sup>214</sup> In the absence of an enforcement system for pension disputes, abusive fiduciaries in authority are likely to take advantage of the vulnerable members.<sup>215</sup> There is a direct correlation between the good performance of a pension sector and the structure of a pension dispute resolution system in a given country.<sup>216</sup>

In Kenya, pension disputes are numerous and most of them relate to non-payments from struggling schemes, mismanagement of the schemes, delay in processing claims, and variation of actuarial formulas among others.<sup>217</sup> Notable schemes such as Railway Corporation, National Society Security, Postal Corporation and the University of Nairobi staff pension schemes wilted because of the conflicts relating to the non-payments and mismanagement.<sup>218</sup> Others have been forced to wind up since such claims and disputes could not be satisfied or settled appropriately.<sup>219</sup> Therefore, to keep a stable and steady growth in the Kenyan pension sector where pension assets are safeguarded and entitlements are guaranteed, there is need to have a well-structured dispute resolution system.<sup>220</sup>

### **3.3 Specialised System for Pension Dispute Resolution**

A dispute resolution system is the structural and procedural framework through which a set of substantive law can be enforced justly.<sup>221</sup> Desirably, the special needs of a targeted class of

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<sup>214</sup> Carrie Menkel-Meadow, 'From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context' (2004) 54 *Journal of Legal Education* 7, 29.

<sup>215</sup> Giandoenico Majone, 'The Rise of the Regulatory State in Europe' (2017) *Western Europe Politics* 77, 101.

<sup>216</sup> Muthundinne Sigwadi, 'The Personal Liability of Pension Fund Trustees for Breach of Fiduciary Duties' (2008) 20 *South African Mercantile Law Journal* 331,346

<sup>217</sup> *Staff Pension Fund & Kenya Commercial Bank Staff Retirement (DC) Scheme 2006 & another v Ann Wangui Ngugi & 524 other* [2018] eKLR; *Kenya County Government Workers Union & another v Board of Trustees Local Authority Pension Trust & 2 others; Retirement Benefits Authority & another (Interested Parties)* [2021] eKLR; [2018] eKLR (n 22)3.

<sup>218</sup> Rono, Bitok and Asomoah (n 101) 16.

<sup>219</sup> Kennedy Gachuhi, 'RBA Holds Talks over Planned Liquidation of Kshs.1.4bn Pyrethrum Pension Scheme' *the Pensioner* (Nairobi, January-July Issue, 2019).

<sup>220</sup> Amos Gitau Njuguna, 'Governance in Kenya's Occupational Retirement Benefits Schemes: The Service Providers' Perspective' (2016) 8 *European of Business and Management* 125,134.

<sup>221</sup> Everett (n 114) 19.

disputes should inform the design of the system of their resolution.<sup>222</sup> Pension disputes have several features that makes them special.<sup>223</sup> First, pension disputes cut across diverse but intertwined legal obligations and trust.<sup>224</sup> Secondly, they often involve actuarial calculations of benefits, which require very technical and complex assessment.<sup>225</sup> Thirdly, parties to this class of disputes are often aged and interested in expeditious and less formal dispute processing.<sup>226</sup> Lastly, they can be frequent, numerous and routine hence the high volume of the caseload.<sup>227</sup> Therefore, courts and tribunals are ill-equipped to resolve such disputes.<sup>228</sup>

Specialisation in pension dispute resolution promotes expertise, expedition, affordable access, informality, efficiency, and uniformity.<sup>229</sup> It also focuses attention for the pension dispute which are often numerous and routine.<sup>230</sup> However, critics of a specialised system consider it to be isolated, monopolistic, and sometimes inconsistent.<sup>231</sup> Moreover, the critics observe that some structures of a specialised system may undermine the rudimentary tenets of justice.<sup>232</sup>

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<sup>222</sup> Peerenboom Randall and Xin He, 'Dispute Resolution in China: Patterns, Causes and Prognosis' (2009) 4 East Asia Law Review 1, 62.

<sup>223</sup> Markus B Zimmer, 'Overview of Specialised Courts' (2009) 2 International Journal for Court Administration 46, 60.

<sup>224</sup> Eileen E Gillese, 'Two Decades after Schmidt: Where Has Pension Law Been and Where Is It Going' (2015) 19 Canadian Labour & Employment Law Journal 1, 22.

<sup>225</sup> Sherika L.L Ellis, Esko Kivisaari and Dariusz Sanko, 'Background Paper: The Role of Actuarial Calculations and Reviews in Pension Supervision' (2015) IOPS Working Papers on Effective Pensions Supervision, No.24 <[http://www.iopsweb.org/WP\\_24\\_Background-paper-actuarial-calculations.pdf](http://www.iopsweb.org/WP_24_Background-paper-actuarial-calculations.pdf)>accessed 23 February 2021.

<sup>226</sup> Nyenti (n 166) 24.

<sup>227</sup> Lufuno Nevondwe and Kola O. Oduke, 'An Analysis of the Role of Pension Funds Adjudicator' (2013) 13 Mediterranean Journal of Social Sciences 817, 827.

<sup>228</sup> Lawrence Baum, *Specializing the Courts* (University of Chicago Press 2011) 3.

<sup>229</sup> Brett Curry and Banks Miller, 'Judicial Specialisation and Ideological Decision Making in the US Courts of Appeals' (2015) 3 Journal of the American Bar Foundation 29,50.

<sup>230</sup> Richard L. Revesz, 'Specialised Courts and the Administrative Law-Making System' (1990) 138 University of Pennsylvania Law Review 1111, 1174.

<sup>231</sup> Rochelle Coper Drefuss, 'Specialised Adjudication (1990) 1990 Brigham Young University Review 377,442; Jay P Keson and Gwendoyne G Ball, 'Judicial Experience and the Efficiency and Accuracy of Patent Adjudication: An Empirical Analysis of the Case for a Specialised Patent Trial Court (2011) 24 Harvard Journal of Law & Technology 398,468.

<sup>232</sup> Christopher J. Peters, 'Legal Formalism, Procedural Principles, and Judicial Constraint in American Adjudication' in Laura Pineschi (ed), *General Principles of Law-The Role of the Judiciary* (Springer International Publishing 2015) 23, 24.

