

Journal of Conflict Management & Sustainable Development



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in Development Projects Kariuki Muigua

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Implications of Adopting Central Bank Digital Currencies Benjamin Arunda
(CBDCs)

A Critique of Intellectual Property as a Business Asset: Peter M. Muriithi
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Property in Kenya

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Journal of Conflict Management and Sustainable Development

Editor's Note

Welcome to volume 6, issue 4 of the *Journal of Conflict Management and Sustainable Development*.

The Journal provides a platform to share the latest trends and revolutionary out-of-the-box-ideas in research and practice in the areas of conflict management, sustainable development and related fields.

Sustainable development has taken center stage in political, economic, environmental, social and legal discourse across the globe. It has been enshrined as a national value and principle of governance under the Constitution of Kenya. The Journal offers insight on some of the pertinent and emerging issues in this area.

All papers submitted to the Journal undergo thorough peer review by a select team of reviewers in order to adhere to the highest quality of academic standard and credibility of information.

The Journal has witnessed tremendous growth since its launch. It is now recognized as one of the most credible and authoritative publications in the fields of Conflict Management and Sustainable Development and is widely cited by scholars, researchers and students in these areas.

This issue covers several themes in the areas of conflict management and sustainable development such as *Upholding Human Rights and Meaningful Public Participation in Development Projects; Mediation as a Tool to Enhance Access to Justice for Outsourced Workers in Kenya; COVID-19 and the Opportunity for Cohesion: Addressing the Conflict between Local and Migrant Communities in South Africa; Delivering Clean and Affordable Energy for All; Enhancing Public Participation for Effective Management and Protection of Environmental Resources in Kenya; Transmutation of Central Banking Policies and the Legal Implications of Adopting Central Bank Digital Currencies and a Critique of Intellectual Property as a Business Asset: Valuation, Commercialization and Taxation of Intellectual Property in Kenya.*

I wish to thank our efficient team of reviewers, editors, contributors and everyone who has made publication of this Journal possible.

The Editorial Team welcomes feedback from our readers to enable us continue improving the journal.

We welcome submissions of papers, commentaries, case reviews and book reviews on the themes of Conflict management and Sustainable Development and other related fields of knowledge for publication in subsequent issues. These submissions should be channeled to editor@journalofcmsd.net and copied to admin@kmco.co.ke

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June, 2021.

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Upholding Human Rights and Meaningful Public Participation in Development Projects

By: **Kariuki Muigua***

Abstract

The United Nations 2030 Agenda for Sustainable Development Goals (SDGs) envisages a world where human lives will be improved alongside environmental conservation as much of the resources expected to achieve this are natural resources. However, to achieve this, the SDGs acknowledge that this will also require the concerted efforts of all players including, public, private as well as communities. Trade and investments are also expected to play a huge role in raising revenue as well as generating the relevant resources for development. This, however, comes with cases of these international corporations disregarding human rights law which is expected to bind all persons in Kenya and the rest of the world. Communities are expected to be impacted upon by the development and investment projects and activities but they are often sidelined by these investors where they are either not involved through public participation as provided for under the national laws or they suffer human rights violations. This is arguably counterproductive as far as sustainable development is concerned. This paper argues that if human rights of communities and their right to public participation in development projects as guaranteed under international law regime are not protected, then there is not only the risk of failure of the particular projects but also emergence of conflicts. The paper offers some recommendations on how such eventualities may be avoided.

1. Introduction

The 2030 Agenda for Sustainable Development Goals (SDGs)¹ and specifically SDG 17 requires state parties to create partnerships for the Goals

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and specially to strengthen the means of implementation and revitalize the global partnership for sustainable development.² The United Nations reports that as at 2021, ‘Kenya aims to attract more than USD 30 billion in manufacturing investments over the next 5 years by focusing on sectors with high growth potential’ by ‘boosting domestic manufacturing which is believed to have huge potential to attract investment, create employment, stimulate growth, and linkages to all other sectors of the economy’.³

It has been observed that the adoption of rights-based approaches in development work – that is, approaches that are informed and guided by the framework of international human rights law, and the values that underpin it – has had a significant impact on the ways in which development agencies operate.⁴ It is possible to have investments in the name of development that do not meet the needs or respect the human rights of poor or marginalised communities where these local communities can be affected both by the lack of consultation and participation and by the negative impact such projects have on the environment and their livelihoods.⁵

While participation means that people are closely involved in the economic, social, cultural and political processes that affect their lives, it may mean complete and direct control over these processes, or, partial or indirect; the most important thing is that people have constant access to decision-making and power.⁶ Article 21(1) of the United Nations Universal Declaration of

¹ United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1.

² SDG 17.

³ ‘United Nations Supporting Kenya’s Post COVID-19 Industrial Recovery and Growth to Achieve Inclusive and Sustainable Growth | United Nations in Kenya’ <<https://kenya.un.org/en/126013-united-nations-supporting-kenyas-post-covid-19-industrial-recovery-and-growth-achieve>> accessed 23 May 2021.

⁴ ‘Rights-Based Approaches’ (GSDRC) <<https://gsdrc.org/topic-guides/human-rights/rights-based-approaches/>> accessed 22 May 2021.

⁵ ‘Business & Human Rights | Protection International’ <<https://www.protectioninternational.org/en/our-work/what/business-human-rights>> accessed 24 May 2021.

⁶ “UNDP. 1993. *Human Development Report 1993*, 21. <http://www.hdr.undp.org/en/reports/global/hdr1993>.”

Human Rights⁷ guarantees that everyone has the right to take part in the government of his country, directly or through freely chosen representatives. Article 22 thereof also guarantees that everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality. The UN Declaration on the Rights of Indigenous Peoples⁸ also provides that indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.⁹ In addition, States are obligated to consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their Free, Prior and Informed Consent (FPIC) before adopting and implementing legislative or administrative measures that may affect them.¹⁰ Indigenous peoples also have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.¹¹ Indigenous peoples also have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.¹²

Arguably, there is a need for governments together with its development partners to solicit proposals and suggestions from indigenous and local

⁷ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

⁸ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295.

⁹ Ibid, Article 18.

¹⁰ Ibid, Article 19.

¹¹ Ibid, Article 21(1).

¹² Ibid, Article 23.

communities about policies, the Constitution, and development strategies to encourage communities to express their views and increase their sense of ownership and responsibility in the future of their country.¹³ While Kenya has been making tremendous steps towards opening up the marginalised parts of the country such as the North Eastern parts of Kenya, there have been concerns about violation of human rights of the locals in these areas.¹⁴ For instance, there have been reports that while Kenya's newest mega infrastructure project, the Lamu port, is aimed at integrating marginalised northern Kenya into the Kenyan economy and the nation, the planning and construction of the port have yielded a wide range of concerns and contestations, particularly on land rights, the environment, local livelihoods and security.¹⁵ There have been documented reports by different rights groups from the residents about compulsory land acquisition with the government being accused of having taken more land than it paid compensation for.¹⁶ If such reports on forceful acquisition of property were to be true, then such actions would be against Article 40 of the Constitution of Kenya 2010.¹⁷ There have also been major concern on the environmental

¹³ Environmental Research Institute Science Technology and Environment Agency Lao People's Democratic Republic, "Public Participation in Development Projects in LAO PDR" <http://pdf.wri.org/mekong_governance_mreg_eri.pdf> accessed 21 May 2021.

¹⁴ Benard Musembi Kilaka and Jan Bachmann, 'Kenya Launches Lamu Port. But Its Value Remains an Open Question' (*The Conversation*) <<http://theconversation.com/kenya-launches-lamu-port-but-its-value-remains-an-open-question-161301>> accessed 24 May 2021.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ 40. Protection of right to property

(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property--

- (a) of any description; and
- (b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person--

- (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

impact of the port's construction¹⁸, and local protests against the project have been met with harassment by Kenyan security forces.¹⁹ There were also growing concerns about employment opportunities to residents.²⁰ Arguably, such allegations against the government, that is, inadequate meaningful

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation--

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that--

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

¹⁸ See *Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR* where the Petitioners averred that the LAPSET Project was designed and implemented in violation of the Constitution and statutory law; the project would have far reaching consequences on the marine ecosystem of the Lamu region in terms of the destruction of the mangrove forests, discharge of industrial effluents into the environment, and effects of the fish species and marine life; and if the project was to be implemented as designed, it would affect their cultural heritage and way life as well as their livelihoods.

¹⁹ Benard Musembi Kilaka and Jan Bachmann, 'Kenya Launches Lamu Port. But Its Value Remains an Open Question' (*The Conversation*)

<<http://theconversation.com/kenya-launches-lamu-port-but-its-value-remains-an-open-question-161301>> accessed 24 May 2021.

²⁰ *Ibid.*

public participation may raise concerns on the government's commitment to protection and promotion of human rights of the affected communities. This paper critically discusses the place of human rights and meaningful public participation in development projects within the context of Kenya.

2. Human Rights and Meaningful Public Participation in Development Projects: The Connection

The United Nations *Declaration on the Right to Development*²¹ states that development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.²² The *Declaration* also provides that the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.²³

"People today have an urge - an impatient urge - to participate in the events and processes that shape their lives. And that impatience brings many dangers and opportunities. It can dissolve into anarchy, ethnic violence or social disintegration. But if properly nurtured in a responsive national and global framework, it can also become a source of tremendous vitality and innovation for the creation of new and more just societies." (UNDP, 1993: 1)²⁴

²¹ UN General Assembly, *Declaration on the Right to Development: resolution / adopted by the General Assembly*, 4 December 1986, A/RES/41/128.

²² Ibid, Preamble.

²³ Article 1.1, *Declaration on the Right to Development: resolution / adopted by the General Assembly*, 4 December 1986, A/RES/41/128.

²⁴ 'Human Development Report 1993 | Human Development Reports' <<http://hdr.undp.org/en/reports/global/hdr1993>> accessed 16 May 2021; Giles Mohan, 'Participatory Development' [2002] *The companion to development studies* 49.

The international human rights law is designed primarily to protect individuals and groups from abusive action by states and state agents.²⁵

While it is true that most of the investment projects are financed and carried out by international companies, with Development Financial Institutions (DFIs) and multi-national development banks having long track records of being critical providers of financing in Africa, supplying riskier, longer term investment capital that tends to focus on sustainability²⁶, some commentators have accused some international and multinational investors of alleged human rights and environmental abuses, including using child labor to clean toxic materials, failing to repair pipeline leakages, and operating in protected indigenous lands without authorization especially in developing countries.²⁷ As far as trade agreements are concerned, there have also been worldwide concerns in relation to the lack of transparency of the negotiations as far as citizens are concerned, in contrast with the fundamental role being played by the large multinationals.²⁸ Notably, the negotiations are the result of long-term efforts by ultraliberal circles, politicians and directors of multinationals, working through many common bodies and the treaties are not published until, at best, the negotiations have been concluded.²⁹

²⁵ Shelton Dinah, 'Protecting Human Rights in a Globalized World', *Human Rights and Corporations* (Routledge 2017).

²⁶ 'ESG Investments Will Fuel Africa's Post-Pandemic Recovery' (13 May 2021) <<https://www.internationalinvestment.net/opinion/4031186/esg-investments-fuel-africa-post-pandemic-recovery>> accessed 23 May 2021.

²⁷ 'Foreign Investors Gone Wild' <<https://archive.globalpolicy.org/soecon/develop/democracy/2007/0507wild.htm>> accessed 21 May 2021; 'What Are the Main Criticisms of the World Bank and the IMF?' (*Bretton Woods Project*, 4 June 2019) <<https://www.brettonwoodsproject.org/2019/06/what-are-the-main-criticisms-of-the-world-bank-and-the-imf/>> accessed 24 May 2021; see also 'Globalization, Tourism, and Indigenous Peoples: What You Should Know About the World's Largest Industry – Planeta.Com' <<https://www.planeta.com/globalization-1999/>> accessed 24 May 2021.

²⁸ Robert Joumard, 'The Free Trade Agreements: Contempt for Citizens, Sovereignty for Multinationals' (*CADTM*, 23 May 2021) <<https://www.cadtm.org/The-free-trade-agreements-contempt>> accessed 24 May 2021.

²⁹ Ibid; see also Eric Toussaint, 'The World Bank, the IMF and the Respect of Human Rights' (*CADTM*, 23 May 2021) <<https://www.cadtm.org/The-World-Bank-the-IMF-and-the-respect-of-human-rights>> accessed 24 May 2021.

It has been argued that the international protection of human rights and environmental protection represent two of the fundamental values and aims of modern international society.³⁰ It has been opined that ‘the rights to the highest attainable standard of health and to an adequate standard of living depend on a certain degree of environmental quality and in several cases, environmental degradation or destruction has been viewed as a violation of these human rights’.³¹ In addition to this, destruction of the environment through such problems as pollution or global warming can directly interfere with the enjoyment of communities’ fundamental human rights including a wide range of social and cultural right as well.³²

Notably, among the extraordinary achievements of the *Declaration on the Right to Development*³³ is the advancement of a human rights-based approach to development.³⁴ For those who advocate for this approach, ‘development from a human rights perspective embraces as key attributes: Social justice (through inclusion, equality and non-discrimination, taking the human person as the central subject of development and paying special attention to the most deprived and excluded); Participation, accountability and transparency (through free, meaningful and active participation, focusing on empowerment); and international cooperation (as the right to development is a solidarity-based right).³⁵

³⁰ Dinah Shelton, *A Rights-Based Approach to Public Participation and Local Management of Natural Resources* (2008), 20<
https://www.iges.or.jp/en/publication_documents/pub/conferenceproceedings/en/739/3ws-26-dinah.pdf> Accessed 16 May 2021.

³¹ Bridget Lewis, ‘Environmental Rights or a Right to the Environment? Exploring the Nexus between Human Rights and Environmental Protection.’ (2012) 8 *Macquarie Journal of International and Comparative Environmental Law* 36.

³² *Ibid*, 36.

³³ UN General Assembly, *Declaration on the Right to Development: resolution / adopted by the General Assembly*, 4 December 1986, A/RES/41/128

³⁴ Flávia Piovesan, ‘Active, Free and Meaningful Participation in Development’ (2013) 25 Office of the High Commissioner for Human Rights, *Realizing the Right to Development: Essays in Commemoration of*, 103<
<https://www.ohchr.org/Documents/Issues/Development/RTDBook/PartIIChapter6.pdf>> Accessed 16 May 2021.

³⁵ Flávia Piovesan, ‘Active, Free and Meaningful Participation in Development’ (2013) 25 Office of the High Commissioner for Human Rights, *Realizing the Right to Development: Essays in Commemoration of*, 104.

Participatory development, as it is popularly referred to, has been defined as: “development that seeks to give the poor a part in initiatives and projects that are designed by outside organizations in the hopes that these projects will be more sustainable and successful by involving local stakeholders in the projects goals.”³⁶

Community participation has been defined as the involvement of people in a community in projects to solve their own problems, where people should be given the opportunity where possible to participate as a basic human right and a fundamental principle of democracy.³⁷

The need for public participation and respect for human rights is important for development projects to gain social license to operate.³⁸ This is because as it has been observed, ‘a development process often has four phases: articulation of demand, knowledge generation, dissemination and knowledge utilization where the result of the development cycle is that the solutions are implemented, and the more ownership is felt in all steps of this process, the more applicable the solutions are.’³⁹ Thus, rapid and sustained economic growth (“development”), popular political participation (“democracy”), and respect for the rights of their citizens (“human rights”) are considered to be hegemonic political ideals all around the world.⁴⁰ A Social License to

³⁶ ‘Why Is Participatory Development So Important for Your Nonprofit?’ (*grassrootscollective*) <<https://www.thegrassrootscollective.org/what-is-participatory-development>> accessed 22 May 2021.

³⁷ “Chapter 12 Community participation,” *Manual.*, 2005 <https://ec.europa.eu/echo/files/evaluation/watsan2005/annex_files/WEDC/es/ES12CD.pdf> accessed 21 May 2021.

³⁸ Kathleen Wilburn and Ralph Wilburn, ‘Achieving Social License to Operate Using Stakeholder Theory’ (2011) 4 J. Int. Bus. Ethics 3; Emmanuel Raufflet and others, ‘Social License’ in Samuel O Idowu and others (eds), *Encyclopedia of Corporate Social Responsibility* (Springer 2013) <https://doi.org/10.1007/978-3-642-28036-8_77> accessed 24 May 2021; Lain Dare, Jacki Schirmer and Frank Vanclay, ‘Community Engagement and Social Licence to Operate’ (2014) 32 Impact Assessment and Project Appraisal 188.

³⁹ Chris J Koopmans, K van Veluw and FG Wijnands, ‘Participatory Development as a Way to Innovations: Five Key Elements for Success’ (2014) 3 Building Organic Bridges 791, at 792.

⁴⁰ Jack Donnelly, ‘Human Rights, Democracy, and Development’ (1999) 21 Human Rights Quarterly 608.

Operate (SLO) refers to the perceptions of local stakeholders that a project, a company, or an industry that operates in a given area or region is socially acceptable or legitimate.⁴¹ Companies can gain the social license through: maintaining positive corporate reputation; understanding culture, customs, language history and history of communities, among others;⁴² educating local stakeholders about project; ensuring open communication amongst all stakeholders;⁴³ business partnerships with communities; workforce training; community support and capacity building; and employing innovation and technology.⁴⁴ Arguably, these activities are capable of enhancing respect for human rights. As for communities, for them to grant the social license, they ask themselves the following questions: Do they Respect us? Are they Listening? Do they let us Participate? Do they let us Participate? Are they Transparent with us? Can we Believe what they say? Are they Responsive to our issues? Can we Trust them?⁴⁵ Companies must ensure that the answers to all these questions remain continually affirmative.

It has been argued that ‘democratic governance and human rights are critical components of sustainable development and lasting peace’, where ‘countries with ineffective government institutions, rampant corruption, and weak rule of law are estimated to have a 30-to-45 percent higher risk of civil war and a higher risk of extreme criminal violence than other developing countries’.⁴⁶ In addition, public involvement in decision-making processes is not only important for development projects affecting the environment, but is also necessary for identifying the impact projects will have on communities.⁴⁷

⁴¹ Emmanuel Raufflet and others, ‘Social License’ in Samuel O Idowu and others (eds), *Encyclopedia of Corporate Social Responsibility* (Springer 2013) <https://doi.org/10.1007/978-3-642-28036-8_77> accessed 24 May 2021.

⁴² Ian Thomson and Susan Joyce, ‘The Social Licence to Operate: What It Is and Why Does It Seem so Difficult to Obtain?’, *Prospectors and Developers Association of Canada Convention, Toronto, Ontario, Canada* (2008).

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ ‘Democracy, Human Rights and Governance | U.S. Agency for International Development’ (26 March 2021) <<https://www.usaid.gov/democracy>> accessed 21 May 2021.

⁴⁷ Environmental Research Institute Science Technology and Environment Agency Lao People’s Democratic Republic, ‘Public Participation in Development Projects

Arguably, development, particularly at the local level, can be made much more effective by active public participation where effective civic action can hold governments accountable⁴⁸ and ensure that the decisions of government are in line with the needs of citizens and thus potentially solve failures in government that plague most poor countries including; wastage and leakage, unequal access, corruption, and poor coordination.⁴⁹

Communities are mostly impacted upon by investments and development projects through what is popularly known as the impact investing, defined which is “part of the decades-old tradition of corporate social responsibility that holds domestic and international financial institutions and corporations accountable for harmful employment, community, or environmental impacts.”⁵⁰ Impact investments have also defined as “investments made into companies, organizations, and funds with the intention to generate social and environmental impact alongside a financial return.”⁵¹ As far as impact investment in Kenya is concerned, Kenya has in the recent past been ranked highly compared to its East African counterparts,

in LAO PDR” < http://pdf.wri.org/mekong_governance_mreg_eri.pdf > accessed 21 May 2021.

⁴⁸ ‘How Can Participatory Development Be Improved? | Devex’ <<https://www.devex.com/news/how-can-participatory-development-be-improved-80472>> accessed 24 May 2021; ‘Determinants of Public Participation in Kenya County Governments - Antony Mbithi, Damiana Ndambuki, Fredrick Owino Juma, 2019’ <<https://journals.sagepub.com/doi/full/10.1177/0021909618794028>> accessed 24 May 2021; Berner, M. M., Amos, J. M., & Morse, R. S., “What constitutes effective citizen participation in local government? Views from city stakeholders.” *Public Administration Quarterly* (2011): 128-163; Alessandra Ricciardelli, ‘Governance, Local Communities, and Citizens Participation’ in Ali Farazmand (ed), *Global Encyclopedia of Public Administration, Public Policy, and Governance* (Springer International Publishing 2017) <https://doi.org/10.1007/978-3-319-31816-5_3221-1> accessed 24 May 2021.

⁴⁹ Devex Editor // 11 March 2013, ‘How Can Participatory Development Be Improved?’ (*Devex*, 11 March 2013) <<https://www.devex.com/news/sponsored/how-can-participatory-development-be-improved-80472>> accessed 21 May 2021.

⁵⁰ Ronald Phillips, ‘Impact Investing and Community Development’ (2016) 25 *Maine Policy Review* 63, 63.

⁵¹ Castano, T., “Preparing for Impact: Five Ideas to Maximize the Potential of Impact Investing”, New Start New Jersey, April 2017, 1< <https://ideas.nsnj.org/wp-content/uploads/2017/08/NSNJ-Preparing-for-Impact.pdf> > accessed 21 May 2021.

with Kenya representing nearly half of impact capital disbursed in East Africa—more than USD 650 million by non-development finance institutions (non-DFIs) impact investors and more than USD 3 billion by development finance institutions (DFIs), and more than triple the amount deployed in each of Uganda and Tanzania, the countries with the next highest amounts at around 13% and 12% respectively.⁵²

It has been observed that ‘while governments at every level –local, state, national –determine how to meet fundamental needs with constrained resources, impact investing continues to mature into a vehicle for innovative, socially oriented enterprises, where the convergence of these two macro-level developments can create opportunities for stakeholders and communities.’⁵³

The success of development activities is thus closely linked with the status of respect for human rights for concerned communities as well as how effectively these communities are involved in the processes leading to the negotiations leading to the seating up and operation of investment and development projects.

3. Kenya’s Legal and Policy Framework on Meaningful Public Participation in Development Projects: Challenges and Prospects

Kenya’s position as a global investment destination has been improving significantly, with the World Bank’s latest ‘Ease of Doing Business’ ratings identifying Kenya as one of the most notably improved countries globally,

⁵² ‘Kenya Tops East Africa Blocs in Impact Investment - Ministry of Industrialization, Trade and Enterprise Development (MoITED)’ <<https://www.industrialization.go.ke/index.php/media-center/blog/240-kenya-tops-east-africa-bloc-in-impact-investment>> accessed 23 May 2021; ‘Kenya: The Country Impact Investors Cannot Afford to Ignore’ (20 January 2020) <<https://www.pioneerspost.com/news-views/20200120/kenya-the-country-impact-investors-cannot-afford-ignore>> accessed 23 May 2021; Global Impact Investing Network and Open Capital Advisors, *The Landscape for Impact Investing in East Africa* (ETHIOPIA 2015).

⁵³ Castano, T., “Preparing for Impact: Five Ideas to Maximize the Potential of Impact Investing”, New Start New Jersey, April 2017, 1< <https://ideas.nsnj.org/wp-content/uploads/2017/08/NSNJ-Preparing-for-Impact.pdf>> accessed 21 May 2021.

progressing 24 places in two years from 80th in 2017 to 56th in 2019.⁵⁴ During the said period, the flow of foreign direct investment also saw a significant step up in 2018, increasing by 27 per cent to \$1.6 billion, according to the United Nations Conference on Trade and Development (UNCTAD).⁵⁵ In order to strengthen the private sector which is considered to be crucial to implementing the President's Big Four Agenda, and foreign direct investment which has a key role in increasing private sector activity, the Kenyan Government has been working towards increased foreign direct investment by taking steps to facilitate private enterprise and foreign investment, for instance, through predictable regulatory and tax practices.⁵⁶ The Presidency's *Big Four Agenda* which is a 5-year development plan under 4 key pillars, namely: food security, affordable housing, manufacturing, and affordable healthcare for all.⁵⁷

This section highlights the regulatory framework which should guide the investment and development plans to also ensure that the same positively impacts on the livelihoods of its people. Specifically, it looks at the provisions that are aimed at enhancing and promoting public participation in development as part of ensuring that there is promotion of the development, transfer, dissemination and diffusion of environmentally sound technologies to developing countries on favourable terms, including on concessional and preferential terms, as mutually agreed, as envisaged under SDG 17, Target 17.7. Notably, the push for economic growth cannot only be driven by Kenya's Government but also by its people, hence the need for active and meaningful participation of the people.⁵⁸

⁵⁴ 'What's the Role of an Impact Investor like CDC in Kenya?' (CDC Group) <<https://www.cdcgroup.com/en/news-insight/insight/articles/whats-the-role-of-an-impact-investor-like-cdc-in-kenya/>> accessed 23 May 2021.

⁵⁵ Ibid.

⁵⁶ 'What's the Role of an Impact Investor like CDC in Kenya?' (CDC Group) <<https://www.cdcgroup.com/en/news-insight/insight/articles/whats-the-role-of-an-impact-investor-like-cdc-in-kenya/>> accessed 23 May 2021.

⁵⁷ 'The Big 4 - Empowering the Nation' <<https://big4.delivery.go.ke/>> accessed 25 December 2020.

⁵⁸ 'What's the Role of an Impact Investor like CDC in Kenya?' (CDC Group) <<https://www.cdcgroup.com/en/news-insight/insight/articles/whats-the-role-of-an-impact-investor-like-cdc-in-kenya/>> accessed 23 May 2021.

a. Constitution of Kenya 2010

Articles 2(5) and (6) of the Constitution of Kenya 2010⁵⁹ provide that the general rules of international law, and any treaty or convention ratified by Kenya, form part of the laws of Kenya, thus binding Kenya to observe its human rights obligations under international bill of human rights.⁶⁰

The Constitution of Kenya 2010 recognises public participation as an important component of governance in Kenya. Article 10 thereof provides for the national values and principles of governance which include the following: (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; (c) good governance, integrity, transparency and accountability; and (d) sustainable development (Emphasis added).⁶¹ These national values and principles of governance are to bind all State organs, State officers, public officers and all persons whenever any of them- (a) applies or interprets this Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions.⁶²

Article 20 of the Constitution of Kenya states that the Bill of Rights binds all state organs and all persons, which persons are defined under Article 260 as including a “company, association or other body of persons whether incorporated or unincorporated.”

Regarding public participation, one of the great motivations for the devolved system of governance in the country was to boost public participation, as captured under the Fourth Schedule Part 2 (14) of the Constitution of Kenya which provides that one of the functions of the County governments is ensuring and coordinating the participation of communities and locations in governance at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of the functions

⁵⁹ Republic of Kenya, Constitution of Kenya 2010 (Government Printer, Nairobi, 2010).

⁶⁰ See also Treaty Making and Ratification Act, No. 45 of 2012, Laws of Kenya.

⁶¹ Constitution of Kenya 2010, Article 10(2).

⁶² Constitution of Kenya 2010, Article 10(1).

and powers and participation in governance at the local level.⁶³ Similarly, Sections 87 to 92 and 115 of the County Governments Act, 2012⁶⁴ outline the principles of public participation and the procedure for facilitating public participation in County government governance and administration matters.

The Constitution also outlines the obligations of the State in respect of the environment which include, *inter alia*: encourage public participation in the management, protection and conservation of the environment; and establish systems of environmental impact assessment, environmental audit and monitoring of the environment.⁶⁵ However, it is worth pointing out that ‘every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources’.⁶⁶

The Constitution obligates all State organs and all public officers to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.⁶⁷

b. Environment (Management and Co-ordination) Act, 1999

The *Environmental Management and Co-ordination Act, 1999*⁶⁸ (EMCA) provides for “environmental audit and monitoring”⁶⁹ and “environmental impact assessment”⁷⁰, among others, which are meant to ensure that all persons take care of the environment while carrying out any activities which may adversely affect the environment. Strategic Environmental Assessment

⁶³ Fourth Schedule Part 2 (14), Constitution of Kenya 2010.

⁶⁴ County Governments Act, No. 17 of 2012, Laws of Kenya.

⁶⁵ Article 69 (1), Constitution of Kenya, 2010.

⁶⁶ Article 69 (2), Constitution of Kenya, 2010.

⁶⁷ Article 21(3), Constitution of Kenya, 2010.

⁶⁸ Environmental Management and Co-ordination Act, No. 8 of 1999, Laws of Kenya.

⁶⁹ Ibid, sec. 68;69.

⁷⁰ Ibid, secs 58-67; see also Environmental Management and Co-ordination (Amendment) Act, 2015 (No. 5 of 2015), sec. 57A (1) provides that “all Policies, Plans and Programmes for implementation shall be subject to Strategic Environmental Assessment”.

(SEA) is defined as the process by which environmental considerations are required to be fully integrated into the preparation of *policies, plans and programmes* and prior to their final adoption (emphasis added).⁷¹ Environmental impact assessment means a systematic examination conducted to determine whether or not a programme, activity or project will have any adverse impacts on the environment.⁷² Environmental audit means the systematic, documented, periodic and objective evaluation of how well environmental organisation, management and equipment are performing in conserving or preserving the environment.⁷³ Strategic Environmental and Social Assessment (SESA) is seen to be a more effective tool since it integrates the social issues that are likely to emerge and not just the environmental considerations.⁷⁴

The implementation of this Act is to be guided by the following principles of Sustainable Development: (a) the principle of public participation in the development of policies, plans and processes for the management of the environment; (b) the cultural and social principles traditionally applied by any community in Kenya for the management of the

⁷¹ Environmental protection Agency, 'Strategic Environmental Assessment,' available at <http://www.epa.ie/monitoringassessment/assessment/sea/#.Vi5tmGuJ2CA>. S. 57(2), EMCA, provides that for the avoidance of doubt, the plans, programmes and policies (referred to in the Act) are those that are- (a) subject to preparation or adoption by an authority at regional, national, county or local level, or which are prepared by an authority for adoption through a legislative procedure by Parliament, Government or if regional, by agreements between the governments or regional authorities, as the case may be; (b) determined by the Authority as likely to have significant effects on the environment.

⁷² *Environmental Management and Co-Ordination Act*, No 8 of 1999 (Government Printer, Nairobi, 1999), s.2.

⁷³ *Ibid.*

⁷⁴ Notably, the *Energy Act*, No. 1 of 2019, Laws of Kenya, requires under sec. 107 that a person who intends to construct a facility that produces energy using coal shall, before commencing such construction, apply in writing to the Authority for a permit to do so. Such an application must be accompanied by, inter alia, a Strategic Environment Assessment and Social Impact Assessment licenses. Also notable are the provisions of s. 57A(1) of the *Environmental Management Co-ordination (Amendment) Act 2015* which are to the effect that all policies, plans and programmes for implementation shall be subject to Strategic Environmental Assessment.

environment or natural resources in so far as the same are relevant and are not repugnant to justice and morality or inconsistent with any written law;(c) the principle of international co-operation in the management of environmental resources shared by two or more states;(d) the principles of intergenerational and intragenerational equity;(e) the polluter-pays principle; and (f) the pre-cautionary principle.⁷⁵

EMCA outlines various environmental offences which include offences related to inspection, Environmental Impact Assessment, records and standards and offences related to hazardous wastes.⁷⁶ The Act also prescribes penalties for these offences.⁷⁷

c. Kenya National Action Plan on Business and Human Rights

The *Kenya national action plan on business and human rights For the Implementation of the United Nations Guiding Principles on Business and Human Rights*⁷⁸ (NAP) was drafted to domesticate the UN Guiding Principles on Business and Human Rights focusing on five thematic issues identified by stakeholders, namely: Land and Natural Resources; labour rights; revenue transparency; environmental protection; and access to remedy.⁷⁹ The objectives of this NAP are: To guide the State as it fulfils its duty to protect individuals and communities from business-related human rights abuses, consistent with its domestic and international obligations; To guide businesses on the measures they should undertake to meet their responsibility to respect human rights in their operations; To offer a roadmap of strengthening access to State-based judicial and non-judicial remedies for victims of business-related harm and to promote human rights due diligence by businesses, ensuring that they play their role in the attainment of SDGs in a manner that respects human rights; and to form a basis for dialogue between the State, businesses, individuals

⁷⁵ Environmental Management and Co-ordination Act, sec. 3(5).

⁷⁶ EMCA, s.137-146.

⁷⁷ Ibid.

⁷⁸ Republic of Kenya, Kenya national action plan on business and human rights For the Implementation of the United Nations Guiding Principles on Business and Human Rights, June 2019<
https://www.ohchr.org/Documents/Issues/Business/NationalPlans/2019_FINAL_BHR_NAP.PDF> accessed 23 May 2021.

⁷⁹ Ibid, p. ii.

and communities whose rights are adversely impacted by business operations, and civil society organisations on promoting respect for human rights by businesses.⁸⁰ The NAP outlines policy actions aimed at enhancing State duty to protect human rights as well as those aimed at enhancing and upholding corporate responsibility to respect human rights.⁸¹ NAP is a step in the right direction and has the potential to enhance respect for human rights in the country.

The above national constitutional, policy and statutory instruments are not exhaustive as there are other various government policies, programmes, plans and actions meant to achieve the frameworks outline above.

4. Upholding Human Rights and Meaningful Public Participation in Development Projects

Kenya seeks to achieve economic and social development that positively impacts on its people while also seeking to achieve sustainable development, with the Kenya's Vision 2030⁸², the national development initiative, seeking to transform Kenya into an industrialised middle-income country by 2030.⁸³ Notably, President Uhuru Kenyatta's 'Big Four' development agenda which is part of this journey aims to deliver 500,000 affordable homes, achieve universal healthcare coverage, raise the share of manufacturing in the economy from 9 to 15 per cent, and improve food security – all by 2022.⁸⁴ Fundamental rights of citizens are considered to be the bedrock for managing and mitigating conflict, spurring economic growth, and protecting human dignity where countries with democratic freedoms are more just, peaceful, and stable, and citizens can fulfill their potential.⁸⁵

⁸⁰ Ibid, p. 11.

⁸¹ Ibid, chapter two.

⁸² Republic of Kenya, *Sessional paper No. 10 of 2012 On Kenya Vision 2030*, (Government Printer, 2012).

⁸³ 'What's the Role of an Impact Investor like CDC in Kenya?' (*CDC Group*) <<https://www.cdcgroup.com/en/news-insight/insight/articles/whats-the-role-of-an-impact-investor-like-cdc-in-kenya/>> accessed 23 May 2021.

⁸⁴ Ibid.

⁸⁵ 'Democracy, Human Rights and Governance | U.S. Agency for International Development' (26 March 2021) <<https://www.usaid.gov/democracy>> accessed 21 May 2021.

In addition, it has been opined that countries that are democratic, respect the rights of their citizens and observe the rule of law at home and abroad are also safer places to live, work and trade.⁸⁶

4.1 Addressing the Lack of Political Goodwill to enhance Public Participation

It has been suggested that in order to enhance effective public participation, the duty bearers should do the following: ensuring that as duty bearers (leaders) they are accessible to and represent citizens; ensuring existence of forums and opportunities for citizens to participate and engage in matters affecting their lives; providing civic education; developing effective communication channels with citizens; providing timely information to citizens on critical and emerging issues; and providing resources to facilitate public participation.⁸⁷

There is a need for promoting effective and meaningful public participation of communities in development activities in order to ensure that their rights are not only protected but also ensure that they benefit from the targeted development projects in order to improve their livelihoods.⁸⁸ Leaders should work closely with their constituents as a way of not only identifying their challenges but also ensuring that any investment projects within their localities are held accountable as per the law.

⁸⁶ ‘The Role of Human Rights, Democracy, and Good Governance in Promoting Sustainable Development’ (GSDRC) <<https://gsdrc.org/document-library/the-role-of-human-rights-democracy-and-good-governance-in-promoting-sustainable-development/>> accessed 21 May 2021.

⁸⁷ Uraia, ‘What is Public Participation?’ <https://uraia.or.ke/wp-content/uploads/2016/11/Citizen-Participation-BOOKLET.pdf> accessed 21 May 2021.

⁸⁸ ‘Rural Development ∴ Sustainable Development Knowledge Platform’ <<https://sustainabledevelopment.un.org/topics/ruraldevelopment/decisions>> accessed 24 May 2021; ‘Making the Case: Effective Public Participation Is Good for Business in the Mekong Region | Pact’ <<https://www.pactworld.org/library/making-case-effective-public-participation-good-business-mekong-region>> accessed 24 May 2021.

4.2 Eradicating Illiteracy for Community Empowerment

The United Nations Environmental Assembly (UNEA) asserts that this development path should maintain, enhance and, where necessary, rebuild natural capital as a critical economic asset and source of public benefits, especially for poor people whose livelihoods and security depend strongly on nature.⁸⁹

It is estimated that ‘more than one billion people in the world live in abject poverty on less than \$1.25 per day while the richest 1% people have almost half of the world’s wealth, leading to the conclusion that there is a huge gap and inequality in the distribution of the world economy’.⁹⁰ The high rates of poverty are more pronounced in developing countries mainly in the African continent,⁹¹ despite the fact that Africa as a continent is endowed with immense natural and human resources as well as great cultural, ecological and economic diversity.⁹² Some of the causes of poverty in Africa include,

⁸⁹ ‘What Is an “Inclusive Green Economy”? | UNEP - UN Environment Programme’ <<https://www.unenvironment.org/explore-topics/green-economy/why-does-green-economy-matter/what-inclusive-green-economy>> accessed 24 December 2020.

⁹⁰ ‘Poverty Is a Human Rights Violation | Apolitical’ (17 June 2020) <https://apolitical.co/en/solution_article/poverty-is-a-human-rights-violation> accessed 24 December 2020.

⁹¹ ‘Poverty in Africa Is Now Falling—but Not Fast Enough’ <<https://www.brookings.edu/blog/future-development/2019/03/28/poverty-in-africa-is-now-falling-but-not-fast-enough/>> accessed 25 December 2020; Chandy L, ‘Why Is the Number of Poor People in Africa Increasing When Africa’s Economies Are Growing?’ (*Brookings*, 30 November 1AD) <<https://www.brookings.edu/blog/africa-in-focus/2015/05/04/why-is-the-number-of-poor-people-in-africa-increasing-when-africas-economies-are-growing/>> accessed 25 December 2020; ‘On the Poorest Continent, the Plight of Children Is Dramatic’ (*SOS-US-EN*) <<https://www.sos-usa.org/SpecialPages/Africa/Poverty-in-Africa>> accessed 25 December 2020; ‘Poverty and Development in Africa’ <<https://www.globalpolicy.org/social-and-economic-policy/poverty-and-development/poverty-and-development-in-africa.html>> accessed 25 December 2020.

⁹² ‘Poverty and Development in Africa’ <<https://www.globalpolicy.org/social-and-economic-policy/poverty-and-development/poverty-and-development-in-africa.html>> accessed 25 December 2020; Muigua K, *Utilizing Africa’s Natural Resources to Fight Poverty* (2014) <<http://kmco.co.ke/wp-content/uploads/2019/06/Utilizing-Africas-Natural-Resources-to-Fight-Poverty-26th-March2014.pdf>> accessed 25 December 2020.

inter alia, population growth, war and crises, climate change, illnesses, inadequate agricultural infrastructure, and unjust trade structures.⁹³

SDG Goal 1 seeks to ensure that State Parties end poverty in all its forms everywhere by the year 2030.⁹⁴ Human poverty may also be perceived as a

⁹³ 'On the Poorest Continent, the Plight of Children Is Dramatic' (SOS-US-EN) <<https://www.sos-usa.org/SpecialPages/Africa/Poverty-in-Africa>> accessed 25 December 2020.

⁹⁴ SDG Goal 1, United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1.

The related targets include:

1.1 By 2030, eradicate extreme poverty for all people everywhere, currently measured as people living on less than \$1.25 a day.

1.2 By 2030, reduce at least by half the proportion of men, women and children of all ages living in poverty in all its dimensions according to national definitions.

1.3 Implement nationally appropriate social protection systems and measures for all, including floors, and by 2030 achieve substantial coverage of the poor and the vulnerable.

1.4 By 2030, ensure that all men and women, in particular the poor and the vulnerable, have equal rights to economic resources, as well as access to basic services, ownership and control over land and other forms of property, inheritance, natural resources, appropriate new technology and financial services, including microfinance.

1.5 By 2030, build the resilience of the poor and those in vulnerable situations and reduce their exposure and vulnerability to climate-related extreme events and other economic, social and environmental shocks and disasters.

1.A Ensure significant mobilization of resources from a variety of sources, including through enhanced development cooperation, in order to provide adequate and predictable means for developing countries, in particular least developed countries, to implement programmes and policies to end poverty in all its dimensions.

1.B Create sound policy frameworks at the national, regional and international levels, based on pro-poor and gender-sensitive development

denial of human rights as it arguably infringes on, among others, human freedom and destroys human dignity. It is viewed as an intrusion into human dignity.⁹⁵

Basic human rights are an integral part of human rights and their violation has been seen as sabotage of human dignity.⁹⁶ Education is considered to be *a key driver to transform lives*, build peace, eradicate poverty, and drive sustainable development, (Emphasis added)⁹⁷ as education promises to free all citizens from the shackles of ignorance, poverty, and disempowerment, and endow them with the capacity to be architects of their destiny, and catalysts of entrepreneurship, innovation, and global citizenship.⁹⁸

The *World Declaration on Education for All, 1990*⁹⁹ provides that ‘every person – child, youth and adult – shall be able to benefit from educational opportunities designed to meet their basic learning needs. These needs comprise both essential learning tools (such as literacy, oral expression, numeracy, and problem-solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to

strategies, to support accelerated investment in poverty eradication actions.

⁹⁵ Rukooko, A.B., ‘Poverty and human rights in Africa: historical dynamics and the case for economic social and cultural rights’, *The International Journal of Human Rights*, Vol. 14, Iss. 1, 2010.

⁹⁶ *Vienna Declaration and Programme of Action*, Article 25, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

⁹⁷ ‘Why Africa Needs to Ensure Inclusive and Equitable Quality Education and Lifelong Learning for All | Blog | Global Partnership for Education’ <<https://www.globalpartnership.org/blog/why-africa-needs-ensure-inclusive-and-equitable-quality-education-and-lifelong-learning-all>> accessed 7 December 2020.

⁹⁸ Ibid.

⁹⁹ World Conference on Education for All: Meeting Basic Learning Needs. 1990. *World declaration on education for all and framework for action to meet basic learning needs adopted by the World Conference on Education for All: Meeting Basic Learning Needs, Jomtien, Thailand, 5-9 March 1990*. New York, N.Y.: Inter-Agency Commission (UNDP, UNESCO, UNICEF, World Bank) for the World Conference on Education for All.

participate fully in the development, to improve the quality of their lives, to make informed decisions, and to continue learning.¹⁰⁰

The *General Comment No. 13 on the Right to Education*¹⁰¹ states that ‘as an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth’.¹⁰²

The *International Covenant on Economic, Social, and Cultural Rights (ICESCR)*¹⁰³ states that the ‘States Parties to the Covenant agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance, and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace’.¹⁰⁴

By eradicating illiteracy amongst communities, it is possible to empower them to not only participate meaningfully in development projects and decision-making processes but also to be meaningfully employed in the projects.

¹⁰⁰ World Declaration on Education for All, 1990, Article 1(1).

¹⁰¹ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10.

¹⁰² Ibid, para. 1.

¹⁰³ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

¹⁰⁴ Ibid, Article 13(1).

4.3 Enhancing Corporate Social Responsibility for Human Rights Violations

The UN Guiding Principles on Business and Human Rights were drafted and endorsed in recognition of: States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms; the role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights; and the need for rights and obligations to be matched to appropriate and effective remedies when breached.¹⁰⁵ The 31 principles therein "seek to provide for the first time an authoritative global standard for preventing and addressing the risk of adverse human rights impacts linked to business activity".¹⁰⁶

Notably, the Principles obligate the States to protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.¹⁰⁷ Regarding the corporate responsibility to respect human rights, the Principles require that Business enterprises should respect human rights.¹⁰⁸ This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.¹⁰⁹ Additionally, in order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should: (a) Draw on internal and/or independent external human rights expertise; (b) Involve *meaningful consultation* (Emphasis added) with potentially affected groups and other relevant

¹⁰⁵ UN Guiding Principles on Business and Human Rights, Resolution 17/4, 16 June 2011.

¹⁰⁶ Stefanie Ricarda Roos, 'UN Guiding Principles on Business and Human Rights' in Samuel O Idowu and others (eds), *Encyclopedia of Corporate Social Responsibility* (Springer 2013) <https://doi.org/10.1007/978-3-642-28036-8_746> accessed 24 May 2021.

¹⁰⁷ UN Guiding Principles on Business and Human Rights, 3.

¹⁰⁸ UN Guiding Principles on Business and Human Rights, 13-16.

¹⁰⁹ Ibid, 13.

stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.¹¹⁰

There is a need for the government of Kenya to effectively enforce the NAP in order to ensure that corporations observe and respect human rights especially those of communities living within the localities where their projects are situated.

4.4 Promoting Meaningful and Effective Impact Assessment Processes

It has been observed that the issues raised in the Lamu Port construction project could have been averted if due process had been followed from the project's inception¹¹¹ including: timely and adequate compensation to everyone affected by the project; proper and robust environmental and social impact assessments; considering qualified residents for employment opportunities; and addressing the perennial problems of land rights in Lamu, all aimed at ensuring that the Lamu residents are treated as direct stakeholders and partners to the project where their voices, concerns and aspirations are taken seriously.¹¹²

The government should continually establish efficient systems of Strategic Environmental Assessment (SEA), Environmental Impact Assessment (EIA), Strategic Environmental and Social Assessment (SESA) and Environmental Audit and Monitoring of the environment and Environmental Security Assessment (ESA) and ensure that the same are periodically reviewed to ensure that they remain effective.

There is a need to ensure that these EIA processes are not only carried out as a formality but are also reflective of what is on the ground and there should also be a follow up mechanism to ensure that the companies engage the communities throughout and that they continually carry out their duties as

¹¹⁰ Ibid, 19.

¹¹¹ Benard Musembi Kilaka and Jan Bachmann, 'Kenya Launches Lamu Port. But Its Value Remains an Open Question' (*The Conversation*) <<http://theconversation.com/kenya-launches-lamu-port-but-its-value-remains-an-open-question-161301>> accessed 24 May 2021.

¹¹² Ibid .

per the law and the assessment reports.¹¹³ There is also a need for the government to follow up on local content provisions such as those provided for under the regime regulating extractives industry in Kenya, namely, *Mining (Dealings in Minerals) Regulations, 2017*; *Mining (Licence and Permit) Regulations, 2017*; *Mining (Work Programmes and Exploration Reports) Guidelines, 2017*; *Mining (State Participation) Regulations, 2017*; *Mining (Use of Local Goods and Services) Regulations, 2017*; *Mining (Employment and Training) Regulations, 2017*; and *Mining (Use Of Assets) Regulations, 2017*.

The *Mining (Use of Local Goods and Services) Regulations, 2017*¹¹⁴ were enacted to- promote job creation through the use of local expertise, goods and services, businesses and financing in the mining industry value chain and their retention in the country; achieve the minimum local level and in-country spend for the provision of the goods and services in the mining industry value chain; increase the capability and international competitiveness of domestic businesses; create mining and mineral related support industries that will provide jobs and sustain economic development; achieve and maintain a degree of participation for Kenyans or companies incorporated in Kenya for the supply of goods and the provision of services; and provide for a robust, transparent monitoring and reporting system in relation to the use of goods and services.¹¹⁵

¹¹³ 'Chapter 3: EIA Process' <<http://www.fao.org/3/V8350E/v8350e06.htm>> accessed 24 May 2021; '1.7 Overview of the Stages of the EIA Process' <https://www.soas.ac.uk/cedep-demos/000_P507_EA_K3736-Demo/unit1/page_14.htm> accessed 24 May 2021; 'Our Role in Securing Public Participation in the Kenyan Legislative and Policy Reform Process' (*Natural Justice*, 23 July 2020) <<https://naturaljustice.org/our-role-in-securing-public-participation-in-the-kenyan-legislative-and-policy-reform-process/>> accessed 24 May 2021; 'Accountability, Transparency, Participation, and Inclusion: A New Development Consensus? - Carnegie Endowment for International Peace' <<https://carnegieendowment.org/2014/10/20/accountability-transparency-participation-and-inclusion-new-development-consensus-pub-56968>> accessed 24 May 2021.

¹¹⁴ *Mining (Use of Local Goods and Services) Regulations, 2017*, Legal Notice No. 83 of 2017, Laws of Kenya.

¹¹⁵ *Mining (Use of Local Goods and Services) Regulations, 2017*, Regulation 3.

The *Mining (Employment and Training) Regulations, 2017*¹¹⁶ were enacted to- promote job creation through the use of local expertise in the mining industry, the entire mining value chain and to retain the requisite skills within the country; develop local capacities in the mining industry value chain through education, skills and technology transfer, research and development; and achieve the minimum local employment level and in-country spend across the entire mining industry value chain.¹¹⁷

These are some of the regulations that can go a long way in enhancing Public Participation in development projects as well as empowering communities as a way of upholding their human rights through changing their lives and ensuring that they hold both the government and the investors accountable as far as environmental and socio-economic obligations are concerned.

4.5 Addressing Corruption

The various laws and regulations dealing with the investment and development regime in the country, if fully enforced, can be a useful tool in fighting corruption and tax evasion by the investors as they seek to promote accountability and transparency on the income and expenses incurred by these companies.¹¹⁸ These Regulations, alongside other transparency and accountability measures and practices are useful for developing countries such as Kenya, where non-declaration or under declaration of profits by the multinationals has been happening.¹¹⁹ They can however work even better

¹¹⁶ *Mining (Employment and Training) Regulations, 2017*, Legal Notice No. 82, Laws of Kenya.

¹¹⁷ *Mining (Employment and Training) Regulations, 2017*, Regulation 3.

¹¹⁸ 'Helping Countries Combat Corruption: The Role of the World Bank' <<http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm>> accessed 24 May 2021; 'Influencing Governments on Anti-Corruption Using Non-Aid Means' (*U4 Anti-Corruption Resource Centre*) <<https://www.u4.no/publications/influencing-governments-on-anti-corruption-using-non-aid-means>> accessed 24 May 2021; G Shabbir Cheema and Jean Bonvin, 'Corruption and Integrity Improvement Initiatives in Developing Countries'.

¹¹⁹ 'Accountability, Transparency, Participation, and Inclusion: A New Development Consensus? - Carnegie Endowment for International Peace' <<https://carnegieendowment.org/2014/10/20/accountability-transparency-participation-and-inclusion-new-development-consensus-pub-56968>> accessed 24 May 2021; Susan Rose-Ackerman, 'The Challenge of Poor Governance and Corruption' (2005) 2005 *Revista Direito GV* 207; PMJRO Cheruiyot and others,

where communities are actively and meaningfully involved in the various stages of the projects.

It has been suggested that good institutional governance - specifically, a strong public voice with accountability, strong political stability, good regulations, and powerful anticorruption policies tend to conduce a positive relationship between natural resource richness and economic development.¹²⁰

4.6 Promoting Civil Education

In the High Court case of *Mohamed Ali Baadi and others v Attorney General & 11 others* [2018] eKLR, the Court rightly pointed out that access to information is a key pillar in the environmental governance scheme in our Constitution because effective Public Participation in decision-making depends on full, accurate and up-to-date information.¹²¹

With enhanced literacy levels, it is possible to carry out civic education regarding various challenges that arise from given projects and also for communities to fully appreciate the merits and demerits of certain projects and also appreciate the compromises that they need to make, if any.¹²²

4.7 Promoting Fair and Equitable International Trade and Investments Regimes

Previous studies on the role of citizens in trade and investment agreements processes have concluded that the declared objectives of the treaties for business freedom differ from their underlying and arguably, the nature, indeed if not clearly negative, of the socio-economic benefits that may be

‘Effect of Public Financial Management Practices on Performance in Kericho County Government, Kenya: A Critical Review’ (2017) 5 *International Journal of Education and Research* 211.

¹²⁰ Zeynalov, A., "Do Sufficient Institutions Alter the Relationship between Natural Resources and Economic Growth?" *MPRA Paper* 46850 (2013), at p. 11. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2413867 [Accessed on 16/1/2020].

¹²¹ *Mohamed Ali Baadi and others v Attorney General & 11 others* [2018] eKLR, Petition 22 of 2012.

¹²² ‘The Role of Civic Education’ <https://civiced.org/papers/articles_role.html> accessed 24 May 2021.

expected show that the objective of the free trade agreements is not growth and jobs, or even to protect investments or promote international trade.¹²³ Their only objective and it is a fundamental one, is to guarantee the priority of the rights of multinationals to do business and make profits.¹²⁴

Some commentators, while pointing out the lopsided North-South trade and investment rules, call for review of the current international investment rules to make them more just and equitable ones which will require cooperation between North and South.¹²⁵ Notably, SDG 17 targets require that states should: enhance North-South, South-South and triangular regional and international cooperation on and access to science, technology and innovation and enhance knowledge sharing on mutually agreed terms, including through improved coordination among existing mechanisms, in particular at the United Nations level, and through a global technology facilitation mechanism;¹²⁶ Enhance international support for implementing effective and targeted capacity-building in developing countries to support national plans to implement all the sustainable development goals, including through North-South, South-South and triangular cooperation;¹²⁷ and Promote a universal, rules-based, open, non-discriminatory and equitable multilateral trading system under the World Trade Organization, including through the conclusion of negotiations under its Doha Development Agenda¹²⁸, among others.

5. Conclusion

It has been argued that since Africa's poverty problems run deep, it is only the long process of building democratic institutions and the civil society needed to make them work will bring meaningful development to Africa,

¹²³ Robert Joumard, 'The Free Trade Agreements: Contempt for Citizens, Sovereignty for Multinationals' (*CADTM*, 23 May 2021) <<https://www.cadtm.org/The-free-trade-agreements-contempt>> accessed 24 May 2021.

¹²⁴ Ibid.

¹²⁵ 'Foreign Investors Gone Wild'

<<https://archive.globalpolicy.org/socecon/develop/democracy/2007/0507wild.htm>> accessed 21 May 2021.

¹²⁶ SDG 17 Target 17.6.

¹²⁷ SDG 17, Target 17.9.

¹²⁸ SDG 17, Target 17.10.

where empowerment of local people will ensure long-term poverty reduction.¹²⁹ Some authors have suggested several approaches for the promotion and protection of human rights in the era of globalization: (1) emphasizing state responsibility for the actions of non-state actors; (2) imposing international legal obligations directly on non-state actors, including international institutions, multilateral enterprises, and individuals; (3) encouraging private regulation through corporate codes of conduct, product labeling, and other consumer or corporate actions; and (4) involving non-state actors directly in the activities of international organizations to promote and protect human rights.¹³⁰

The United Nations observes that achieving the 2030 Sustainable Development Agenda requires pooling resources and expertise, channeling public and private expertise, encouraging public and private investments together towards high-growth industrial sectors.¹³¹

Corporate Social Responsibility is arguably becoming less and less voluntary around the world.¹³² There is a need for all the relevant stakeholders to work towards upholding human rights and enhancing meaningful Public Participation of communities in development projects as a way of ensuring that communities not only benefit from the said development projects but also guaranteeing that these communities fully appreciate and support the investments.

¹²⁹ 'Development Requires Local Empowerment'
<<https://archive.globalpolicy.org/soecon/develop/democracy/2006/0927localempowerment.htm>> accessed 21 May 2021.

¹³⁰ Shelton Dinah, 'Protecting Human Rights in a Globalized World', *Human Rights and Corporations* (Routledge 2017).

¹³¹ 'United Nations Supporting Kenya's Post COVID-19 Industrial Recovery and Growth to Achieve Inclusive and Sustainable Growth | United Nations in Kenya' <<https://kenya.un.org/en/126013-united-nations-supporting-kenyas-post-covid-19-industrial-recovery-and-growth-achieve>> accessed 23 May 2021.

¹³² Kathleen Wilburn and Ralph Wilburn, 'Achieving Social License to Operate Using Stakeholder Theory' (2011) 4 J. Int. Bus. Ethics 3.

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<http://www.hdr.undp.org/en/reports/global/hdr1993>."

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<<http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm>>
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<<https://www.sos-usa.org/SpecialPages/Africa/Poverty-in-Africa>> accessed 25 December 2020.

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Conflict within the Triangle: Mediation as a Tool to Enhance Access to Justice for Outsourced Workers in Kenya

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Abstract

Outsourced workers in Kenya face a number of employment-related challenges including dissatisfaction due to their remuneration and other allowances, lack of access to training and facilities for upscaling their skills, and general working conditions including the way they are treated by the management of the client enterprise. Though they face issues similar to workers in standard employment relationships (SERs), access to justice for outsourced worker is sometimes hindered due to the peculiarities of the triangular employment relationship (TER). Employment laws were framed with SERs in mind, and thus trade disputes are defined as differences or apprehended differences between an employer and employee. Outsourced workers relate with two authority figures - the outsourcing company and the client enterprise - who exercise varied levels of control over the workers. The employment status, as well as the rights and obligations of the parties in outsourcing TERs, are not as clear cut as in SERs. With the rise of the practice of outsourcing in Kenya, the Employment and Labour Relations Court has had to innovate to address outsourcing TERs. An alternative solution, which would avoid trying to fit outsourcing TERs into the structure that favours the SER, is alternative dispute resolution mechanisms since they encompass greater flexibility. The objective of this paper is to assess whether mediation can offer outsourced workers access to justice, in view of the peculiarities of outsourcing TERs. This paper presents a background on the nature of triangular employment relationships, as well as an overview of the employment-related challenges faced by outsourced workers. It then considers the pros and cons of mediation in employment dispute resolution, and demonstrates the suitability of mediation to address the challenges faced by outsourced workers in Kenya. It concludes that, whereas the courts

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remain as a viable option to address trade disputes, mediation would be ideal to address outsourced workers' employment-related grievances because it is informal and allows for innovative ways to have win-win solutions.

1. Introduction

Outsourced workers face employment-related challenges several challenges, some of which are similar to those generally faced by employees, and some which are peculiar to outsourcing triangular employment relationships (TERs). Employees can access justice and have employment-related grievances resolved by virtue of the Constitution, employment laws, company policies and procedures, unionization and individual employment contracts. Over the years, there have been progressive attempts towards equalizing the bargaining power within the standard employment relationship (SER).¹ However, attempts to equalize bargaining power have not extended as much towards non-standard forms of work (NSWs).²

Outsourcing is an NSW because it involves multiple parties as compared to the SER which entails a relationship between two parties.³ Outsourcing involves a labour intermediary, an outsourcing company, which hires outsourced workers and avails them to a client enterprise. This leads to a TER.⁴ Research shows that outsourcing places workers in positions of perceived detachment from the client enterprise where they work.⁵ This detachment can lead to feelings of discrimination due to the disparate access to training, unequal remuneration, and the lack of organizational identification.⁶ These feelings of discrimination are more pronounced when the outsourced workers confound the day-to-day control exercised by the client enterprise with legal control, thus perceiving the client enterprise as

¹ Daniel D Barnhizer, 'Inequality of Bargaining Power' (2005) 76 *University of Colorado Law Review* 139; Margaret Jane Radin, 'Market-Inalienability: Making and Selling Babies' [1987] *Harvard Law Review* 174.

² Carole Lang, Isabelle Schömann and Stefan Clauwaert, 'Atypical Forms of Employment Contracts in Times of Crisis' [2013] *ETUI* 5.

³ Ilan Oshri, Julia Kotlarsky and Leslie P Willcocks, *The Handbook of Global Outsourcing and Offshoring* (3rd edn, Springer 2015) 8.

⁴ BPS Van Eck, 'Temporary Employment Services (Labour Brokers) in South Africa and Namibia' (2010) 13 *PER: Potchefstroomse Elektroniese Regsblad* 107.

⁵ Matthew Bidwell and others, 'The Employment Relationship and Inequality: How and Why Changes in Employment Practices Are Reshaping Rewards in Organizations' (2013) 7 *Academy of Management Annals* 61.

⁶ *ibid.*

their employer. This is a peculiarity of the outsourcing TER that may hinder the outsourced workers' access to justice to resolve their employment-related grievances.

The main aim of this paper is to assess whether mediation can offer outsourced workers access to justice, in view of the peculiarities of outsourcing TERs. It contains results that were part of a study that analyzed the legal regulation of outsourcing TERs in Kenya.⁷ This paper presents a background on the nature of outsourcing TERs. It then gives an overview of the employment-related challenges faced by outsourced workers. It then considers the suitability of mediation to address the challenges faced by outsourced workers in Kenya.

2. Nature of Outsourcing Triangular Employment Relationships

Under outsourcing TERs, outsourced workers supply services to a client enterprise without being directly employed by it.⁸ Outsourced workers relate with two authority figures, the outsourcing company and the client enterprise, each with varied levels of control over them.⁹ The outsourcing company exercises legal control because of the employment contract, whereas the client enterprise exercises day-to-day control over the execution of the duties. This splitting and sharing of employer functions affects the outsourced workers' perception of employment status, as well as their employment rights.¹⁰

Outsourced workers are considered to be employees of the outsourcing companies.¹¹ The Industrial Court, which was the court of first instance, opined that Abyssinia used outsourcing as a means to circumvent recognition of the trade union.¹² However, quoting Murgor L.J. in *Kenya Airways v Aviation and Allied Workers Union*, the Court of Appeal emphasized that

⁷ Melissa Muindi, 'An Analysis of the Legal Regulation of Outsourcing Triangular Employment Relationships in Kenya' (University of Nairobi, Kenya ongoing).

⁸ Van Eck (n 4).

⁹ Guy Davidov, 'Joint Employer Status in Triangular Employment Relationships' (2004) 42 *British Journal of Industrial Relations* 727.

¹⁰ Van Eck (n 4); Robert Buch, Bård Kuvaas and Anders Dysvik, 'Dual Support in Contract Workers' Triangular Employment Relationships' (2010) 77 *Journal of Vocational Behavior* 93; Davidov (n 9).

¹¹ *Abyssinia Iron & Steel Limited v Kenya Engineering Workers Union* [2016] eKLR (Court of Appeal).

¹² *Kenya Engineering Workers Union v Abyssinia Iron And Steel Ltd* [2014] eKLR (Industrial Court).

“outsourced services is one such widely accepted business concept, which enables a company to focus on core business, reduce overheads, increase cost and efficiency savings, and manage cyclical resource demands. It is not designed to deprive Kenyans of their jobs”.¹³ The court found that, given the validity of the discharge agreements and the new contracts of employment, the workers had ceased to be employees of Abyssinia. A new employer-employee relationship had been formed between them and the outsourcing company, Jokali. This emphasized the fact that outsourced workers are employees of the outsourcing company. It should be noted though that the employment laws do not define the relationship between the outsourced workers and the client enterprise, which is not an ideal situation.

As employees of the outsourcing company, outsourced workers are entitled to an array of employment rights, as provided for under the employment laws.¹⁴ In addition, outsourced workers are entitled to the constitutional rights granted in the Bill of Rights.¹⁵ In particular, the Constitution of Kenya grants four basic rights to all workers.¹⁶ This means that outsourced workers are entitled to the Constitutional rights to fair remuneration, to reasonable working conditions, to be unionized, to go on strike. It is argued that through this constitutionalization, workers’ rights potentially enjoy better enforcement.¹⁷ However, outsourced workers still face challenges in attaining these employment rights.

¹³ *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR (Court of Appeal) 46.

¹⁴ The Kenyan labour law framework consists primarily of the Employment Act 2007, Labour Institutions Act 2007, the Work Injury Benefits Act 2007, the Labour Relations Act 2007, the Occupational Safety and Health Act 2007 and the Employment and Labour Relations Court Act 2011.

¹⁵ Constitution of Kenya 2010 ch 4. These constitutional rights include the right to be free from slavery, servitude and forced labour; the right to non-discrimination and equal protection of the law; the right to freedom of association; the right to social security; the right to fair labour practices and reasonable working conditions; the right to join, form and participate in the activities of trade unions; and the right to go on strike and to lawfully assemble, demonstrate and picket.

¹⁶ Constitution of Kenya art 41.

¹⁷ Vincent Kiplangat Mutai, ‘Constitutionalizing Labour Rights: “Fair Labour Practices” as a Constitutional Standard in Kenya’ (2016) 12 *The Law Society of Kenya Journal* 27.

It has also been noted with concern that some employers use outsourcing TERs and façade companies to evade employment regulations.¹⁸ In *Aviation and Allied Workers Union v Kenya Airways* Rika J. disapproved the practice of outsourcing, stating *obiter* that:

“Cheap labour... results in a race to the bottom, where countries lower labour standards to have minimal labour regulatory burdens... Outsourcing of labour is contrary to the principles of fair labour practices, sustainable development, and engenders the race to the bottom. It intends to avoid regular employment relationships, employees’ social security and is a vehicle for the lowering of international labour standards.”¹⁹

Though this case was appealed and the judgement overturned, the strong views expressed by the court of first instance reflect an underlying bias against the practice of outsourcing, when the plight of outsourced workers is taken into account. Outsourced workers are viewed as vulnerable because the outsourcing TER places them in positions of perceived detachment.²⁰ In addition, the means of redressing their employment-related grievances may be inadequate. This paper addresses this gap by assessing whether mediation can offer outsourced workers access to justice to enhance the resolution of their employment-related grievances. The next section provides an overview of these employment-related grievances.

3. Outsourced Workers’ Employment-Related Grievances

The challenges discussed in this section are based on a study analyzing the legal regulation of outsourcing TERs in Kenya.²¹ The respondents were outsourced workers engaged under outsourcing TERs. The qualitative data was collected using in-depth telephone interviews.²² This approach led to the uncovering of hitherto undiscovered issues, as well as interpreting a social phenomenon through the eyes of its participants.²³

¹⁸ *Phillip Ateng Oguk & 27 others v Westmont Power [Kenya] Limited & another* [2015] eKLR (Industrial Court).

¹⁹ *Aviation and Allied Workers Union v Kenya Airways Limited & 3 others* [2012] eKLR (Industrial Court) [39].

²⁰ Bidwell and others (n 5).

²¹ Melissa Muindi (n 7).

²² Since the field study was conducted in 2020, the narrative collection methods were adapted to suit the coronavirus pandemic precautionary measures.

²³ Alan Bryman, *Social Research Methods* (4th edn, Oxford University Press 2012) 380.

3.1 Overview of employment-related grievances

The resolution of employment-related grievances was a key aspect discussed in the field study. It was found that 88 per cent of the outsourced workers reported general dissatisfaction with some aspects of being an outsourced worker. These revolved around their working conditions, their treatment by the client enterprise's managerial staff and permanent employees, and their remuneration and other allowances. 67 per cent of the respondents complained that their remuneration was lower than that of the client enterprise's permanent workers. One outsourced worker expressed frustration with the fact that her remuneration remained the same even when she transitioned between client enterprises. She complained that outsourcing provided no growth or possibility of promotion, whereas employees integrated into a company had such possibilities.

Other dissatisfactions included lack of access to training and facilities for upscaling their skills.²⁴ Outsourced workers were also often excluded from staff meetings.²⁵ This showed a difference in the management of permanent and outsourced workers, albeit being subtle and unofficial. Another grievance related to the lack of unionization. Most outsourced workers were unaware that the constitutional right to be unionized applied to them; they perceived it a right that could only be granted to employees.²⁶ They expressed a general inability and awareness on joining trade unions.

Job insecurity was another grievance experienced because of their impermanence.²⁷ In addition, the concept of working for two different authority figures led to challenges in meeting the expectations of both authority figures.²⁸ The outsourced workers also complained of conflicting

²⁴ It was noted that it was difficult across the board for outsourced workers to access occupational-related trainings. However, 27 per cent of the outsourced workers were able to access training from the client enterprises and 11 per cent through the outsourcing companies whereas 62 per cent took care of their own professional development based on what they could afford.

²⁵ This brought about a perceived detachment from the client enterprise. Though, it was also noted that 27 per cent of the respondents saw freedom in the exclusion from organizational bureaucracy.

²⁶ Constitution of Kenya art. 41.

²⁷ Holger Görg and Dennis Görlich, 'Offshoring, Wages and Job Security of Temporary Workers' (2015) 151 *Review of World Economics* 533; Monica Belcourt, 'Outsourcing—The Benefits and the Risks' (2006) 16 *Human resource management review* 269.

²⁸ On one end of the spectrum, the outsourcing company's roles were extensive and outsourced workers had a stable relationship with the outsourcing company. On the

policies and practices on employment matters such as overtime. Further, managerial decisions involving the outsourced workers often took a longer period of time because of the consultations between the two authority figures. These are the main employment-related grievances that outsourced workers expressed. The next section considers the challenges faced in seeking to resolve these grievances.

3.2 Challenges in resolving employment-related grievances under outsourcing TERs

It was noted that 71 per cent of the outsourced workers felt uncertain about or were not confident about seeking to have their employment-related grievances resolved. As one respondent described his frustration with accessing justice after discovering he was ineligible for sick leave and medical insurance,

“There’s a lot you can’t do as an outsourced worker. I had nowhere to complain when this happened to me. It’s like most of the clauses are unenforceable. The contract was like 20 pages. I mean I could barely go through it. Then later I realized that the reason they make it so long is like they put things like they limit the amount you can sue them for. I remember after signing the contract thinking this is just dodgy. And there’s nothing I could change in the contract. And this was not the first time something like that happened to me. And the circle is so tiny. So what do you do? Do you now go and sue the people who later you will be seeking employment from? So you just leave it and accept your fate. You don’t want to be labelled as a *kichwa ngumu* (hard-headed person) who nobody can work with”

In many cases, the outsourced workers did not make their grievances known because they did not feel that the actions against them had been illegitimate or unreasonable, but instead saw them as part of the nature of working under outsourcing TERs. For example, all outsourced workers who were excluded from work meetings were unhappy with it, but did not consider the client enterprise to be wrong in doing so. 89 per cent of the outsourced workers saw less favourable treatment, detachment from the client enterprise and precariousness as intrinsic to outsourcing arrangements rather than things that they could change. As such, they did not openly complain about them.

other end of the spectrum, the stable relationship was with the client enterprise and the outsourced company had minimal roles such as payrolling.

Outsourced workers attributed their grievances to either internal or external factors. External factors include the legal framework because it shapes what workers and employers perceive to be legitimate.²⁹ The inability of the employment legislative to adequately support outsourced workers was an impediment to them viewing these grievances as injustices.³⁰ As a result, the less favourable treatment was considered legitimate and warranted. Whereas the employment laws legitimize the interests of SER workers, outsourced workers often feel they may not have such legal support. The attribution of the employment-related grievances to either the client enterprise, the outsourcing company or external factors affected how the outsourced workers chose to resolve them. If they attributed them to external forces they were less likely to seek redress.

Another challenge in seeking to resolve employment-related grievances is the splitting and sharing of employer functions between two authority figures.³¹ This lead to uncertainty as to the responsibilities of the authority figures for the different aspects the employment relationship. For example, issues relating to remuneration seemed difficult to attribute to either authority figure.³² Though 77 per cent of outsourced workers were dissatisfied with their remuneration, they were unaware of how much the client enterprise was offering for their services and the subsequent mark-up by the outsourcing companies. They were unsure as to whether to seek redress for their perceived low remuneration with either the client enterprise or the outsourcing company.

The outsourced workers' perceptions of lack of access to justice to resolve their employment-related grievances was aggravated by the rationalization that they willingly signed into outsourcing TERs, fully aware of the contractual insecurities.³³ Unlike SER workers who have clearly outlined

²⁹ ILO, *Non-Standard Employment around the World: Understanding Challenges, Shaping Prospects* (PRODOC 2016) 2–3; Sandra E Gleason, *The Shadow Workforce: Perspectives on Contingent Work in the United States, Japan, and Europe* (WE Upjohn Institute 2006).

³⁰ This is because outsourced workers relate with two authority figures; see also Davidov (n 9).

³¹ Van Eck (n 4); Buch, Kuvaas and Dysvik (n 10); Davidov (n 9).

³² Outsourced workers' remuneration is based on the amount the outsourcing company receives from the client enterprise, less the amount the outsourcing company deducts as its fees.

³³ See also Thomas Prosser, 'Dualization or Liberalization? Investigating Precarious Work in Eight European Countries' (2016) 30 *Work, Employment and Society* 949;

employment rights as well as a collective voice, outsourced workers operate within a TER. 11 per cent of the outsourced workers expressed that they did not know who to go to for redress. As one outsourced worker aptly explained,

“Most times I’m like okay, who do I go to? I’m not an employee. Am I supposed to go to the human resources department and I’m not their employee? It’s not so straightforward.”

As a result, most outsourced workers preferred to suffer silently through their employment-related grievances and where this was untenable they felt compelled to terminate the job opportunity with the client enterprise. Under the SER, termination by the employee would mean resignation.³⁴ However, outsourcing TERs allow outsourced workers to leave a client enterprise without terminating their relationship with the outsourcing company. Hence, if they identified the client enterprise as the source of their grievance they could leave and seek placement with a different client enterprise. Nonetheless, this option largely depended on the outsourced workers’ perceived level of job security.³⁵ On the other hand, where they attributed the grievance to either the outsourcing company or the nature of the outsourcing TER, they were more hesitant to seek redress because it could potentially leave them jobless.

3.3 Outsourced worker’s access to the Employment and Labour Relations Court (ELRC)

The employment laws provide for the resolution of employment-related disputes through litigation.³⁶ The Employment and Labour Relations Court has jurisdiction over employment-related disputes relating to or arising out

Claudia Weinkopf, ‘Precarious Employment and the Rise of Minijobs’ in Leah F Vosko, Martha MacDonald and Iain Campbell (eds), *Gender and the Contours of Precarious Employment* (Routledge 2009).

³⁴ Employment Act 2007 ss 35 and 36.