Nonetheless, a well organised and specialised pension adjudication system is significant in delivering justice to the aggrieved parties.<sup>233</sup> The system must be well designed to support the rule of law.<sup>234</sup> The structure must also inspire public confidence in the enforcement of rights.<sup>235</sup>

### **3.4 Pension Dispute Resolution in Kenya**

Kenya has a three-tier specialised system of pension dispute resolution.<sup>236</sup> At the first level, a relevant service provider is required to resolve disputes internally and make decisions within the Internal Dispute Resolution (IDR) mechanisms.<sup>237</sup> At the second level, if a member of a pension scheme is dissatisfied with a decision emanating from a scheme's IDR mechanism, the party can apply to the RBA through its CEO for a review of the complaint.<sup>238</sup> An aggrieved member of a pension scheme is required to do so in writing and the service provider (scheme official) whose decision is challenged is then notified.<sup>239</sup> It is the duty of the RBA to investigate the dispute and make a determination.<sup>240</sup> Scheme officials are also allowed to apply to the RBA, for reviews of complaints relating to the management of a pension scheme.<sup>241</sup> Notably, the RBA has established a complaints portal where one can file such application without having to be physically present.<sup>242</sup> At the third level, if a party is dissatisfied with the decision of the RBA, the party can appeal to the Retirement Benefits Appeals Tribunal (the RBAT) within thirty days of that decision.<sup>243</sup> The

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<sup>233</sup> Melissa F. Wasserman and Jonathan D Slack, 'Is Too Much Specialisation a Bad Thing? Specialisation in Specialised Courts' (2021) 115 *Northwestern Law Reviews* 1, 44.

<sup>234</sup> McLaughlin Mitchell, 'A Kantian System? Democracy and Third-Party Conflict Resolution' (2002) 46 *American Journal of Political Science* 749,759.

<sup>235</sup> Donald H Seigler, 'Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts' (1987) 87 *Hastings Law Journal* 665,728.

<sup>236</sup> Retirement Benefits Act, 1997 ss 46, 47 And 48.

<sup>237</sup> *Ibid* s 46 (1).

<sup>238</sup> *Ibid*.

<sup>239</sup> *Ibid* s 46 (2).

<sup>240</sup> *Ibid*.

<sup>241</sup> RBA (n 19) 2.

<sup>242</sup> RBA (n 91)15.

<sup>243</sup> Retirement Benefits Act, 1997 s 47, 48.

decision of the RBAT is final and no appeal from its decisions should be filed at the High Court or at the Employment and Labour Relations Court (ELRC).<sup>244</sup> However, a party may challenge either the RBA or the RBAT at the High Court by way of judicial review.<sup>245</sup>

As a specialised system established outside the court system, parties are expected to process their pension disputes through it exhaustively.<sup>246</sup> That is because other than being a legal requirement, there is a strong belief that this system is more suitable than ordinary courts of law in addressing pension disputes.<sup>247</sup> However, the system does not address disputes relating to pension schemes that are exempted from the application of the Retirement Benefits Act, 1997 such as the civil service schemes.<sup>248</sup> Nonetheless, it is envisioned that the system should suitably address pension disputes to promote the economic growth of the sector.<sup>249</sup>

However, the RBA has been vested with quasi-judicial adjudicatory powers to investigate and make binding decisions on complaints from pension schemes' IDR mechanisms, besides its regulatory functions.<sup>250</sup> Consequently, RBA must perform the regulatory, investigative, and adjudicatory roles in the pension sector.<sup>251</sup> That potentially undermines the independence and impartiality of the RBA in pension adjudication and creates an impression of bias contrary to the legal requirements.<sup>252</sup> Indeed, there are instances RBA has selectively delayed or refused to act on

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<sup>244</sup> [2018] eKLR (n 217) 20.

<sup>245</sup> [2015] eKLR (n 29) 3.

<sup>246</sup> [2020] eKLR (n 23) 3.

<sup>247</sup> [2017] eKLR (n 29) 3.

<sup>248</sup> RBA (n 19) 2.

<sup>249</sup> Government of Kenya (GOK), 'Kenya Vision 2030: A Globally Competitive and Prosperous Kenya' (Government Printer 2008); Ministry of Gender, Children, and Social Development, 'Kenya National Social Protection Policy' (Government Printer 2011).

<sup>250</sup> Retirement Benefits Act, 1997 s 46.

<sup>251</sup> RBA (n 19) 2; Retirement Benefits Act, 1997 s 5, 6, 7, 46.

<sup>252</sup> *Chadwick Okumu v Capital Markets Authority* [2018] eKLR.



some disputes for unreasonably long time even after the court has directed for a hearing which creates an impression of bias.<sup>253</sup>

### 3.5 Adjudicatory Independence of the RBA

A clear-cut separation of powers between the adjudication body and other branches of the government is a vital aspect of an appropriate adjudication.<sup>254</sup> The main function of the RBA is regulation which involves making regulations for the pension industry in Kenya.<sup>255</sup> Regulation involves issuance of directives and policies which have a force of law in the society.<sup>256</sup> Adjudication on the other hand involves determination of individual rights or duties.<sup>257</sup> Mandating a state agency with both adjudicatory and regulatory duties create a perception of bias hence undermines its independence.<sup>258</sup> An agency like RBA which performs both regulatory and adjudicatory functions may struggle balancing political supervision with impartiality and is considered to be less attentive to the adjudicatory function.<sup>259</sup> The adjudicatory powers of the RBA may be negatively influenced for several reasons:<sup>260</sup>

First, it is an agency accountable to the minister in charge of finance(treasury) which is in the executive arm of the government.<sup>261</sup> This exposes the agency to potential political influence and

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<sup>253</sup> [2018] eKLR and [2018] (n 26) 3.

<sup>254</sup> Jeffrey M. Sharman, 'Judicial Ethics: Independence, Impartiality and Integrity' <<https://publications.iadb.org/publications/english/document/Judicial-Ethics-Independence-Impartiality-and-Integrity.pdf>> accessed 9 February 2021.

<sup>255</sup> Retirement Benefits Act, 1997 s 5.

<sup>256</sup> Vijay Vir Singh, 'Regulatory Management and Reform in India' <<https://www.oecd.org/gov/regulatory-policy/44933869.pdf>> accessed 15 August 2021.

<sup>257</sup> William Mitchell College of Law, 'Rulemaking or Policymaking by Adjudication' <[https://mitchellhamline.edu/minnesota-administrative-procedure/wp-content/uploads/sites/41/2015/06/MAP\\_Chapter\\_16.5.pdf](https://mitchellhamline.edu/minnesota-administrative-procedure/wp-content/uploads/sites/41/2015/06/MAP_Chapter_16.5.pdf)> accessed 15 August 2021.

<sup>258</sup> John Ferejohn, 'Independent Judges, Dependent Judiciary: Explaining Judicial Independence' (1999) 72 Southern California Law Review 353,384.

<sup>259</sup> James E Moliterno, 'The Administrative Judiciary's Independence Myth' (2006) 41 Wake Forest Law Review 1191,1234.

<sup>260</sup> Ariel Bendor and Sharon Yadin, 'Regulation and the Separation of Powers' (2019) 28 Southern California Interdisciplinary Law Journal 357,385.

<sup>261</sup> Retirement Benefits Act, 1997 s 5(d).

manipulation.<sup>262</sup> Secondly, its Board of Directors (BOD) are politically appointed.<sup>263</sup> This senior management team may be willing to serve the selfish interest of the appointing authority.<sup>264</sup> Thirdly, fundings are politically allocated through the ministry.<sup>265</sup> This also exposes it to possible external influence.<sup>266</sup> Besides, the resources that the agency receives are shared among its functions with no special attention to adjudication.<sup>267</sup> Further, RBA has superior means of accessing information in the sector which may be used at the disadvantage of scheme members.<sup>268</sup> That is because there is high financial illiteracy in the Kenyan pension sector.<sup>269</sup>

As a rulemaking body, it is normally conflicted when its regulations are at the heart of the dispute and it has to adjudicate on them.<sup>270</sup> Being an agency adjudication it is impossible to have recusal remedies for any resulting or perceived bias even if the same were to be raised with the RBA on a case to case basis.<sup>271</sup> Ultimately, this has the potential of causing apathy in the use of and phobia towards it as part of the adjudication system.<sup>272</sup> Therefore, the appeals from the RBA to RBAT may not help in addressing these underlying structurally enabled bias.<sup>273</sup> Equally, frequent judicial

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<sup>262</sup> Richard J Pierce Jr, 'Political Accountability and Delegated Power: A Response to Professor Lowi' (1987) 36 American University Law Review 391,418.

<sup>263</sup> Retirement Benefits Act, 1997 s 6.

<sup>264</sup> Jennifer L. Selin, 'What Makes an Agency Independent?' (2015) 59 American Journal of Political Science 971,989.

<sup>265</sup> Retirement Benefits Act, 1997 s 17.

<sup>266</sup> Robin J Arzt, 'Recommendations for a New Independent Adjudication Agency to Make the Final Administrative Adjudications of Social Security Act Benefits Claims' (2003) 23 Journal of the National Association of Administrative Law Judges 267,386.

<sup>267</sup> David Coen and Mark Thatcher, 'Network Governance and Multi-Level Delegation: European Networks of Regulatory Agencies' (2008) 28 Journal of Public Policy 49,71.

<sup>268</sup> Tony Prosser, *Law and the Regulators* (Clarendon Press Oxford 1997) 216.

<sup>269</sup> Asenath Maobe, 'Financial Literacy and Retirement Planning in Kenya' (2017) 5 Researchjournals' Journal of Finance 1, 24.

<sup>270</sup> Marta A. Geletkanyaz, 'CEO Outside Directorships and Firms Performance: A Reconciliation Agency and Embeddedness Views' (2011) 54 The Academy of Management Journal 335,352.

<sup>271</sup> Kent Barnett, 'Why Bias Challenges to Administrative Adjudication Should Succeed' (2016) 81 Missouri Law Review 1023, 1044.

<sup>272</sup> Richard A. Posner, 'The Concept of Regulatory Capture: A Short, Inglorious History' in Daniel Carpenter and David A. Moss (eds), *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (Cambridge University Press 2014) 49,50.

<sup>273</sup> Christopher J. Walker and Melissa F. Wasserman, 'The New World of Agency Adjudication' (2019) 107 California Law Review 141,197.

reviews in courts of law will only increase the courts' intervention on and seek to formalize the specialised system.<sup>274</sup>

This paper rejects the notion that delegation of agency adjudication like that of RBA to an agent or body can guarantee independence and impartiality because it retains the influence of the regulator.<sup>275</sup> It is also commonplace in Kenya that state agencies which are annexed to the executive of the government like RBA are likely to experience corruption and diminished integrity hence cannot render an independent adjudication as desired.<sup>276</sup> That contravenes the law that requires independence in pension adjudication and constitutional right to fair hearing and access to justice.<sup>277</sup>

Therefore, it is important to remove the adjudicatory functions from state agencies which perform non-adjudicatory duties and establish independent adjudicatory bodies.<sup>278</sup> This is important in safeguarding the independence in dispute resolution and ensuring that all the disputes are attended to effectively and efficiently without bias.<sup>279</sup> It is considered that if these two functions are separated, the bodies entrusted with the separate functions would perform better than if they are unified.<sup>280</sup> An independent adjudication fills the gaps in regulations.<sup>281</sup> Separating these two

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<sup>274</sup> Deborah R. Hensler, 'Our Courts, ourselves: How the Alternative Dispute Resolution Movement is Reshaping Other Legal System' (2003) 108 Dickson Law Review 165,197.

<sup>275</sup> Mark A Pollock, 'Delegation, Agency, and Agenda Setting in the European Community' (1997) 51 International Organisation 99,134.

<sup>276</sup> Peter Anassi, *Corruption in Africa: The Kenyan Experience* (Trafford 2004) 303.

<sup>277</sup> Nyenti (n 166) 24.

<sup>278</sup> Lori Kyle Endris and Wayne E. Penrod, 'Judicial Independence in Administrative Adjudication: Indiana's Environmental Solution' (1996) 16 St. John's Journal of Legal Commentary 125,144.

<sup>279</sup> Aharon Barak, 'On Society, Law and Judging: Montesquieu Lecture 2010' <[https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5887&context=fs\\_papers](https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5887&context=fs_papers)> accessed 14 August 2021.

<sup>280</sup> Glen O. Robinson, 'The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform' (1970) 118 University of Pennsylvania Law Review 485,539.

<sup>281</sup> Ibid.

functions safeguards independence and objectivity in adjudication.<sup>282</sup> That enhances the parties' confidence in the adjudication process.<sup>283</sup> At the same time, the two separate functions may offer checks and balances to each other for the public good.<sup>284</sup>

### **3.6 Summary**

Disputes can affect the pension schemes negatively and jeopardize the interest of the scheme members. Having a properly designed dispute resolution system is crucial in addressing disputes in a pension sector. Pension disputes have special needs that require that they be addressed within a specialised system. Kenya has a specialised system for pension dispute resolution which involves internal mechanisms of the pension service providers, the RBA and the RBAT. The level at which the RBA is involved in pension adjudication is very important because it is at this level that a fair assessment of internal decisions is made.

However, the RBA's role in pension adjudication is exposed to external influences and bias since it serves as the industry's regulator at the same time. Therefore, the independence of the RBA in pension dispute resolution appears compromised and gives an impression of potentially biased adjudicatory body contrary to the legal requirement and recommendations that pension disputes should be resolved by an independent and impartial body or tribunal.

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<sup>282</sup> Stephen R. Melton, 'Separation of Functions at the FERC: Does the Reorganization of the Office of General Counsel Mean What it says?' (1984) 5 Energy Law Journal 349,356.

<sup>283</sup> Antonin Scalia, 'Seperation of Functions: Obscurity Preserved' (1982) 34 Administrative Law Review 1.

<sup>284</sup> David H. Rosenblown, 'Public Adminstrative Theory and the Seperation of Powers' (1983) 43 Public Administrative Review 219,227.

## CHAPTER 4

### BEST PRACTICES IN PENSION DISPUTE RESOLUTION

#### 4.1 Introduction

This chapter identifies some of the best practices in pension dispute resolution featuring in other jurisdictions. The pension disputes resolution systems of South Africa, United Kingdom and Australia are analysed for this purpose. These countries are selected for this exercise not only because they are common law jurisdictions but because they have unique institutional structures for pension adjudication that are independent of their regulatory system in line with the international legal standards and recommendations. The Office of the Pension Funds Adjudicator (OPFA) of South Africa, Pension Ombudsman of the UK, and the Australian Financial Complaints Authority (ACFA) are addressed in that order because of the level of complexity and independence in their establishment and operation.