³⁵ Their perceptions of job security related to both their security within their current roles with the current client enterprise, together with future employment prospects through the outsourcing company. The workers who perceived higher levels of job security felt more secure about seeking redress for their employment-related grievances; see also Sukti Dasgupta, *Employment Security: Conceptual and Statistical Issues* (International Labour Office 2001) 2–5.

³⁶ Employment and Labour Relations Court Act 2011; Employment Act pt XII; Labour Relations Act 2007 pt IX.

of employment between an employer and an employee.³⁷ An employee is defined as a person employed for wages or a salary and this includes an apprentice and an indentured learner.³⁸ On the other hand, an employer is defined as any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.³⁹ These definitions cater for the SER, but not for the outsourcing TER.

The ELRC has been creative in enabling outsourced workers' access to justice before the court by classifying outsourced workers as employees of the outsourcing company.⁴⁰ However, there is no guidance as to the relationship between the outsourced worker and the client enterprise, and to whether the court's jurisdiction extends to this relationship. This paper argues that, alternative dispute resolution (ADR) mechanisms, particularly mediation, would effectively redress this gap.

4. Mediation to Enhance Outsourced Workers' Access to Justice

This section begins with a discussion on access to justice, as provided for under the Constitution of Kenya, 2010. It then considers defines mediation and thereafter discusses the advantages and disadvantages of mediation in resolving employment-related disputes. Finally, it considers the suitability of mediation to address outsourced workers' employment-related grievances.

4.1 The constitutional right of access to justice

Access to justice is a fundamental constitutional principle. Article 48 of the Constitution of Kenya, 2010 provides that the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice. Article 27 guarantees the right of equality before the law and the right to equal protection and equal benefit of the law. This equality includes the full and equal enjoyment of all rights and fundamental freedoms.⁴¹

³⁷ Employment and Labour Relations Court Act s 12(1)(a).

³⁸ Employment Act s 2; Employment and Labour Relations Court Act s 2; Labour Relations Act s 2; Labour Institutions Act 2007 s 2.

³⁹ Employment Act s 2; Employment and Labour Relations Court Act s 2; Labour Relations Act s 2.

⁴⁰ *Abyssinia v KEWU* (n 11).

⁴¹ Constitution of Kenya art. 27(2).

Article 22(1) provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. In addition, Article 159(1) emphasizes that judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by the Constitution. In exercising judicial authority, the guiding principles include *inter alia* that justice shall be done to all irrespective of status, justice shall be administered without undue regard to procedural technicalities, and that ADR and traditional dispute resolution mechanisms (TDRM) shall be promoted.⁴²

The Constitution recognizes ADR and TDRM as one of the means of ensuring access to justice because they meet the constitutional ideal of disputes being redressed without undue regard to procedural technicalities.⁴³ In addition, they are expeditious, non-coercive, flexible, and cost-effective.⁴⁴ Unlike litigation, ADR and TDRM are less adversarial and focus on resolution rather than settlement, thus leading to mutually satisfying outcomes and fostering relationships.⁴⁵ They are ideal for ensuring access to justice for vulnerable persons who would otherwise face challenges accessing formal litigation through courts. It is for this reason that alternative dispute resolution mechanisms are also referred to as appropriate dispute resolution mechanisms.⁴⁶ The author argues that, though the option of litigation remains open to outsourced workers, ADR may enhance their access to justice to resolve their employment-related grievances.

4.2 Mediation as an alternative dispute resolution mechanism

ADR refers to various dispute resolution options that exclude litigation, including early neutral evaluation, enquiry, negotiation, conciliation, expert

⁴² *ibid* art. 159(2)(a),(b) and (d).

⁴³ Kariuki Muigua, 'Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010' [2013] KMCO 6 <<http://www.kmco.co.ke/attachments/article/111/Paper%20on%20Article>> accessed 20 April 2021.

⁴⁴ Kariuki Muigua, 'Heralding A New Dawn: Achieving Justice Through Effective Application Of Alternative Dispute Resolution Mechanisms (ADR) In Kenya' (2013) 1 *Alternative Dispute Resolution* 40, 48.

⁴⁵ Muigua Kariuki, *Resolving Conflicts through Mediation in Kenya* (Glenwood Publishers 2012) 79–88.

⁴⁶ Emmah Khisa Senge Wabuke, 'Enhancing Access To Justice In Kenya: The Imperative of Adopting Alternative Dispute Resolution Mechanism' (2015) 3 *Alternative Dispute Resolution* 209, 210.

determination, mediation, and arbitration.⁴⁷ ADR mechanisms may be classified into three categories, namely, facilitative, evaluative and determinative processes.⁴⁸ In facilitative processes such as mediation, a third party assists the disputing parties in identifying their issues and coming to a suitable agreement. In evaluative processes such as early neutral evaluation, the third party takes a more active role in advising the parties about their issues and the possible outcomes. Finally, in determinative processes such as arbitration, the third party makes a determination on the matter after listening to the arguments and considering the evidence. Some scholars, however, argue that this classification does not consider negotiation, thus it may be deemed to stand as its own independent category.⁴⁹

Mediation, as a facilitative process, is akin to negotiation in the presence of a third, neutral party.⁵⁰ It may be defined as the intervention into a dispute or negotiation by an acceptable, impartial and neutral third party who has no authoritative decision-making power, to assist disputing parties in voluntarily reaching their own mutually-acceptable, informal resolution of the issues in dispute.⁵¹ In mediation, the parties have control over the process, in that they agree upon the mediator, the forum and the outcome. It is a voluntary, flexible, confidential process in which the parties have a great level of autonomy. Mediation enhances inclusivity and promotes the efficient, quick resolution of disputes. The essence of mediation is that it encourages parties to a dispute to come to an acceptable out-of-court agreement without feeling the sense of legal obligation experienced through litigation. It therefore leads to win-win solutions as compared to litigation's win-lose settlements.⁵²

⁴⁷ Prof. Paul Musili Wambua, 'Broadening Access to Justice in Kenya through ADR; 30 Years On' (2015) 3 *Alternative Dispute Resolution* 8.

⁴⁸ Diana A Orago, 'Alternative Dispute Resolution in the Criminal Justice System in Kenya' (PhD Thesis, University of Nairobi 2020); Kariuki Muigua and Francis Kariuki, 'ADR, Access to Justice and Development in Kenya', *Justice and Jurisprudence: Nation Building through Facilitating Access to Justice* (2014).

⁴⁹ Wabuke (n 46) 211.

⁵⁰ Kariuki Muigua, 'Making Mediation Work for All: Understanding the Mediation Process' (2019) 7 *Alternative Dispute Resolution* 120, 121.

⁵¹ Christopher W Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (4th edn, Jossey-Bass 2014) 20.

⁵² Kariuki (n 45) 79–88.

With the introduction of court-annexed mediation (CAM) into the justice system, the judiciary has embraced mediation more actively.⁵³ CAM envisions a situation where judicial officers screen cases brought before them to assess whether they can potentially be redressed through mediation; the judges then refer the identified cases to mediation and thereafter the disputing parties move the court to record a consent agreement.⁵⁴ The CAM framework is supported by the Civil Procedure Act which provides that the court may direct that a dispute presented before it be referred for mediation.⁵⁵ This may be upon the request of the disputing parties, where the judicial officer deems it appropriate, or where the law requires it. CAM was first implemented in the Commercial and Family Divisions of the High Court in April 2016. By July 2017, a quarter of the 1,550 cases referred to CAM had been resolved within an average of two months as compared to the average two years under the normal court process.⁵⁶ By 2018, CAM had successfully been adopted by the ELRC.

As mentioned earlier, mediation is voluntary and the third party does not have authoritative decision-making powers.⁵⁷ The presence of the mediator is simply to steer the parties towards an amicable approach of resolving the dispute.⁵⁸ The mediator does not make decisions on behalf of the parties and the solutions arrived at are purely based on the parties' agreement. It, therefore, maintains a working relationship between the parties. This paper argues that the facilitative nature of mediation makes it most suitable for the resolution of outsourced workers' grievances.

⁵³ Florence Karimi Shako, 'Mediation in the Courts' Embrace: Introduction of Court-Annexed Mediation into the Justice System in Kenya' (2016) 4 *Alternative Dispute Resolution* 130, 131.

⁵⁴ Kariuki Muigua, 'Court Sanctioned Mediation in Kenya-An Appraisal' 9 <<http://kmco.co.ke/wp-content/uploads/2018/08/Court-Sanctioned-Mediation-in-Kenya-An-Appraisal-By-Kariuki-Muigua.pdf>> accessed 21 April 2021.

⁵⁵ Civil Procedure Act s 59B.

⁵⁶ 'Court Annexed Mediation Offers Alternative to Delayed Justice for Kenyans' (*World Bank*, 5 October 2017) <<https://www.worldbank.org/en/news/feature/2017/10/05/court-annexed-mediation-offers-alternative-to-delayed-justice-for-kenyans>> accessed 21 April 2021.

⁵⁷ Moore (n 51) 20.

⁵⁸ Muigua, 'Making Mediation Work for All: Understanding the Mediation Process' (n 50) 128.

4.3 Pros and Cons of Mediation in Employment Dispute Resolution

Employment disputes resolution refers to the resolution of disputes arising from existing or terminated employment relationships.⁵⁹ Employment disputes are also referred to as trade disputes. The Labour Relations Act defines a trade dispute as a dispute or difference, or an apprehended dispute or difference, between employers and employees, between employers and trade unions, or between an employers' organisation and employees or trade unions, concerning any employment matter, and includes disputes regarding the dismissal, suspension or redundancy of employees, allocation of work or the recognition of a trade union.⁶⁰

Employment disputes often relate to allegations of unfair treatment or to interpersonal incidents and challenges experienced during employment and they may be emotionally-charged.⁶¹ They include complaints of discrimination, unequal remuneration, the breach of health and safety entitlements, unfair termination, violation of working hours, and the deprivation of other employment rights. Though employment-related disputes may be resolved through litigation before the ELRC, there are advantages and disadvantages of resolving them through mediation.

Employment relationships feature an inherent inequality of bargaining power tilted towards the employer.⁶² If the mediator does not adequately navigate this inequality, the disputing parties may not consensually arrive at an agreement. Relatedly, where one party is obstinate the mediation process may simply be a waste of time and effort. Another disadvantage is that mediation may not be well suited to handle grave employment grievances such as alleged harassment.⁶³ In addition, the mediation outcomes are potentially non-binding, especially if they are not recorded by the court as in CAM, thus the parties may experience difficulties in enforcing their obligations against each other.

⁵⁹ Tanmeet Kaur Sahiwal, 'Employment Dispute Resolution and Mediation: An Analysis' (2019) 12 Online Journal of Multidisciplinary Subjects 1085, 1086.

⁶⁰ Labour Relations Act s 2.

⁶¹ Sahiwal (n 59) 1086.

⁶² Peter Ackers, 'Rethinking the Employment Relationship: A Neo-Pluralist Critique of British Industrial Relations Orthodoxy' (2014) 25 The International Journal of Human Resource Management 2608.

⁶³ Sahiwal (n 59) 1088.

A key advantage of mediation is that it promotes communication and cooperation.⁶⁴ The presence of the mediator ensures that the parties effectively communicate their issues, needs and interests, but in a manner that focuses on maintaining the relationship between them. Mediation has the ability to reduce hostility and continue the ongoing outsourcing TER. Another advantage is acceptability, in that mediation is voluntary thus leads to durability of the solutions arrived at.⁶⁵ Both the employer and employee would be willing to abide by the agreement because it is attuned to their interests and needs. In addition, mediation is less expensive than litigation and is time-saving. This section focused on the suitability of mediation in employment disputes generally. The next section focuses on employment-related grievances within outsourcing TERs.

4.4. Suitability of Mediation to Address Outsourced Workers' Employment-Related Grievances

Based on outsourced workers' experiences, legal remedies available to them to address their employment-related grievances were minimal. While they are legally protected by both national and international employment laws in their capacity as workers, in practice these entitlements were difficult to access or enforce. For example, in a claim for equal pay for work of equal value, the expectation is that the comparator would be another worker under the same employer. As such, an outsourced worker would be unable to complain about the differential remuneration in comparison to workers employed directly by the client enterprise or those engaged by a different outsourcing company. Even though they may be working together in the same premises, contractually they are not working for the same employer.⁶⁶ As such, outsourced workers may not have comparators to prove that there has been unequal pay.

By rationalizing that their dissatisfactions are an inherent part of the outsourcing TER, 71 per cent of the outsourced workers felt uncertain about or were not confident about seeking to have them resolved. Mediation would be useful in this respect because it enhances communication and cooperation between the parties.⁶⁷ Mediation would allow the outsourced workers to openly express their interests, needs and values to the client enterprise and the outsourcing company, in the presence of a neutral third party whose goal is to guide them towards a suitable agreement.

⁶⁴ Moore (n 51) 25.

⁶⁵ *ibid* 20.

⁶⁶ *Abyssinia v KEWU* (n 11).

⁶⁷ Moore (n 51) 25.

The employment framework does not conclusively address the employment status within outsourcing TERs because it does not deal with the relationship between the outsourced worker and the client enterprise. There is no clear framework through which outsourced workers can address the employment-related grievances attributed to the client enterprise. Consequently, most outsourced workers viewed their dissatisfaction with the client enterprise as part of the nature of outsourcing TER which could not be changed.⁶⁸ The reality is that if the outsourced workers had the opportunity to speak up in a safe space, they could seek to have this unequal treatment redressed. Mediation can offer the outsourced workers such a safe space.

Further, litigation tends to be expensive and the options that the courts may adopt to settle the dispute may be limiting.⁶⁹ On the other hand, having both authority figures at the mediation table would not unduly increase the costs. The advantage of having both authority figures at the mediation table is that it would allow the mediator to ascertain which authority figure is best placed to redress the outsourced workers employment-related grievances. The mediation framework is flexible and does not bear the burden of trying to fit the agreement within the options envisaged by the litigation framework.⁷⁰ Mediation can therefore enhance outsourced workers' access to justice.

Mediation is a cost-effective method that leads to quick resolution of disputes.⁷¹ Since mediation is not adversarial in nature, the outsourced workers' quest to have their employment-related grievances resolved would not put a strain on their relationships under the outsourcing TER.⁷² Mediation would thus foster the continuation of an amicable relationship between the three parties. Therefore, outsourced workers would be less fearful about job losses due to the voicing of grievances.

⁶⁸ For example, it was noted that 89 per cent of the outsourced workers saw less favourable treatment, detachment from the client enterprise and precariousness as an expected part of outsourcing TERs. They viewed this as intrinsic to outsourcing arrangements rather than things that they could change.

⁶⁹ Muigua, 'Heralding A New Dawn: Achieving Justice Through Effective Application Of Alternative Dispute Resolution Mechanisms (ADR) In Kenya' (n 44) 42.

⁷⁰ Moore (n 51) 25.

⁷¹ *ibid.*

⁷² Kariuki (n 45) 79–88.

5. Conclusion

The advantages of using mediation, as an ADR mechanism, in employment dispute resolution cannot be overlooked. Mediation is cost-effective, saves time, and allows for win-win solutions for both the employers and employees.⁷³ Both parties stand to gain by adopting mediation, as opposed to litigation, which takes an adversarial, win-lose, settlement approach.⁷⁴

This study argues that mediation would be effective in enhancing access to justice for disputes emanating from outsourcing TERs. Outsourced workers face several employment-related challenges. Their grievances include pay inequalities, lack of access to training and facilities for upscaling their skills, exclusion from meetings, job insecurity and lack of unionization. Though these employment-related grievances are similar to those that SER workers face, some are due to the nature of outsourcing TERs. For instance, outsourced workers' job security relates to both their security within their current roles with the current client enterprise, together with future employment prospects through the outsourcing company.⁷⁵ In addition, there is a splitting and sharing of the employer function between the outsourcing and client enterprise.⁷⁶

The employment legal framework classifies outsourced workers as employees of the outsourcing company, but does not define the relationship between the outsourced worker and the client enterprise.⁷⁷ Though this classification enables access to justice through the ELRC, it fails to recognize that outsourcing TERs are essentially different from the SER.⁷⁸ This paper argues that mediation may enhance access to justice for outsourced workers because it is not bound by the rules on employment status. As such, outsourced workers would be able to seek redress for employment-related grievances that they attribute to either the outsourcing company or the client enterprise, as well as those that they attribute to the nature of the outsourcing TER itself.

Within outsourcing TERs, the option of mediation can be provided for under either the employment contract between the outsourcing company and outsourced worker, or in the service contract between the client enterprise

⁷³ Moore (n 51) 25.

⁷⁴ Kariuki (n 45) 79–88.

⁷⁵ Dasgupta (n 35) 2–5.

⁷⁶ Van Eck (n 4); Buch, Kuvaas and Dysvik (n 10); Davidov (n 9).

⁷⁷ *Abyssinia v KEWU* (n 11).

⁷⁸ Van Eck (n 4); Buch, Kuvaas and Dysvik (n 10); Davidov (n 9).

and the outsourcing company. It is recommended that mediation clauses be encouraged within outsourcing TERs to enhance outsourced workers' access to justice to resolve their employment-related grievances. Alternatively, mediation may take the form of CAM at the parties' request, the judicial officer's determination or the requirement of the law.⁷⁹ It is recommended that, where parties to an outsourcing TER bring a dispute before court, CAM be adopted as the first dispute resolution option. However, if the outsourcing dispute is not redressed through mediation, it should proceed to litigation.

⁷⁹ Civil Procedure Act s 59B.

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COVID-19 and the Opportunity for Cohesion: Addressing the Conflict between Local and Migrant Communities in South Africa

*By: Kenneth Wyne Mutuma **

Introduction

The fragility of a South Africa built around the dream of a rainbow nation continues to come under violent scrutiny in the current crisis caused by the COVID-19 pandemic. The crisis has exacerbated the tensions of an already strained relationship between local communities and migrants. This is evident from the discordant messages that have been issued by key government personnel on whether or not migrants locked in South Africa should be the recipients of various reliefs by the government to alleviate the hardship occasioned by the crisis. Some citizens have taken to social media suggesting that the limited resources of the country and the present dire needs of citizens, do not afford the luxury of supporting foreigners. Thus, we are witnessing an additional layer to an already strained relationship between locals and migrants, as has been evident in a past, cluttered by tensions and in extreme cases, dramatic waves of xenophobic violence perpetrated against African nationals.

This article attempts to provide an overview of the present experiences of migrants in the current situation in light of the clear constitutional provisions that frame the idea of social cohesion as one in which South Africa belongs to all that live in it. The article relies heavily on current literature and research on post apartheid South Africa, migrant communities and social cohesion, particularly data collected and analysed by migration networks, migrant and refugee organizations, media and government sources to analyse the experiences of migrants within South Africa. It will rehash some of the research that has been carried out on the tensions between local and migrant communities, highlighting critical driving factors fuelling these tensions. This discussion is critical as it informs the relatively different treatment of

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migrants by government and various institutions during the present crisis and what can be done, within the context of the pandemic, to build an inclusive society where migrants feel a sense of belonging. The unique challenges presented by the COVID-19 crisis should also be viewed as an opportunity to build cohesion between local and migrant communities. Many societies have emerged at their best when faced with severe crisis. COVID-19 presents such a prospect where society can reflect upon the underlying values that have founded this country and emerge from the crisis more inclusive, cohesive and jointly invested in creating a better South Africa.

The Experiences of Migrants

While most (though not exclusively) of the pre-1994 migration was mainly internally, in the post 1994 period, inflow migration now included migrants from Africa and Asia (Segatti, 2011). This is explainable as it was not until 1993 that South Africa finally recognised the principle of asylum, accepting local integration and the responsibilities for the provision of social welfare to refugees and asylum seekers (Odunayo, Asuelime & Okem, 2017). At the same time, when one reviews some of the major conflicts that broke out in Africa post 1990, it comes as no surprise that South Africa soon became a destination for refugees fleeing human rights abuse, collapsed states, conflict and war (Odunayo, Asuelime & Okem, 2017). Many migrants entering the country were drawn by a number of pull factors. For example, the access to business facilities, market of consumers and transport infrastructure (Dinbabo & Nyasulu, 2015). These advantages were apparent to both skilled migrant labour force and unskilled African migrants, who preferred to live closer to the CBD than in geographically marginalised and underserved peripheral areas that apartheid had created (Segatti, 2011). It was also within the CBD that many organisations provided services to refugees. The result at the end of these phases of migration has been the creation of areas with a multi-cultural identity that includes parts dominated by the historical exclusive white apartheid suburbs.

In terms of social cohesion, living in these areas continues to be the centre of multiple challenges associated with urban populations including the complexities of harmonizing distinct socio-cultural elements amidst the economic impacts that in-migration produces in these assorted spaces

(World Economic Forum, 2017). Juxtaposed over these complexities are the historical convolutions associated with the legacy of apartheid and its pre-occupation with racial separation, the result of which has been a spatial system that places black people on the economic fringes where poverty and unemployment is rife (Chutel, 2017). One can readily see how the entry of migrants into these spaces can lead to outcomes that are in dissonance with South Africa's international obligations to protect vulnerable asylum seekers. Local and migrant communities sharing these common spaces are brought into competition for acute economic opportunities resulting in inter and intra-community tensions that have manifested in the past in overt and covert forms of xenophobia (or as some researchers have suggested – Afrophobia – given the unique form the resentment takes against Africans foreign nationals, in particular) (Dube, 2019). There's has been much discourse around the nature of this hostility and its causes. Many of these factors are symptomatic, while others require an examination of the disaffections and anger that continues to seethe at deeper level. It will also be observed that these factors are interrelated. Below is a summary of some of the factors that have been highlighted:

▪**Marginalisation:** Generally, the anger and frustration amongst South Africa's poor can be traced back to decades and centuries of apartheid and colonial oppression and marginalisation. Inequality in South Africa was institutionalised, and the country's resources were skewed towards the white minority. Under the new South Africa, a combination of social and economic realities continues to confine many locals to the periphery leaving them with a deep sense of frustration (Chutel, 2017). These frustrations present a poignant basis of anger that can be directed against persons perceived to be the source of the socio-economic realities (Choane, Shukila and Mthombeni, 2011).

▪**Unmet Expectations:** For millions, the dawn of democracy signalled hope of an end to poverty and marginalisation. However, 26 years into democracy, this hope seems elusive. The ongoing difficulties associated with accessing basic services such as health, social welfare and education, coupled with the scramble for

employment opportunities and other resources, connive in the creation of an individual and collective sense of disempowerment (Claassen, 2017). It is no wonder that settlements that have recently experienced ‘xenophobic’ violence have also been the site of violent and other forms of protest around other issues, most notably service delivery (Human Sciences Research Council, 2008).

▪**Stigmatisation of Migrants:** From the onset migrants experience systematic exclusion rooted in the acquisition and societal recognition of their identity documents, resulting in their marginalisation in diverse areas including access to primary health care, housing, employment and business permits. The result of such marginalisation at policy and institutional level is the creation of social norms and values within the community where migrants are stigmatised and discriminated against (Miller, 2018). Violence and hostility towards the migrant is seen as a supplement and extension of this institutional position reflected in the immigration policy of the state. The response to this sense of marginalisation by the migrant community has been to disengage from a society they perceive as unwilling to accommodate them, exhibiting a level of apathy when it comes to their participation within various community structures.

▪**“Othering” or Insider – Outsider Perceptions:** Various researchers ascribe it to the outsider-insider phenomenon – the tendency to attack those that we see as “other”, those who are more vulnerable and seen as outsiders (Centre for the Study of Violence and Reconciliation, 2008). A mixture of bio-cultural affinity, use of language and accompanying distortions of information available to the public, create an environment conducive to “othering” – a process through which sections of society are defined as good contradistinction to bad outsiders. Migrants are widely subjected to mechanisms of “othering” through the application of various bio-cultural features, which are used to justify attitudes exhibited against “the other” (SAHO, 2018). The extent in which physical and inalienable characteristic such as language, skin shades, religion,

staple diets, dress and hairstyles etc as well as other cultural embodiments such as language continue to be used to perpetuate deeper hostile attitudes cannot be underestimated. Through this “othering”, migrants attitudes and prejudices are developed about foreigners making it easy for them to be blamed for a wide range of ills including spreading diseases, crime etc.

■ Manipulation by Opinion Makers: It is easy to comprehend how this view of the ‘inferior other’ can translate into extreme violence, which can be easily manipulated by persons in positions of influence. Dating back to 1994, anti-foreigner sentiments have been expressed by government ministers, various government departments and citizens. In the more recent past it has been suggested that the 2015 wave of violence was the result of negative statements associated with monarch of the Zulu nation, King Zwelithini (Chutel, 2019; SAHRC, 2016). Several commentators have drawn a link between what such authorities say and the unleashing of violence against migrants (Landau, 2011). In this regard, the ability of authorities to inflame locals in this manner should be viewed in light of these insider-outsider perceptions.

■ Approach towards Nation Building: The project of nation building can present difficulties towards building an inclusive identity that is in line with the constitutional principle that South Africa belongs to all who live in it (Institute of Security Studies, 2015). As with many parts of the world, South Africa’s post 1994 nation building project has had to confront the challenges of globalization that have diminished the relevance of the nation-state. This has triggered the phenomenon of international migration on an unprecedented scale. In these circumstances the process of nation building on the basis of unity around homogeneous history, ethnicity etc. has come under increasing challenge as states have seen the growth of large sections of immigration. In this context, South Africa could repeat the errors of many African countries which sought to enhance in-group solidarity, inadvertently strengthening out-group hostility. This risk is heightened by a sense of superiority

that flows out of the discourse of South African exceptionalism, which entrenches views that the rest of Africa is inherently inferior to South Africa (The Conversation, 2017). This kind of patriotic pride can translate into condescension and a disassociation with the continent.

▪ **Media Biases:** The media seems to have attracted a level of culpability for its acquiescence, and in some cases active reinforcement, of the “othering” of migrants. The media not only shapes public opinion but has the power to cultivate perceptions around identity and mechanisms of inclusion and exclusion within society. The concern with the media in South Africa lies in the manner information communicated creates and perpetuates certain perceptions about different segments of the community (Al-jazeera, 2015). Widely exaggerated figures and statements circulated in the media in respect to the numbers of immigrants present in the country continue to stoke the image of a country that is overridden by immigrants (Africa is a country, 2018). These inaccuracies within the media (evident daily reporting about crime, labour concerns and the reasons behind the presence of migrants in South Africa) sow misconceptions and disseminate myths that further confine migrants to the fringes of society. Research has also shown how the media rarely reported positively on the Africa continent, and thus reinforcing virulent stereotypes against people originating from these countries (Adekoya, 2013). Little surprise that South Africans view Africans from other countries as having nothing to contribute to the community.

▪ **Competition for Resources:** Research has established that a large number of South Africans feel that migrants use up resources intended for South Africans (Centre for the Study of Violence and Reconciliation, 2008). Many believe that migrants take up jobs that should have been given to South African nationals (Masikane, Hewitt and Toendepi, 2020). These views are understandable when one considers that years after democracy, many South Africans are yet to access their basic socio-economic rights. In the environs of

such acute shortages, migrants have been painted as competing for scarce resources with millions of poor South Africans (Maina et al., 2011). In these representations, migrants compete unfairly and undeservedly with South Africans for resources that they are not entitled to. This has prompted many local communities to blame the government's management of cross-border migration for the growing numbers of migrants, suggesting that it was this exacerbated competition over resources such as housing, trading opportunities, formal employment etc, that bred resentment for migrants among host communities (Afro Barometer, 2019). A corollary to these sentiments is the feeling that migrants are more attractive to employers as they often are more susceptible to labour exploitation (Vettori, 2017). In these circumstances, they end up competing for low skilled jobs with locals, where they are obviously preferred. This in turn results in further acrimony with locals who accuse them of being more than willing to tolerate low wages and aiding a race to the bottom.

■ **“Scapegoating” Hypothesis:** This thinking is compounded by excuses made by authorities about their limited capacity to provide services amidst this overwhelming presence of migrants (Tella and Ogunnubi, 2014). Dubbed by researchers as the 'scapegoating hypothesis' this thinking suggest that service providers are unable to keep up because of the high levels of in-migration into South Africa and the constraints that this puts on the limited available resources (Johnson, 2019). This however ignores the fact that most of South Africa's migration is internal, consisting of South Africans moving within the country, causing the same challenges in terms of access to resources on one level, with similar consequences of stratified exclusionary tendencies being exercised against new comers into the area who are South Africans. It appears that space continues to define access to resources and services and ultimately patterns of inclusion and exclusion. Amidst this set of social relations it is most obviously the “strangers”/ “foreigners” who are seen as excluded from community rights and access to resources, and become easy scapegoats for associated socio-economic challenges.

▪**Political and Institutional Factors:** The pivotal role of leadership (particularly at the local level) towards building intra-community relationship remained a key feature cited in relations to concerns around credibility and the gap of mistrust between legitimate leadership structures and the community at large. The causes of this erosion of trust have been the subject of a number of research reports. For example, it is felt that there was a failure by existing leaders to understand the role that democratic and public institutions are meant to play in enhancing public participation (Crush and Ramachandran, 2014). Instead, corruption and ineptitude in these institutions perpetuated a maze of bureaucracy deliberately restricting the flow of information in order to further the interest of a few “connected” individuals. This loss of confidence in legitimate authority structures presents an entry for the growth of dysfunctional structures (formal and informal) driven by self-interest and willingness to manipulate concerns through divisive techniques which apportion culpability for concerns on certain sections of the community (Misago, 2019).

▪**Psycho-social Dimension:** Many of the present threats to today’s migrant/local relationships were rooted in generations of gross violations experienced during apartheid. This manifested in virtually every aspect including – the psychosocial responses of individuals; the current crisis in skills shortages flowing out of decades of denial of educational development; and the impact of years of political and economic isolation of the country and its interaction with the greater continent. Researchers have highlighted this psychosocial dimension illustrating how the violence against African migrants has been consistent with structural exclusion and racial devaluation that took place during the apartheid period (Matsinhe, 2011) It has been suggested that these complexes and psychological feelings of shame continue to be projected to African immigrants, suggesting that xenophobia occurs at a level of visible difference where lighter skin has been associated with better socio-economic standing while darker skin is often associated with criminality and poverty.

▪ **Culture of Violence:** Another dimension of this psychosocial aspect, and which has been the subject of much documentation, relates to the psychological impact of the past atrocities, including political violence in 1980s, towards creating a culture of violence often reflected today in the violent service delivery protests; the brutality of crime; vigilante responses in defiance of the rule of law; the culture of impunity; and the violence that accompanies the phenomenon of xenophobia (South African Government News Agency, 2010). The isolation theory argues that apartheid isolated the country incapacitating the exposure of its people to the populations of other African countries sowing the seeds for less tolerance of difference, the fruits of which currently manifest in the xenophobic prejudices exhibited towards African nationals (Harris, 2002). Certainly, one cannot dispute that apartheid did create powerful ideologies of difference and promoted stereotypes, which encourage biased perception of foreigners as criminals and carriers of disease.

The above factors are relevant in the present context of the pandemic and the general response by the authorities to it. It has been observed that the pandemic deepens fissures present in different countries. Some have gone as far as suggesting that the pandemic exposes the construct of the state and national identity programmes it carries out. In the context of South Africa, one can therefore expect the pandemic to illuminate many of the factors discussed above given the direct and indirect impact it is having on the socio-economic conditions of those living in South Africa (Deutsche Welle, 2020). As observed, these conditions have played a dominant role in the perceptions towards migrants and how they fit into the national project of social cohesion. Other psychosocial factors discussed above are also likely to be amplified during this period. For example, if migrants are viewed as outsiders, one can expect these perceptions and what fuels them to drive an even wider wedge between them and local communities (Garba, 2020). Juxtaposed upon all of this is the role that leadership can play in furthering social cohesion. In the past as observed, many leaders have thrived on opportunism where migrants form convenient scapegoats for the ills facing the country (Shoki, 2020). The pandemic once again is likely to expose any

crisis of leadership that exists in this regard, as observed in various other parts of the world where leaders have leaned upon ideologies based on extreme nationalism that is exclusionary, instead of building a society undergirded by shared values (Shoki, 2020).

COVID-19 and Social Cohesion

The lockdown by government in response to the rising cases of COVID-19 cases has been lauded severally on the international front (Bearak, 2020). From a health perspective, it has been praised as being scientific sound and providing the necessary lead time for building within the healthcare system, the capacity to cope with the pandemic (Bateman, 2020). However, as the lockdown drags on, concerns are being raised about its effects on the economy and the impact that this may have on the most vulnerable of the population (Garba, 2020). To this end, the government has made several announcements to alleviate the plight of these groups including the provision of various grants and food parcels, business stimulus and concessions around healthcare (Dhever and Hinckermann, 2020; South African Government, 2020). All of these efforts aim at ensuring that the impact of the pandemic is not just mitigated but, all sectors of society feel included at this critical time. These actions are cognizant of the fact that poverty, unemployment and inequality have been identified as critical driving factors that impede social cohesion and have the potentially of accelerating social disintegration (Lefko-Everett, 2016). These factors create a sense of exclusion, which translates to apathy and disinvestment in the project of nation building (Estivill, 2003). In taking action to mitigate the intensity of these factors, the government is stemming the potential fragmentation and collapse that could occur, if appropriate action was not taken.

It is clear that the exigencies created by the present COVID-19 pandemic crisis, and the acute dangers facing large sections of vulnerable groups in South Africa, has once again brought to the fore the question of how to design a society that is inclusive of all its members. While the predominant narrative has focused on various citizens on the left of the economic periphery, it is crucial that the place of migrants in this overall debate is not forgotten within the overall scheme of its responsive actions. The lockdown has not brought about severe consequences on citizens alone. Migrants have

been equally affected by these measures. Actually, their plight during this period may be unique on several accounts. Owing to their documentation, majority of them are barred from the social security systems of the country (Taran, 2015). They are unable to access the grants and other alleviations currently provided by the government on account of their lack of South African citizenship (Ebrahim, 2020). To add to this, the ambiguity by the government on whether these forms of assistance extend even to those that are not South Africans creates what some suggest is a continuation of institutionalised xenophobia (France 24, 2020). In the past, faced with the reality of the absence of governmental support, most migrants have tended to fend for themselves through the informal business sector. Now amidst the lockdown, they find themselves confined in their homes and cut off from any form of income generation. The situation is exacerbated by the closures of international borders, which basically leaves them trapped within South Africa. Given the sensitivity with which the government has approached the vulnerable among its citizens, is it not time that a similar ‘business unusual’ approach was adopted for migrants?

An approach that is inclusive of the plight of migrants would not only be in tandem with the tenets of the Constitution but would go a long way towards signifying that the government is invested in all persons living within South Africa. In turn, such persons are likely to become invested in the country that they reside. It is no secret that the achievement of a nation’s developmental vision is tied to the loyalty and buy-in of the people that live within its borders. People devoted to a country are likely to pour in their resources (financial, human, innovation etc.) towards the development of the country that they are a part (International Organization of Migration, 2020).

Countries like the Singapore, United States of America and Australia, have been particularly good at capturing this loyalty and transforming immigrants into citizens. Often this has been done during times of societal or individual crisis when individual migrants are searching for acceptance and belonging. In this sense, the COVID-19 crisis could present an opportunity for South Africa to firmly communicate its commitment to these groups and break past signals that view migrants as burdens and not resources (Garba, 2020). Through a crisis of this nature, it is possible to set in motion initiatives where

migrants and locals forge a common front against a common danger. Nothing less should be expected if we are to effectively respond to a pandemic that knows no boundaries of race, ethnicity, gender or nationality.

Opportunities for Cohesion

Past attempts have been made to provide solutions to the tensions posed by the presence of migrants in South Africa within the wider framework of the nation building projects. Some of these attempts reflect extreme views of people who believe cohesion is only possible through exclusion of migrants. Such views find expression in simplistic proposals such as the erection of a wall along the South African border (Gqirana, 2017). Regretfully, history indicates that migration will remain a reality in a globalised world and no amount of effort to seal up borders will impede the movement of people from one country to another (Aleshkovski, 2017). What is required in this area are more complex approaches recognising the long-term prospects of assimilating migrants into the nation building project of creating a cohesive South Africa that resonates with the ideals of its Constitution. The COVID-19 pandemic presents an opportunity to accelerate measures that can be taken to realise this goal of cohesion (McAuliffe and Bauloz, 2020). Its potential to accelerate societal responses has been observed across various sectors and is tied to manner the crisis exposes society's most vulnerable points, thereby demanding urgent actions on the part of those concerned. For example, the pandemic has exposed the crisis of inequalities in the education sector and induced innovative ways of resolving these inequalities (McDonald, 2020). Similar observations can be made regarding the fragmentation of our society, as exposed by our society, and innovative ways through which rapid interventions can be made to strengthen social cohesion. What follows is a discourse around the role that different actors can employ in coming up with innovative measures to leverage the present crisis and attain the ultimate goal of constructing a national identity that incorporates migrants.