#### 4.2 South Africa: Office of the Pension Funds Adjudicator (OPFA)

In South Africa, pension fund industry is one of the largest industries that contributes significantly to the growth of the country's economy.<sup>285</sup> Between 1956 and 1996 the industry was marred with maladministration and abuse of power to the detriment of the pension funds' members.<sup>286</sup> Consequently, there was a surge of pension disputes which were all directed at the Financial Services Board which was not a specialised pension dispute resolution system but a general financial services regulator.<sup>287</sup> This led to backlogs and slowdown of service delivery in this body.<sup>288</sup> Also, there was a gap in the regulation, enforcement and oversight in the South African

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<sup>285</sup> Lufuno and Odeku (n 227) 31.

<sup>286</sup> Mhango (n 81) 10.

<sup>287</sup> Lufuno and Odeku (n 227) 31.

<sup>288</sup> Ibid.

pension industry.<sup>289</sup> This led to a legal reform in 1996 to establish a specialised process through which pension disputes could be handled and determined.<sup>290</sup>

The Office of the Pension Funds Adjudicator (OPFA) was established to be presided over by an independent adjudicator with the objective of disposing the disputes in a procedurally fair, economical and expeditious manner.<sup>291</sup> It was established pursuant to the Mouton Committee's recommendations which found it necessary to have a specialised pension dispute resolution system.<sup>292</sup> However, the establishment of OPFA did not fully adopt the Mouton Committee's recommendation for a pension ombudsman similar to that of the UK's model.<sup>293</sup> It has the powers of a court of law, its procedures are informal and its investigatory powers can help it address issues that over and above the ones raised in the disputes before it.<sup>294</sup> Nonetheless, the appeals from it lie at the High Court within six weeks after the decision of the Adjudicator.<sup>295</sup>

All the disputes that arise from the pension funds' internal mechanisms are addressed to the OPFA for investigation and binding determination.<sup>296</sup> The office is quasi-judicial and not administrative.<sup>297</sup> It protects the members of the pensions funds by ensuring that the funds are managed in line with the rules and regulations.<sup>298</sup> It does that by offering resolutions that are

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<sup>289</sup> Khuko Mashile, 'The Laws Regulating the Establishment and Functions of the Establishment of the Office of the Adjudicator' (LL.M Thesis, University of Limpopo 2017).

<sup>290</sup> Pension Funds Act 1956, Chapter V.

<sup>291</sup> Ibid.

<sup>292</sup> W L Mouton, 'The Mouton Report: Report of the Committee of Investigation into a Retirement Provision System for South Africa' (Financial Services Board 1992) para.5.

<sup>293</sup> Mhango (n 74) 10.

<sup>294</sup> *IBM South Africa Pension Fund v IBM South Africa (Pty) Ltd* (2000) 21ILJ 1467 (PFA) para 13; *Sekele v Onon Money Purchase Pension Fund & Another* [2006] 6BPLR 2148 (PFA).

<sup>295</sup> Pension Funds Act 1956, Chapter V.

<sup>296</sup> Ibid.

<sup>297</sup> *Henderson v Eskom* [1999] BPLR 353 (PFA); *Old Mutual Life Assurance Co. (South Africa) Ltd v Pension Funds Adjudicator and Others* (3) SA 458 (c) para 12.

<sup>298</sup> Ian Atiken, 'South African: The Occupational Pension Scheme' (1999) 5 *Journal of Pension Funds Management* 69,75.

economical and expeditious<sup>299</sup> Besides, the existence of this system does not deny any aggrieved party from processing their disputes through alternative dispute resolution systems.<sup>300</sup> Since the first adjudicator, Mr. John Murphy was appointed in 1998, South Africa has witnessed development in pension jurisprudence that was not there before.<sup>301</sup> That is because of the specialised and concentrated obligation to specifically adjudicate on pension disputes and expand jurisprudence in this area.<sup>302</sup>

The OPFA is considered an independent and impartial tribunal.<sup>303</sup> This is largely and directly related to the fact that it is separate and independent of the Financial Sector Conduct Authority (FSCA), which regulates pension services among other financial services.<sup>304</sup> The OPFA on one hand strictly executes pension adjudicatory responsibilities, the FSCA on the other hand is in charge of rulemaking or regulating the industry.<sup>305</sup> This is seen as compliant with the South African constitutional requirement that every dispute must be resolved with an independent and impartial body or tribunal.<sup>306</sup> As such it promotes the constitutional principle of equality which the South African constitution also demands.<sup>307</sup>

The Adjudicator and the Deputy Adjudicator are appointed to the office by the Minister for Finance who also has powers to recall them from the office.<sup>308</sup> In spite of all the praises heaped on the office for its success so far, the fact that its staff is appointed and recalled by the executive arm of

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<sup>299</sup> Pension Funds Act 1956, s 30A (3).

<sup>300</sup> Ibid

<sup>301</sup> Mhango (n 81) 10.

<sup>302</sup> Mtendeweka Mhango and Ntombizozuko Dyani Mhango, 'Reflections on Transformative Pension Adjudication' (2017) 38 Industrial Law Journal 2173,2200.

<sup>303</sup> Lufuno and Odeku (n 227) 31.

<sup>304</sup> Financial Sector Regulation Act 2017, s 56,57,58.

<sup>305</sup> Ibid.

<sup>306</sup> South Africa Constitutional Act 1996, s 34.

<sup>307</sup> Lufuno Nevondwe, 'South African Social Security and Retirement Reform: A Long Journey Towards the Towards the Redrafting of the New Pension Funds Act' (2010)15 Pensions: An International Journal 287,296.

<sup>308</sup> Pension Funds Act 1956, 30C (2), (5).

the government is considered a glaring downside on its independence.<sup>309</sup> Also, the OPFA normally receives a considerably high number of disputes which do not fall under its jurisdiction.<sup>310</sup> That is a testament that there is low public awareness of the system.<sup>311</sup>

#### **4.3 United Kingdom: Pensions Ombudsman (PO)**

The first stage of pension dispute resolution in the UK is the pension service providers through an IDR, which is required to respond within eight days of receipt of the dispute.<sup>312</sup> Prior to 2018, the procedure was that if one was dissatisfied by the decision of the internal mechanism, the dispute was to be escalated to the Pension Advisory Service (PAS) for an independent advice.<sup>313</sup> The PAS was to advise whether the dispute was mature for Pensions Ombudsman or the Financial Ombudsman Service(FOS).<sup>314</sup> However, this has since changed since the PAS dispute resolution team has been transferred and incorporated in the office of the Pensions Ombudsman.<sup>315</sup>

Therefore, the procedure as it is today is that disputes arising from IDR are filed directly with the Pension Ombudsman or Financial Ombudsman Service, if it is about administration of the pension schemes or marketing of the pension products respectively.<sup>316</sup> The Pension Ombudsman is prohibited from assuming jurisdiction on matters that are under consideration in IDR.<sup>317</sup> An ombudsman is an independent official who is appointed to investigate and resolve disputes.<sup>318</sup> The

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<sup>309</sup> Lufuno and Odeku (n 227) 31.

<sup>310</sup> Ibid.

<sup>311</sup> Ibid (n 227) 31.

<sup>312</sup> Government of UK, 'Personal Pensions: Complaints' <<https://www.gov.uk/personal-pensions-your-rights/complaints>>accessed 28 August 2021.

<sup>313</sup> Niderict Government Services, 'Complaining about Your Pension Scheme' <<https://www.nidirect.gov.uk/articles/complaining-about-your-pension-scheme>>accessed 28 August 2021.

<sup>314</sup> Ibid.

<sup>315</sup> The Pension Ombudsman, 'The Pensions Ombudsman News' *Newsletter* (London, January 2020) <[https://www.local.gov.uk/sites/default/files/documents/20200200\\_Bulletin%2067%20TPO%20Stakeholder%20newsletter%20January%202020.pdf](https://www.local.gov.uk/sites/default/files/documents/20200200_Bulletin%2067%20TPO%20Stakeholder%20newsletter%20January%202020.pdf)> access 28 August 2020.

<sup>316</sup> Ibid.

<sup>317</sup> The Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996 r 2.

<sup>318</sup> Nidirect Government Services (n 306) 40.



Pension Ombudsman is independent of the Occupational Pensions Regulatory Authority (OPRA)<sup>319</sup> and the Financial Conduct Authority (FCA), the regulators.<sup>320</sup> The regulators are there to control the pension industry whilst the Pensions Ombudsman exist to provide redress.<sup>321</sup>

However, pension regulators also have a role to investigate pensions complaints but for regulatory purposes only not for adjudication.<sup>322</sup> Whereas OPRA can investigate complaints related to workplace and stakeholder pension schemes, FCA can investigate complaints related on the marketing or selling of pension services to consumers.<sup>323</sup> Nevertheless, it is the sole function of the Pensions Ombudsman to offer adjudicatory redress in pension disputes filed out of IDR processes.<sup>324</sup>

The first Pensions ombudsman was appointed in 1991 to adjudicate disputes against breach of trust law or maladministration of the pension schemes.<sup>325</sup> The Pensions Ombudsman has power to interpret pension laws, rules and regulations to parties who may have legal representation.<sup>326</sup> However, this jurisdiction is specialised and limited to only disputes related to the administration of pension schemes.<sup>327</sup> For Pensions Ombudsman to assume jurisdiction, the disputes must be directly related to the proper running of the schemes not on the exercise of discretion or difference in opinions.<sup>328</sup> However, there are many instances the PO has been called upon to not only redress

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<sup>319</sup> Pension Act 1995, s 1.

<sup>320</sup> David Blake, 'Two Decades of Pension Reform in the UK: What Are the Implications of the Occupational Pension Schemes' (2000) 22 *Employee Relations* 223, 245.

<sup>321</sup> David Laverick, Memorandum by the Office of the Pensions Ombudsman' <<https://publications.parliament.uk/pa/cm200203/cmselect/cmworpen/92-III/92m67.htm>> accessed 28 August 2021.

<sup>322</sup> Nidirect Government Services (n 306) 40.

<sup>323</sup> Ibid.

<sup>324</sup> David Blake, 'The UK Pension System: Key Issues' (2008) 8 *Pensions: An Internal Journal* 330,375.

<sup>325</sup> Helen Fawcett, 'Pension Reform in the UK: Re-casting the Public/Private Mix in Pension Provision 1997-2000' <<https://strathprints.strath.ac.uk/1791/6/strathprints001791.pdf>> accessed 28 August 2021.

<sup>326</sup> Richard Nobles, 'Access to the Law of Pensions: The Lessons from National Grid v Laws' (2000) 22 *Employment Relations* 282,288.

<sup>327</sup> Philippa James, 'Guaranteed Minimum Pensions-Equalisation' (2002) 8 *Pensions: An International Journal* 32,40

<sup>328</sup> Richard Sleight, 'Citizen Participation with UK Pension Fund Responsible Investment Decisions' <<https://www.diva-portal.org/smash/get/diva2:1483342/FULLTEXT01.pdf>> accessed 28 August 2020.

a dispute but also investigate the activities of a pension schemes.<sup>329</sup> This system uses informal resolution approaches to arrive at a determination.<sup>330</sup> The decision of the Pension Ombudsman can be appealed to the English High Court of Justice.<sup>331</sup>

The independence of the office of Pensions Ombudsman from the regulators gives the system a neutral point of view of the industry to notice regulatory gaps and suggest possible solutions.<sup>332</sup> It prides itself to be an independent institution established in law to act impartially and offer services for free.<sup>333</sup> The independence of the Pension Ombudsman is considered a major factor in the effective pension adjudication.<sup>334</sup> However, it is notable that Pensions Ombudsman is appointed and resourced by the Secretary of Works and Pension which invites doubts as to its full adjudicatory independence.<sup>335</sup> Nevertheless, the independence of the Pension Ombudsman is interestingly guaranteed by local Memorandum of Understanding (MoU) between the Ombudsman and the Secretary.<sup>336</sup>

The MoU behooves the secretary and the Department of Pensions and Works of the UK to allow the Pension Ombudsman to operate independently without influence from the executive.<sup>337</sup> This is further buttressed by the fact that the Pension Ombudsman can only be removed from office like a judge, which is quite procedural.<sup>338</sup> So far, it has been noted that the UK's executive involved

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<sup>329</sup> Fawcett (n 325) 42.

<sup>330</sup> Margaret Doyle, Vanda Bondy and Carolyn Hirst, 'The Use of Informal Resolution Approaches by Ombudsman in the UK and Ireland' (Hot Off Press 2014) para 35.

<sup>331</sup> Ibid.

<sup>332</sup> Fiona Stewart and Juan Yermo, 'Pension Fund Governance: Challenges' <<https://www.oecd-ilibrary.org/docserver/241402256531.pdf?expires=1630145917&id=id&accname=guest&checksum=F2D7C5ED92D5A11368DEC7573519ADEE>> accessed 28 August 2020.

<sup>333</sup> The Pension Ombudsman, 'Our Role' <<https://www.pensions-ombudsman.org.uk/what-we-do>> access 28 August 2021.

<sup>334</sup> Mark Grant, 'The Ombudsman Approach to Remedies and Compensation' (2000) 6 *Journal of Pension Management* 49,72.

<sup>335</sup> Laverick (n 314) 41.

<sup>336</sup> Ibid.

<sup>337</sup> Ibid 42.