Government as a convenor of social cohesion

Government possess enormous social capital when it comes to dictating how different elements of society interact with each other. It is hoped that it will use its social capital as a convenor and promoter of social cohesion to initiate a societal change campaign during this time to create debate and dialogue

that challenges discriminatory perceptions, attitudes and behaviours that trigger, among other things, racism, and xenophobia. If there is one thing that the pandemic has shown everyone is that it does not discriminate. Lives have been lost and all manner of persons have been affected irrespective of gender, age, race or nationality. This truth forms a ready-made platform for a broad social cohesion initiative. In this regard, and within the context of the current social cohesion, the vision of such an initiative should underlie the following principles:

- Although crafted against the backdrop of social cohesion and the exclusion of migrants, the initiative should recognize that the symptoms of this kind of polarization as part of a wider trend of social disintegration within South African society. Government is particularly wary of the potential for this social disintegration during this period of crisis. The impact of the pandemic is likely to widen income inequalities, which in the context of South Africa take a racial hue (Harvie 2020). More than ever, the pandemic presents an opportunity for an initiative to bridge this fraught divide. Already countless number of individuals, corporates and civil society has begun their own initiatives in solidarity with the most vulnerable of society. These include food schemes and other forms of much needed assistance. As earlier noted, government has also made provision to support many vulnerable citizens. The basis for this support is to avert the feeling of exclusion by many groups sitting on the periphery. This rationale is likely to be undermined if any of these groups – such as migrants – are left out. Thus, efforts in this direction should place a premium on rebuilding the relational foundations for a socially cohesive society, including the restoration of trust, accountability and respect among individuals – irrespective of their nationality.

- Such an initiative should recognize the complex, multidimensional and structural antecedents of violence in South Africa that has become even more evident in the context of the crisis (Deutsche Gesellschaft für Internationale Zusammenarbeit, 2019; SaferSpaces, 2019). While the lockdown was crafted to achieve specific health

outcomes it had the undesirable outcome of uncovering the scale of gender-based violence within the privacy of homes (ENCA, 2015). During the lockdown, police have been inundated with calls of distress by many vulnerable women trapped in homes and unable to resort to escape to places previously used for solace and refuge such as work, religious centres, schools etc. This has amplified the work of various researchers who have pointed at the unique characteristic within the country of using violence against the most vulnerable of society. This is not only evident in the context of gender-based violence but can similarly be observed in other settings of vulnerability such as migrants and locals, farm workers, domestic workers. The common pattern in all of this is the unequal power relations and contemporary manifestations of exclusion and marginalization. The crisis presents the unique opportunity to burrow into the historical psychosocial antecedents that undergird this kind of violence and emerge with a long-term approach.

- The initiative would be founded upon the values of ubuntu, human rights and principles of equity, equality, non-discrimination, human dignity, non-violence, participation, inclusion, accountability, social solidarity and unity in diversity (Odiaka and Oriogu, 2017). While many South Africans may be conversant with these values, the pandemic presents an opportunity to create a society that is a living embodiment of the values. What these values mean, and their importance, is most readily displayed during times of pervasive suffering and societal distress. In such times, it is not difficult to illustrate the significance of ubuntu or inclusion. It is also in such moments that society understands the power in solidarity pulling together the collective strength it possesses in its diversity (Odiaka and Oriogu, 2017). An integral part of the discourse around these values should include how they relate to migrants, as indeed it would be hollow attempting to build a society founded on these values to the exclusion of others.

- The initiative should be linked to the aspirations of Agenda 2063, a vision developed by the Africa Union that promotes the

emancipation process and renaissance idealised by leaders that established the Organisation of African Unity (OAU). Agenda 2063 as a roadmap for attaining the goals of an economic and cultural prosperous continent that is in solidarity and driven by its own citizenry (African Union, 2020). As observed, constructing a national identity on the basis of extreme nationalism can pose a danger to those living within and without the state (Crabtree, 2019; Zalewski, 2019). The history of the 20th Century and its flirtation with fascism remains a strong warning for those who would pursue an endeavour steeped in national superiority (Harrison and Boyd, 2018). In this regard, researchers have pointed at the dangers of propagating a narrative of South African exceptionalism within the context of the continent. This only perpetuates the legacy of apartheid in so far as it sought to etch a history of superiority with the rest of the continent. Linking migrants, social cohesion and the futuristic agenda of Africa mitigates pressures that may emerge in this way.

- The heart of the initiative should leverage social change through fundamental shifts in the attitudes and values of individuals and communities. This is in contrast to a number of interventions, currently operating within the terrain, whose focus is almost exclusively on external behaviour and influencing the policy domain. It has been suggested that many of the present fractures in society are the result of interventions aimed at the symptoms and not the root cause. Major interventions such as the Truth and Reconciliation Commission, have been criticized for being event based, and failing to understand the long-term efforts in a continuing process of healing and inclusion (Toshihiro, 2014). Government should take into consideration these valuable lessons in its initiatives to promote social cohesion amidst the crisis created by the pandemic. While the pandemic is not going to be with us forever, great efforts should be made to ensure that the work initiated continues many years beyond the crisis.

It is important to state that while government has a critical role to play in building social cohesion, any initiative it may come up with must recognize the inherent value that subsists within communities to address their own challenges (Bauloz, Vathi and Acosta, 2019). Government's interventions should therefore be designed to optimize communities' capacities to identify their own priority concerns, resources and social networks to address these and ultimately come up with innovative solutions to enhancing the tenacity of the glue that holds society together. In this regard, one envisages a situation where government will enter into strategic partnerships with a range of international and national organizations; government departments and statutory institutions; media houses; universities and schools amongst other stakeholders to collaborate on the implementation of initiatives that would collectively promote the integration of migrants as part of a national social cohesion project.

Media, Outreach and Dialogue

As one would anticipate the crisis generated by the pandemic has dominated media discourse. There have been several strands to this discourse. While much of it has straddled health and safety concerns, there has been a fair amount of reflection around the nature of society in so far as its response to the present crisis. Amidst the growing inequality divide exacerbated by the pandemic, there are increasing calls for the creation of a more equitable and inclusive society. There is an equal sense of urgency within the current messaging in calling for the end of unacceptable practices that the crisis has highlighted such as gender-based violence, sexual abuse, substance abuse, amongst other things. In all of this is there is an opportunity for the media to adopt a narrative that is more inclusive of the migrants (Guadagno, 2020).

As earlier observed, the media has been a silent accomplice when it comes to how migrants are viewed, and stereotypes that ultimately lead to their discrimination (Ngcamu and Mantzaris, 2019). The landscape created by the pandemic provides an opportunity to re-write this discriminatory narrative COVID-19 knows no boundaries and does not discriminate (Guadagno, 2020). This is the key message upon which the response of society is being mobilised. No member of society should be left behind including migrants. Every individual living in South Africa ought to be a part of the care required

during this period, as well as the collective response to the pandemic. The media should use the overwhelming realisation of the need for togetherness in responding to COVID-19 to further an agenda of social cohesion that includes previously marginalised groups such as migrants.

It is important that media messaging is not in isolation but supported by a host of outreach activities aimed at schools, youth groups, community and faith-based structures, and migrant communities (Morand, 2015). The pandemic has already accelerated this kind of activity and created an occasion to amplify through such outreach, the message of a national cohesive society that comprises migrants. This message could be boosted through association with multi-media campaigns that coincide with national and international public holidays such as (Human Rights Day, Freedom Day, Day of Reconciliation, Africa Day, Mandela Day, International Human Rights Day and International Refugee Day etc.). These days create public awareness about human dignity and unity in diversity and could be used to initiate virtual and online campaigns across the country through platforms such as blogs, Twitter, Facebook, Instagram and other interactive mobile applications. Each of these days presents an opportunity to stimulate dialogue in the public domain to reposition migrants within South Africa with the rest of the country through inspirational unifying messages that promote a common South African identity, unity in diversity, tolerance and respect for human dignity (Njozela and Burns, 2019).

The heart of all outreach activity should rest on dialogue. Dialogue implies a two-way communication that allows for a meeting of minds. It has been suggested that many of the tensions that exist between migrant and local communities are due to the absence of spaces for dialogue (Alps Resilience 2019). Much alienation and misunderstanding occur in the gaps created by the absence of such spaces. Dialogue therefore provides a vehicle towards achieving the overall goal of a social campaign aimed at effecting profound change in mindsets and perceptions. South Africa has a rich experience in the area of dialogue having navigated through difficult times of its history by employing inter and intra-community conversation. The resources it has acquired in this journey including the social capital resident in dialogue practitioners scattered around the country, should be utilised to effect the

profound change envisaged in the area of social cohesion. Understanding that such resources may be limited, it may be sensible to run dialogues based on a matrix that prioritises areas where the pandemic's impact intersects with hot spots of past and current patterns of tension and violence against migrants, such as the three big metros of the country: Durban (KZN), Johannesburg (Gauteng) & Cape Town (Western Cape). The overall goal of the dialogues would be to use our common vulnerabilities during the present times to address the root causes of violence and building better relations within between local and migrant communities. There is potential to expand the reach and outcomes across the country into all nine provinces through community to community transfers, out-scaling, up-scaling and real potential for building a nationwide social movement that promises change in the individual, collective and institutional attitudes in managing diversity.

Documentation & Research

The year 2020 will be etched into the memories of the present generation, and these memories will influence future generations. This relationship between the memory, present experiences and the nature of future society highlights the importance of documentation in the context of the journey of creating a more cohesive society (Ladner, 2018). Future generations should look at this moment – a time of upheavals generated by the pandemic – as the instant when South Africa society re-ordered its relationships, re-connected and emerged with greater unity. In this sense, the above enterprises present an opportunity to document community and national initiatives that result in tolerance, respect for human dignity, social justice, which can serve as inspirations and lessons. Such documentation can celebrate communities that have overcome adversarial relationships and emerged more cohesive in a time of crisis. Some have suggested that more could have been done in this respect when it comes to South Africa's transition from apartheid to democracy. We are at another moment where society is unlikely to emerge the same. Documenting these changes can strengthen the resolve of the country to retain the best parts of what emerges. Inherent in this process of capturing the emerging stories of cohesion is an intense process of documentation that uses various forms of creative expression in the form of art, drawing, plays, and photography or audio-visual recordings (Wildschut, 2007). All of this provides a *thick description*

that detail contexts, sentiments, social and power relations and the processes of change that occur. In practical terms what one hopes to achieve here will be the production of stringent material – verbal and creative expression and processes, of social, political, cultural and economic dynamics – that reshapes community and social contexts (Christian Aid Myanmar, 2019). In the setting of migrant and local relationship, this reshaping may involve a re-alignment of personal and interpersonal processes as well as power relations that underpin social transactions, providing the foundations for building more cohesive and sustainable communities. The product of such re-alignment could be re-worked in collages or exhibitions of living heritage, and as historic pieces of living memory and memorialisation to celebrate both victorious outcomes as well as the journeys towards this end, as repositories of history for the generations to follow.

Social Cohesion Advocates as Change Agents

Debates regarding the change process and how it is induced continue to abound. Notwithstanding the diversity of opinions in this area, the role of social change agents as catalysts to change is undisputed (Jason, 2013). Incremental change has been radically hastened by the involvement of one or more agents able to inspire and accelerate this process. This is evident when one observes the role played by prominent personalities in effecting changes all over the world including in the important area of social cohesion. The Department of Sports, Arts and Culture has recognised this fact in fostering the role of social cohesion advocates within its wider nation building programme (Department of Sports, Arts and Culture, Republic of South Africa, 2020a.). These advocates are drawn from leaders in the public, private and civil society sectors including artists, non-profits, and trade unionists etc. that interact closely with their communities (Department of Sports, Arts and Culture, Republic of South Africa, 2020b.). The advocates are drawn out of the community because of the potential to cascade change within their communities. Part of the process revolves around building their capacity to employ dialogue methodologies that enhance social cohesion. Such methodologies equip the advocates of change through a variety of tools with the capacity to facilitate social change within their distinct spheres of influence.

It is critical, within the broad strategy of employing social change advocates, for government as a potential convenor of a national programme to build social cohesion, to involve all strategic partnerships that it has worked with in the past, including relationships with relevant national, provincial and local government departments, local government and municipal structures, community and faith-based organisations, informal and formal opinion-leaders, community structures, non-government organisations, and other representative formations in the identified communities. In addition, government should utilize existing capacity within organisations familiar with dialogue, migrant/host dynamics and the terrain of social cohesion. In the present context, it may be preferable for such dialogues to be stimulated by joint teams of local and migrants drawn from faith-based, non-governmental government organization and other structures. Such teams could be an embodiment of social cohesion and their co-existence may help promote constructive dialogue within and between South Africans and migrants to build socially cohesive communities. Lastly, and equally important if the conversations are to have a nationwide impact, the dialogues should adopt a coordinated approach at national and local level and have sufficient funding in view of the long term efforts necessary for achieving attitudinal and behavioural shifts.

Conclusion

Post-apartheid South Africa continues to experience a lot of inflow migration particularly from other African countries, a phenomenon which is attributable to a number of push and pull agents. African migrants cite factors such as conflict in their home countries, availability of business and market opportunities in South Africa etc. as some of the reasons for migration. In a country still recovering from the horrors of apartheid, the incessant preoccupation with racial segregation is apparent. This, coupled with other factors such as competition for scarce resources, unmet expectations and frustration with government, media biases, scapegoating, “othering”, political and institutional factors, has led to tensions between locals and migrant communities. In extreme cases, migrants have been exposed to violent xenophobic and “Afrophobic” attacks.

The COVID-19 pandemic has amplified these tensions and brought the plight of migrants to the limelight. Lack of access to social security systems and grants as well as the inability to generate income owing to the lockdown are some of the challenges that migrants are facing presently. However, notwithstanding its negative effects, the pandemic presents the country with a unique opportunity to show our collective commitment to the integration of migrants into society and the overall acceleration of the process of social cohesion. The government will play the most important role using its vast social capital to promote inclusion of migrants at national and community level. Strategic partnerships with NGOs, civil societies, communities and local governments will create awareness and promote social cohesion dialogues with a far reaching effect. The media will also be crucial in the process, using its outreach to adapt a narrative which is more inclusive of migrants. Another important aspect is documentation and research, through which we are able to create a repository of the outcomes of cohesion efforts for the consumption of future generations. Lastly, we cannot deny the usefulness of social change advocates in effecting change in important areas such as social cohesion. Collaborative efforts between the government and strategic partners should include social change advocates to stimulate constructive dialogues on social cohesion and inclusivity. In remaining true to our dream of becoming a rainbow nation, we must resist the urge to resort to extreme nationalism and embrace diversity for a more inclusive and cohesive South Africa.

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Delivering Clean and Affordable Energy for All

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Abstract

Energy is considered to be an important component of social and economic needs of any society. Indeed, the integral role of energy is recognised under Sustainable Development Goal 7 of the United Nations 2030 Agenda for Sustainable Development Goals which seeks to 'ensure access to affordable, reliable, sustainable and modern energy for all'. The United Nations has observed that while 'energy is central to social and economic well-being, 1.1 billion people have no access to electricity, while 2.9 billion have to cook with polluting, inefficient fuels such as firewood'. This is despite the fact that Affordable and Clean Energy is seen as an important means towards achieving many of the SDGs – from poverty eradication via advancements in health, education, water supply, and industrialization to mitigating climate change'. Most of the people without access to affordable and clean energy are within the African continent. These people still rely on non-renewable sources of energy which are not only inefficient but also a danger to their health. This paper explores the ways through which the Government of Kenya can work with other stakeholders to ensure that there is a transition to cleaner and affordable energy sources for all its population, as a step towards achieving sustainable development agenda.

1. Introduction

It has been observed that energy and more precisely, inequitable access to energy—represents one of Africa's greatest obstacles to social and economic development.¹ Notably, the Continent is largely divided into three regions

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¹ Hafner M, Tagliapietra S and de Strasser L, 'The Challenge of Energy Access in Africa' in Manfred Hafner, Simone Tagliapietra and Lucia de Strasser (eds), *Energy*

namely: North Africa, which is heavily dependent on oil and gas, South Africa, which depends on coal and the rest of Sub-Saharan Africa, which is largely reliant on biomass.² Kenya falls within the Sub-Saharan Africa which also means that most of its citizens especially within the rural regions rely mainly on biomass, (unprocessed wood, charcoal, agricultural residues and animal waste), with adverse effects on their health.³ Thus, while the UN Secretary-General Ban Ki-Moon launched the Sustainable Energy for All Initiative (SE4All) in 2011 where he also declared 2012 the year for sustainable energy for all⁴, this has largely remained a mirage especially for the African region.

The *Kenya Sustainable Energy for All (SE4All) Action Plan*, was launched by the Ministry of Energy and Petroleum as an Action Agenda (AA) with an energy sector-wide long-term vision spanning the period 2015 to 2030, which outlines how Kenya will achieve her SE4All goals of 100% universal access to modern energy services, increase the rate of energy efficiency and increase to 80% the share of renewable energy in her energy mix, by 2030.⁵ In addition, the updated *Least cost power development plan 2017-2037* developed by the Ministry of Energy and Petroleum, which is an update of the 2015-2035 electricity Sector Master plan estimated peak demand for the period 2017-2037 ranges from 1,754MW to 6,638MW in the reference case scenario, 1,754MW to 9,790MW in the high case and between 1754MW in 2017 to 4,763MW in 2037 in the low case scenario.⁶ The energy sources considered in the system expansion plan for the different cases in the

in Africa: Challenges and Opportunities (Springer International Publishing 2018) <https://doi.org/10.1007/978-3-319-92219-5_1> accessed 19 April 2021.

² Karekezi, S., Kithyoma, W., & Energy Initiative, "Renewable energy development." In *workshop on African Energy Experts on Operationalizing the NEPAD Energy Initiative*, June, pp. 2-4. 2003, 2.

³ See Christine W Njiru and Sammy C Letema, 'Energy Poverty and Its Implication on Standard of Living in Kirinyaga, Kenya' (2018) 2018 *Journal of Energy*.

⁴ Republic of Kenya, *Kenya Sustainable Energy for All (SE4All) Action Plan*, January 2016

<https://www.seforall.org/sites/default/files/Kenya_AA_EN_Released.pdf> accessed 18 April 2021.

⁵ Ibid.

⁶ Republic of Kenya, *Least cost power development plan 2017-2037*, p. xv <<http://gak.co.ke/wp-content/uploads/2019/02/Updated-Least-Cost-Power-Development-Plan-2017-2022-min.pdf>> accessed 18 April 2021.

report included: Geothermal, nuclear, Wind, Solar, Import, Petrol-thermal plants, Hydropower, Coal and Natural gas.⁷ However, while Kenya has made significant steps towards increasing the power production, sustainability of some of these sources as well as affordability remains a challenge.⁸ The challenges facing Kenya's energy sector have been summarized as including: low electrification rate, reliance on imported fossil fuels, transmission inefficiencies, frequent power outages, high cost of rural electrification, demand for electricity outstripping generation capacity, and inability of the power utility agency to connect all customers who apply for connection to the national grid.⁹ It has been noted that the energy use of human societies has historically been marked by four broad trends: Rising consumption as societies industrialize, gain wealth and shift from traditional sources of energy (mostly biomass-based fuels such as wood, dung and charcoal) to commercial forms of energy (primarily fossil fuels); steady increases in both the power and efficiency of energy-producing and energy-using technologies; de-carbonization and diversification of fuels, especially for the production of electricity, throughout most of the 20th century; and a reduction in the quantities of conventional pollutants associated with energy use.¹⁰ Arguably, Kenya's energy sector is still struggling with problems that hinder the smooth transition through the stated trends, thus exposing its people to poverty and the potential adverse health effects.

This paper explores how Kenya can fast-track its efforts towards ensuring that it achieves sustainable and affordable energy for all its people in line with the United Nations 2030 Agenda for Sustainable Development Goals (SDGs)¹¹ Goal 7 which is based on this. The paper thus mainly focuses on addressing these challenges and offer solutions to promote the uptake, access

⁷ Ibid.

⁸ See Samoita D and others, 'Barriers and Solutions for Increasing the Integration of Solar Photovoltaic in Kenya's Electricity Mix' (2020) 13 *Energies* 5502.

⁹ Christine W Njiru and Sammy C Letema, 'Energy Poverty and Its Implication on Standard of Living in Kirinyaga, Kenya' (2018) 2018 *Journal of Energy*, 2.

¹⁰ Dilip Ahuja and Marika Tatsutani, 'Sustainable energy for developing countries' [2009] S.A.P.I.EN.S. *Surveys and Perspectives Integrating Environment and Society* <<http://journals.openedition.org/sapiens/823>> accessed 24 April 2021.

¹¹ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

and use of sustainable and affordable renewable energy for the Kenyan people in line with SDG Goal 7.

2. Place of Clean and Affordable Energy in Sustainable Development Agenda

Right to energy is so important that some authors have argued that ‘food and energy are the two essential resources to support the modern and civilized society of the mankind’.¹²

The United Nations 2030 Agenda for Sustainable Development Goals (SDGs) Goal 7 seeks to ‘ensure access to affordable, reliable, sustainable and modern energy for all’. The associated targets that are meant to create action to ensure universal access to sustainable energy include: By 2030, ensure universal access to affordable, reliable and modern energy services; by 2030, increase substantially the share of renewable energy in the global energy mix; by 2030, double the global rate of improvement in energy efficiency; By 2030, enhance international cooperation to facilitate access to clean energy research and technology, including renewable energy, energy efficiency and advanced and cleaner fossil-fuel technology, and promote investment in energy infrastructure and clean energy technology; and by 2030, expand infrastructure and upgrade technology for supplying modern and sustainable energy services for all in developing countries, in particular least developed countries, small island developing States and landlocked developing countries, in accordance with their respective programmes of support.¹³ This goal was informed by the fact that ‘the world has experienced a rapid demand of energy sources, both fossil fuels and renewables’.¹⁴ In addition, ‘as the population continues to grow, so will the demand for cheap energy, and an economy reliant on fossil fuels is creating drastic changes to

¹² Tomabechei K, ‘Energy Resources in the Future’ *Energies* 2010, 3, 686-695, 686.

¹³ ‘Goal 7: Affordable and Clean Energy’ (*The Global Goals*)

<<https://www.globalgoals.org/7-affordable-and-clean-energy>> accessed 18 April 2021.

¹⁴ Franco IB, Power C and Whereat J, ‘SDG 7 Affordable and Clean Energy: EWisely: Exceptional Women in Sustainability Have Energy to Boost–Contribution of the Energy Sector to the Achievement of the SDGs’.

our climate'.¹⁵ Urbanization and ambitions of economic development will also demand more energy.¹⁶

The United Nations rightly points out that while 'energy is central to social and economic well-being, 1.1 billion people have no access to electricity, while 2.9 billion have to cook with polluting, inefficient fuels such as firewood'.¹⁷ Some commentators have observed that 'SDG 7 Affordable and Clean Energy ensures access to affordable, reliable, and sustainable energy and is crucial in achieving many of the SDGs – from poverty eradication via advancements in health, education, water supply, and industrialization to mitigating climate change'.¹⁸

Access to cleaner and affordable energy sources is thus an important part of the journey towards achieving the sustainable development goals.

3. Accessing Clean and Affordable Energy Needs for All: The Kenyan Experience

Most developing countries are struggling with growing population and it is expected that today's world population will increase 1.26 times to reach 9.7 billion in 2050 with most of the world's population which include 90% of the population growth belonging to the developing countries.¹⁹

¹⁵ 'Goal 7: Affordable and Clean Energy' (UNDP)

<<https://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-7-affordable-and-clean-energy.html>> accessed 18 April 2021.

¹⁶ Hafner M, Tagliapietra S and de Strasser L, 'The Challenge of Energy Access in Africa' in Manfred Hafner, Simone Tagliapietra and Lucia de Strasser (eds), *Energy in Africa: Challenges and Opportunities* (Springer International Publishing 2018) <https://doi.org/10.1007/978-3-319-92219-5_1> accessed 19 April 2021

¹⁷ Valencia M, 'Sustainable Energy for All Shifts Gear to Speed Delivery of Affordable, Clean Energy' (*United Nations Sustainable Development*) <<https://www.un.org/sustainabledevelopment/blog/2016/06/sustainable-energy-for-all-shifts-gear-to-speed-delivery-of-affordable-clean-energy/>> accessed 18 April 2021.

¹⁸ Franco IB, Power C and Whereat J, 'SDG 7 Affordable and Clean Energy: EWisely: Exceptional Women in Sustainability Have Energy to Boost–Contribution of the Energy Sector to the Achievement of the SDGs', 106.

¹⁹ Salvarli MS and Salvarli H, *For Sustainable Development: Future Trends in Renewable Energy and Enabling Technologies* (IntechOpen 2020) <<https://www.intechopen.com/books/renewable-energy-resources-challenges-and-applications/for-sustainable-development-future-trends-in-renewable-energy-and-enabling-technologies>> accessed 19 April 2021.

Kenya, just like many other developing countries in Africa, is dealing with the burden of a growing population, environmental pollution, poverty, corruption and legal and policy framework inadequacies, among others, which all affect the achievement of clean and sustainable energy for all.²⁰ In addition, cultural perceptions (including myths about the flavour of food cooked on traditional stoves and the relative safety and cost of clean alternatives) have also been identified as a significant barrier to wider uptake of clean cooking fuels.²¹

These challenges informed the drafting of the sustainable development goals and the related targets. As a result, the environment which is being increasingly polluted because of rapid industrialization and human work is critical in the sustainable development agenda where sustainable development mainly covers the use of renewable energy, energy security, energy pricing, energy policy, renewable energy applications and smart grid technologies.²² The World Health Organization in a 2018 Household Energy Assessment Rapid Tool (HEART) developed in Kenya highlights human health issues from non-renewable energy sources where it points out that ‘household air pollution (HAP) from inefficient fuel combustion is one of the most important global environmental health risks today’ especially in low- and middle income countries such as Kenya, where majority of the population still rely on solid fuels (wood, animal dung, charcoal, crop wastes and coal) burnt in inefficient, highly polluting stoves for cooking and heating.²³ Indeed, this trend is expected to go on for longer if the latest

²⁰ Painuly JP, ‘Barriers to Renewable Energy Penetration; a Framework for Analysis’ (2001) 24 Renewable energy 73.

²¹ Ngeno G and others, ‘Opportunities for Transition to Clean Household Energy in Kenya: Application of the Household Energy Assessment Rapid Tool (HEART)’, *Opportunities for transition to clean household energy in Kenya: application of the household energy assessment rapid tool (HEART)* (2018), 1.

²² Salvarli MS and Salvarli H, *For Sustainable Development: Future Trends in Renewable Energy and Enabling Technologies* (IntechOpen 2020) <<https://www.intechopen.com/books/renewable-energy-resources-challenges-and-applications/for-sustainable-development-future-trends-in-renewable-energy-and-enabling-technologies>> accessed 19 April 2021.

²³ Ngeno G and others, ‘Opportunities for Transition to Clean Household Energy in Kenya: Application of the Household Energy Assessment Rapid Tool (HEART)’, *Opportunities for transition to clean household energy in Kenya: application of the household energy assessment rapid tool (HEART)* (2018), vi.

reports are anything to go by. It is reported that Kenyans are expected to pay higher for liquefied petroleum gas from 1st July 2021 following the reinstatement of value-added tax (VAT) on liquefied petroleum gas (LPG) through the Finance Act 2020, but the implementation of the charges was deferred to the second half of 2021 due to the Covid-19 crisis.²⁴ This is a retrogressive move by the Government from the earlier development where 'Kenyan households had since June 2016 been enjoying low cooking gas prices after the Treasury scrapped the tax on LPG to cut costs and boost uptake among the poor who rely on dirty kerosene and charcoal for cooking', a move that was in line with the country's commitment to achievement of SDG Goal 7.²⁵ With affordability being a key access barrier to clean cooking fuels, such as liquefied petroleum gas (LPG), this move is likely to erode the gains made in transitioning the country to cleaner technologies.²⁶

It has been suggested that while many developing countries have been apparently trying to restructure their energy sectors it is difficult to realize innovations in the energy sector as they struggle with cost, market share and policy as the main barriers for the development of renewable energy.²⁷ This is especially important since the reserves of fossil fuels are naturally expected to come to an end.²⁸

²⁴ April 23 2021 F, 'Cooking Gas Prices to Rise Sh350 on New Tax' (*Business Daily*) <<https://www.businessdailyafrica.com/bd/economy/cooking-gas-prices-rise-sh350-on-new-tax-3373296>> accessed 23 April 2021; Kerubo MJ and B, 'Higher Gas Costs: What You'll Pay to Refill Your Cylinders Beginning July' (*The Standard*) <<https://www.standardmedia.co.ke/nairobi/article/2001410538/kenyans-to-pay-more-for-cooking-gas-beginning-july>> accessed 23 April 2021.

²⁵ June 11 2020 T, 'Kenyans to Pay Sh300 More for Cooking Gas' (*Business Daily*) <<https://www.businessdailyafrica.com/bd/economy/kenyans-to-pay-sh300-more-for-cooking-gas-2292630>> accessed 23 April 2021.

²⁶ Shupler M and others, 'Pay-as-You-Go Liquefied Petroleum Gas Supports Sustainable Clean Cooking in Kenyan Informal Urban Settlement during COVID-19 Lockdown' [2021] *Applied Energy* 116769.

²⁷ Salvarli MS and Salvarli H, *For Sustainable Development: Future Trends in Renewable Energy and Enabling Technologies* (IntechOpen 2020) <<https://www.intechopen.com/books/renewable-energy-resources-challenges-and-applications-for-sustainable-development-future-trends-in-renewable-energy-and-enabling-technologies>> accessed 19 April 2021.

²⁸ *Ibid.*

Kenya's major sources of energy for the main economic production are oil, geothermal and hydro resources for electricity production where oil-based electricity generation is environmentally harmful, expensive and a burden to the national trade balance; the rivers for hydropower and their tributaries are found in arid and semi-arid areas with erratic rainfall leading to problems of supply security, and geothermal exploitation has cost and risk issues, amongst others.²⁹ The cost of electricity generation and supply is also affected by the overdependence on Hydroelectric Power (HEP) as the main source of renewable energy, which is weather dependent and the unpredictable weather, due to climate change has made power rationing a common phenomenon in a number of Sub-Saharan Africa countries during the dry seasons.³⁰ It has been observed that while 'Renewable Energy Technologies (RETs) provide attractive environmentally sound technology options for Africa's electricity industry, the success of RETs in the region has been limited by a combination of factors which include: poor institutional framework and infrastructure; inadequate RET planning policies; lack of co-ordination and linkage in the RET programme; pricing distortions which have placed renewable energy at a disadvantage; high initial capital costs; weak dissemination strategies; lack of skilled manpower; poor baseline information; and, weak maintenance service and infrastructure'.³¹

The challenges of energy cost and reliability in Kenya are made worse by the energy transmission and distribution virtual monopoly currently existing in Kenya.³² Kenya Electricity Generating Company (KenGen), generates about 70% of Kenya's electricity.³³ On the same breadth, Kenya Power owns

²⁹ Samoita D and others, 'Barriers and Solutions for Increasing the Integration of Solar Photovoltaic in Kenya's Electricity Mix' (2020) 13 *Energies* 5502, 1.

³⁰ ISSAfrica.org, 'Monopoly on Electricity Supply Contributes to Deforestation' (*ISS Africa*, 9 March 2010) <<https://issafrica.org/amp/iss-today/monopoly-on-electricity-supply-contributes-to-deforestation>> accessed 22 April 2021.

³¹ Karekezi, S., Kithyoma, W., & Energy Initiative, "Renewable energy development." In *workshop on African Energy Experts on Operationalizing the NEPAD Energy Initiative*, June, pp. 2-4. 2003, 1.

³² Owiro, D., Poquillon, G., Njonjo, K. S., & Oduor, C., 'Situational Analysis of Energy Industry, Policy and Strategy for Kenya' [2015] Institute of Economic Affairs.

³³ 'Who We Are' <<https://www.kengen.co.ke/index.php/our-company/who-we-are.html>> accessed 22 April 2021.

and operates most of the electricity transmission and distribution system in the country and sells electricity to over 8 million as at end of June 2020.³⁴ The Government of Kenya has a controlling stake at 50.1% of shareholding with private investors at 49.9%.³⁵ Lack of competition in the electricity generation and supply sector has been blamed for inefficiency and high costs of energy.³⁶

The *Energy Act, 2019*³⁷ was enacted to consolidate the laws relating to energy, to provide for National and County Government functions in relation to energy, to provide for the establishment, powers and functions of the energy sector entities; promotion of renewable energy; exploration, recovery and commercial utilization of geothermal energy; regulation of midstream and downstream petroleum and coal activities; regulation, production, supply and use of electricity and other energy forms; and for connected purposes.³⁸ While the citizenry was hoping that the enactment of this law would liberalize the energy market in Kenya and eliminate Kenya Power's monopoly in transmission and distribution of electricity in the country through licensing of other companies, the Government seemed to only affirm the same.³⁹

KenGen is among the companies that have been seeking to enter the retail market and sell electricity directly to consumers.⁴⁰ However, to the

³⁴ 'Who We Are | Kplc.Co.Ke' <<https://www.kplc.co.ke/content/item/14/about-kenya-power>> accessed 22 April 2021.

³⁵ Ibid.

³⁶ ISSAfrica.org, 'Monopoly on Electricity Supply Contributes to Deforestation' (*ISS Africa*, 9 March 2010) <<https://issafrica.org/amp/iss-today/monopoly-on-electricity-supply-contributes-to-deforestation>> accessed 22 April 2021.

³⁷ Energy Act, No. 1 of 2019, Laws of Kenya.

³⁸ Ibid, Preamble.

³⁹ 'Now Government Reaffirms Kenya Power's Monopoly' (*The East African*) <<https://www.theeastafrican.co.ke/tea/business/now-government-reaffirms-kenya-power-s-monopoly-1408382>> accessed 22 April 2021.

⁴⁰ 'KenGen Moves to End Kenya Power's Monopoly by Selling Electricity Directly to Consumers' (*Sun-Connect East Africa News*, 26 November 2020) <<https://sun-connect-ea.org/kengen-moves-to-end-kenya-powers-monopoly-by-selling-electricity-directly-to-consumers/>> accessed 22 April 2021; Siele M, 'Kengen to Begin Direct Power Sales Ending KPLC Monopoly - Business Today Kenya' <<https://businesstoday.co.ke/kengen-to-begin-direct-power-sales-ending-kplc-monopoly/>> accessed 22 April 2021;

disappointment of many Kenyans, the Government declined to license other companies, as yet.⁴¹

In summary, therefore, Kenya's energy sector still suffers from consistent power outages especially during dry seasons, high electricity tariffs specially exacerbated by high poverty and employment rates, energy retail sector monopoly, and cultural issues and biases that affect uptake of cleaner energy technologies, among others.⁴² Notably, as far as the use of clean energy is concerned, it is estimated that two-thirds of Kenya's energy currently comes from bioenergy.⁴³ In addition, as Kenya seeks to move from non-renewable energy sources to renewable energy sources as envisaged under the United Nations 2030 Agenda for Sustainable Development Goals, moving an economy which relies heavily on wood fuel and biomass as its largest energy source, to achieve sustainable energy use through the gradual increase in the use of renewable energy sources that are often expensive due to the technology deployed, in the face of oil and coal discoveries that could be more readily accessible in spite of its known effects on the environment is a great challenge.⁴⁴ This is mainly due to higher poverty levels in many households in developing countries, such as Kenya thus making it nearly impossible to afford the renewable and cleaner energy sources.⁴⁵ This is what is also mainly referred to as energy poverty, which the World Economic Forum in 2010 defined as 'the lack of access to sustainable modern energy services and products'.⁴⁶ Related to this definition is the observation that 'it

⁴¹ 'Now Government Reaffirms Kenya Power's Monopoly' (*The East African*) <<https://www.theeastafrican.co.ke/tea/business/now-government-reaffirms-kenya-power-s-monopoly-1408382>> accessed 22 April 2021.

⁴² Avila, N., Carvallo, J. P., Shaw, B., & Kammen, D. M., "The energy challenge in sub-Saharan Africa: A guide for advocates and policy makers." *Generating Energy for Sustainable and Equitable Development, Part 1* (2017): 1-79.

⁴³ 'Kenya Energy Outlook – Analysis' (IEA) <<https://www.iea.org/articles/kenya-energy-outlook>> accessed 21 September 2020.

⁴⁴ Owiro, D., G. Poquillon, K. S. Njonjo, and C. Oduor. "Situational analysis of energy industry, policy and strategy for Kenya." *Institute of Economic Affairs* (2015), p. 7.

⁴⁵ Karekezi, S., Kithyoma, W., & Energy Initiative, "Renewable energy development." In *workshop on African Energy Experts on Operationalizing the NEPAD Energy Initiative*, June, pp. 2-4. 2003; Christine W Njiru and Sammy C Letema, 'Energy Poverty and Its Implication on Standard of Living in Kirinyaga, Kenya' (2018) 2018 Journal of Energy.

⁴⁶ 'Energy Poverty' (*Habitat For Humanity*)

is not only a matter of sustainability: energy poverty can be found in all conditions where there is a lack of adequate, *affordable*, reliable, quality, safe and environmentally sound energy services to support development.(emphasis added).⁴⁷ The connection between energy poverty and socio-economic development is that ‘insufficient energy usually translates into the impossibility to develop agriculture and manufacturing, thus keeping the poorest countries trapped in a vicious circle: they cannot afford the energy that can drive them out of poverty’.⁴⁸

It is, therefore, possible to conclude that as the situation currently stands, majority of Kenyan population are suffering from energy poverty that needs to be addressed.