<sup>338</sup> Ibid 42.

have co-operated well and have supported the Pensions Ombudsman.<sup>339</sup> However, this does not extinguish the fact that the involvement of the executive poses a potential threat to the full independence of the Pension Ombudsman which may materialize any time in the future.<sup>340</sup>

#### **4.4 Australia: Australian Financial Complaints Authority (AFCA)**

In Australia pension disputes are resolved by the Australian Financial Complaints Authority (AFCA).<sup>341</sup> The AFCA was operationalized on 1<sup>st</sup> November 2018 to not only deal with pension disputes that arise from IDR of the pension service providers but also to handle all complaints by consumers and small businesses in the financial service industry as a single body.<sup>342</sup> It replaced the Financial Ombudsman Service (FOS), the Credit and Investments Ombudsman (CIO) and the Superannuation Complaints Tribunal (SCT).<sup>343</sup>

The defunct SCT which was responsible for pension adjudication before AFCA was established, was a statutory body which was funded through the government resource allocations.<sup>344</sup> It was a public adjudicatory institution without industry membership.<sup>345</sup> However, AFCA is an External Dispute Resolution (EDR) member/industry-funded body.<sup>346</sup> An EDR is a scheme of independent dispute resolution of the disputes which have not been resolved by the IDR mechanisms of the financial service providers.<sup>347</sup> The AFCA is therefore a consolidation of EDR schemes that existed

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<sup>339</sup> Ibid 42.

<sup>340</sup> Harold J. Krent, 'Presidential Control of Adjudication within the Executive Branch' (2015) 65 Case Western Law Review 1083, 1117.

<sup>341</sup> Australian Financial Complaints Authority Act 2018.

<sup>342</sup> Ramsay and Webster (n 95) 12.

<sup>343</sup> Ibid

<sup>344</sup> Ibid 43.

<sup>345</sup> Greg Weeks, 'Superannuation Complaints Tribunal and the Public/Private Distinction in Australian Administrative Law' (2006) 13 African Journal Administrative Law 1,17.

<sup>346</sup> Ramsay and Webster (n 95) 12.

<sup>347</sup> Ian Ramsay and Miranda Webster, 'The Evolution and Consolidation of External Dispute Resolution Schemes in the Financial Sector: From the Banking Ombudsman to the Australian Financial (2019) 20 Journal of Banking and Financial Law and Practice 182,198.

in the Australian financial service industry.<sup>348</sup> It is independent of the Australian Prudential Regulatory Authority (APRA) which is the regulator in the Australian financial service industry.<sup>349</sup> It appears that the consolidated EDR approach in the Australian financial services industry is suitable to match the integrated financial service industry in that country.<sup>350</sup>

The AFCA is not a public body but it performs a public function which is dispute resolution for the public good in the industry.<sup>351</sup> As regards pension disputes, it makes a binding determination notwithstanding lack of acceptance of the complainant.<sup>352</sup> It is operated as a not-for profit company which is independently chaired and having equal representation from the industry.<sup>353</sup> Its main objective is to provide low-cost, prompt and informal dispute resolution which is difficult to find in courts.<sup>354</sup> Being an EDR, court intervention is not encouraged.<sup>355</sup> However, there are limited instances when a court of law can review decisions of the AFCA because of the public interest involved.<sup>356</sup> This limitation of court intervention is to further the objectives of alternative dispute resolution which was interfered with when the courts often reviewed the SCT's decision.<sup>357</sup>

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<sup>348</sup> Nicola J Howell, 'Shutting the Courts Out: Developing Consumer Credit Law in the Shadow on Alternative Dispute Resolution and the New Australian Complaints Authority' (2019) 30 *Journal of Banking Finance Law and Practice* 57,78.

<sup>349</sup> Australian Prudential Regulatory Authority Act 1998.

<sup>350</sup> Ian Ramsay, Julie Abramson and Alan Kirkland, 'Review of the Financial System External Dispute Resolution and Complaints Framework: Final Report' (Commonwealth of Australia 2017) para 43.

<sup>351</sup> Dimitry V. Yakolev, Dina R. Kripakora, Gelina I. Barkelova, Stevetlona H. Solvykatley and Kseniya V. Didenko, 'Alternative Financial Dispute Resolution in Australia' <[https://www.researchgate.net/publication/348600526\\_ALTERNATIVE\\_FINANCIAL\\_DISPUTE\\_RESOLUTION\\_MECHANISM\\_IN\\_AUSTRALIA](https://www.researchgate.net/publication/348600526_ALTERNATIVE_FINANCIAL_DISPUTE_RESOLUTION_MECHANISM_IN_AUSTRALIA)> accessed 28 August 2021.

<sup>352</sup> AFCA, 'Make a Complaint: Making a Complaint about a Financial Firm' <<https://www.afca.org.au/make-a-complaint>> accessed 28 August 2021.

<sup>353</sup> QMV, 'Make Way Superannuation Complaints Tribunal (SCT) Here comes the Australian Financial Complaints Authority (AFCA)' <<https://www.qmvsolutions.com/blog/make-way-superannuation-complaints-tribunal-sct-here-comes-the-australian-financial-complaints-authority-afca>> accessed 28 August 2021.

<sup>354</sup> Ramsay and Webster (n 95) 12.

<sup>355</sup> Ibid.

<sup>356</sup> Ibid 44.

<sup>357</sup> Pamela McAlistler, 'The Demise of the Superannuation Complaints Tribunal: The Decision in Wilkinson v Care and Brekler v Leshem' (1998) 22 *Melbourne University Law Review* 281,309.

As an industry-based institution, its independence from political influence is guaranteed in terms of control and funding.<sup>358</sup> The regulator, APRA has no role in adjudication or control of the AFCA's adjudicatory functions.<sup>359</sup> However, it should be noted that AFCA is headed by Chief Ombudsman and CEO who is appointed by the Minister which can elicit perception of political influence.<sup>360</sup> Equally, it cannot be overemphasized that pension industry is not homogenous and some players will be more dominant than the others hence the possibility of dominant private interest influencing the EDR like AFCA.<sup>361</sup> Nevertheless, ACFA eradicates industry capture by ensuring that there is equal industry representation in its Board of Directors (BOD).<sup>362</sup>

#### **4.5 Summary**

In South Africa, United Kingdom and Australia pension disputes have been given a special attention. In all these countries, a specialised system of dispute resolution has been established to resolve pension disputes which takes pension disputes out the mainstream court system. In South Africa, OPFA is independent of the regulatory FSCA with each of them performing separate roles. This system is guarded against influences which may hamper fair adjudication. However, its main challenge is the political appointments and funding as well as the frequent court interventions against its decision. In the UK, the Pension ombudsman system sits independent and separate of the industry regulators, the OPRA and FCA. The possible political influence that may arise from the political appointments and funding is prevented through an MOU signed between the Pension

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<sup>358</sup> Ramsay and Webster (n 88) 12.

<sup>359</sup> Rosalie Degabriele, 'Rosalie, Perceptions of the Governance of the Australian Superannuation Industry' <<https://ssrn.com/abstract=2807711>> accessed 29 August 2021.

<sup>360</sup> AFCA, 'Executive and Leadership' <<https://www.afca.org.au/about-afca/independence/afca-executive-and-leadership>> accessed 29 August 2021.