4. Delivering Clean and Affordable Energy for All: The Global Trends and the Lessons

While it has been argued that there is no “one size fits all” approach to successful clean household energy initiatives, some commentators have observed that a suite of options targeted to different sociocultural environments is likely to have wider acceptance.⁴⁹

4.1. Transition to Cleaner Energy Models

It has been observed that ‘one of the biggest limitations to achieving the SDGs is linked to the geography: the population in need is mostly located in rural areas, where there is no grid-electricity, and its expansion is often financially and logistically infeasible’.⁵⁰ In light of this, it has been suggested that ‘off-grid power has been instrumental in addressing this problem, notably stand-alone solutions, such as solar panels, hydro mini-grids, biogas mini-grids, among others, all of which comes from renewable sources, and

<<https://www.habitat.org/emea/about/what-we-do/residential-energy-efficiency-households/energy-poverty>> accessed 23 April 2021.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ngeno G and others, ‘Opportunities for Transition to Clean Household Energy in Kenya: Application of the Household Energy Assessment Rapid Tool (HEART)’, *Opportunities for transition to clean household energy in Kenya: application of the household energy assessment rapid tool (HEART)* (2018), 1.

⁵⁰ ‘Energy Poverty’ (*Habitat For Humanity*)

<<https://www.habitat.org/emea/about/what-we-do/residential-energy-efficiency-households/energy-poverty>> accessed 23 April 2021.

which makes it the perfect alternative to obtain a reliable and sustainable energy service, at a considerably low price'.⁵¹ As such, 'off-grid renewables give developing countries the opportunity to erase the electricity gap without passing through a phase of fossil fuels that would be hard to sustain in terms of cost, natural resources, and global environment'.⁵²

There has been calls for 'pro-poor access to electricity measures that will ensure that there is access that provides poor people with energy services enabling poverty reduction, which services include, for example: light, information and communications technologies, mechanical power for productive uses, and refrigeration or water pumping, as their poverty impacts may consist of income generation, female empowerment, or better education and health'.⁵³ This can be achieved in what is referred to as 'energy transition', defined as the global energy sector's shift from fossil-based systems of energy production and consumption — including oil, natural gas and coal — to renewable energy sources like wind and solar, as well as lithium-ion batteries.⁵⁴

Notably, Sweden was listed in 2020 Energy Transition Index (ETI) ranking for the third consecutive year as the country most ready to transition to clean energy, followed by Switzerland and Finland.⁵⁵ The ETI analyzes each country's readiness to adopt clean energy using three criteria: energy access and security; environmental sustainability; and economic development and growth.⁵⁶ Conspicuously, the top ten countries in the ranking were from the developed world, showing their readiness to transition.⁵⁷ Most African countries were ranked lowly or not considered at all, as demonstrated in the map below.

⁵¹ Ibid.

⁵² Ibid.

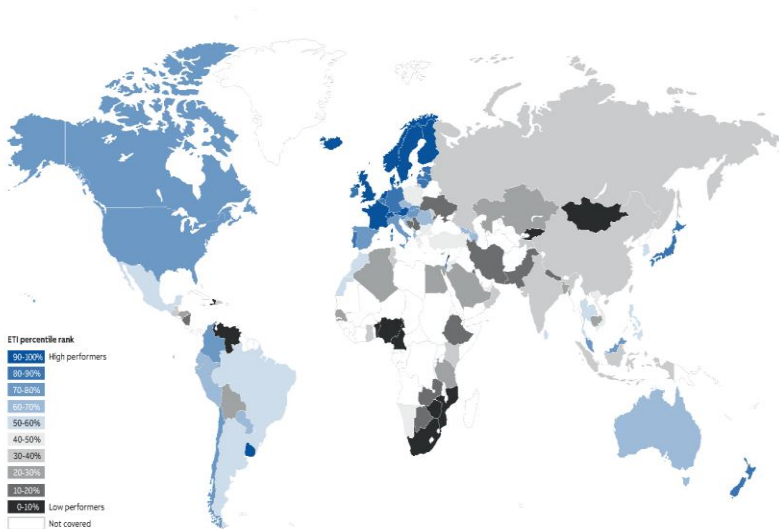
⁵³ Pueyo, A., *Pro-poor access to green electricity in Kenya*. No. IDS Evidence Report; 135. IDS, 2015, 3.

⁵⁴ 'Global Energy Transition Index, 2020 and Its Highlights – Civilsdaily' <<https://www.civildaily.com/news/global-energy-transition-index-2020-and-its-highlights/>> accessed 19 April 2021.

⁵⁵ 'These Countries Are Leading the Transition to Sustainable Energy' (*EcoWatch*, 14 May 2020) <<https://www.ecowatch.com/sustainable-energy-countries-2645997492.html>> accessed 19 April 2021.

⁵⁶ Ibid.

⁵⁷ Ibid.



Source: World Economic Forum, *Fostering Effective Energy Transition 2020*⁵⁸

Currently, Sweden boasts of about 54% energy that comes from renewable energy sources, with the country having attained the government's 2020 target of 50 per cent in 2012, while the power sector targeting to get to 100 per cent renewable electricity production by 2040.⁵⁹ Notably, Sweden's high share of renewable energy is attributed to hydropower (water) and bioenergy which are the top renewable sources in Sweden – hydropower mostly for electricity production and bioenergy for heating.⁶⁰ Sweden's success has been attributed to, inter alia, its market-based approach to energy policy, which is focused on creating well-functioning and competitive energy markets.⁶¹ The Swedish energy policy agreement of 10 June 2016 set the

⁵⁸ 'Energy Transition Index 2020' <<https://new.abb.com/news/detail/67960/energy-transition-index-2020>> accessed 19 April 2021.

⁵⁹ 'Energy Use in Sweden' (*sweden.se*, 23 December 2015) <<https://sweden.se/nature/energy-use-in-sweden/>> accessed 19 April 2021.

⁶⁰ Ibid.

⁶¹ International Energy Agency, *Energy Policies of IEA Countries: Sweden 2019 Review* <https://www.connaissancedesenergies.org/sites/default/files/pdf-actualites/Energy_Policies_of_IEA_Countries_Sweden_2019_Review.pdf> accessed 19 April 2021.

path for the current success, based on reconciling: ecological sustainability; competitiveness; and security of supply.⁶² In addition, the Policy was meant to create a basis for ensuring that 'Sweden achieves a robust electricity system with high reliability, low environmental impact and with access to electricity at competitive prices and also create long-term perspectives and clarity for market participants and bring new jobs and investments to Sweden.'⁶³

Kenya can learn a lot from the Swedish experience and it is high time that the stakeholders embark on the necessary steps to move the country towards consistent transition towards cleaner renewable energy sources for all.

4.2. Investing in Science, Technology and Innovation for Provision of Sustainable Energy for All

It has been agreed by many commentators that in order to meet the ever escalating energy needs of the growing population, energy solutions should be supported by utilizing renewable energy sources even though currently, the contribution of renewable energy to the world primary energy is not high to meet the primary energy and electricity supplies.⁶⁴ It has been observed that 'energy markets across the world are in the middle of a revolution, triggered by the pursuit of decarbonization and fueled by innovation'.⁶⁵

Some commentators have pointed out that 'new enabling technologies related to renewable energies will help to reduce environmental costs, and

⁶² Swedish Nuclear Society and Analysgruppen, *The Swedish energy policy agreement of 10 June 2016 – unofficial English translation* <https://balticbrilliantproject.eu/onewebmedia/Swedish_political_energy_agreement_2016.pdf> accessed 19 April 2021.

⁶³ Ibid.

⁶⁴ Salvarli MS and Salvarli H, *For Sustainable Development: Future Trends in Renewable Energy and Enabling Technologies* (IntechOpen 2020) <<https://www.intechopen.com/books/renewable-energy-resources-challenges-and-applications/for-sustainable-development-future-trends-in-renewable-energy-and-enabling-technologies>> accessed 19 April 2021.

⁶⁵ Woodhouse S and Bradbury S, 'Chapter 2 - Innovation, Disruption, and the Survival of the Fittest' in Fereidoon P Sioshansi (ed), *Innovation and Disruption at the Grid's Edge* (Academic Press 2017) <<https://www.sciencedirect.com/science/article/pii/B9780128117583000024>> accessed 22 April 2021.

thus the energy systems will be operated as both securely and economically without environmental problems, making new renewable energy markets a necessity in both the wholesale and retail markets.⁶⁶

Kenya has been making some commendable steps towards its transition to cleaner energy technologies since June 2016 when the Ministry of Finance zero-rated LPG gas to boost uptake by the poorer households. Notably, this has also seen the introduction of Pay-As-You-Go (PAYG) LPG smart meter technology in Kenya, enabling more Kenyans to embrace and enjoy the use of LPG for cooking and lighting as a cleaner and cheaper energy option.⁶⁷ Notably, across the world digitisation has driven and enabled the transformation of energy systems with many new companies entering the market with innovative products based on digital solutions, and companies from the information and communication sector and other companies from outside the industry increasingly driving the change.⁶⁸

There is also a need for continued investment in fuel efficient cook stoves improvements in developing countries as part of efforts to reduce indoor pollution and improve cooking efficiency.⁶⁹ This calls for a greater role of the Government and private sector to encourage use of energy efficient stoves and other related innovations.⁷⁰

⁶⁶ Salvarli MS and Salvarli H, *For Sustainable Development: Future Trends in Renewable Energy and Enabling Technologies* (IntechOpen 2020) <<https://www.intechopen.com/books/renewable-energy-resources-challenges-and-applications/for-sustainable-development-future-trends-in-renewable-energy-and-enabling-technologies>> accessed 19 April 2021.

⁶⁷ Shupler M and others, 'Pay-as-You-Go Liquefied Petroleum Gas Supports Sustainable Clean Cooking in Kenyan Informal Urban Settlement during COVID-19 Lockdown' [2021] *Applied Energy* 116769.

⁶⁸ Johannes Giehl and others, 'Survey and Classification of Business Models for the Energy Transformation' (2020) 13 *Energies* 2981, 12.

⁶⁹ Manibog, Fernando R. "Improved cooking stoves in developing countries: problems and opportunities." *Annual Review of Energy* 9, no. 1 (1984): 199-227.

⁷⁰ 'The Livelihoods Carbon Fund Doubles Its Investment in an Energy Efficiency Project to Reach 600,000 People in Kenya – Livelihoods Funds' <<https://livelihoods.eu/the-livelihoods-carbon-fund-doubles-its-investment-in-an-energy-efficiency-project-to-reach-600000-people-in-kenya/>> accessed 24 April 2021; Lucy Stevens and others, 'Market Mapping for Improved Cookstoves: Barriers and Opportunities in East Africa' (2020) 30 *Development in Practice* 37; 'Improved Cookstoves, Kenya | Natural Capital Partners'

Decarbonisation, decentralisation and digitalisation have been flaunted as part of the future of the global energy sector.⁷¹ Decarbonisation is defined as the reduction of carbon dioxide emissions through the use of low carbon power sources, achieving a lower output of greenhouse gasses into the atmosphere.⁷² Notably, decarbonisation involves increasing the prominence of low-carbon power generation, and a corresponding reduction in the use of fossil fuels which means increased use of renewable energy sources like wind power, solar power, and biomass.⁷³ Decarbonising the power sector is used to mean reducing its carbon intensity: that is, reducing the emissions per unit of electricity generated (often given in grams of carbon dioxide per kilowatt-hour).⁷⁴

It is important to point out that the Paris Agreement was created to hold nations accountable in their efforts to decrease carbon emissions, with the central goal of ensuring that temperatures do not rise 2 degrees Celsius above pre-industrial level.⁷⁵ It has been observed that the growth of renewable sources of power, such as wind turbines, solar panels and coal-to-biomass upgrades as well as other innovations, such as using batteries and allowing homes to generate and share their own power, can also lead to higher rates of decarbonisation.⁷⁶

<<https://www.naturalcapitalpartners.com/projects/project/kenya-improved-cookstoves>> accessed 24 April 2021.

⁷¹ 'Decarbonisation, Decentralisation and Digitalisation: The Big Drivers at PowerGen 2017'

<<https://www.power-technology.com/features/featured-decarbonisation-decentralisation-and-digitalisation-the-big-drivers-at-powergen-2017-5856615/>> accessed 23 April 2021.

⁷² 'What Is Decarbonisation?'

<<https://www.twi-global.com/technical-knowledge/faqs/what-is-decarbonisation.aspx>> accessed 24 April 2021.

⁷³ Ibid.

⁷⁴ 'What Is "Decarbonisation" of the Power Sector? Why Do We Need to Decarbonise the Power Sector in the UK?' (*Grantham Research Institute on climate change and the environment*)

<<https://www.lse.ac.uk/granthaminstitute/explainers/what-is-decarbonisation-of-the-power-sector-why-do-we-need-to-decarbonise-the-power-sector-in-the-uk/>> accessed 24 April 2021.

⁷⁵ 'What Is Decarbonisation?' (*Drax*, 21 August 2020)

<<https://www.drax.com/sustainability/what-is-decarbonisation/>> accessed 24 April 2021.

⁷⁶ Ibid.

Arguably, new digital tools can promote sustainability, including satellites to verify greenhouse gas emissions and technologies to track air pollution at the neighbourhood level.⁷⁷ The digitalization of the power sector is associated with greater transparency into operations, which greatly increases efficiency and reliability while decreasing costs and consequently; consumers will not only see the benefits of digitalization through lower monthly utility bills but also reduced outages and faster response times.⁷⁸

It has been observed that ‘the digitalisation of the power sector has already begun, with block chain and smart meters becoming commonplace as well as there being a possibility of virtual power plants replacing traditional ones, interlinking small scale solar and wind with base load to create a reliable power system.’⁷⁹

The International Energy Agency recommends some policy actions that governments can take to prepare for digitalisation which include: Build digital expertise within their staff; ensure appropriate access to timely, robust, and verifiable data; build flexibility into policies to accommodate new technologies and developments; experiment, including through ‘learning by doing’ pilot projects; participate in broader inter-agency discussions on digitalisation; focus on the broader, overall system benefits; monitor the energy impacts of digitalisation on overall energy demand; incorporate digital resilience by design into research, development and product manufacturing; provide a level playing field to allow a variety of

⁷⁷ ESI Africa, ‘How Digitalisation Is Reshaping the Energy Sector’ (*ESI-Africa.com*, 30 July 2020) <<https://www.esi-africa.com/smart-grids/how-digitalisation-is-reshaping-the-energy-sector/>> accessed 23 April 2021.

⁷⁸ ‘What Could Digitalization Achieve in the Power Sector?]’ (*Alliance to Save Energy*, 10 December 2020) <<https://www.ase.org/blog/what-could-digitalization-achieve-power-sector>> accessed 23 April 2021.

⁷⁹ ‘Decarbonisation, Decentralisation and Digitalisation: The Big Drivers at PowerGen 2017’ <<https://www.power-technology.com/features/featured-decarbonisation-decentralisation-and-digitalisation-the-big-drivers-at-powergen-2017-5856615/>> accessed 23 April 2021.

companies to compete and serve consumers better; and learn from others, including both positive case studies along with more cautionary tales.⁸⁰

4.3. Newer Business Models in Energy Sector: Opening Up the Energy Sector

It has been argued that ‘the ongoing energy system transformation across the world, and especially in developed world, and the growth of renewable energies are changing the structure and value creation of the energy industry with adopted business model classes showing that traditional business models are affected by the decarbonisation, decentralisation and digitisation of the energy system in all segments and economic sectors.’⁸¹

There is a need for the stakeholders in the energy sector to adopt business models that ensure that consumers get value, one that encourages consumers to pay for value, and one that converts those payments to profits.⁸² Liberalization and energy system transformation can arguably significantly increase the pace of change and have impact on the business model landscape substantially.⁸³

In many countries around the world, especially in the developed world, there has been a trend of liberalization, unbundling and deregulation of the energy sector in order to improve access to energy.⁸⁴ The liberalization of the energy market is defined to mean the opening of the electricity and gas market to free competition where existing monopolies are broken and the market is opened to more participants.⁸⁵

⁸⁰ ESI Africa, ‘How Digitalisation Is Reshaping the Energy Sector’ (*ESI-Africa.com*, 30 July 2020) <<https://www.esi-africa.com/smart-grids/how-digitalisation-is-reshaping-the-energy-sector/>> accessed 23 April 2021.

⁸¹ Johannes Giehl and others, ‘Survey and Classification of Business Models for the Energy Transformation’ (2020) 13 *Energies* 2981, 12.

⁸² Fuentes-Bracamontes R, ‘Is Unbundling Electricity Services the Way Forward for the Power Sector?’ (2016) 9 *The Electricity Journal* 16.

⁸³ Giehl J and others, ‘Survey and Classification of Business Models for the Energy Transformation’ (2020) 13 *Energies* 2981.

⁸⁴ Fuentes-Bracamontes R, ‘Is Unbundling Electricity Services the Way Forward for the Power Sector?’ (2016) 29 *The Electricity Journal* 16.

⁸⁵ ‘Liberalization & Unbundling of Energy Markets | Definition’ (25 March 2020) <<https://www.next-kraftwerke.com/knowledge/liberalization-energy-markets>> accessed 22 April 2021.

Liberalization in regard to the energy markets and specifically electricity and gas mainly refers to “the opening up of an industry to more competition, often involving the relaxing of government restrictions to break up existing monopolies and open the market to more participants.”⁸⁶ Liberalization has been characterized as involving the introduction of competition (via structural changes such as the removal of subsidies, vertical unbundling of integrated utilities to facilitate non-discriminatory access to monopoly networks and horizontal unbundling of incumbents to create viable competitors) and the establishment of independent energy sector regulators.⁸⁷ Expressed differently, in electricity and downstream gas supply, liberalization has often involved privatization (and/or the introduction of new private entrants) and structural reform of national industries to create competitive wholesale and retail markets with regulated non-discriminatory third party access to monopoly transmission and distribution networks.⁸⁸

Where liberalization has been achieved such as the European Union energy markets, it was done to benefit consumers through; raising employment levels, increasing business efficiency and increasing a country's potential economic development and GDP growth.⁸⁹ Thus, “opening up these markets to competition allows consumers to benefit from lower prices and new services...more efficient and consumer-friendly than before” and consumers benefit because a breaking up of a monopoly and introducing competition will help give consumers savings in price but also choice of what service they demand.⁹⁰ It has also been argued that ‘potential economic development and GDP growth is likely to occur as shown by the benefits to consumers, employment and efficiency because of increased employment which will cause more people to spend disposable income; an increase in companies

⁸⁶ ‘GRIN - Liberalisation of Energy Markets. Effects on Gas and Electricity Generation, Distribution and Supply’ <<https://www.grin.com/document/323337>> accessed 23 April 2021.

⁸⁷ Michael G Pollitt, ‘The Role of Policy in Energy Transitions: Lessons from the Energy Liberalisation Era’ (2012) 50 *Energy policy* 128.

⁸⁸ Michael G Pollitt, ‘The Role of Policy in Energy Transitions: Lessons from the Energy Liberalisation Era’ (2012) 50 *Energy policy* 128, 3.

⁸⁹ ‘GRIN - Liberalisation of Energy Markets. Effects on Gas and Electricity Generation, Distribution and Supply’ <<https://www.grin.com/document/323337>> accessed 23 April 2021.

⁹⁰ *Ibid.*

also increases employment but also the reduction in market prices will result in consumers having more disposable income to be spent on other goods and services, and this will lead to economic development in other industries and businesses and is likely to increase GDP.⁹¹ It has also been observed that ‘the introduction of competition in downstream energy sectors, such as electricity and gas supply, facilitates competition in upstream gas and coal production sectors; while the general increase in energy trading facilitates the introduction of emissions markets’.⁹²

Notably, while Kenya may have attained some milestone as far as unbundling (encouraging private generators of power, and separating generation from distribution) is concerned, the same cannot be said about liberalization (which is visibly missing from the Vision 2030). Notably, the electricity sector is unbundled and generation by independent power producers is permitted by law and is regulated, where as at 2018, it was estimated that the private sector produces 28% of Kenya’s centralised electricity supply.⁹³ This was enabled through Feed-in tariffs (FITs) Regulations which were introduced in 2008 and revised in 2010 and 2012 to enable independent power producers to sell electricity to KPLC at a fixed price for a fixed term of 20 years.⁹⁴ Despite the commendable considerable success of this development, there has been challenges in uptake of this generated power. For instance, it is estimated that Kenya’s Lake Turkana wind farm and its 365 turbines make for a generating capacity of more than 300MW, creating one of the most productive projects anywhere in the world.⁹⁵ Wind power has become a key contributor to the national grid to the extent that where there is interruption in its production, consumers have

⁹¹ Ibid.

⁹² Michael G Pollitt, ‘The Role of Policy in Energy Transitions: Lessons from the Energy Liberalisation Era’ (2012) 50 *Energy policy* 128, pp. 2-3.

⁹³ Kees Mokveld & Steven von Eije, *Final Energy report Kenya*, Commissioned by the Netherlands Enterprise Agency 2018, 13
<<https://www.rvo.nl/sites/default/files/2019/01/Final-Energy-report-Kenya.pdf>>
accessed 19 April 2021.

⁹⁴ Ibid, 13.

⁹⁵ ‘What’s Driving Wind Power in Kenya and What Challenges Lie in Wait?’
<<https://www.nsenergybusiness.com/features/wind-power-kenya-challenges/>>
accessed 24 September 2020.

ended paying more for electricity in the country.⁹⁶ Notably, the Lake Turkana Wind Power (LTWP) has been allocated a maximum production quota of 210MW, against an installed capacity of 310MW.⁹⁷ While independent power producers have made considerable efforts to produce enough power to run the country, there have been problems with uptake of the same by the Kenya Power and Lighting Company Plc (KPLC). For instance, in the recent times and partly due to the Corona Virus (Covid-19) pandemic, there have been reports that measures to contain the pandemic have led to reduced demand for power especially among the commercial consumers who account for over 65% of the power use in the country.⁹⁸ Reports also indicate that KPLC has prioritized the uptake of geothermal at 39.5 per cent, hydro at 33.9 per cent, wind at 14 per cent, diesel at 9.7 per cent with other sources like solar, imports from Uganda and co-generation accounting for about three per cent.⁹⁹ This has thus left some of the producers with excess power.¹⁰⁰ This shows that Kenya's main consumers of electricity are commercial businesses and when these run into difficulties, the independent power producers are left stranded.¹⁰¹ This happens while there are still reports that there are homes in Kenya still not connected to the grid despite the Government's best efforts to do so.¹⁰² Thus, even as the

⁹⁶ 'Consumers Pay the Price as Covid Electricity Cuts Hit Turkana Project - The East African' <<https://www.theeastafrican.co.ke/tea/business/consumers-pay-the-price-as-covid-electricity-cuts-hit-turkana-project-1939124>> accessed 19 April 2021.

⁹⁷ 'Consumers Pay the Price as Covid Electricity Cuts Hit Turkana Project - The East African' <<https://www.theeastafrican.co.ke/tea/business/consumers-pay-the-price-as-covid-electricity-cuts-hit-turkana-project-1939124>> accessed 1 October 2020.

⁹⁸ 'Consumers Pay the Price as Covid Electricity Cuts Hit Turkana Project - The East African' Monday September 14 2020
<<https://www.theeastafrican.co.ke/tea/business/consumers-pay-the-price-as-covid-electricity-cuts-hit-turkana-project-1939124>> accessed 1 October 2020.

⁹⁹ 'Consumers Pay the Price as Covid Electricity Cuts Hit Turkana Project - The East African' Monday September 14 2020
<<https://www.theeastafrican.co.ke/tea/business/consumers-pay-the-price-as-covid-electricity-cuts-hit-turkana-project-1939124>> accessed 1 October 2020.

¹⁰⁰ Ibid.

¹⁰¹ "The Seven Major Threats to Kenya's Power Sector." *Energy For Growth*, <https://www.energyforgrowth.org/memo/the-seven-major-threats-to-kenyas-power-sector/>. Accessed 24 Apr. 2021; Avila, Nkiruka, Juan Pablo Carvallo, Brittany Shaw, and Daniel M. Kammen. "The energy challenge in sub-Saharan Africa: A guide for advocates and policy makers." *Generating Energy for Sustainable and Equitable Development, Part 1* (2017): 1-79.

¹⁰² *Kenya Energy Situation - Energypedia.Info*.

Government looks for ways to produce cleaner power, there is also a need to address the disconnect between production and distribution of the power possibly through liberalization of the energy sector.¹⁰³

While this has been attributed to the Covid-19 pandemic that afflicted almost the whole world in 2020, it raises a concern as to whether the power producers' major customers are only the commercial users.¹⁰⁴ This is because, it has already been pointed out that there are households in Kenya that still mainly rely on kerosene and biomass (firewood and charcoal) as their main source of energy for their inability to afford electricity.¹⁰⁵ Thus, even as we vouch for increased transition to renewable energy by way of increased production, this scenario points out the fact that there is more than availability of the renewable energy: the same must not only be made available but must also be made affordable to the local 'mwananchi' (citizen). Affordability of energy is key.

While the Energy Ministry had expressed optimism of introducing net metering for customer-sites generation (dependent on the enactment of the energy bill), establish regulations for mini-grids, and had started exploring the idea of local-currency-denominated tariffs in a bid to encourage local commercial banks to participate in energy projects,¹⁰⁶ this was however not achieved after the enactment of the Energy Act, 2019¹⁰⁷. Liberalization of the sector would make all of these easier to actualize, for the benefit of consumers.

Arguably, the current unbundling structure has not achieved a lot for the Kenyan people as the high cost and unreliability of electricity supply in the country are still major issues, as these are greatly affected by state monopoly

https://energypedia.info/wiki/Kenya_Energy_Situation. Accessed 24 Apr. 2021.

¹⁰³ 'Liberalization & Unbundling of Energy Markets | Definition' (25 March 2020) <<https://www.next-kraftwerke.com/knowledge/liberalization-energy-markets>> accessed 22 April 2021.

¹⁰⁴ The Seven Major Threats to Kenya's Power Sector." *Energy For Growth*, <https://www.energyforgrowth.org/memo/the-seven-major-threats-to-kenyas-power-sector/>. Accessed 24 Apr. 2021.

¹⁰⁵ *Kenya Energy Situation - Energypedia.Info*.

https://energypedia.info/wiki/Kenya_Energy_Situation. Accessed 24 Apr. 2021.

¹⁰⁶ Kees Mokveld & Steven von Eije, *Final Energy report Kenya*, Commissioned by the Netherlands Enterprise Agency 2018, 13.

¹⁰⁷ Act No. 1 of 2019, Laws of Kenya.

mainly through Kenya Power, a vertically integrated company.¹⁰⁸ Liberalization would ensure that for all forms of energy - gas, electricity, coal and oil - industrial and domestic consumers would be free to choose their supplier.¹⁰⁹ Kenya needs to borrow a leaf from some of the most successful countries in this sector such as Sweden and Singapore, among others.

In order to improve energy security and affordability, Singapore began to deregulate its electricity market since 2003, with the creation of the National Electricity Market of Singapore (NEMS) allowing for bid-ask offers to be made for the dispatch of electricity supply on the wholesale side and subsequently, the retail market liberalized in tranches, with 80% of electricity consumers currently already given an option to select their electricity retailers since late 2014.¹¹⁰ As result, as at 2018, it was reported that ‘supply competition and the retail liberalization efforts had possibly led to a combinatorial decrease in wholesale electricity prices by up to 9.11%, accounting for the influence of oil prices and volatility components’.¹¹¹ The country has also attracted investors in the sector making it more competitive for the retail consumer as far as choice of energy supplier is concerned.¹¹² Notably, 14 electricity providers participated in the pilot phase, including units of infrastructure companies.¹¹³

Kenya should follow in the footsteps of Singapore and other countries that have liberalized their energy markets in order to address the gap between

¹⁰⁸ Tarver, Evan. “Horizontal vs. Vertical Integration: What’s the Difference?” *Investopedia*, <https://www.investopedia.com/ask/answers/051315/what-difference-between-horizontal-integration-and-vertical-integration.asp>. Accessed 24 Apr. 2021.

¹⁰⁹ World Trade Organization, “The Social Effects of Energy Liberalisation: The UK Experience,” *Launching a Common European Energy Market*, Lisbon 5/6 June 2000, https://www.wto.org/english/tratop_e/serv_e/symp_mar02_uk_social_effects_energy_lib_e.pdf accessed 19 April 2021.

¹¹⁰ Loi TSA and Jindal G, ‘Electricity Market Deregulation in Singapore – Initial Assessment of Wholesale Prices’ (2019) 127 Energy Policy 1.

¹¹¹ Ibid.

¹¹² ‘Singapore Electricity Market Deregulation Attracts DBS, StarHub’ (*Nikkei Asia*) <<https://asia.nikkei.com/Business/Markets/Nikkei-Markets/Singapore-electricity-market-deregulation-attracts-DBS-StarHub>> accessed 19 April 2021.

¹¹³ Ibid.

generation, transmission and distribution of energy and particularly electricity and consequently ensure that all people in the country have access to cleaner, affordable energy.

4.4. Enhancing the Role of Private Sector in Renewable Energy Sector

Notably, *Energy Act, 2019* provides for the establishment of the Rural Electrification and Renewable Energy Corporation which is charged with, *inter alia*, harnessing opportunities offered under clean development mechanism and other mechanisms including, but not limited to, carbon credit trading to promote the development and exploitation of renewable energy sources.¹¹⁴ The Nuclear Power and Energy Agency is also mandated to, *inter alia*, put in place mechanisms to attract private sector funding in research and human resource development for matters relating to energy.¹¹⁵

With introduction of market liberalization in Kenya's energy sector, a robust carbon credit trading system in Kenya could achieve the twin goals of raising funds and climate change mitigation in the energy sector.¹¹⁶ According to the International Finance Corporation (IFC), the estimated total investment potential for the climate-smart needs of Côte d'Ivoire, Kenya, Nigeria, and South Africa is \$783 billion by 2030.¹¹⁷ Sixteen percent of this potential is for renewable energy generation (\$123 billion), while well over half (\$499 billion) is for the transportation sector.¹¹⁸ Regarding clean energy access in

¹¹⁴ Sec. 44(1) (q), *Energy Act*, No. 1 of 2019, Laws of Kenya.

¹¹⁵ Sec. 55(2) (k), *Energy Act*, No. 1 of 2019

¹¹⁶ 'Kenyans Earn First Ever Carbon Credits From Sustainable Farming' (*World Bank*) <<https://www.worldbank.org/en/news/press-release/2014/01/21/kenyans-earn-first-ever-carbon-credits-from-sustainable-farming>> accessed 23 April 2021; Yiting Wang and Catherine Corson, 'The Making of a "charismatic" Carbon Credit: Clean Cookstoves and "Uncooperative" Women in Western Kenya' (2014) 0 *Environment and Planning A* 0; Kioko Nzuki Mwanja, 'Carbon Trading In Kenya: A Critical Review'; Kanyinke Sena, 'Carbon Credit Schemes and Indigenous Peoples in Kenya: A Commentary' (2015) 32 *Ariz. J. Int'l & Comp. L.* 257.

¹¹⁷ International Finance Corporation, *Climate Investment Opportunities in Emerging Markets: An IFC Analysis*, 2016, 60.<https://www.ifc.org/wps/wcm/connect/59260145-ec2e-40de-97e6-3aa78b82b3c9/3503-IFC-Climate_Investment_Opportunity-Report-Dec-FINAL.pdf?MOD=AJPERES&CVID=IBLd6Xq> accessed 19 April 2021.

¹¹⁸ International Finance Corporation, *Climate Investment Opportunities in Emerging Markets: An IFC Analysis*, 2016, 60.<<https://www.ifc.org/wps/wcm/connect/59260145-ec2e-40de-97e6->

Sub-Saharan Africa, it is estimated that 600 million people in the region have no access to basic electricity services, and this number will increase with a projected 2.3 percent annual population growth, with only seven Sub-Saharan countries presently having electricity-access rates exceeding 50 percent; the rest have an average grid access rate of just 20 percent.¹¹⁹ In addition, the annual investment in the Sub-Saharan African power system is currently estimated at around \$8 billion per year, or 0.5 percent of GDP while electricity demand in Africa is projected to triple by 2030, representing huge potential for investment in renewable energy.¹²⁰ It is also estimated that Africa's power sector requires investments of \$70 billion per year, on average, between now and 2030, which can be split into about \$45 billion per year for generation capacity and \$25 billion for transmission and distribution, creating a huge opportunity for investments.¹²¹ Kenya would greatly benefit from this opportunity considering that it requires huge investments in the energy sector, especially in the area of renewables considering that Kenya's development blueprint, Vision 2030 which seeks to create "a globally competitive and prosperous country with a high quality of life by 2030" and it aims to transform Kenya into "a newly-industrialising, middle income country providing a high quality of life to all its citizens in a clean and secure environment".¹²² Notably, one of the foundations for Kenya Vision 2030 upon which the economic, social and political pillars of Kenya Vision 2030 will be anchored on include energy where the 'the Government of Kenya committed to continued institutional reforms in the energy sector, including a strong regulatory framework, encouraging private generators of power, and separating generation from distribution, with new sources of energy will be found through exploitation of geothermal power, coal, renewable energy sources, and connecting Kenya to energy-surplus countries in the region.¹²³

3aa78b82b3c9/3503-IFC-Climate_Investment_Opportunity-Report-Dec-FINAL.pdf?MOD=AJPERES&CVID=IBLd6Xq> accessed 19 April 2021.

¹¹⁹ Ibid, 61.

¹²⁰ Ibid, 61.

¹²¹ Ibid, 61.

¹²² Government of the Republic of Kenya, *Kenya Vision 2030: A Globally Competitive and Prosperous Kenya* (Government Printer Nairobi 2007).

¹²³ Ibid.

There is a need for the Government of Kenya to recognise and reach out to the private sector through creating a conducive legal and policy environment for investments in the country's energy sector in order to enable it achieve its objectives in the energy sector for achievement of clean and affordable energy for its people.¹²⁴ This is because, as it has been suggested that 'that effective policies and institutions are the best way to enable developing countries, and the private sector operating in those countries, to attract private finance to drive sustained growth'.¹²⁵ Arguably, 'the private sector is critical to economic growth and poverty reduction, where sustainable and inclusive private sector-led growth can contribute to reducing poverty'.¹²⁶ In addition, 'partnerships between donors, partner governments and the private sector are being used to achieve private sector development objectives which enables governments to access private sector ideas, innovations and business models in search of solutions to intractable development problems'.¹²⁷

4.5. Promoting Energy Efficiency in Kenya

While availability and affordability of energy is an important step towards attaining energy security for all, there is also a need to put equal emphasis on enhancing energy efficiency in the country.¹²⁸ Arguably, energy-efficiency or 'demand-side management' programs can provide a number of benefits in developing countries, including lower costs to customers, an fewer electrical supply problems, greater system reliability and a more moderate growth in demand.¹²⁹ Energy efficiency can be achieved through use of more energy efficient gadgets and appliances as well as employing everyday power saving practices especially in households.¹³⁰

¹²⁴ Tewes-Gradl, Christina, Anna Peters, Karin Vohla, and L. Lütjens-Schilling. "Inclusive Business Policies: How Governments can Engage Companies in Meeting Development Goals." *Endeva UG, Berlin* (2013).

¹²⁵ Tess ewton Cain, 'The Role of the Private Sector in Promoting Economic Growth and Reducing Poverty in the Indo-Pacific Region', 1.

¹²⁶ Ibid, 1.

¹²⁷ Ibid, 2.

¹²⁸ Patterson, Murray G. "What is energy efficiency?: Concepts, indicators and methodological issues." *Energy policy* 24, no. 5 (1996): 377-390.

¹²⁹ Dilip Ahuja and Marika Tatsutani, 'Sustainable energy for developing countries' [2009] S.A.P.I.E.N.S. Surveys and Perspectives Integrating Environment and Society <<http://journals.openedition.org/sapiens/823>> accessed 24 April 2021.

¹³⁰ Attendant, An Automated, et al. *How You Can Help Reduce Greenhouse Gas Emissions at Home - Point Reyes National Seashore (U.S. National Park Service)*.

4.6. Addressing Barriers in Renewable Energy Uptake in Kenya

Renewable energy technologies (RETs) have been defined as energy-providing technologies that utilize energy sources in ways that do not deplete the Earth's natural resources and are as environmentally benign as possible.¹³¹

Some of the earliest barriers to embracing renewable energy technologies have been identified as cost-effectiveness, technical barriers, and market barriers such as inconsistent pricing structures, institutional, political and regulatory barriers, and social and environmental barriers where some may be specific to a technology, while others may be specific to a country or a region.¹³²

Some of the barriers that are relevant to Kenya and ought to be taken up include: highly controlled energy sector where governmental monopoly of energy sector restricts private sector entry; monopoly of energy supplier and/or distributor, electricity generation, transmission and distribution; controlled and lack of private sector investment.¹³³ There is also the problem of lack of involvement of stakeholders in decision-making processes leading to clash of interests where stakeholders' consultation culture is missing, stakeholders are dispersed, there is difficulty in communication, and there is fear of opposition.¹³⁴ Related to this and relevant to Kenya is the observation that there is also renewable energy technologies competing with conventional energy, leading to them being treated as a threat to utility dominance, threat to utility profit, powerful lobbies against renewable energy technologies, threat of transfer of control over energy, powerful lobbies for conventional energy and decoupling of investor–consumer interests.¹³⁵ It has been documented that while the government of Kenya has

https://www.nps.gov/pore/learn/nature/climatechange_action_home.htm. Accessed 24 Apr. 2021.

¹³¹ Jim Watson, Oliver Johnson and Dong Wu, 'Renewable Energy Technologies for Rural Development' [2010] UNCTAD Current Studies on Science, Technology and Innovation.

¹³² Painuly JP, 'Barriers to Renewable Energy Penetration; a Framework for Analysis' (2001) 24 *Renewable energy* 73, 75.

¹³³ *Ibid.*, 83.

¹³⁴ *Ibid.*, 83.

¹³⁵ *Ibid.*, 83.

a history of welcoming private investment in the energy sector, the nature of the political system presents challenges –not least over corruption and access to land thus making investments carry higher risks for large, on-grid projects than they are for off-grid and micro-grid investments.¹³⁶

While Kenya has made some impressive steps towards investing in renewable energy technologies such as wind power and geothermal, and which has seen electricity tariffs reduce during certain periods,¹³⁷ the reduction in prices has not been consistent.¹³⁸ There is a need for the country to continually invest in renewable sources of energy to boost reliability and hopefully reduce the cost of electricity due to reduction in production costs.¹³⁹ The legal, policy, institutional and technical barriers should be addressed to tap into the benefits of using renewable energy sources.¹⁴⁰

¹³⁶ Gordon E, 'The Politics of Renewable Energy in East Africa' (2018), 15<<https://www.oxfordenergy.org/wpcms/wp-content/uploads/2018/08/The-politics-of-renewable-energy-in-East-Africa-EL-29.pdf>> accessed 19 April 2021.

¹³⁷ 'KENYA: 8% Reduction in Electricity Rates Thanks to Renewable Energies' (*Afrik 21*, 30 July 2018) <<https://www.afrik21.africa/en/kenya-8-reduction-in-electricity-rates-thanks-to-renewable-energies/>> accessed 22 April 2021; October 23 2020 F, 'Uhuru Tariff Cut Dims Kenya Power Revenue by Sh4.8bn' (*Business Daily*)<<https://www.businessdailyafrica.com/bd/economy/uhuru-tariff-dims-kenya-power-revenue-by-sh4-8bn-2719632>> accessed 22 April 2021; <https://www.the-star.co.ke/authors/gilbertkoech>. "Kenya Keen to Prioritise Clean, Renewable Energy." *The Star*, <https://www.the-star.co.ke/sasa/technology/2020-04-24-kenya-keen-to-prioritise-clean-renewable-energy/>. Accessed 24 Apr. 2021; Mactilda Mbenywe, "Uhuru addresses world forum, commits to mitigate climate change", *Saturday Standard*, 24 April 2021. <<https://www.standardmedia.co.ke/kenya/article/2001410702/uhuru-commits-to-renewable-energy>> 24 April 2021.

¹³⁸ November 05 2020 T, 'Regulator Agrees to Kenya Power 20pc Electricity Bill Increase' (*Business Daily*) <<https://www.businessdailyafrica.com/bd/economy/regulator-kenya-power-20pc-electricity-bill-hike-2731164>> accessed 22 April 2021; Theuri P, 'Rising Electricity Bills Push Manufacturers to the Wall' (*The Standard*) <<https://www.standardmedia.co.ke/business/business-news/article/2001385332/rising-electricity-bills-push-manufacturers-to-the-wall>> accessed 22 April 2021;

¹³⁹ une 15, and 2018 Lora Shinn. "Renewable Energy: The Clean Facts." *NRDC*, <https://www.nrdc.org/stories/renewable-energy-clean-facts>. Accessed 24 Apr. 2021.

¹⁴⁰ *Barriers to Renewable Energy Technologies | Union of Concerned Scientists*. <https://ucsusa.org/resources/barriers-renewable-energy-technologies>. Accessed 24 Apr. 2021.

There is also a need for digitalization, liberalization, civic education and deregulation of energy sector, among others in order to address the above mentioned challenges.¹⁴¹

5. Conclusion

The United Nations Development Programme (UNDP) has rightly pointed out that ‘investing in solar, wind and thermal power, improving energy productivity, and ensuring energy for all is vital if we are to achieve SDG 7 by 2030’. In addition, ‘expanding infrastructure and upgrading technology to provide clean and more efficient energy in all countries will encourage growth and help the environment’.¹⁴²

It has also been observed that ‘policy and market design are vital to steering digitally enhanced energy systems onto an efficient, secure, accessible and sustainable path’.¹⁴³ It is time for the stakeholders and especially the Government to consider liberalization of the country’s energy sector, especially in electricity generation, transmission and distribution. Liberalization of Kenya’s energy sector also calls for ‘a strong framework for regulation which is essential together with the benefits of a more efficient, innovative, and customer-focused industry’.¹⁴⁴ There is a need for rethinking the current approaches in energy generation, transmission and distribution if the goal and dream of cleaner and affordable energy sources for all Kenyans are to be achieved as part of realisation of the 2030 Agenda on SDGs as well as Kenya’s Vision 2030. Without implementing radical changes in the sector, SDG Goal 7 will remain a mirage. Delivering Clean and Affordable Energy for all is a noble dream that is achievable.

¹⁴¹ “The General Framework for Liberalization and Regulation of Public Utilities in Countries of Ex-Yugoslavia.” *Florence School of Regulation*, 21 Mar. 2017, <https://fsr.eu.eu/niq19-1-liberalization-ex-yugoslavia/>.

¹⁴² ‘Goal 7: Affordable and Clean Energy’ (UNDP) <<https://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-7-affordable-and-clean-energy.html>> accessed 18 April 2021.

¹⁴³ ESI Africa, ‘How Digitalisation Is Reshaping the Energy Sector’ (*ESI-Africa.com*, 30 July 2020) <<https://www.esi-africa.com/smart-grids/how-digitalisation-is-reshaping-the-energy-sector/>> accessed 23 April 2021.

¹⁴⁴ ‘How Strong Regulatory Frameworks Support Development’ (NARUC) <<https://www.naruc.org/international/news/how-strong-regulatory-frameworks-support-development/>> accessed 24 April 2021.

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<<https://www.naturalcapitalpartners.com/projects/project/kenya-improved-cookstoves>> accessed 24 April 2021.

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Enhancing Public Participation for Effective Management and Protection of Environmental Resources in Kenya

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Abstract

The principle of public participation is one of the principles of governance enshrined in Article 10 Constitution of Kenya 2010.¹ Public participation in environmental decision-making processes is a vital requirement. This is especially so when it comes to Environmental Impact Assessments. Comprehensive and transparent involvement of the public is advocated for by both national and international laws. Public participation is necessary in identifying, addressing and mitigating potential environmental risks associated with various projects.

As jurisprudence has shown overtime time and buttressed by seminal court decisions, any project undertaken without effective public participation especially one that stands to impact on the environment is null and void ab initio. The right to a clean and healthy environment is one of the rights guaranteed under the Constitution of Kenya 2010.²

Premised on the foregoing, this paper therefore delimits what constitutes meaningful public participation that can lead to realization of effective management and protection of environmental resources in Kenya. In doing so, this paper defines the elements of the principle of public participation, the importance of the principle of public participation, gives a critique of the barriers towards achieving effective public participation and lastly provides recommendations of how the barriers can be reduced.

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¹ Article 10 of the Constitution of Kenya 2010

² Article 40 of the Constitution of Kenya 2010

1.0 Introduction

All human activities revolve around the environment and as such these activities have the power to alter the planet irreversibly. The basis of this assertion can be derived from what constitutes environment. Perhaps the simplest and most memorable definition of "environment" is that given by *Albert Einstein*, who once said, "...the environment is everything that isn't me."³ The only problem with adopting this definition is that there will be very little activity which does not have an "environmental" impact.⁴ This illustrates that defining environment is challenging due to the scope of what can be regarded as part of the environment.

A succinct definition of environment is that it is a combination of elements whose complex interrelationships make up the settings, the surroundings and the conditions of life of the individual and society as they are and as they are felt. (EC Council Regulation 1872/84, Action by the Community Relating to the Environment, 1984.)⁵ The term environment has also been defined by the International Court Justice in *the Legality of the Threat or use of Nuclear Weapons Case* to include, "... not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn."⁶

A legal definition of the term *environment* in Kenya is provided by Section 2 of the Environmental Management and Co-ordination Act,⁷ (hereinafter EMCA) which states that: "*Environment*" includes the physical factors of the surroundings of human beings including land, water, atmosphere, climate, sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetics and includes both the natural and the built environment"

³ <https://www.brainyquote.com/quotes/albert_einstein_165189> accessed on 31/05/21

⁴ Justine Thornton & Silas Beckwith, Environmental Law (Sweet and Maxwell 1997) pg.2

⁵ Mark Stallworthy, Environmental Law 1st Edition, pg.2

⁶ ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996, p 241, para 29

⁷ Act No. 8 of 1999

Environmental resources are “any materials or services from the environment that are valuable to the society.”⁸ They include natural resources among other things.

On the other hand, public participation can succinctly be defined as the active involvement of members of a community in decisions which affect them.⁹ A statutory definition of public participation is offered by the Wildlife Conservation and Management Act No. 47 of 2013 which under Section 3(1) defines *public participation* to mean; *active involvement by the citizenry in decision making processes through, inter alia, use of the national media, relevant consultative mechanisms and public hearings.*

In essence, then public participation involves the dissemination of information and invitation to the public to participate in the decision-making process.¹⁰ The principle of public participation operates as a direct democracy where citizens influence and share their ideas on the exercise of public authority.¹¹ It lies on the notion that every citizen has a right to be informed on matters that affect them and also accorded an opportunity to express their views.¹²

Principle 10 of the Rio Declaration also offers a lengthy elucidation of what constitutes public participation. It states that; “*Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their*

⁸Encyclopaedia, ‘Environmental Resources’

<<https://www.encyclopedia.com/environment/encyclopedias-almanacs-transcripts-and-maps/environmental-resources>> accessed on 31/05/21

⁹Doctors for Life International v The Speaker National Assembly and Others (2006) (CCT12/05) (ZACC 11)

¹⁰ Ibid No.9

¹¹Dominic Steiger, ‘A Constitutional Theory of Imperative Participation; Delegated Rulemaking, Citizen’s Participation and the Separation of Powers Doctrine,’ (2015) 79 *Alberta Law Review* 3

¹² Ibid No.11

communities, and the opportunity to participate in decision-making processes..."¹³

The principle of public participation places an obligation upon States to provide effective access to judicial and administrative proceedings, including redress and remedy.¹⁴ This is to ensure the protection of the right to public participation. Public participation empowers citizens as they are able to hold the government accountable for the decisions made.¹⁵ As a result of this principle of public participation, the government is able to make informed decisions while taking into account the needs of the stakeholders and the society at large.¹⁶

The importance of public participation was emphasized by the Court of Appeal¹⁷ where it stated that, "...*The issue of public participation is of immense significance considering the primacy it has been given in the supreme law of this country and in relevant statutes relating to institutions that touch on the lives of the people. The Constitution in Article 10 which binds all state organs, state officers, public officers and all persons in the discharge of public functions, highlights public participation as one of the ideas and aspirations of our democratic nation... public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates.*"¹⁸

¹³UN Commission on Human Rights, Human rights and the environment, 9 March 1992, principle 10

¹⁴UN Commission on Human Rights, Human rights and the environment, 9 March 1992, principle 10

¹⁵ ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996, p 241

¹⁶Ibid No.14

¹⁷Kiambu County Government & 3 others v Robert N. Gakuru & Others [2017] eKLR.

¹⁸Ibid No.17

2.0 A Case for meaningful Public Participation in a bid to realize Effective Management and Protection of Environmental Resources in Kenya

In a discourse to realize effective management and protection of environmental resources in Kenya, meaningful public participation is at the centre. In-limine, Article 10 (2) (a) of the *Constitution of Kenya 2010* captures the *principle of public participation* as one of the *national values and principles of governance*.

In essence, the *principle of public participation* binds all state organs, state officers, public officers and all persons in; interpreting and applying the Constitution, enacting, interpreting and applying laws and lastly making and implementing public policy decisions.¹⁹

a) Tracing the interface between public participation and protection of environmental resources.

The interface between public participation and protection of environmental resources is demonstrated by the explicit requirement of public participation by law in matters directly relating to environment. A brief review of various laws buttresses these assertions.

The Constitution of Kenya 2010 acknowledges the importance of the environment as well as the need to protect and conserve it. It connotes, “*respectful of the environment, which is our heritage, and determined to sustain it for the benefit of future generations;*”²⁰ At the core of the national values and principles of governance enshrined under the Constitution of Kenya, 2010 is the participation of the people.²¹ Such principles bind all persons and state organs whenever they enact, apply or interpret any law.²² This therefore means that the Constitution guarantees the citizens the right to take part in decision making processes. Among such decisions, is the decision regarding activities that impact on environment. Public participation and environmental protection go hand in hand.

¹⁹ Article 10(1) of the Constitution of Kenya 2010

²⁰ Constitution of Kenya 2010, preamble para 4.

²¹ Article 10(2)(a) of the Constitution of Kenya 2010

²² Article 10(1) of the Constitution of Kenya 2010

Participation of the people is one among multiple ways of attaining sustainable development; which forms part of the principles and national values governing the Constitution.²³ Public participation also ensures that everyone gets involved in the protection and conservation of the environment, a requirement introduced by Article 69 (1) (d) and (2) of the Constitution of Kenya 2010. It is not only an expression of the sovereignty of the people as articulated under Article 1 of the Constitution, but it is also one of the corner stones of our new democracy.²⁴

Statutory provisions to a great extent also create a requirement of public participation in protection of environmental resources. Section 3(5) (a) of the EMCA requires the Environment and Land Court in exercising the jurisdiction conferred upon it to be guided by the principle of public participation in the development of policies.

The Cabinet secretary in charge of matters environment is required under Section 5 (ca) of EMCA to provide evidence of public participation in the formulation of the policy and the environmental action plan. EMCA, establishes the National Environment Management Authority (hereinafter NEMA) under Section 7, clothed with powers and authority to protect the environment. As such it's imperative and informative that one of the object and function of NEMA is to undertake, in co-operation with relevant lead agencies, programmes intended to enhance environmental education, *public awareness and public participation*.

EMCA subsidiary regulations²⁵ which provide for Environmental (Impact Assessment and Audit) Regulations, 2003 under rule 17 provide for the requirement of public participation in conducting an environmental impact assessment. Verbatim, this regulation provide that during the process of conducting an environmental impact assessment study, the proponent shall in consultation with the NEMA, seek the views of persons who may be affected by the project.

²³Article 10(2)(d) of the Constitution of Kenya 2010

²⁴Mui Coal Basin Local Community & 15 others v Permanent Secretary of Energy & 17 others [2015] eKLR.

²⁵ Act No. 8 of 1999

As such public participation is a condition precedent to the issuance of an Environmental Impact Assessment Licence.²⁶ Section 4 (b) of the Wildlife Conservation and Management Act No. 47 of 2013 provides that conservation and management of wildlife shall entail effective public participation as one of the guiding principles.

Lastly, the Forest Conservation and Management Act No. 34 of 2016 under section 4(b) provides for public participation and community involvement in the management of forests as one of the guiding principles. The community likely to be affected by certain operations must be engaged in deciding whether such an operation will be carried out or not. The rising need for enhancing public participation in the protection and management of environmental resources has been occasioned by the adverse effects of climate change and environmental degradation.²⁷

b) Delimiting what constitutes meaningful public participation as a means of ensuring effective management and protection of environmental resources

The Constitution of Kenya 2010 envisages a meaningful and active public participation.²⁸ It requires the citizens to be engaged at every stage of the decision-making process.²⁹ It also requires the participation to be comprehensive, timely and also include a mechanism through which citizens' views can be aired and addressed.³⁰ Public participation cements a critical and foundational principle of the Constitution sovereignty of the

²⁶Maria Hadjimichael, 'Forming Perceptions and the Limits to Public Participation on Ocean Commons: Evidence from a Citizens Jury Workshop,' (2017) 11 *International Journal of the Commons* 200.

²⁷ Brian Clarke, 'Improving Public Participation in Environmental Impact Assessment,' (1994) 20 *Built Environment Journal* 294.

²⁸Elias Kipyego and Joshua Wandare, 'Public Participation and the Budgeting Process within the County Government of Nandi, Kenya,' (2017) 2 *European Journal of Management and Marketing Studies* 56.

²⁹Ibid No. 28

³⁰Elias Kipyego and Joshua Wandare, 'Public Participation and the Budgeting Process within the County Government of Nandi, Kenya,' (2017) 2 *European Journal of Management and Marketing Studies* 56

people. It is an ongoing obligation placed on the government through the process of Environmental Impact Assessment.³¹

The courts overtime have deliberately delimited what constitutes meaningful public participation. In this regard, Justice Joel Ngugi in the case of; *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others*³² clearly epitomized the elements of public participation as follows; *Firstly*, the government agency or public official is mandated to craft the modalities of the participation.³³ Here, they are required to fashion the participation in a manner that is consistent with the subject matter. When crafting the modalities, they are supposed to take into account the quantity and quality of the governed to participate in their own governance.

Secondly, the principle of public participation calls for innovation and malleability depending on the subject matter, culture and logistical constraints. This means that the courts can neither prescribe how public participation is to be carried out nor can they use a litmus test to determine whether the same has been achieved or not. The only test that can be used by the courts to determine whether public participation has been carried out is that of effectiveness.³⁴

Thirdly, the principle of public participation requires access to and dissemination of the relevant information. This is important as it helps the members of the community to make informed decisions.³⁵

Fourthly, the principle does not require that everyone should give their view on an issue of environmental governance. What it requires is the evidence of intentional inclusivity and diversity. Thus, any clear intention of keeping out

³¹Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR.

³²Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated)

³³Ibid No. 32, para 97(a).

³⁴Mui (n 32) para 97(b).

³⁵Mui (n 32) para 97(c).

the relevant stakeholders renders such public participation illegal and ineffective *ab initio*. While considering the issue of inclusivity, the government agency or public official must take note of the principle of subsidiarity; which connotes that those mostly affected by an action must have a bigger say in such an action. That their views must be more deliberately sought and taken into account.³⁶

Fifthly, the principle of public participation does not compel the government agency or public official to take as dispositive, the views expressed by the public. Rather, it places a duty on the government agency or public official to take into consideration and in good faith all the views expressed. On this element, the court added that; *“The government agency or public official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.”*³⁷

Lastly, the principle of public participation is *“not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.”*³⁸

In conclusion, the court stated that in order to determine whether public participation was adequately carried out for a certain project, it is important to consider factors such as: *“the bona fides of the public actor, the nature of the subject matter, the length and quality of engagement and the number of mechanisms used to reach as many people as possible.”*³⁹

Sachs J, in the case of; *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others*⁴⁰ added that when it comes to the principle of public participation, what matters at the end of the day is that a reasonable opportunity has been accorded to members of the public and all interested

³⁶Mui (n 32) para 97(d).

³⁷Mui (n 32) para 97(e).

³⁸Mui (n 32) para 97(f).

³⁹Constitutional Petition No.s 305 of 2012, 34 of 2013 & 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated)

⁴⁰(2006) 2 SA 311.

parties to know about the issues likely to affect them and have an adequate say regarding the same. He further noted that what amounts to a reasonable opportunity varies on a case to case basis.

The court in the case of; *Republic v The Attorney General & Another ex parte Hon. Francis Chachu Ganya* uttered important statements regarding access to information. It stated that; “*Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them.*”⁴¹ Hence, the sharing of information with the public depends on its availability.

The recent court decision in the case of; *David Ndii & Others vs Attorney General & Others*⁴² codified to a great extent the aspect of meaningful public participation when it provided verbatim thus; “*...As we have said above, the principle of public participation is a founding value in our Constitution. Citizens now take a central role in determining the way they want to be governed, and must be involved in legislative and other processes that affect them at all times. In that regard, for meaningful public participation to be realized, citizens must be given information they require to make decisions that affect them.*”

c) Delimiting the Importance of Public Participation and in protection of environmental resources

Without a doubt and from the foregoing it is crystal clear that meaningful public participation is important in protection of environmental resources. Indeed, public participation is an indelible feature in environmental decision-making in many environmental regulatory systems world-wide. Individuals and organizations that are to be affected by development approvals, pollution licences, land use plans and other types of regulatory processes have

⁴¹JR Miscellaneous Application No. 374 of 2012).

⁴² Constitutional and Human Rights Division Petition No. E282 of 2020 (Consolidated With Petition NOs. 397 of 2020, E400 of 2020, E401 of 2020, E402 of 2020, E416 of 2020, E426 of 2020 and 2 of 2021)

increasingly demanded greater consultation, and more transparent and accountable decisions.⁴³

The importance of public participation in environmental decision-making processes cannot be emphasized enough. It is a right which provides for active citizenry in all matters affecting public interest. Firstly, public participation results to better decision making. This is because it ensures that the government agency or public officials are aware of the needs of the people, hence helping them to make decisions that lasts longer and that have more validity.⁴⁴ It helps them understand and identify public interest concerns while formulating environmental policies. Secondly, better decision-making trickles down towards the improvement of the quality of life. Engagement of the people exposes local conditions that might not be widely known.⁴⁵

Buttressing the importance of public participation in environmental matters, *Dr. Kariuki Muigwa* argues that citizens know the country's land and natural attributes more intimately than a government ever will. Thus, involving them before making decisions helps in tapping the direct and immediate connection between them and the environment. Citizen's day-to-day observation grants them access to information about environmental conditions that the government could never obtain.⁴⁶

Thirdly, involvement of the people brings in more points of view and consideration of these points leads to the improvement in social conditions, the economy and the environment. Involvement of the public promotes

⁴³ Benjamin Richardson and Jona Razzaque, 'Public Participation in Environmental Decision-making' [2006] *Research Gate* 165.

⁴⁴ The Aarhus Convention Newcastle Workshop, 'Public Participation in Local Environmental Decisions' [1999] 11.

⁴⁵ *Mui Coal Basin Local Community & 15 others v Permanent Secretary of Energy & 17 others* [2015] eKLR.

⁴⁶ Kariuki Muigwa, *Securing Our Destiny through Effective Management of the Environment* (Glenwood Publishers, 2020) page 78-79

environmental justice and it also helps to integrate ecological and social considerations in governmental decisions.⁴⁷

Fourthly, involving the public at an early stage in the decision-making process, and finding ways for their views to be heard and taken into account, helps build consensus. By being involved in the process, the citizens will understand why a particular decision was made even though they do not agree with it.⁴⁸ Consequently, this leads to less litigation, fewer delays and better implementation of the decisions made.⁴⁹ It addresses the distrust that results from the predominance of experts in environmental decision-making.⁵⁰

Fifthly, public participation helps in assessing the scientific and technical uncertainties occasioned by environmental threats such as climate change, as well as weigh such uncertainties against perceived benefits.⁵¹

Lastly, public participation improves democracy. Engaging citizens before making decisions shows them that they are valued and that their views are important.⁵² It also strengthens public support for and awareness of environmental goals. Additionally, it builds trust and confidence in the authority making the decision.⁵³

Considering the importance of public participation there arises then the question of who should participate in this process. The case of; *Mui Coal Basin Local Community & 15 others v Permanent Secretary of Energy & 17 others* gave a detailed answer to this seminal question. The court notes that,

⁴⁷Benjamin Richardson and Jona Razzaque, 'Public Participation in Environmental Decision-making' [2006] *Research Gate* 166.

⁴⁸ Kariuki Muigua, *Securing Our Destiny through Effective Management of the Environment* (Glenwood Publishers, 2020) page 12

⁴⁹Benjamin Richardson and Jona Razzaque (n 47) page 166.

⁵⁰Stockholm Environment Institute, *Making Space: how Public Participation shapes environmental decision-making* (2019) 2.

⁵¹*Ibid* No.50

⁵²The Aarhus Convention Newcastle Workshop, 'Public Participation in Local Environmental Decisions' [1999] 11.

⁵³ Muigua (n 48).

“public participation does not dictate that everyone must give their views on an issue of environmental governance. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs...thus, the individuals likely to be directly affected by the activities to be carried out should be afforded a reasonable opportunity to participate and air out their views.”⁵⁴

This position is supported by scholars such as *Driessen and Vermeulen* who noted that the focus of those engaged in public participation should be on complete representation of interests as opposed to full inclusion; where the stakeholders believed to represent the interest of the public are engaged in the process rather than the participation of everybody.⁵⁵

d) Environmental Impact Assessments as a means of ensuring effective management and protection of environmental resources.

Environmental Impact Assessments (EIA) is one of the processes which influence environmental decisions. Section 2 of EMCA defines environmental impact assessment as a systematic examination conducted to determine whether or not a programme, activity or project will have any adverse impacts on the environment.

Despite the importance of EIA in environmental protection they can be a barrier to meaningful public participation. The first barrier that Environmental Impact Assessments (EIA) present is the quality of the information. Having a look at the EIA reports published by the National Environmental Management Authority will tell you that the way in which the reports are presented is wanting. The reports are usually too wordy and this makes it difficult for a lay person to capture the important details. This

⁵⁴Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014(Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated)

⁵⁵Driessen P and Vermeulen W, ‘Network Management in Perspective: Concluding Remarks on Network Management as an Innovative Form of Environmental Management’ [1995] Kluwer Academic Publishers.

goes hand in hand with the method used to relay this information. EIA advertisements for the public are mostly done in daily newspapers.⁵⁶

This action faces the problem of inadequate interpretation of the message as a result of English being used and consequently, important aspects of the message are left out. The problem with newspapers is that not all people get access to them, which only worsens the situation.

The second barrier is the language used. Language plays an important role in ensuring that the target audience absorbs the information being relayed. Truth be told, majority of the people in these communities likely to be affected by the operations are illiterate and if literate, they face difficulties in trying to understand the Queen's Language. Research has shown that English is used in pamphlets, photos and maps used in public participation events. *"Although English is Kenya's national language and the literacy level may be 79%, often the message is lost because of inadequate interpretation. Consequently, there is inadequate explanation of background and technical material that may help the public to contribute effectively in EIA deliberations."*⁵⁷

e) Reducing the Barriers to Public Participation as a means of ensuring effective management and protection of environmental resources

Reducing the barriers to public participation will ultimately result to the enhancement of the same. Firstly, it is important to note that majority of the households in Kenya rely on radio as their source of information. This is due to the fact that they are able to access local stations which relay information in the most effective way. Therefore, harnessing and utilising these stations presents a good way through which the public can be educated about the projects proposed to be carried out.

Secondly, pamphlets and posters as well as EIA study reports should be written in indigenous language in order to help the public digest the

⁵⁶Nick Okello Lindsay Beevers Wim Douven & Jan Leentvaar, 'The doing and undoing of public participation during environmental impact assessments in Kenya' (2009) 27(3) *Impact Assessment and Project Appraisal* 222

⁵⁷Ibid No.56

information as well as contribute effectively in public participation events. Simple examples and illustrations, especially in diagrams should be included as well. Diagrams tend to stick in the mind better than plain text.

Thirdly, holding meetings with the public at their local church or at the local market where they carry out their livelihoods is more convenient than inviting them to a local hotel. This also helps in including other people who had no idea of such a meeting being convened. Understanding the dynamics of the public such as where to get them is vital in enhancing effective public participation.

Fourthly, increased application of interactive mechanisms at the different levels of public participation helps in expanding and equipping them with the relevant information that they can use to make decisions. For example, a visit to a successful development of a related project during scoping can help the affected community understand different aspects and participate in an informed way.

Lastly, although this might be expensive on the side of the proponents, issuing incentives to the public might increase participation. Incentives such as transportation to the venue of the participation especially in areas where the distance between the venue and the residence is far would do. However, caution must be taken so as to avoid diverting the public's attention to irrelevant issues.

3.0 Conclusion

The concept of public participation is an established and justiciable right in Kenya. Indeed, public participation cements a critical and foundational principle of the Constitution namely sovereignty of the people as constituted by Article 1 of the Constitution of Kenya 2010.

Jurisprudence has firmly established that courts will firmly strike down any laws or public acts or projects that do not meet the public participation threshold. Indeed, it is correct to say that our Constitution, in imagining a new beginning for our country in 2010, treats secrecy in matters of public interest as anathema to our democracy.

It is without a doubt then that, matters such protection of environmental resources requires meaningful public participation. In essence, incorporating all the elements of meaningful public participation as stipulated above will enhance public participation in environmental matters. This will in return ensure effective management and protection of environmental resources

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Transmutation of Central Banking Policies and the Legal Implications of Adopting Central Bank Digital Currencies (CBDCs)

*By: Benjamin Arunda**

Abstract

Central Banks are sui generis institutions established by national or regional governments or economic blocks by the enforcement of relevant public and private law legislations. Central banking policies and practices, inter alia, revolve around promoting price stability; formulating monetary, fiscal and exchange rate policies; issuing currencies; and regulating the banking sector. These policies and practices have transmuted over the years due to the changing nature of national or regional policies on political and economic development; international trade; technological advancements in payment systems; and banking. The promotion of international central banking best practices by bodies such as the World Bank (WB) and the International Monetary Fund (IMF) have also influenced the changing nature of central banks. In the period prior to World Wars I and II, central banks were largely established as privately owned entities but transitioned into servants of the state during the world wars as they financed the monetary needs of their governments. However, after the world wars, most central banks globally transmogrified in nature to operate as autonomous sui generis public law entities that function independently from external political or corporate influence. The 2007/2008 Global Financial Crisis further affected central bank operations. In the last decade, the banking ecosystem has been transformed by changing consumer needs, technological advancements and increased global trade that has necessitated cross-border remittances. The growing interest in financial technologies 'fintech' and digital currencies could spell the next frontier of central banking practices. These transformations have impacted on central banking policies. This

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paper explores the transmutation of central banking policies and the legal implications of adopting Central Bank Digital Currencies (CBDCs).

Introduction

The Central Bank of Kenya (CBK), like most central banks globally, is a *sui generis* state-owned public law institution established in 1966 by an Act of Parliament.¹ The bank's legal establishment is further anchored in Article 231 (1) of the Constitution of Kenya, 2010. The constitution has charged the bank with the responsibility of "formulating monetary policy, promoting price stability, issuing currency and performing other functions conferred to it by an Act of Parliament".² Section 3 of the Central Bank of Kenya Act (1966) provides as follows:

- (1) "There is hereby established a bank which shall be known as the Central Bank of Kenya and which shall also be known by the alternative corporate name of the Banki Kuu ya Kenya.
- (2) The Bank shall be a body corporate with perpetual succession and a common seal, with power to acquire, own, possess and dispose of property, to contract, and to sue and to be sued in its own name.
- (3) The Bank shall exercise any type of central banking function unless specifically excluded under this Act, and shall enjoy all the prerogatives of a central bank.
- (4) The Bank may make its own rules of conduct or procedure, not inconsistent with the provisions of this Act, for the good order and proper management of the Bank.
- (5) The Bank shall not be subject to the Companies Act (Cap. 486) or the Banking Act (Cap. 488)."

In Section (3) sub-section (5), the Act establishes the *sui generis* nature of the CBK by excluding it from being subject to the Companies Act, despite being a "a body corporate with perpetual succession"³; and also absolves it from subjection to the Banking Act albeit it is a bank.

¹ Central Bank of Kenya (CBK), 'Bank History' (2017) accessed <<https://www.centralbank.go.ke/bank-history/#>> 3 April 2021 [1].

² Article 231 (2), Constitution of Kenya (2010).

³ Section 3 (2), Central Bank of Kenya Act (1966).

Historically, however, central banks were majorly privately owned in the seventeenth century and then largely transitioned to become ‘servants of the state’ during the first and second world wars.⁴ Most of the early central banks to be established, for instance the Banque de France and the Bank of England were founded to finance the state during war-times although reliant on private capital.⁵ The nationalization of most central bank started around 1935 but largely after WWII, but a few central banks are still privately owned to-date (either partly or entirely with varied shareholding structures), such as Greece, Japan, South Africa, Switzerland, Belgium and Turkey.⁶

The history of banking is quite fragmented making it difficult to establish the exact period when banking began; however, modern banking and central banking dates back to the seventeenth century.⁷ The first central banks to be established in that era were the Amsterdamsche Wisselbank in 1609, the Sveriges Riksbank in 1668, and Bank of England in 1694 which were largely joint stock entities.⁸ Although Wisselbank was closed in 1819, the Bank of England and Riksbank are still the central banks of the United Kingdom and Sweden respectively.⁹ These two banks were initially established to provide war-time finance through debt to their governments and to be the clearing house for commerce, but metamorphosed to adopt new mandates and policies over the years.¹⁰

Over the centuries, the roles of central banks have revolved around the following key policy areas: financial stability support, monetary support,

⁴ Tim Lambert, ‘A Brief History of Banks’ (Local Histories, 2020) accessed <<http://www.localhistories.org/banking.html>> 3 April 2021, [6].

⁵ C.A.E Goodhart, ‘The Changing Role of Central Banks’, FMG, London School of Economics, 1.

⁶ Jannie Rossouw, ‘Should central banks have private shareholders?’ (World Economic Forum, 30 July 2015) accessed <<https://weforum.org/agenda/2015/07/should-central-banks-have-private-shareholders/#>> 25 April 2021, [4] and [6].

⁷ Michael Bordo, ‘A Brief History of Central Banks’, Federal Reserve Bank of Cleveland, December 2007, 1.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*

fiscal support, payment system policy and macro-economic support.¹¹ Direct financial or revenue support to the state by central banks to finance extraordinary expenditures such as during wartime is one of the founding roles of most central banks.¹² This role has transmuted over the years with most central banks significantly limiting such support to governments or restricting instances of such direct support to only when extreme necessity arises, and its issuance tightly regulated by public law.¹³

The payment system policy function has also transmuted over the years moving from mere printing of banknotes or minting coins and subsequently circulating them, to the supervision and overall regulation of the banking industry, payment instruments, infrastructure and mechanisms.¹⁴

All the policy areas are instrumental in developing a strong economy and will be discussed in-depth later in this paper. For instance, many economists have often blamed the economic decline of Zimbabwe on the poor central bank policies among other things including lack of autonomy of vital public institutions such as the Reserve Bank of Zimbabwe which were led at the behest of the former president Robert Mugabe.¹⁵ As a result, the country's economy started to decline and further sunk into hyperinflation. Of particular interest is Zimbabwe's involvement in the 1998 war in the Democratic Republic of Congo which cost the country an estimated ZWD 6 billion which was unbudgeted expenditure.¹⁶ Some sources estimate that Zimbabwe spent USD 3 million every day of the war in unbudgeted expenditures, thus overstretching the country's financial capacity.¹⁷

Poor central bank policies, such as printing money for purposes contrary to international policy standards, can lead to economic decline. A country can

¹¹ Angela Reddish, 'Central Banks: Past, Present, Future' (2012) 30 *Ensayos sobre POLÍTICA ECONÓMICA* 14, 14.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ Perry Warjiyo and Solikin M. Juhro, *Central Bank Policy: Theory and Practice*, (Emerald Publishing 2019) 4.

¹⁵ Chidochashe Munangagwa, 'The Economic Decline of Zimbabwe' (2009) 3 *Gettysburg Economic Review* 109, 110.

¹⁶ *Ibid* 114.

¹⁷ *Ibid* 114.

be tempted to print money for the following reasons: first, to service debts in this decade where many developing countries – especially in Africa – are burdened with high debts and keep piling,¹⁸ for instance in the case of Kenya that recently secured a \$2.34 billion loan from the International Monetary Fund (IMF) in addition to its ballooning public debt to finance Covid-19 relief efforts and support economic recovery.¹⁹ Secondly, to cater for increasing need for public expenditures especially for developing economies with poor infrastructural development and large low income populations, for instance, in the case of Zimbabwe that printed money to finance expenditures post the 2008 financial crisis.²⁰ Over the years central banks have abandoned printing money for such reasons as practiced especially during the period when central banks were ‘servants-of-the-state’.²¹

In order to investigate and determine the transmutations of the various central bank policies, this paper expounds on the progressions of the different policies, mandates and legal nature of central banks at different historical epochs while reflecting on case studies across the world.

The Post World-Wars Period Central Banking Mandates and Policies

The world-wars period influenced the mandates and policies of many central banks across the world.²² The superficial identities of central banks in the world-war periods largely faded away to give room for a wave of new changes in central banking theory and practices.²³ Although the rationale for the establishment of various early banks were somewhat distinct, for instance: the Bank of England was mainly established for fiscal purposes;

¹⁸ Tony Watima, ‘Printing money is dodgy economics’ (Business Daily, 15 December 2020) accessed <<https://www.businessdailyafrica.com/bd/opinion-analysis/columnists/printing-money-is-dodgy-economics-3228916>> 8 April 2021, [13].