<sup>361</sup> Francina Cantatore and Brenda Marshall, 'A step too far in consumer credit protection: Are external dispute resolution schemes wielding the Sword of Damocles?' (2012) 40 Australian Business Law Review 322,335.

<sup>362</sup> David Locke, 'The Australian Financial Complaints Authority: Helping Build Trust in the Financial Services Industry' (2019) 70 Governance Directions 710, 715.

Ombudsman and the appointing authority which compels the latter to allow and support the former's independent operations. However, it has possible frequent court intervention through appeals to the High Court.

The AFCA of Australia share the element of independence from the regulator with the OPFA and the PO systems as analysed. It handles financial disputes while the APRA regulates the financial industry. The AFCA system is the most unique of all these systems for three reasons. The first one is that the AFCA is not a statutory body but a member/industry owned EDR. Secondly, it performs adjudication for the entire Australian financial serve industry and not specific to pensions unlike the OPFA and the PO. Lastly, being a private institution intervention of the courts is highly limited unlike OPFA and PO which are public institutions with automatic right to appeal to the High Court, and the High Court also have judicial review powers over them.

## CHAPTER 5

### CONCLUSION AND RECOMMENDATIONS

#### 5.1 Introduction

This chapter provides a general conclusion and recommendations for the study. The general conclusion includes all the findings on all the research questions that this research paper attempts to answer. The chapter also offers possible solutions to the research problem, which solutions are useful for future systemic and legal reform regarding pension dispute resolution in Kenya. This chapter clarifies the basis for this study by offering alternatives to the problematic pension dispute resolution in Kenya which has not been addressed elsewhere in the existing literature. It also highlights possible further research areas related to the subject of study.

#### 5.2 Conclusion

This research paper addresses the inappropriateness of the specialised system of pension dispute resolution of Kenya. This paper questions the independence of the RBA in discharging adjudicatory functions in the pension sector. This paper has approached this line of interrogation by answering four basic questions. First, is as to what is the legal framework in Kenya for an independent pension dispute resolution. Second, is as to how the involvement of the RBA undermines the independence of the specialised pension dispute resolution. Third, is as to which are the best practices in pension dispute resolution. The last one is as to how the Kenyan system can be reformed to ensure that it is appropriate for the pension disputes. In the main, the argument in this paper is pegged on the legal standards which require that every dispute resolution should be independent and impartial.

The theory of adjudication as advanced by both Jeremy Bentham and Lon Fuller appearing in Chapter 1, informs the analysis of the research questions. The guide from Bentham helps

understand that a suitable institutional structure of an adjudication system is important in ensuring that the objective of adjudication is realised. Fuller on the other hand, not only agrees with Bentham on that front but adds that there are basic normative values like independence and impartiality that should never be absent in adjudication. The paper also relies on the separation of powers theory where De Montesquieu urges that the three government arms (executive, legislature and judiciary) should perform separate and independent functions. For instance, if the RBA is vested with regulatory powers which linked to the role of the executive it should again be mandated to resolve pension disputes which is a judicial function. Instead, two separate and independent bodies should be created to carry out respective functions.

These theoretical expositions are supported by several existing literatures that this paper reviews to contextualize the justification of the study. The reviewed literature confirms that dispute resolution is important especially in maintaining social order which is thus the major role of a properly structured dispute resolution. The literature also confirms that independence and impartiality are key principles that should be intricately part of the dispute resolution including pension dispute resolution.

Considering that, the reviewed literature frowns upon the practice of vesting adjudicatory mandates with the regulators or administrative bodies with direct interest in a particular sector because it is contrary to the principle of independence and impartiality. This is the literature that this research paper sought to extend by focusing on the Kenyan specialised system of pension dispute resolution. The paper has relied on the secondary data collected from the library and the internet supported sources. The data available have been used to support the claim that indeed there is a problem with vesting pension regulatory and adjudicatory powers with the RBA which



affects its independence and impartiality in pension dispute resolution. The data links the adjudicatory challenges that RBA faces to its lack of adjudicatory independence.

Chapter 2 of this paper reviews the legal framework on independent pension dispute resolution. The law is significant for the enforcement of rights, and it is the duty of the law to create an institutional framework for the enforcement of such rights in form of adjudication. However, a particular adjudication established may lack basic values need in dispute resolution such as independence and impartiality. There are international and national legal framework and standards which recognize these principles in adjudication to be a precondition for the suitability and appropriateness.

The law applicable in Kenya requires that dispute resolution should be handled by an independent and impartial body. Also, international standards require that pension dispute resolution outside the pension service providers' internal mechanisms should be addressed by an independent body or tribunal. The legal framework forbids the use of a pension adjudication system which can be influenced externally or that which gives an impression of a conflicted, compromised, and biased mandate. The law protects the right to fair hearing, equality, human dignity, and access to justice of the aggrieved parties which must be given effect to in any given dispute resolution system. The law does this to encourage members of the public to have confidence in the system and to reinforce the rule of law.

Chapter 3 examines the independence of the RBA in specialised pension dispute resolution. Pension disputes usually have negative impacts to the pension industry and the people who depend on the pension industry's services. An a suitably designed pension dispute resolution system is important in processing the disputes thereby reducing their harmful effects and preventing their future occurrences. In designing a pension dispute resolution system regard must be had to the

special needs of the pension disputes which makes it preferable to have an appropriate specialised system.

In Kenya, pension dispute resolution is processed through a specialised system which involves service provider's IDR, the RBA and the RBAT. The second level is crucial because it involves the external resolution of dispute for a fair review of complaints that arise from IDR mechanisms. For Kenya, it is at this level where the RBA is involved in pension adjudication. However, the RBA as the regulator is subject to some influences which may interfere with its adjudicatory function. Therefore, the independence of the RBA in pension dispute resolution appears compromised and exposed to influences against the legal requirements and standards that a dispute should be handled by an independent and impartial body.

Chapter 4 of this paper identifies some of the best practices in pension dispute resolution featuring in South Africa, United Kingdom and Australia. In these countries, pension disputes have been given a special attention. They have specialised systems of dispute resolution. All these systems are independent from their regulatory bodies unlike Kenya. For instance, in South Africa, the OPFA is independent of the regulatory body, the FSCA and the independence in adjudication from regulatory function is maintained. In the UK, the Pension ombudsman system is independent and separate of the OPRA and the FCA, the industry regulators in that country. The AFCA of Australia is also independent of APRA, the regulator in Australia.

The AFCA of Australia appears to be a unique dispute resolution system. It is not a statutory body but a member/industry owned EDR. Also, it performs adjudication for the entire Australian financial service industry and not specific to pensions unlike the OPFA and the PO. Further, being a private institution, intervention of the courts is highly limited unlike the Southern Africa's OPFA and UK's Pension Ombudsman which are public institutions with automatic right to appeal to the

High Court and the High Court also have judicial review powers over them. As a specialised system, frequent interventions by the courts may claw back the intention of the specialisation and alternative justice.