¹⁹ Antoinette M. Sayeh, ‘IMF Executive Board Approves \$2.34 billion ECF and EFF Arrangements for Kenya’ (IMF, 2 April 2021) accessed <<https://www.imf.org/en/News/Articles/2021/04/02/pr2198-kenya-imf-executive-board-approves-us-billion-ecf-and-eff-arrangements>> 8 April 2021.

²⁰ N 15 [8].

²¹ N 9, 14.

²² N 9, 14.

²³ Gerald Epstein, ‘Post-War Experiences with Development Central Banks: The Good, the Bad and the Hopeful’, (UNCTAD, G-24 Discussion Paper No. 54, February 2009), 14.

the Bank of France for fiscal and monetary support; the Bank of Japan for fiscal, monetary and financial stability; the Federal Reserve for monetary and financial stability; and the Bank of Canada mainly for political stability, in the post-world wars period, their salient functions aligned with the economic and/or financial objectives of their respective states.²⁴ The symbiotic relationship between central banks and states in the war periods was largely at the detriment of the banks because they had no independence and were marred with political influence.²⁵ The nationalization of the central banks post World War II (WWII), such as the Bank of England and the Bank of France, resulted to increased autonomy with less political influence and a focused mandate for price stability.²⁶

The wave of influence of central banking practices by the early establishments such as the Bank of England is what seemingly framed the nature of central banks in Africa. The Central Bank of Kenya, for instance, evolved from the East Africa Currency Board (EACB) after a failed attempt to create a single central bank for Kenya, Uganda and Tanganyika.²⁷ The EACB was established after World War I in 1919 and mandated as the sole currency issuer in the East African region during colonial period and at independence.²⁸ The currency board performed some central banking roles at independence including providing credit to the government and lending to commercial banks for the purpose of crop financing.²⁹ The CBK has made significant milestones characterized with evolution of policies and functions towards achieving its mandate over the last five decades.³⁰

Modern central banking is built around a number of international best practices and standards from institutions such as the International Bank for

²⁴ Angela Redish, 'The History of Central Banks, Monetary and Banking Policy in Latin America' [2012] 30 PE [32].

²⁵ *Ibid* [34].

²⁶ *Ibid* [36].

²⁷ N 1, [12].

²⁸ 'The Paper Money of the East African Currency Board' accessed <<https://africanbanknotes.com/articles/jun07-eastafrika.php>> 25 April 2021, [1]. Also see N 1, [12].

²⁹ N 1, [13].

³⁰ N 1, [4].

Reconstruction and Development (the World Bank)³¹, the IMF, the Basel Committee on Banking Supervision (BCBS)³² and also from regulatory institutions and prominent economists.³³ The recipe for the new era of central banking is significantly distinct from historical legal nature, mandates and policies of central banks. The components for this recipe include: central bank autonomy, use of indirect monetary policy approaches such as short-term interest rates instead of credit ceilings, and a focus on financial stability and fighting inflation.³⁴ Central banking policies in the post-war era have increasingly shifted away from directly financing government expenditures, and according to Epstein:

“This recipe – no support for the government expenditure, reluctance to manage exchange rates and opposition to use of capital controls, and a refusal to engage in credit allocation policies to support economic sectors – is a highly idiosyncratic one in the sense that, as a package, it is dramatically different from the historically dominant theory and practice of central banking, not only in the developing world, but, notably, in the now developed countries themselves”³⁵

In the post-world wars period, the policies and mandates of central banks have progressively transmuted in response to three key dynamic factors:

1. The existence of other or alternative sources of funds for states

– States relied on the central banks to finance its war-time needs and its economic objectives. The central banks provided fiscal support

³¹ The establishment of the United Nations and its various development, peace and security agencies after World War II, which also influenced the formation of other development organizations around the world such as the World Trade Organization (WTO) in furtherance of global peace and harmony has also significantly contributed to the progressive advancement of central banking. The achievement of sustainable peace greatly inspired many countries to refocus their central banking objectives from financing operations during wartimes to ensuring stability of their economies.

³² ‘The Basel Committee - overview’ (Bank of International Settlement) accessed <bis.org/bcbs/> 25 April 2021.

³³ N 21.

³⁴ N 21.

³⁵ N 21, [4].

and were burdened to pay the debts of the state.³⁶ Contemporarily, however, governments have a myriad of bilateral and unilateral lenders that help fund their economic objectives.³⁷

2. The prevailing economic theory – The development economic theory and philosophical beliefs have led to the rise of a new breed of economists with different perspectives of central bank establishment and mandates. These varied economic theories continue to advance and influence how central banks operate.³⁸

3. The technology of money and financial instruments – In 1966 when the CBK was established, there was no complex payment systems and financial instruments to regulate, the bank's main roles were to issue currency and lend to banks.³⁹ Over the years, the meaning and nature of money has changed profoundly; from mere banknotes and coins to mobile money like Mpesa.⁴⁰

The Central Banking Monetary Policy Mandate and Practices

The collapse of the Gold Standard and the Great Depression represented a gigantic failure for the central banks and their economies.⁴¹ The objectives, the models and the operational frameworks of most central banks fell apart; then followed the subservience of the central banks to the socialist control

³⁶ This is evident in the case of the Bank of England, the Bank of France, the Bank of Japan, the Federal Reserve, Riksbank and even the Central Bank of Kenya (at its infancy at establishment) that all demonstrated in one way or another servanthood to the state. See N 22 above.

³⁷ **Examples:** IMF, World Bank, Africa Development Bank, Issuance of bonds, and treasury bills among many others.

³⁸ The economists of today have learnt from the profound mistakes of previous ones. For instance, the premise of economic analysis in monetary and fiscal policies are progressively being transformed with new proven models of managing national debt and governing central banks. See N 21 above.

³⁹ N 1 [3].

⁴⁰ The speed of money has increased tremendously. Money is increasingly becoming digital and the use of physical cash dwindling, much more in the wake of mobile money, cryptocurrencies and other internet-based money. This concept will be discussed further later in this paper when handling Central Bank Digital Currencies (CBDCs).

⁴¹ N 5, 5.

by governments, especially during WWII.⁴² Before the world wars, central banks did not attach great importance to maintaining the stability of their national economies.⁴³ However, there was a shift after WWI when central banks, under the auspices of the socialist controls, started being concerned about price levels, real economic activities and employment.⁴⁴ This shift reflected the changing nature of the political economies of many countries with fast growing suffrage and rising labour movements.⁴⁵

Maintaining currency stability gradually became the primary role of many central banks in supporting the sustainable economic growth of their countries.⁴⁶ Initially, the monetary policy function was comparatively simple but has become increasingly complex in line with globalization and the development of domestic economies.⁴⁷ The monetary policy role has transmuted from mere commercial paper predominance to monetary operations targeted at interest rate moderation.⁴⁸

By mid and late 1990s, most countries had enshrined, in their central bank laws, a provision that made monetary stability the principal objective of the banks and outlined the fundamentals of setting and implementing the policy; pragmatically a take-over of the monetary policy by governments.⁴⁹ In Africa, various studies show that this was a period of major shifts in central banking. The Central Bank of Kenya Act (1966), in a bid to establish monetary policy as the primary role, stipulates that:

*“The principal object of the Bank shall be to formulate and implement monetary policy directed to achieving and maintaining stability in the general level of prices”.*⁵⁰

⁴² *Ibid.*

⁴³ N 6, 2.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ Perry Warjiyo and Solikin Juhro, *Central Bank Policy: Theory and Practice*, Emerald Publishing, 2019, 5.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ N 5, 5.

⁵⁰ Section 4 (1), Central Bank of Kenya Act (1966).

Economic pressures built up in 1970s pushing inflation to double digits in Europe and the US, often referred to as the ‘Great Inflation’.⁵¹ As a result of the Great Inflation, many of the affected economies experienced a sharp reversal of their central bank monetary policies, starting with the US.⁵² The launch of the ‘shock therapy’ by Paul Voker in 1979 which was characterized with monetary tightening and raising the interest rates up to double digits, led to recession and a decline in inflation.⁵³

Since the 1980s, most central banks have implemented inflation targeting as the leading monetary policy framework.⁵⁴ For instance, the central banks for New Zealand, Canada, the United Kingdom and the Euro area have introduced explicit inflation targets.⁵⁵ Central banks in many developing countries are also transitioning from merely targeting a monetary aggregate to the more contemporary framework of inflation targeting.⁵⁶ AP Faure defines price stability, generally known as inflation rate, as the non-volatile or low and stable changes in the general price levels.⁵⁷ Historical data has shown that when the inflation rate is low it also remains non-volatile thus the majority of the world economies, particularly the developed countries, have settled on an inflation rate of 2 -3% per annum (pa).⁵⁸ The logic behind settling on 2 – 3% pa rate is that (1) a rate of 0% pa is too close to deflation which often have a significant negative impact on investment and spending; and (2) that 2 – 3% pa is tolerable and can be easily managed from dropping down to deflation.⁵⁹ Most recently as concerns grew on the erosion of the monetary policy space with falling inflation expectations and dwindling

⁵¹ Esther Jeffers and Dominique Plihon, ‘The Historical Evolution of Central Banks: Are We on the Verge of a New Era?’ 4.

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ ‘Monetary Policy and Central Banking’ (International Monetary Fund (IMF), 16 March 2021) accessed <<https://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/16/20/Monetary-Policy-and-Central-Banking>> 26 April 2021, [2].

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ AP Faure, *Central Banking & Monetary Policy: An Introduction*, [2015] Bookboon, 11.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

equilibrium interest rates, many central banks especially in developed countries started to review their monetary policy frameworks.⁶⁰

This paper posits that central bank role of maintaining price stability is not isolated, rather, it is intertwined with other factors such as the stability of the financial sector, the health of the political environment and the general performance of the economy. The progressive transmutation of monetary policy mandates and practices since the 1980s over different economic and political epochs is evidence enough that it is a multi-faceted policy, for instance the transition to inflation targeting policies was influenced by many factors.⁶¹ In the 1980s and 1990s, the central banking policy frameworks were largely based on two principles of the monetarist theory, (1) that the main cause of inflation is over-supply of money into circulation, and as a result, (2) monetary policy is the best solution for fighting inflation.⁶² The independence of central banks is also a key factor that influences the ability of the bank to set achievable or realistic targets and work towards them. Lack of existential and operational autonomy may jeopardize the performance of the central bank policies.⁶³

The factors that can influence the implementation and success of central bank monetary policies are vast, especially with increasing globalization and technology use. However, two key examples of such instances stand out:

1. The Great Financial Crisis of 2007/2008 – It would not be far-fetched to assert that there is no country that did not feel the impact of the Great Financial Crisis. Against the backdrop of the financial crisis, most central banks in developed countries eased their monetary policies reducing the interest rates to the extent that short-term rates

⁶⁰ N 54.

⁶¹ *Ibid.*

⁶² N 51.

⁶³ Undue influence from political or corporate institutions on the central bank or its decision making bodies such as the Monetary Policy Board, may make it difficult for it achieve the policy objectives. The autonomy of the central bank should not be compromised. The central bank key employees such as the governor and the members of the decision making bodies should have security of tenure and other necessary elements of personal autonomy, to ensure they perform their functions of setting and/or implementing the central bank mandates and policies.

almost hit zero percent thus limiting the option to further cut policy rates.⁶⁴ In order to mitigate against the risk of falling into deflation, central banks implemented unconventional monetary policies such as buying long-term bonds in order to lower long-term rates and loosen monetary conditions.⁶⁵ This was the conversation across the globe, central banks taking unconventional actions to cushion their economies against the negative effects of the 2007 financial crisis.⁶⁶

2. The Covid-19 Crisis – The Covid-19 pandemic has presented one of the most unprecedented socio-economic situations to the world in this decade. The negative impacts have extensively impacted the different aspects of the global economy from healthcare, manufacturing, hospitality, and supply chain. In response to the negative impacts of Covid-19 to the economy, most central banks have taken unconventional policy actions to ease the monetary stress, provide liquidity for funding markets, and maintain credit flows.⁶⁷ For instance, to mitigate the strain in the currency and bonds markets, several central banks in emerging markets used foreign exchange interventions and deployed asset purchases program for the first time.⁶⁸

The Central Banking Financial Stability Policy Mandate and Practices

Financial stability became an important element of central bank policies especially after the Great Financial Crisis (GFC) of 2007/2008.⁶⁹ Every sector in an economy can be negatively affected if a country becomes financially unstable. Central banks have, over the last decade, accorded particular attention to the financial stability role especially after the 2007 GFC and the global efforts to combat climate change which was recognized by the 2015 Paris Agreement as a global issue.⁷⁰ The most recent global issue

⁶⁴ N 54.

⁶⁵ *Ibid.*

⁶⁶ Suchada Kirakul, 'Fiscal policy and its implementation for central banks' BIS Papers No. 67, 325, 327.

⁶⁷ International Monetary Fund, 5. See N 54.

⁶⁸ *Ibid.*

⁶⁹ N 54.

⁷⁰ N 51, 5.

that has also re-emphasized the vital role of central banks in promoting financial stability is the Covid-19 pandemic which has resulted in massive job losses, closure of businesses, record-high losses, and breakdown of national health systems.⁷¹

The GFC awakened central banks to the fact that countries ought to contain the risks that could destabilize the financial system in entirety by leveraging dedicated financial policies.⁷² Over the years, the financial stability policies set out by central banks, although narrow at the beginning, have been expanded to cover macro-prudential policy frameworks.⁷³ Central banks in most countries are established autonomous body-corporate institutions that are thus best suited to conduct the macro-prudential policies of a country.⁷⁴ Maintaining financial system stability has become one of the key primary mandates considered on the same level as price stability or as one of the top in the hierarchy of policies.⁷⁵ As the global economy continues to change, with unprecedented phenomena such as Covid-19, central banks will continue to transmute the nature of their financial stability and macro-prudential policies to meet the economic needs of their countries.⁷⁶

Central Banking Policies and Mandates in Combating Climate Change and Supporting Sustainable Finance

Climate change has become one of the greatest challenges that the world has to contend with in the 21st century with its far-reaching effects negatively impacting both developing and developed countries in pursuing their sustainable development goals.⁷⁷ Climate change is a key environmental goal in the United Nation's 2030 Agenda for Sustainable Development Goals thus making it an instrumental element of the development agenda of any country.⁷⁸ According to Kariuki Muigua, "climate change affects not only

⁷¹ N 67.

⁷² International Monetary Fund, 7. See N 54.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ N 46.

⁷⁶ N 54 [11].

⁷⁷ Kariuki Muigua, 'Combating Climate Change in Kenya for Sustainable Development' (2021) *JCMSD* 6, 244, 245.

⁷⁸ United Nations 2030 Agenda for Sustainable Development Goals, 13, (United Nations).

national and global economy but also has a direct effect on the livelihoods of communities".⁷⁹ The conversations around climate change and environmental conservation ought to continue in every office or boardroom where decisions on sustainable development are made. Against the backdrop of the rising public awareness and campaigns against the risks that climate change pose to economies and humanities at large, and the universal political commitment to mitigate these risks as embodied in the 2015 Paris Agreement, contemporary central banking mandates and policies have tended towards supporting these mitigation efforts.⁸⁰ There is a growing number of central banks globally that have gone beyond the theoretical debate on addressing climate change issues, and started promoting the development of green finance as a key milestone in sustainable development.⁸¹ Adoption of green finance policies by central banks into their core mandates and policies, and the incorporation of the climate change risks into their macro-prudential frameworks, is evidence of the transmuting roles of central banks.⁸²

The conversations around combating climate change risks and promoting activities and policies that protect the environment continue to advance in Kenya. The enactment into law of the Climate Change Act 2016 provided a regulatory framework for the enhancement of national response to climate change challenges.⁸³ The Environmental Management and Co-ordination Act, 1999 (EMCA) creates avenues for climate change mitigation by providing for fiscal incentives.⁸⁴ The Act provides that the Cabinet Secretary in charge of Ministry of Finance can, upon recommendation by the National Council of Public benefit organizations, make proposals to the Government with regard to tax, fiscal incentives, dis-incentives, or fees meant to induce

⁷⁹ N 77, 244.

⁸⁰ Simon Dikau and Ulrich Volz, 'Central Bank Mandates, Sustainability Objectives and the Promotion of Green Finance', SOAS Department of Economics, Working Paper No. 232, January 2020, 2.

⁸¹ *Ibid*, 2.

⁸² *Ibid*, 2.

⁸³ Climate Change Act, No. 11 of 2016, Laws of Kenya.

⁸⁴ Environmental Management and Co-ordination Act, No. 8 of 1999, Laws of Kenya.

or promote the management and conservation of the environment and natural resources, or prevent their degradation.⁸⁵

To the extent that climate change has far-reaching impacts on the national and global economy, its effects on the financial stability of a country cannot be ignored. Historically, central bank roles have considerably evolved, and often major strides in the evolution journey have been made in response to crises such as the Great Financial Crisis and Covid-19 crisis, and perpetual policy problems.⁸⁶ The campaign for central banks to participate in combating climate change led to the launch of progressive initiatives such as the Central Banks and Supervisors Network for Greening the Financial System (NGFS) and the Sustainable Banking Network (SBN).⁸⁷ Although the general consensus among central bankers and policy leaders is that central banks should not ignore climate change, there is no corresponding consensus on the extent of involvement of the banks and how much it should affect their policies.⁸⁸ The advancement of ideas of green finance would be a good way for central banks to support environmentally friendly policies and activities.⁸⁹

Safeguarding the financial stability of countries has been at the core of central bank mandates, and post-crisis deliberations have birthed arguments that central banks should move away from narrow price stability policies and deepen their involvement in ensuring financial stability.⁹⁰ Climate change risks are a source of financial instability, therefore, promoting environmental sustainability is squarely within the scope of central banks' mandates.⁹¹ A speech by François Villeroy de Galhau, the governor of the Banque de France demonstrated how much central bank governors are beginning to appreciate their role in combating climate change:

⁸⁵ Environmental Management and Co-ordination Act, Section 57 (1).

⁸⁶ N 80, 2.

⁸⁷ NGFS. 2018. First Progress Report – October 2018. Paris: Central Banks and Supervisors Network for Greening the Financial System.

⁸⁸ NGFS. 2019. A Call for Action. Climate Change as a Source of Financial Risk. Paris: Central Banks and Supervisors Network for Greening the Financial System.

⁸⁹ *Ibid* 80.

⁹⁰ Esther Jeffers and Dominique Plihon, 13. See N 51.

⁹¹ *Ibid*.

“The first central bank in History, the Risbank, was founded in the 17th century to finance the Swedish government’s war costs. Today, central banks must wage another type of “war” alongside the signatory states of the 2015 Paris Agreement—the fight against climate change and its consequences”.⁹²

The Central Banking Payment System Policy and Regulatory Mandate

Central banks roles have transmuted tremendously over the years and the evolution of the payment system function from merely printing and circulating currency notes and coins to regulating and supervising the payment instruments, mechanisms and the infrastructures.⁹³ Further, with regard to financial stability, central banks role as Lender of Last Resort (LOLR) has progressed into macro-prudential regulation and supervision.⁹⁴

The Central Bank of Kenya issues regulations and guidelines that subject banks to certain restrictions, requirements and guidelines with regard to their legal existence, and scope of operations.⁹⁵ This regulatory structure is largely meant, *inter alia*, to create transparency between the banking institutions and individuals and companies they transact with.⁹⁶ Due to the interconnected nature of the banking industry, and the national economic reliance on banks, it is exceedingly important for the regulatory agencies to ensure the standardized practices and championed and adhered to by the banks.⁹⁷ Some of the key objectives of regulations include:

1. The Prudential role – to protect depositors by reducing their risk exposures in the deposit-taking institutions.
2. Reduce systemic risks – to reduce the risk of occurrence of disrupting events in the industry that may result from adverse trading conditions and could cause bank failures.

⁹² *Ibid.*

⁹³ Perry Warjiyo and Solikin Jurho, 4. See N 46.

⁹⁴ *Ibid*, 5.

⁹⁵ The Central Bank of Kenya, ‘Regulations and Guidelines’, accessed <<https://www.centralbank.go.ke/policy-procedures/legislation-and-guidelines/>> 30 April 2020 [3].

⁹⁶ *Ibid* [4].

⁹⁷ *Ibid.*

3. Prevent financial crimes – to reduce the risk of misuse of banks for purposes of financing crime such as terrorism and child trafficking, and laundering of illegally acquired moneys.
4. Protection of banks' confidentiality credit allocation – to direct credit to the favoured sectors thus provide best customer service in a competitive business environment.⁹⁸

The objectives and scope of the regulatory mandate of central banks continue to change in this age where the definition of money and banking are increasingly becoming ambiguous and financial technologies springing up rapidly. The macro-prudential and micro-prudential regulation and supervision by central banks are imperative for the maintenance of the financial system stability.⁹⁹ The purpose of micro-prudential regulation is to micro-regulate and supervise the financial institutions and emphasizes on the performance and soundness of the individual financial institutions.¹⁰⁰ On the other hand, macro-prudential regulation involves macro-regulating and supervising the financial institutions with focus on mitigating systemic risks for the achievement of financial stability.¹⁰¹ In most countries the central banks have the macro and micro-prudential regulatory mandate, while in others the micro-prudential function was transferred to a separate authority, for instance in Australia, South Korea and Indonesia, micro-prudential role is undertaken by the financial services authority.¹⁰²

In most countries, there are multiple legislations enacted to guide the central bank in its regulatory and supervisory mandate. In Kenya, the CBK is guided by the following legislations:

1. The Constitution of Kenya 2010 – The supreme law stipulates, in Chapter 12, the principles of public finance, and goes ahead to establish the CBK in Article 231. It further empowers Parliament

⁹⁸ *Ibid* [5].

⁹⁹ Perry Warjiyo and Solikin Jurho, 5. See N 46.

¹⁰⁰ *Ibid*, 5.

¹⁰¹ *Ibid*.

¹⁰² *Ibid*.

enact laws to provide for the “composition, powers, functions and operations of the Central Bank of Kenya”.¹⁰³

2. The Central Bank of Kenya Act (2015) – The Act establishes the CBK and empowers it to make subsidiary legislation and guidelines, *inter alia*, for the purposes of regulating and supervising banking institutions.¹⁰⁴
3. The National payment System Act (2011) – This Act brings all the payment service providers including banking institutions and mobile money service providers under the regulatory auspices of the CBK.¹⁰⁵ It also makes the CBK the oversight authority over their products and activities to ensure safety and efficiency of their platforms.¹⁰⁶
4. The Banking Act (2015) – The Act provides guidelines on the establishment and conduct of banking business in Kenya.¹⁰⁷ It also stipulates that any banking business, financial service and mortgage finance can only be conducted by institutions with a banking license.¹⁰⁸
5. The Banking (Credit Reference Bureau) Regulations (2008) – The regulations are established under the Banking Act with the purpose of governing how the Credit Reference Bureaus are established and supervised by the CBK.¹⁰⁹
6. The Microfinance Act (2006) – This Act provides the regulatory guidelines for all deposit-taking micro-finance institutions. These institutions fall within the regulatory and supervisory scope of the CBK.¹¹⁰

The rapidly changing banking or financial services environment with the emergence of disruptive financial technologies such as mobile money, electronic money, cryptocurrencies, and Decentralized Finance (DeFi)

¹⁰³ Article 231 (5), Constitution of Kenya (2010).

¹⁰⁴ Section 3, Central Bank of Kenya Act, Cap. 491, Laws of Kenya.

¹⁰⁵ The National Payment Systems Act, No. 39 of 2011 (the long title of the Act).

¹⁰⁶ Section 2 of the National Payment Systems Act, No. 39 of 2011.

¹⁰⁷ Section 3 of the Banking Act, Cap. 488, Laws of Kenya.

¹⁰⁸ *Ibid* at Section 7.

¹⁰⁹ Section 34 (3A) (5) of the Microfinance Act, 2006, as read with Section 31 of the Banking Act.

¹¹⁰ Section 3 of the Microfinance Act, 2006.

among others, have transformed the nature of most financial services and the business models of some financial institutions.¹¹¹ In Kenya, investments in fintech businesses continue to surge thus stirring debates in the legal space on the applicable regulatory frameworks for fintechs.¹¹² The fintech companies in Kenya are actively lobbying to have a separate regulatory authority other than the CBK stating that a separate body designed for the fintech sector would help bolster innovation.¹¹³ The rise of Mpesa as a dominant mobile money service provider has transformed mobile banking and transactions in Kenya and East Africa.¹¹⁴

Blockchain-based cryptocurrencies, particularly Bitcoin, are also growing in use in Kenya and causing a regulatory headache, with CBK and other regulators such as the Capital Markets Authority (CMA) only issuing cautionary statements to warn the public against dealing in the digital currencies.¹¹⁵ Despite CBK leaving cryptocurrencies unregulated in Kenya, similar to many other countries including the East Africa Community (EAC) members, the number of individuals or companies transacting in cryptocurrencies is increasing. According to a report by Citibank, Kenya is among the countries having the largest bitcoin holdings, with the percentage holding estimated to be approximately 2.3% of the Gross Domestic Product (GDP).¹¹⁶ These developments may require the involvement of the central bank in regulation and supervision, or rather, enactment of new laws to establish new a regulatory body as championed by the Kenya's fintech space. The latest area of regulatory disruption in Kenya has been the digital lending sector. The high proliferation of the digital lenders such as Tala and Branch

¹¹¹ Perry Warjiyo and Solikin Jurho, 5. See N 46.

¹¹² Esther Njiru-Omulele, 'Banking Regulations 2021: Kenya' (Global Legal Insights, 19 March 2021) accessed <<https://www.globallegalinsights.com/practice-areas/banking-and-finance-laws-and-regulations/kenya>> 1 May 2021 [22].

¹¹³ *Ibid* [24].

¹¹⁴ 'The M-Pesa Wonder: How it all began', (Safaricom Newsroom, 1 May 2017) accessed <<https://newsroom.safaricom.co.ke/the-m-pesa-wonder-how-it-all-began/>> 1 May 2021.

¹¹⁵ Central Bank of Kenya (CBK), 'Virtual Currencies – Bitcoin' in Circular No. 14 of 2015, 18 December 2015.

¹¹⁶ 'Kenya among the few countries in the world with highest per capita holding of Bitcoin - Citi' (Kenyan Wallstreet, 8 October 2019) accessed <<https://kenyanwallstreet.com/kenya-among-countries-world-highest-per-capita-holding-bitcoin-citi/>> 1 May 2021.

in Kenya, with some exploiting borrowers' data vulnerability and charging high interest rates, has become a challenge for regulators.¹¹⁷ In 2020, the CBK revoked the approval of several digital lender and in effect barring the unregulated digital mobile lenders from listing loan defaulters with the Credit Reference Bureau.¹¹⁸ In a bid to bring the digital lenders under the regulatory scope of the CBK, the Central Bank of Kenya (Amendment) Bill 2020 proposes to add the following:

2. Section 4A of the Central Bank of Kenya Act, 2014 is amended—

(a) in subsection (1) by inserting the following new paragraphs immediately after paragraph (d) —

(da) regulate and supervise the conduct of providers of digital financial products and services;

(db) regulate and supervise the conduct of digital credit providers and digital credit service providers;

(dc) regulate and supervise the conduct of providers of financial products and services;

(dd) regulate and supervise the conduct of financial services;¹¹⁹

These proposed amendments clearly demonstrate a fast changing business environment in the banking and financial services industry that will require transmutation of laws to cope with the evolution of markets and consumers, and to fill regulatory and oversight gaps. Other evolving areas that will influence the transmutation of central bank practices include the growing complexity of money laundering and use of decentralized digital currencies to finance terrorism.¹²⁰

¹¹⁷ N 112 [27 - 28].

¹¹⁸ John Mutua, 'New bid to place digital lenders on CBK watch' (Business Daily, 9 February 2021) accessed <<https://www.businessdailyafrica.com/bd/markets/capital-markets/new-bid-to-place-digital-lenders-on-cbk-leash-3284284>> 1 May 2021.

¹¹⁹ Section 2 of Central Bank of Kenya (Amendment) Bill 2020.

¹²⁰ N 112 [57].

The Legal Implications of Adopting Central Bank Digital Currencies (CBDCs)

The last decade has seen disruptions in the financial services industry with the emergence of Blockchain technology upon which cryptocurrencies, stablecoins and decentralized finance (DeFi) runs on.¹²¹ In about a decade, the number of cryptocurrencies listed on the coin listing platform, Coin Market Cap, has risen to over 9500 coins and tokens with a whopping market capitalization of \$2.47 trillion.¹²² These phenomenal and disruptive developments in the financial services sector are increasingly putting the control of the financial systems under decentralized control of individuals and startups running fintechs, and away from the regulatory scope of central banks.¹²³ This is the fundamental building block of Blockchain and bitcoin as expressly described by the pseudonym Satoshi Nakamoto in the 2008 whitepaper titled *Bitcoin: A Peer-to-Peer Electronic Cash System*.¹²⁴ The conversations about bitcoin and cryptocurrencies are growing faster globally with governments increasingly gaining interest and central banks gradually getting involved with Central Bank Digital Currencies (CBDCs) whether at research level, or at proof of concept, or at development, or at live market testing.¹²⁵ The Digital Currency Research Institute, a sub-division of the People's Bank of China has confirmed in several media reports that they are

¹²¹ Luisa Scarcella, 'Adopting a Central Banking Digital Currency: A Tax Policy Perspective' (Afronomics Law, 2 December 2020) accessed <<https://www.afronomicslaw.org/2020/12/02/adopting-a-central-banking-digital-currency-a-tax-policy-perspective>> 8 May 2021 [1].

¹²² Coin Market Cap, accessed <<https://coinmarketcap.com/>> 8 May 2021.

¹²³ This explains why central banks cannot afford to remain asleep with regard to participation in the current technological disruptions. For instance, the \$2.47 trillion stored in the Blockchain network as per the market capitalization is running off the main financial systems regulated by the central bank. With most central banks only issuing cautionary notices against cryptocurrencies, it may be necessary to do more in participating and promoting a healthy development of the space.

¹²⁴ Satoshi Nakamoto, 'Bitcoin: A Peer-to-Peer Electronic Cash System' (Satoshi Nakamoto Institute, 31 August 2008) accessed <<https://nakamotoinstitute.org/bitcoin/>> 8 May 2021.

¹²⁵ Hedera Hashgraph, 'What is a central bank digital currency?' accessed <<https://hedera.com/learning/what-is-a-central-bank-digital-currency-cbdc?>> 8 May 2021 [1].

working with state-owned banks to test the China's new CBDC in Shenzhen, Xiongan, Chengdu and Suzhou.¹²⁶

Despite the increasing discourse and development of CBDCs, majority of people including professionals in banking do not yet comprehend what they are. CBDCs are explained by Hedera Hashgraph as “an electronic form of central bank money that citizens can use to make digital payments and store value” issued by central banks and are universally accessible.¹²⁷ The Committee on Payments and Market Infrastructures (CPMI), which is a body hosted by the BIS and comprises of representatives of various central banks, have stated that “CBDC raises old questions about the role of central bank money”.¹²⁸ In trying to define CBDCs, the CPMI have stated that:

“CBDC is not a well-defined term. It is used to refer to a number of concepts. However, it is envisioned by most to be a new form of central bank money. That is, a central bank liability, denominated in an existing unit of account, which serve both as a medium of exchange and a store of value.”¹²⁹

According a report by the Bank of International Settlement (BIS), over 80% of central banks are actively researching on CBDCs.¹³⁰ The contemporary central banks such as the CBK issue fiat currencies largely in physical notes and coins and are thus the recognized legal tenders within their jurisdictions; an adoption of CBDCs would be a new variant of central bank money thus redefining the legal tender.¹³¹ According to the BIS Report, their survey findings show that most central banks are still trying to understand the implications of CBDCs on their jurisdictions while most central banks in emerging economies showing high likelihood of adopting CBDCs in the future.¹³²

¹²⁶ N 121.

¹²⁷ N 125 [4].

¹²⁸ CPMI, Central Bank Digital Currencies, BIS, March 2018, p. 1.

¹²⁹ *Ibid*, 3.

¹³⁰ Codruta Boar, Henry Holden and Amber Wadsworth, ‘Impending arrival – a sequel to the survey on central bank digital currency’, Bank of International Settlement (BIS) Papers No. 107, January 2020, 2.

¹³¹ *Ibid*, 1

¹³² *Ibid*.

The most researched types of CBDCs are wholesale token-based CBDCs that are essential in facilitating interbank settlements, and a general purpose CBDC which is accessible by the public through tokens or accounts.¹³³ The author posits that the use of general purpose CBDCs would have profound legal implications on the way consumers of financial services interact with central banks, as it would make it possible for the general public to have accounts with the central banks bypassing the retail bankers. Central bankers and policymakers have raised important legal issues that would be associated with an introduction of CBDCs; in particular, the legal issues revolving around the fundamental relationship between the state, money and the law.¹³⁴ The IMF has highlighted a number of areas of law and regulations that will most likely be impacted by the adoption of a CBDC; some of them include: private law including property law, tax law, contract law, insolvency law, payment system and settlement finality law, private international law, privacy and data protection law, and laws relating to Anti-Money Laundering (AML) and Countering Financial Terrorism (CFT).¹³⁵ These various areas of law, either directly or indirectly, fall within the regulatory scope of the central bank and other financial services regulatory bodies. Various central banks have shared their motivation for developing a CBDCs, which include the following:¹³⁶

1. Financial stability
2. Monetary policy implementation
3. Financial inclusion
4. Domestic payments efficiency
5. Cross-border payments efficiency
6. Payments safety and robustness

The level of disruption that an adoption of CBDCs will bring to the performance of these roles or the achievement of the goals will most likely also have disruptive legal implications. In a research publication by Hossein

¹³³ *Ibid.*, 2.

¹³⁴ Wouter Bossu, Masaru Itatani and others, 'Legal Aspects of Central Bank Digital Currency: Central Bank and Monetary Law Considerations', IMF Working Paper No. WP/20/254, 5.

¹³⁵ *Ibid.*

¹³⁶ N 130, 4.

Nabilou of Oxford University Faculty of Law, with regard to the legal implications of adopting CBDCs in the EU, he stated that:

“In addition to the potential legal impediments to issuing CBDC as legal tender, the introduction of such a virtual currency by the ECB would beget potential effects that might either undermine the ECB’s mandate as well as its basic and ancillary tasks, or otherwise come into conflict with the constitutional constraints set by the EU primary laws on the ECB in employing its monetary policy tools.”¹³⁷

The author posits that these implications will most likely be replicated in other parts of the world mainly because (1) the legal existence or nature of most central banks is similar and (2) the fundamental roles and primary policy mandates of most central banks are also similar. According to Nabilou, if the implementation of CBDCs is simultaneous with the abolishment of cryptocurrencies and physical cash, or other forms of digital money, the possible impact would be the removal of the Zero Lower Bound (ZLB) constraint on the implementation of monetary policies.¹³⁸ Any impact on the conduct or implementation of monetary policy and other central banking policies through the adoption of CBDCs will definitely have legal implications.

Conclusion

This paper has clearly demonstrated how the central banking mandates and policies have transmuted over the years since the inception of the concept in the seventeenth century. As the nature of global trade continue to change, social and economic activities advance, and environmental challenges continue to become the crux of global concerns, central bank mandates and policies will continue to transmute.¹³⁹ In a Bloomberg post by Love Liman,

¹³⁷ Hossein Nabilou, ‘Central Bank Digital Currencies: Preliminary Legal Observations’ (University of Oxford, Faculty of Law, 22 Feb 2019) accessed <<https://www.law.ox.ac.uk/business-law-blog/blog/2019/02/central-bank-digital-currencies-preliminary-legal-observations>> 11 May 2021, [2].

¹³⁸ *Ibid*, [5].

¹³⁹ This is a progressive change. It is highly likely that as technologies advance, the future roles of central banks may become leaner and the legal existence and mandates of financial institutions change.

where he discusses the need for the Sweden's central bank to change in order to act progressively to meet the demands of the changing economic times, he states that:

“The Riksbank’s 352-year history gives it the distinction of being the world’s oldest central bank. But the legislation governing it has yet to catch up with the kind of policy it needs to deliver to address the crisis triggered by Covid-19.”

This demonstrates the dire need to change the legislations governing the central bank for it to be efficient in addressing financial, economic and other policy areas. This paper has also demonstrated that the adoption of CBDCs will have far-reaching legal implications. The issuance of CBDCs and its implementation across different economies would impact on the functions and the powers of central banks.¹⁴⁰ It is, therefore, for the purposes of promoting sustainable development, imperative that legislations and other laws be developed to progressively and positively influence the development of central banks.

¹⁴⁰ N 134.

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A Critique of Intellectual Property as a Business Asset: Valuation, Commercialization, and Taxation of Intellectual Property in Kenya

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Abstract

The motivation behind this paper is to conceptualize the nature of intellectual property as a business asset in Kenya. The author intends to analyze the now widely accepted facets of intellectual property as a business asset namely valuation, commercialization, and taxation. Inquisitively the paper asks; What are the various approaches used when carrying out a valuation of intellectual property? How can intellectual property be commercialized in Kenya? How is intellectual property taxed in Kenya? The author appreciates the jurisdictional nature of intellectual property; hence, the discussion hereinbelow is limited to Kenya. In doing so, the author shall; offer a brief introduction defining Intellectual Property, critique valuation, commercialization, and taxation of intellectual property in Kenya; and lastly, the paper shall give a conclusion.

1.0 Introduction

Intellectual property (hereinafter IP), which includes, but is not limited to, trademarks, service marks, patents, copyrights, industrial designs, and trade secrets, represents rights, which, when legally protected, enable the owner of the IP to preclude others from using and/or producing the protected IP.¹ The rights granted to the owner of the IP could translate into economic value since the owner has the legal ability to use the IP to his advantage and to prevent others from exploiting the particular idea or technology.²

The legal rights accorded to an owner of IP reflects public policy consensus to provide the developer /inventor and founder of the IP with the economic

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¹ Ashok K. Jain, Valuation of Intellectual Property 16 IPL Newsl. 6 (1997).

² Ibid No.1

benefits associated with such assets. Accordingly, the elements of value for IP assets is largely due to its legal "monopoly," which provides the basis and support for pricing premiums, cost savings, competitive and marketing advantages, and barriers to entry.³ On this basis, IP as a business asset can be analyzed in three parts all of which are aimed at the economic benefits of IP to the developer/inventor. These are:

- a) Valuation
- b) Commercialization
- c) Taxation

2.0 Valuation of IP

In order to address the issue of valuation of IP asset, there is a need to define what constitutes IP assets. *IP assets* are a subset of intangible assets and distinguished from other intangible assets by the fact that they are a creation of the law. As such, IP assets are legally protected and can be legally enforced.⁴

IP assets can be independently identified, are transferable and have an economic life (in contrast to their legal life, which is generally longer than their economic life). IP assets include patents, industrial designs, trademarks, copyright, and trade secrets e.t.c.⁵ There are two perspectives that can be adopted in defining an IP asset namely; legal and economic perspective.

Legal perspective: An IP asset can be defined in terms of particular qualitative characteristics or standards (such as that of novelty, originality).

Economic perspective: An IP asset can be defined in terms of the economic benefit linked to the IP asset. For example, a patent that has not contributed to the production or protection of income has no economic value, even though it has legal existence.⁶

³ Ashok K. Jain, Valuation of Intellectual Property 16 IPL Newsl. 6 (1997).

⁴ WIPO- IP valuation

<https://www.wipo.int/export/sites/www/sme/en/documents/pdf/ip_panorama_11_learning_points.pdf>lastly accessed on 5th April, 2021.

⁵ Ibid No.4

⁶ WIPO- IP valuation

Value of an IP Asset

The value of an IP asset derives, in essence, from *its ability to exclude competitors from a particular market*. Whilst the legal right grants exclusivity or the right to exclude, the economic rights are based on exclusivity of use, that is, the ability to control the use of the IP asset.⁷

For an IP asset to have a quantifiable value, it should:

- a) generate a measurable amount of economic benefit to its owner/user.
- b) enhance the value of other assets with which it is associated.

This "*hidden*" value associated with IP assets along with the increase in the nature and type of IP assets being accorded legal protection on a worldwide basis have offered businesses new global opportunities to leverage the use of their IP. This has been achieved by expansion into new markets through the use of strategic alliances, licensing agreements, and joint ventures. Accordingly, companies and individual proprietors have expanded the scope and use of their IP to provide new and innovative opportunities to achieve improved financial results in the form of increased sales, profitability, market share, and shareholder value and certain related benefits in the form of greater consumer awareness, public recognition, and overall acceptance of their IP assets.⁸

Defining IP Valuation

IP Valuation succinctly can be referred to as a process to determine the monetary value of subject IP.⁹ This involves bringing together the economic concept of the value and the legal concept of property.¹⁰

<https://www.wipo.int/export/sites/www/sme/en/documents/pdf/ip_panorama_11_learning_points.pdf>lastly accessed on 5th April, 2021.

⁷ Ibid No.6

⁸ Ashok K. Jain, Valuation of Intellectual Property 16 IPL Newsl. 6 (1997).

⁹ WIPO- IP valuation.

<https://www.wipo.int/export/sites/www/sme/en/documents/pdf/ip_panorama_11_learning_points.pdf>lastly accessed on 5th April, 2021.

¹⁰ WIPO, The Value of Intellectual Property, Intangible Assets and Goodwill
<https://www.wipo.int/sme/en/documents/value_ip_intangible_assets_fulltext.html> lastly accessed on 5th April, 2021

Importance of IP Valuation

An assessment of the validity, strength, protection and remaining life of the IP is very much needed before starting an exploitation activity. In the same way, after the conception of an invention, it is important to consider whether the IP still needs further development or it is ready to be commercialized. It should be borne in mind that where it is decided to commercially exploit an IP asset that is still in the development phase, the business effort can be greater, given the greater uncertainty surrounding its commercial success and the consequent economic return.¹¹

With the increasing contribution of intangible assets, such as IP, in business growth, it has now become imperative to measure and determine its value. This is important because, in every business transaction, it would be inevitable to factor in the contribution of the intangible assets. Interestingly, however, this value or contribution varies depending on the kind of business transaction, and it is in this sense that one must be able to determine the various uses of IP valuation.¹²

Moreover, valuing and financing IP creates a multiplier effect not just for the business sector but also for the government. If a standard in valuation and financing IP is established, investments beneficial both for the economy and the industry will come in and numerous expansions will happen. This will mean added jobs, bigger researches, and more opportunities. Premised on this understanding the potentials IP brings to an industry and to the economy can be massively felt not just nationally but also globally.¹³

Enunciating Intellectual Property Valuation Approaches

IP has *value* to an individual proprietor or company in part because it enables such an individual proprietor or company to conduct operations with the knowledge, experience, and reputation that has been derived through the

¹¹ Roberto d'Erme, Intellectual Property commercialisation highlights (European IPR Helpdesk).

¹² APEC Intellectual Property Experts Group, Intellectual Property (IP) Valuation Manual: A Preliminary Guide January 2018.

¹³ APEC Intellectual Property Experts Group, Intellectual Property (IP) Valuation Manual: A Preliminary Guide January 2018.

development of a particular IP asset. The development of IP generally takes years of marketing, advertising, and/or research and development support and refinement. As a result, it is hoped that the IP will enable consumers to easily identify with an individual proprietor's or company's products or services and, thereby, generate widespread and consistent demand for such products and services.

The following are the conventional and accepted approaches to estimate the fair market value of IP:

1. The Market Approach
2. The Cost Approach
3. The Income Approach
4. The Royalty Approach

1. The Market Approach

The Market Approach is a valuation technique by which fair market value is estimated based on arm's length exchange prices in actual transactions and on asking prices for assets currently offered for sale.¹⁴ The market approach method is based on comparison with the actual price paid for a similar IP asset under comparable circumstances. To do a valuation with this method, one needs to have:¹⁵

- a) An active market (price information, arm's length)
- b) An exchange of an identical IP asset, or a group of comparable or similar IP assets
- c) If the IP assets are not perfectly comparable, variables to control for the differences

The more information available on the nature and extent of rights transferred, including the detailed terms and conditions, the circumstances of the transaction (e.g., cross-licence, licence agreed in settlement of litigation), the

¹⁴ Ashok K. Jain, Valuation of Intellectual Property 16 IPL Newsl. 6 (1997).

¹⁵ WIPO, The Value of Intellectual Property, Intangible Assets and Goodwill <https://www.wipo.int/sme/en/documents/value_ip_intangible_assets_fulltext.html> lastly accessed on 5th April, 2021.

more accurate the valuation will be. This method is much more likely to reflect market perceptions and moods than a valuation based on the income method.¹⁶

Market-based approaches can be used as a primary methodology for determining the level of investment in early-stage companies, with net assets (or cost approaches) utilized as a cross-check of these values. Market-based valuations are recommended when conducting a valuation to¹⁷:

- a) determine licensing royalty rates;
- b) secure financial investment and determine the level of equity, and
- c) assist decision-making for strategic business development in the enterprise.

2. The Cost Approach

The Cost Approach is a valuation technique that uses the concept of replacement cost as an indicator of value. The premise of the Cost Approach is that a prudent investor would pay no more for an asset than the amount for which the asset could be replaced.¹⁸

The cost method is primarily based on the intention of establishing the value of an IP asset by calculating the cost of developing a similar (or exact) IP asset either internally or externally. It seeks to determine the value of an IP asset at a particular point of time by aggregating the direct expenditures and opportunity costs involved in its development and considering obsolescence of an IP asset.

For example, if the IP owner has data pertaining to the cost it incurred for the preceding five years and wants today's value of that IP, the cost incurred in its development, adjusted to inflation, will provide a current value which, in turn, will be further adjusted for obsolescence to arrive at a final opinion of its value.¹⁹ The cost method is generally the least used method as, in most

¹⁶Ibid No.15.

¹⁷ APEC Intellectual Property Experts Group, Intellectual Property (IP) Valuation Manual: A Preliminary Guide January 2018.

¹⁸ Ashok K. Jain, Valuation of Intellectual Property 16 IPL Newsl. 6 (1997).

¹⁹ WIPO, The Value of Intellectual Property, Intangible Assets and Goodwill

cases, it is considered suitable only as a supplement to the income method (if the valuation is not for bookkeeping purposes). The method is normally used in situations where the subject IP is currently not generating any income.²⁰

It is recommended that the cost approach be used for²¹:

- a) legal and accounting standards requirements (including determining damages from potential IP infringements); and
- b) taxation, particularly capital gains tax and stamp duty liabilities.

3. The Income Approach

The Income Approach is a valuation technique by which the value of IP is estimated by the income generated by the particular IP asset. This looks at the stream of income attributable to the intellectual property based on the historical earnings and expected future earnings. The income method values the IP asset on the basis of the amount of economic income that the IP asset is expected to generate, adjusted to its present-day value. This method is the most commonly used method for IP valuation.²²

How to determine economic income

- a) Project the revenue flow (or cost savings) generated by the IP asset over the remaining useful life of the asset.
- b) Offset those revenues/savings by costs related directly to the IP asset. Costs: labour, and materials, required capital investment, and any appropriate economic rents or capital charges
- c) Take account of the risk to discount the amount of income to a present-day value by using the discount rate or the capitalization rate

<https://www.wipo.int/sme/en/documents/value_ip_intangible_assets_fulltext.html> lastly accessed on 5th April, 2021

²⁰ Ibid No.19

²¹ APEC Intellectual Property Experts Group, Intellectual Property (IP) Valuation Manual: A Preliminary Guide January 2018.

²² WIPO, The Value of Intellectual Property, Intangible Assets and Goodwill
<https://www.wipo.int/sme/en/documents/value_ip_intangible_assets_fulltext.html> lastly accessed on. 5th April, 2021.

Different measures of economic income may be relevant to the various income methods. Some of these measures include the following: Gross or net revenues, gross profit, net operating income, pretax income, net income (after-tax), operating cash flow, net cash flow, incremental income, and cost savings.²³

Given the different measures of economic income that may be used in the income approach, an essential element in the application of the income method is to ensure that the discount rate or the capitalization rate used is derived on a basis consistent with the measure of economic income used.²⁴

4. The Royalty Savings Approach

The Royalty Savings Approach, a variation of the Income Approach, is a technique by which fair market value is estimated based on the after-tax royalty savings an IP asset can be expected to generate in the future. In the Royalty Savings Approach, the value of IP is estimated by capitalizing the royalties saved because the company owns the IP.²⁵

In other words, the owner of the IP realizes a benefit from owning the IP rather than paying rent or royalty for the use of the asset. An integral and initial step in the estimation of the fair market value of the IP by using the Royalty Savings Approach involves estimating a royalty rate.²⁶

The Challenge of Valuing Intellectual Property Assets

Valuing IP assets is seminal especially in the commercialization of IP assets. However, there are various challenges associated with the valuation of IP assets. Valuing IP assets requires that a company or an individual proprietor to (1) identify the IP assets, and (2) assign a justifiable value to the identified IP assets, both of which require careful consideration. A company or an individual proprietor may possess various types of assets that qualify as IP.

²³ Ibid No.22

²⁴ WIPO, The Value of Intellectual Property, Intangible Assets and Goodwill <https://www.wipo.int/sme/en/documents/value_ip_intangible_assets_fulltext.html> lastly accessed on. 5th April, 2021.

²⁵ Ashok K. Jain, Valuation of Intellectual Property 16 IPL Newsl. 6 (1997).

²⁶ Ibid No.25

By its very nature, IP comprises intangible assets that are not as readily identifiable as other tangible assets (e.g., buildings, equipment, etc.)²⁷

In some instances, IP rights are embodied in a granting document, such as an issued patent or a registered trademark. In those instances, the IP assets may be more easily identified by a company or an individual proprietor.²⁸ Consequently, a company or an individual proprietor may possess a vast amount of IP assets, some of which are readily identifiable and others of which are difficult to identify. In such a situation, the question arises of how can a company or an individual proprietor be confident that they are aware of all of their IP assets? The certainty of what constitutes a company or an individual proprietor IP assets' remains a seminal challenge in the valuation of IP assets. This is because those IP assets which are difficult to identify may be inadvertently excluded when an IP valuation is being carried out.

However, a solution to this challenge may lie in performing an IP audit. A comprehensive IP audit generally includes an evaluation of a company or individual proprietor assets to identify the IP assets that they possess. For instance, an IP audit identifies such IP assets as a company or individual proprietor issued patents, registered trademarks, registered copyrights, and trade secrets. Such an audit also identifies IP assets acquired or licensed from third parties. Further, an IP audit identifies IP assets possessed by a company or individual proprietor that does not confer presently enforceable rights, such as pending patent and trademark applications and inventions disclosed to an individual proprietor or company decision-making personnel, for which a patent application is yet to have not been filed. The IP audit may further evaluate a company or individual proprietor process of collecting IP assets. For instance, a company or individual proprietor may have procedures

²⁷ Jody C. Bishop, The Challenge of Valuing Intellectual Property Assets, 1 Nw. J. Tech. & Intell. Prop. 59 (2003).
<https://scholarlycommons.law.northwestern.edu/njtip/vol1/iss1/4>

²⁸ Jody C. Bishop, The Challenge of Valuing Intellectual Property Assets, 1 Nw. J. Tech. & Intell. Prop. 59 (2003).
<https://scholarlycommons.law.northwestern.edu/njtip/vol1/iss1/4>

in place to encourage their employees to disclose their inventions to the company or individual proprietor.²⁹

An IP audit may also include an evaluation of the procedures put in place by a company or individual proprietor for maintaining the IP assets. For example, the Kenya Industrial Property Institute in Kenya requires companies to pay periodic fees to maintain patents in force. Similarly, intellectual property rights licensed from third parties may require periodic payments to be made to the third parties. Thus, an IP audit may evaluate the existing procedures for ensuring payments for maintaining a company or individual proprietor IP assets in force.³⁰

Once a company or individual proprietor identifies the IP assets, it becomes desirable to assign a justifiable value to those assets. One study reported that while in 1978 only twenty per cent of corporate assets were intangible assets, and eighty per cent of corporate assets were tangible assets, by 1997 the relative value of tangible and intangible assets had practically reversed, with seventy-three per cent of corporate assets being intangible assets.³¹

Thus, for many a company or individual proprietor, valuation of their IP assets is a critical factor in determining their financial condition. Valuing IP assets is often a difficult task because their true value may not be readily apparent. It is often desirable to tie the value of an IP asset to income directly attributable to that asset, if determinable.³²

Of course, the value of an IP asset may not be recognized in income received by a company or individual proprietor. Indeed, the full value of an IP asset is likely never to be recognized in income because much of the asset's value resides in the negative right to prevent others from doing something they would otherwise be permitted to do. Thus, a patent may have great value

²⁹ Jody C. Bishop, *The Challenge of Valuing Intellectual Property Assets*, 1 Nw. J. Tech. & Intell. Prop. 59 (2003).
<https://scholarlycommons.law.northwestern.edu/njtip/vol1/iss1/4>

³⁰ Ibid No. 29

³¹ Kenneth E. Krosin, *Management of IP Assets*, AIPLA BULLETIN 176 (2000 Mid-Winter Meeting Issue).

³² Ibid No. 31

even if a company or individual proprietor does not license the patent or enforce the patent against any third parties because a company or individual proprietor possesses “the right” to prevent others from practising the patented invention. For example, potential competitors may decide not to embark on a field encompassed by a company or individual proprietor patent rights.³³

Valuing an IP asset is further complicated because such value is generally not stagnant. Rather, the value of an IP asset often changes over time. Consequently, a company or individual proprietor should periodically (e.g., annually) re-assess the value of its IP assets.

While each of the Intellectual valuation techniques may fail to capture the full value of an IP asset, its use should provide comfort to a company or individual proprietor company’s officers that they have reasonably valued their IP assets in assessing their financial condition. As the reporting of a company or individual proprietor financial condition continues to be more closely scrutinized, the valuation of IP assets becomes increasingly important, particularly if much of a company’s or individual proprietor’s financial value resides in the IP assets.³⁴ Lastly, the existence of limited skilled IP valuers’ in Kenya remains a challenge, that needs to be addressed through training and adoption of global best practices.

3.0 Commercialization of IP assets

It is by commercializing Intellectual property that a person or organization are able to reap the economic benefits from their knowledge/invention and even make it a bit more physical. *Commercialization* is the process of bringing the IP to the market in order for it to be exploited in return of business profits and growth.³⁵ The financial success of any IP commercialization will certainly depend on the choice of the most appropriate commercial tool.³⁶

³³ Kenneth E. Krosin, Management of IP Assets, AIPLA BULLETIN 176 (2000 Mid-Winter Meeting Issue).

³⁴ Ibid No.33

³⁵ Roberto d’Erme, Intellectual Property commercialisation highlights(European IPR Helpdesk).

³⁶ Ibid No.35

Forms of commercialization of IP assets

Generally, intellectual property may be commercialized by:

1. In-House exploitation,
2. By a permanent assignment or
3. By entering into different types of business partnerships, such as licensing, franchising, joint venture or Spin-off Company.

A. An in-house exploitation/Internal product development:

This is one of the most common ways to commercialize IP assets. This form of commercialization is usually adopted by organizations or individual proprietors, that have the requisite competencies and resources to manufacture and supply goods or services. It is worth noting that optimal management of the IP concerned, is needed here if the individual proprietor or organization wishes to leverage its business growth with its own development of the knowledge produced.³⁷

B. By a permanent assignment

This is meant to be an ordinary sale and occurs when an assignor permanently transfers the ownership of its IP asset to an assignee, who will acquire the full rights to dispose of the intangible asset in question unless the assignor asks to be licensed back.³⁸

It is usually done through *ad hoc* assignment contracts but it is possible to include assignment clauses within partnership and employment agreements. As with licences, assignment of IP is done in return for a payment of a lump sum, royalties, or a combination of both.³⁹

³⁷ Roberto d'Erme, Intellectual Property commercialisation highlights(European IPR Helpdesk).

³⁸ Roberto d'Erme, Intellectual Property commercialisation highlights(European IPR Helpdesk).

³⁹ Ibid No.36

C. By entering into different types of business partnerships, such as licensing, franchising, joint venture or Spin-off Company.

This involves the developer/inventor entering into different partnerships. For example:

(i) Licencing

A *licence* is a permission to do something that would otherwise be unlawful.⁴⁰ This often happens when an organization or an individual lack the financial or technical capabilities to directly exploit their IP. Through a licence agreement, the owner of an IP (licensor) allows a third party (the licensee), to access and use their IP for a certain time period in return for financial compensation, either in the form of royalties on products sales or payment of a lump sum. The terms of licence agreements may vary widely, but they commonly provide for the exclusivity or non-exclusivity of the licensed technology, namely the right for the licensee to use the IP solely or in conjunction with the licensor.⁴¹

A licence can also be restricted to a particular purpose, such as research, development, selling or manufacturing purposes.⁴²

Licensing takes various forms:

a) Voluntary or contractual licensing

b) Involuntary licensing such as compulsory licensing. Compulsory licencing is defined as an authorisation given by a national authority to a person, without or against the consent of the IP-holder, for the exploitation of the subject matter protected by a patent or other IP right.⁴³

⁴⁰ Ben Sihanya, *Intellectual Property and Innovation Law in Kenya and Africa, Transferring Technology for Sustainable Development* (1st Edition, Sihanya Mentoring & Innovative Lawyering, 2016) page 38.

⁴¹ Ibid No.41

⁴² Roberto d'Erme, *Intellectual Property commercialisation highlights* (European IPR Helpdesk).

⁴³ Ben Sihanya, *Intellectual Property and Innovation Law in Kenya and Africa, Transferring Technology for Sustainable Development* (1st Edition, Sihanya Mentoring & Innovative Lawyering, 2016) page 38.

Licensing can also be defined in terms of whether the licensee is sole, exclusive or non-exclusive.⁴⁴

- a) Sole licensing is where there is only one licensee. However, the licensor may compete with the Licensee.
- b) Exclusive licensing is where no one may compete with the sole licensee including the licensor.
- c) Non-exclusive licensing is where there is more than one licensee. They may compete among themselves and the licensor can also compete with them.

(ii) Spin-off Company

Spin-offs, also known as “*spin-outs*”, are separate legal entities created by a parent organization to exploit its IP assets.⁴⁵ Once the company is established, the parent organization will assign or license the IP concerned to the spin-off to commercialize it. Spin-offs are a common commercialization practice in Universities and Research Organizations in order for them to exploit and maximize the economic benefits of the knowledge created.⁴⁶

(iii) Franchising

This translates into the acquisition by the company of rights in the innovation, technology, skill, technical information, reputation or brand in the form of the appropriate trademark, service mark, copyright or trademark. An individual or company wishing to exploit the innovation or brand does so by investing in a company to utilize the brand.⁴⁷ Both parties benefit. Thus, successful copyright or trademark owners usually create franchises to

⁴⁴ Ibid No.42 page 38.

⁴⁵ Roberto d’Erme, Intellectual Property commercialisation highlights (European IPR Helpdesk).

⁴⁶ Roberto d’Erme, Intellectual Property commercialisation highlights (European IPR Helpdesk).

⁴⁷ Ben Sihanya, Intellectual Property and Innovation Law in Kenya and Africa, Transferring Technology for

Sustainable Development(1st Edition, Sihanya Mentoring & Innovative Lawyering, 2016) page 513.

facilitate the exploitation of their intellectual property (IP), innovation or technology.⁴⁸

Franchising is a form of technology transfer whereby the franchisor authorizes the franchisee to use the franchisor's copyright or trademark in exchange for royalties and related consideration.⁴⁹ Franchising involves a lot of advertising, and packaging of the products to suit customer tastes in the relevant market. Examples of franchising transactions are in the petroleum industry, food chains, fabrics and textiles, cinema and related lines of business. Examples include; Java, Total, Kobil, Steers, Nandos, Caltex, Mobil, Mother Care, Victoria Secrets and McDonald's.⁵⁰

(iv) Joint Venture

This is a form of business association between two or more independent organizations (joint venturers) to undertake a common project or to achieve a certain goal. This is an agreement in which one investor brings money and the other technology or know-how, (human resources, or distribution network) and they come together to complement each other.⁵¹

This may be done by way of a merger or through a strategic allegiance between stand-alone enterprises. A good illustration is the mergers between African governments and companies. Companies would be interested in such ventures or alliances for purposes of protecting their investments from political risk.⁵²

More specifically, the parties to the joint venture share risks and contribute with their intellectual capital towards technology research and development,

⁴⁸ Ibid No. 46.

⁴⁹ Roberto d'Erme, Intellectual Property commercialisation highlights (European IPR Helpdesk).

⁵⁰ Ben Sihanya, Intellectual Property and Innovation Law in Kenya and Africa, Transferring Technology for Sustainable Development(1st Edition, Sihanya Mentoring & Innovative Lawyering, 2016) page 513.

⁵¹ Roberto d'Erme, Intellectual Property commercialisation highlights(European IPR Helpdesk).

⁵² Ben Sihanya, Intellectual Property and Innovation Law in Kenya and Africa, Transferring Technology for Sustainable Development(1st Edition, Sihanya Mentoring & Innovative Lawyering, 2016) page 39.

production, marketing and commercialisation. The role that IP plays in conducting such collaboration is a central one, it is fundamental that joint venturers clearly define at the outset the ownership of the IP to be created by the joint venture and the other parties' rights to it.⁵³

4.0 Taxation of IP in Kenya

Taxation of IP is territorial in nature. Generally, the treatment of tax on income related to intellectual property is dependent on the nature of income and the activity generating the income, who owns the property, and who makes the payment.

Main legal framework providing for taxation of IP is: **Income Tax Act Cap 470** (precisely; Section 2 (defining a royalty, resident and permanent establishment), Section 3(1), Section 3(2) (a) (iii), Section 6(1), Section 35 (1)(b), Section 35 (3)(b), Section 35 (5) and First schedule Part 1 (11).

A succinct analysis of Taxation of IP

First, it is important to appreciate the nature of the income tax in Kenya. Under the provisions of the Income Tax Act, Cap 470, Laws of Kenya ("the Act") at Section 3(1) income tax is imposed upon all income of a person, if the same was accrued in or derived from Kenya.⁵⁴ Further, the principles of *worldwide* and *source basis* apply to individuals. This simply means Kenyan residents are taxed on their worldwide income while non-residents are taxed on the income from a source within the territory.⁵⁵

Generally, the treatment of tax on income related to intellectual property is dependent on the nature of income and the activity generating the income, who owns the property, and who makes the payment. A transfer or a license

⁵³ Roberto d'Erme, Intellectual Property commercialisation highlights(European IPR Helpdesk).

⁵⁴Section 3 (1) of Income Tax Act Cap 470 provides verbatim "Subject to, and in accordance with, this Act, a tax to be known as income tax shall be charged for each year of income upon all the income of a person, whether resident or non-resident, which accrued in or was derived from Kenya."

⁵⁵ Victor Kiamba, Income Tax Liability on Intellectual Property
<<https://stralexgroup.blogspot.com/2016/06/income-tax-liability-on-intellectual.html>> lastly accessed on 6th April, 2021

of intellectual property depends on whether all the rights to the property have been transferred.⁵⁶

Income from a transfer or licensing of intellectual property may subsequently give rise to a capital gain or loss as well as withholding tax. If the income is accrued to or received by an individual in the furtherance of a business, it may then attract ordinary income tax liability with certain tax deductions and rebates while if in the course of employment, depending on the nature of the employment contract, to ordinary income tax. Amounts received by individuals who create intellectual property may be royalties or compensation, depending on whether they own and license the property or create it for an employer. However, the Act seemingly compounds such amounts as royalties for purposes of income tax.⁵⁷ The definitive section of Income Tax Act Cap 470,⁵⁸ defines *royalty* as a payment made as a consideration for the use of or the right to use:

- a) any copyright of a literary, artistic or scientific work; or
- b) any cinematograph film, including film or tape for radio or television broadcasting; or
- c) any patent, trademark, design or model, plan, formula or process; or
- d) any industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific equipment or experience, and any gains derived from the sale or exchange of any right or property giving rise to that royalty;

The provisions of Section 10 of the Act⁵⁹ deem payments in respect of royalties, among others stated under the said section, from a resident or a person having a permanent establishment in Kenya to any other person, to be income, which has accrued in or derived from Kenya.

⁵⁶ Ibid No. 54

⁵⁷ Victor Kiamba, Income Tax Liability on Intellectual Property <<https://stralexgroup.blogspot.com/2016/06/income-tax-liability-on-intellectual.html>> lastly accessed on 6th April, 2021

⁵⁸ Section 2 of Income Tax Act Cap 470.

⁵⁹ Income Tax Act Cap 470.

Two salient features arise from the provisions of Section 10 of the Income Tax Act Cap 470:

1) *That the payment of the amount constituting the income must be from a resident or a person having a permanent establishment in Kenya.* This is in line with the *OECD Model Tax Treaty Principles* where the source of royalties is based on the tax residence of the party paying the royalties or on royalties having an economic link with a permanent establishment. This removes any focus on the party creating, devising or developing intellectual property and instead focuses on the party making the payment and thus if the party paying the royalty is a resident or a person having a permanent establishment in Kenya, the source of such income is said to be from within the Republic.⁶⁰

A Permanent Establishment is defined in the Act⁶¹ as a fixed place of business in which that person carries on business. A building site, or a construction or assembly project, which has existed for six months or more is deemed to be a fixed place of business.

2) *That such payment is made to any person, resident or not;* the main problem arising from this is *double taxation*. This may come about where a person who has received such payment, not being a resident, is liable to tax in Kenya on source basis while the jurisdiction where he/she is a tax resident imposes a tax on a worldwide income.

Tax Administration

The taxes are deducted at source as **withholding tax** and are at the rate of 5% *for payments to a resident* and 20% *for payments to a non-resident*.⁶² The deductions are carried out by the person making the payment and shall according to Section 35 of the Income Tax Act⁶³, be remitted to the

⁶⁰ Victor Kiamba, Income Tax Liability on Intellectual Property <<https://stralexgroup.blogspot.com/2016/06/income-tax-liability-on-intellectual.html>> lastly accessed on 6th April, 2021

⁶¹ Section 2 of Income Tax Act Cap 470.

⁶² <<https://www.kra.go.ke/en/helping-tax-payers/faqs/more-about-withholding-tax>> lastly accessed on 6th April 2021.

⁶³ Cap 470.

Commissioner together with a return in writing of the amount of the payment, the amount of tax deducted, and such other information as the Commissioner may specify. He/she shall also indicate the person to whom the payment is made with a Certificate stating the amount of the payment and the amount of the tax deducted.⁶⁴

Exemption to the taxation of IP

The Minister (in charge of Treasury) may, by notice in the Gazette, provide that income or a class of income which accrued in or was derived from Kenya to be exempt from tax to the extent specified in the notice.

Part 1 of the First Schedule to the Income Tax Act, provides at paragraph 11 *verbatim* that; *the income of a person from a management or professional fee, royalty or interest, may be exempt from tax when the Cabinet Secretary certifies that it is required to be paid free of tax by the terms of an agreement, to which the Government is a party either as principal or guarantor and that it is in the public interest that the income be exempt from tax.*

It is to be noted that the exemptions are not guaranteed and are solely the decision of the minister in charge.⁶⁵ Taxation of IP as a business asset has been subject to litigation in Kenyan courts for example:

The High Court recently delivered its judgment in the case of; *Vivo Energy Kenya Limited v Kenya Revenue Authority* [2016] eKLR⁶⁶ holding that the Commissioner of Domestic Taxes erred for concluding that a non-exclusive and non-transmissible license to use “Shell” trademarks was a sale of a property giving rise to royalty within the meaning of Section 2 of the Income Tax Act and hence chargeable to tax.

According to *Vivo*, it had only been granted non-exclusive and non-transmissible rights to use the trademarks, the manifestations and the right to include the word “SHELL” In its name in Kenya, without payment of

⁶⁴ Section 35(5) of Income Tax Act Cap 470.

⁶⁵ Victor Kiamba, Income Tax Liability on Intellectual Property <<https://stralexgroup.blogspot.com/2016/06/income-tax-liability-on-intellectual.html>> lastly accessed on 6th April, 2021

⁶⁶ eKLR Civil Suit No. 507 Of 2014.

royalty. Further, Vivo contended that the amount of Kshs. 427,964,870/- it was paid by Shell was not taxable income but a contribution for Research and Development.

However, Vivo was also of the view that even if the money in question was utilized for the acquisition of intangible assets, the said payment could not have amounted to a royalty, as defined in the Income Tax Act. Vivo argued that it had not acquired the trademark but rather it was only given non-exclusive and non-transmissible rights to use “Shell” trademarks in Kenya. Therefore, the Shell retained ownership of the trademarks and that Vivo was obliged to seek the consent or the concurrence of the owner if Vivo wished to either transfer or to transmit any of the rights conferred upon it under the license.

The court reasoned that the significant part of section 2 of the Act is that a royalty is “a payment made as a consideration” Since in this case, money was paid the court stated that the question to be answered is whether or not such payment was consideration for the purposes of Vivo being permitted to use the “Shell” trademarks.

In finding for Vivo, the court stated as follows:

“Both parties acknowledge that the appellant did not own the trademarks. Therefore, if the appellant was paid, it cannot have been for the trademarks. (...) The payment was specifically for Research and Development. This is my understanding, that the appellant [Vivo] when putting to use the trademarks and manifestations, was expected to carry out research and development.

...However, as the said trademarks did not belong to the appellant, the benefit, in the long run, would go to SBI [Shell]. (...) In that respect, the payment was of a capital nature. It was not money which the appellant was to use for trading. (...) Accordingly, I set aside the decision of the Local Committee dated 19th September 2013, and hold that the payment was not royalty, and it was not taxable. The payment was of a capital nature.”

In light of the above, the court concluded that the payment was not a gain derived from the sale of a property, giving rise to royalty under the Act.

5.0 Conclusion

From the above discussion, it is clear that the discourse of IP as a business asset addresses the very basis of the existence of IP. On this basis, there is a need to have in place an enabling legal framework to promote the exploitation of IP as a business asset. This paper propounds that IP is the next frontier for exploitation by innovative and enterprising entrepreneurs, and the valuation, commercialization and taxation of IP will be inseparable in this undertaking.

Rhetorically, this paper questions; What is the role of advocates in valuation, commercialization and taxation of IP as a business asset in Kenya? Is there need for a legislation to promote valuation, commercialization and taxation of IP as a business asset in Kenya?

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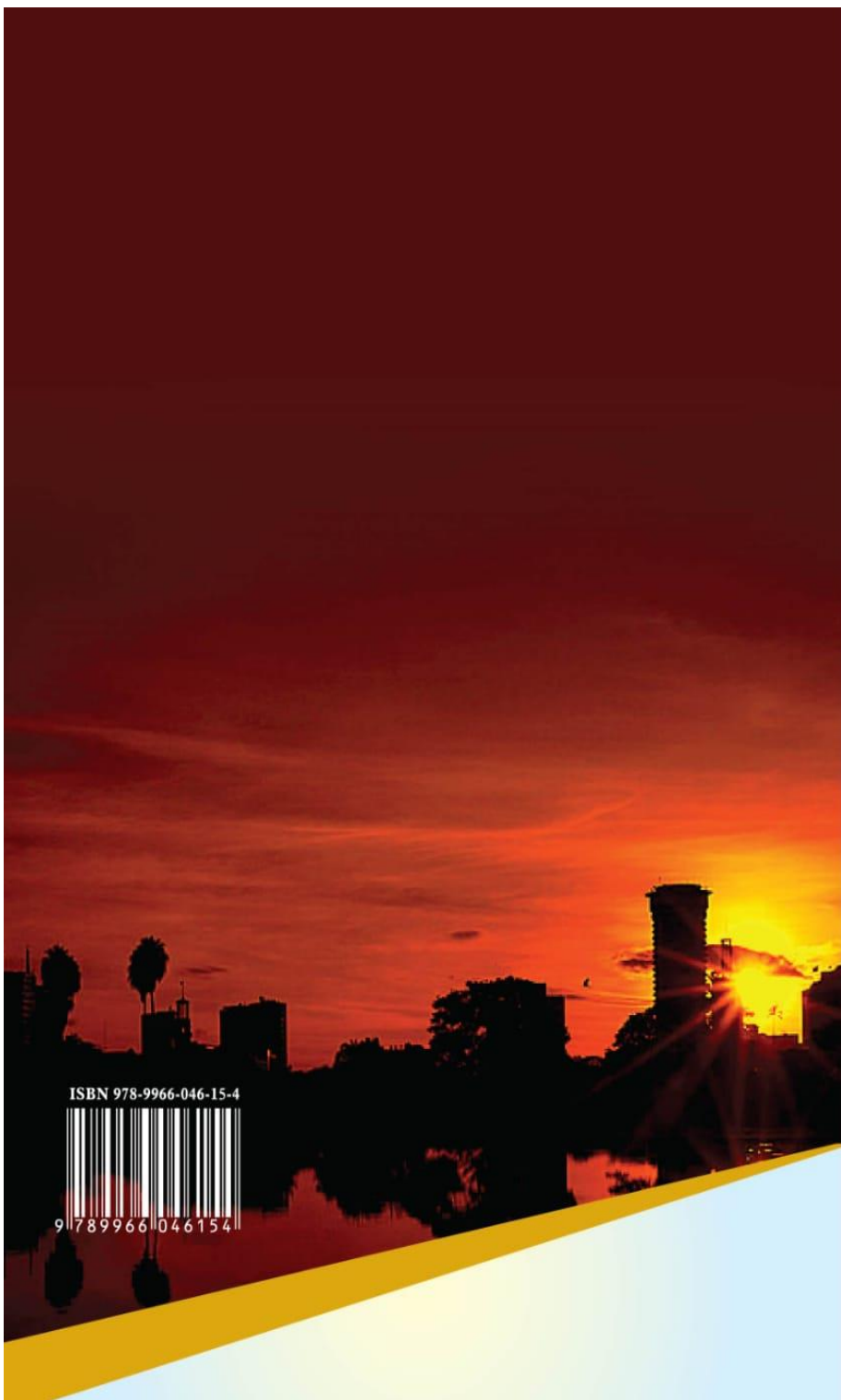
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