It is notable that political appointments of the officers to sit as either adjudicators or ombudsmen in any of these systems still begs the question as to their complete adjudicatory independence. In South Africa, the OPFA has no safeguard against that. However, in the UK the possible political influence that may arise from the political appointment and funding is prevented through an MOU signed between the Pension Ombudsman and the appointing authority which compels the latter to allow and support the former's independent operations. Also, in Australia the AFCA has industry membership as a control on the political influence.

Overall, this paper makes the following four main findings: the first one is that the legal framework on independence in adjudication demands an independent and impartial pension dispute resolution divorced from the regulator. The second one is that the specialised pension dispute resolution system is inappropriate because it vests in the regulator, the RBA, the adjudicatory powers in the pension industry. The third one is that the specialised systems of pension dispute resolution in South Africa, UK and Australia represent some of the best practices in pension dispute resolution since they use systems which are independent of the regulatory functions. The last one is that the appropriateness of the specialised system of pension dispute resolution in Kenya can highly improve if the RBA is divested with the adjudicatory powers and instead an independent body is created to handle pension disputes in Kenya.

### **5.3 Recommendations**

Considering the above conclusion, this research paper suggests various modalities that can be used to reform the Kenya specialised system of pension dispute resolution. First and foremost, the RBA

should not be involved in the pension adjudication. As an administrative body, the RBA should retain the mandate to resolve administrative complaints but not pension disputes. Instead, an independent pension (retirement benefits) tribunal or body should be established outside pension schemes to resolve pension dispute disputes judicially. Notably, this should be at the second level of pension dispute resolution immediately after the IDR mechanism so that parties who are dissatisfied at the scheme level may have an independent and impartial platform to process their disputes.

That tribunal or body should be independent of the RBA or any of other state agency that has other responsibilities in the pension sector. It should be linked to the judiciary for the purposes of appointment of the adjudicators, accountability of their operations and performance of the adjudicatory functions. The adjudicators appointed to the independent body or tribunal should reflect expertise in pension adjudication. The number of adjudicators may be more than one, preferably three, to assist in a collaborative approach to adjudication and sharing of ideas in various disputes which may enhance accuracy and fairness by reducing the risk of bias of one adjudicator. However, the number of adjudicators should not be too many to the extent that decision making becomes a problem.

The second level tribunal or body can be modelled along the ombudsman's system to establish a pension ombudsman for the pension schemes. This would mean that a single adjudicator, the pension ombudsman is appointed independent of the regulator as it is in UK. The ombudsman would be empowered to receive complaints, investigate, and adjudicate on them. However, the Kenyan system should avoid vesting investigative powers to the appointed adjudicator because pension dispute should be procedurally civil, and parties are therefore responsible to prepare their own cases before presenting them to the adjudicator.

The adjudicator or the pension ombudsman's may instead be empowered vide rules to call for production of information which may be needed for resolution of a particular dispute. The newly established system should consider decentralizing its services throughout the country to reach as many people as possible. This is practical as the pension industry continue to grow and many people across the country take interest in retirement savings. The independent adjudicatory should embrace technology and offer Online Dispute Resolution (ODR) services in case the limited resources do not allow it to fully decentralize. Also, the body should publish and report to the public all the disputes brought before and handled by it so that the public may continue to evaluate its fairness, efficiency, and effectiveness.

Noteworthy, having a second level tribunal or body means that the system will still retain the third level specialised appellate mechanism, the Retirement Benefits Appeals Tribunal (RBAT) to address limited appeals from the independent tribunal or body. However, to ensure maximum utilisation of resources in pension dispute resolution, the second level and third level of the specialised system may be merged into one independent pension complaints tribunal exercising only original jurisdiction over the disputes which have been processed through the IDR mechanisms. That then means that the appellate jurisdiction can be taken out of the specialised system. Instead, limited appeals from the independent pension complaints' tribunal can be filed at the ELRC whose decision should be final.

That will expose pension dispute to the rich and binding jurisprudence from the courts which may enable the independent tribunal to have a predictable and judicious approach to adjudication. Relatedly, the pension dispute resolution can be more streamlined if the legal analysis from other disputes can inform pension adjudication at the appellate level. However, the courts involvement should be limited to some grave issues which should be admitted by ELRC after due consideration.

That is, the appeal should not be as of right but rather based on the discretion of the ELRC whose leave should be first sought by the appellant. This is to discourage taking the specialised adjudication back to courts.

Alternatively, Kenya can borrow from Australia to establish an industry based, industry funded and non-statutory EDR system to tackle pension system with very little involvement of the courts. That body must be independent of the regulator or other agencies of the government. Such elements of the AFCA may be borrowed. However, since Kenya does not have an integrated financially transplanting all the features of AFCA of Australia in Kenya would be ill-advised. The AFCA presides over all consumer disputes in the financial sector like in Australia and this may be modified to be specific to pension disputes only.

However, if Kenya adopts a single financial regulator for the entire financial sector, then a single dispute resolution system is desirable. Nonetheless, even with integration of the disputes, it should be composed of specific adjudicators targeting specific categories of disputes for example a pension adjudicator under the umbrella body akin of the AFCA. If Kenya considers having one system of dispute resolution for the financial sector, specific adjudicators under that system should be appointed for pension disputes. However, of the most significance to consider in reforming the specialised system of pension dispute resolution is the independence and impartiality of the adjudication body established immediately after IDR outside the scheme.

Whichever model adopted; it must be independent of the regulatory functions which are performed by other institutions. Therefore, in the short term, the RBA should hold a stakeholder engagement conference to consider institutional overhaul especial as far as pension dispute resolution is concerned and the foregoing suggestions can be put forth for further discussions. In the long term, sections 46, 47 and 48 of the Retirement Benefits Act, 1997 should be amended to streamline

pension dispute resolution in the country. The law should clearly provide for IDR mechanism in the pension schemes and a second level independent dispute resolution body or tribunal. This body should offer a single-shop forum for all pension disputes without exception. The body should embrace independence, impartiality, simplicity, informality, uniformity, clarity, expeditious resolution of disputes and maximum utilisation of resources.

#### **5.4 Further Research Areas**

From this study, some related areas that appear viable for further research include the following: First, is the legal harmonization of public service schemes of different categories and exclusions of disputes emerging from the public service schemes from the specialised system of dispute resolution. Secondly, the regulatory gaps as relates to delinquent employers or scheme sponsors and disputes relating to non-remittance of pension deductions as and when they are due. Finally, another area for further research would be the ownership and administration tussle of the pension schemes for the county government workers between the county and national governments. These emerged as some of problematic areas in the Kenyan pension industry. The relevant laws have a role to play and should therefore be examined further in a detailed study to offer more solutions for the good and stability of the industry.

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**APPENDICES**

**Appendix I: Admission Letter**

## Appendix II: Anti-Plagiarism Form

## Appendix III: Digital Repository Form

**Appendix IV: Copy of Student ID**

## **Appendix V: Clearance Form**

## Appendix V: Certificate of Correction