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Against the Obnoxious Repugnancy Clause as a Limitatimon to Application of Traditional Dispute Resolution Mechanisms in Kenya

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Abstract

This paper analyses the repugnancy clause and proceeds on the basis that it has outlived its time and usefulness as a limitation to the application of Traditional Dispute Resolution Mechanisms (hereinafter referred to as TDRMs) in Kenya. The author's assertions are premised on the basis that TDRMs as a mode of dispute resolution is deeply entrenched in communities in Kenya. Almost all ethnic communities have a TDRM as a means of dispute resolution. For example; Njuri Ncheke for Meru community, Kikuyu Council of Elders, Maslaha as practised through Elders amongst Cushite communities e.t.c

As such TDRMs play a vital role in the resolution of disputes in Kenya. The longevity in the application of TDRMs by various communities in Kenya is a manifestation of the vital role they play in the resolution of disputes. TDRMs highly supplement the formal systems of dispute resolution.

1.0 Introduction

From the onset, there is need to contextualize what constitutes *the repugnancy clause.* The repugnancy clause opines that TDRMs are only applicable or can be used as a means of solving disputes '*only if they were not* ***repugnant to justice and morality or results in outcomes that are repugnant to justice or morality.***

On the other hand, there is need to elucidate what constitutes TDRMs. TDRMs existed even before colonialization.[1] The TDRMs were geared towards fostering peaceful co-existence among the members of each community. The existence of TDRMs such as negotiation, reconciliation, mediation and others is evidence that these concepts are not new in Kenya.[2] The traditional methods of resolving disputes generally referred to as TDRMs are considered to be informal methods of resolving disputes. They operate outside the formal legal framework that exists. TDRMs vary from one community to another. Predominantly, TDRMs are based on cultural practices of various communities.

Each community has its own unique set of customary laws and as such, each community has a different method of dispute resolution.[3] The definition of offences and conflict differs from one community to another. Similarly, the punishment prescribed for each offence differs from one community to another. These various variances of traditional methods of resolving disputes inhibit the creation of a concrete definition of TDRMs.

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[1] Kariuki Muigua, Traditional Conflict Resolution Mechanisms and Institutions, page 2-3.

[2] See generally, Brock-Utne, B., "Indigenous conflict resolution in Africa," A draft presented to week-end seminar on Indigenous Solutions to Conflicts held at the University of Oslo, Institute of Educational Research, 2001, pp. 23-24 ;See also Ajayi, A.T., & Buhari, L.O., "Methods of conflict resolution in African traditional society," African research review,Vol.8, No. 2, 2014, page 138-157

[3]Francis Kariuki, Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology page 11

2.0 The Legal basis of application of the Repugnant Clause and TDRMs in Kenya

A. Enunciating the legal basis of application of the Repugnant Clause in Kenya

The repugnancy Clause is captured under ***Article 159(3)*** of the Constitution[4] and ***Section 3(2) of the Judicature Act***[5]. To this end, Article 159 (3) of the Constitution[6] verbatim provides: *Traditional dispute resolution mechanisms shall not be used in a way that;*

a) *contravenes the Bill of Rights;*
b) *is* ***repugnant to justice*** *and morality or results in outcomes that are repugnant to justice or morality; or*
c) *is inconsistent with this Constitution or any written law.*

In essence, the import of Article 159(3) of the Constitution is that TDRMs are applicable in Kenya as modes of dispute resolution provided that; they do not contravene the bill of rights, they are ***not repugnant to justice and morality*** and lastly that they are not inconsistent with the Constitution or any written law.

On the other hand, the repugnant clause finds its refuge statutorily under ***Section 3(2) of the Judicature Act***[7] which verbatim provides that: '*The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is* ***not repugnant to justice and morality or inconsistent with any written***

[4] Constitution of Kenya 2010
[5] Cap No.8 of the laws of Kenya
[6] Under Chapter Ten of the Constitution of Kenya 2010 (Judicial Authority)
[7] Cap No.8 of the laws of Kenya

***law**, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and undue delay.'*

These two salient provisions of the law form the legal basis of the application of the repugnancy clause in Kenya. The repugnancy clause as captured by ***Article 159(3)*** of the Constitution[8] and ***Section 3(2) of the Judicature Act***[9] can be considered to be a limitation to the application of traditional dispute resolution mechanisms in Kenya.

B. Enunciating the legal basis of application of traditional dispute resolution mechanisms in Kenya

TDRMs have a wide legal basis of their application as modes of dispute resolution. This legal basis includes; constitutional, statutory and policy bases. These legal provisions either directly or indirectly promote the application of TDRMs in Kenya especially appreciating that culture and TDRMs are conjoined twins.[10]

This assertion is based on the fact that TDRMs operate within the confines of cultural practices. As such, TDRMs vary from one community to the other based on each community's cultural

[8] Constitution of Kenya 2010
[9] Cap No.8 of the laws of Kenya
[10] See generally Kassa, G.N., "The Role of Culture and Traditional Institutions in Peace and Conflict: Gada System of Conflict Prevention and Resolution among the Oromo-Borana," Master's thesis, 2006. Available at <http://urn.nb.no/URN:NBN:no-17988> [Accessed on 09/04/21]; See also Mengesha, A. D., et al, „Indigenous Conflict Resolution Mechanisms among the Kembata Society," *American Journal of Educational Research*, Vol.3, No.2, 2015, page 225-242.

practices.[11] It is on this basis then that one can assert that promoting cultural practices in Kenya, to a great extent promotes TDRMs. In essence, TDRMs are based on African Customary Laws. TDRMs operate within the realms of customary law. *Okoth-Ogendo* asserts that the reason why customary law has stood the test of time, among many other reasons, is because the customary laws have over time been seen to function as a set of social and cultural facts.[12] This is the case with TDRMs as they are governed by customary laws.

The most explicit legal provision for the application of TDRMs in Kenya is Article 159 of the Constitution which addresses judicial authority and the legal system.

Article 159 of the Constitution offers the best enumeration of the basis of the application of TDRMs in Kenya. Under Article 159(2) I of the Constitution, TDRMs are considered to be one of the principles that ought to guide courts and tribunals in the exercise of their judicial authority. Verbatim Article 159(2)(c) of the Constitution provides that; In exercising judicial authority, the courts and tribunals shall be guided by the following principles; alternative forms of dispute resolution including reconciliation, mediation, arbitration and *traditional dispute resolution mechanisms* shall be promoted, subject to clause (3).

[11] Francis Kariuki, Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology page 11

[12] Okoth-Ogendo, "The Tragic African Commons: A Century of Expropriation, Suppression and Subversion" (2010)

In essence, Article 159(2)(c) of the Constitution persuades courts and tribunals to at all material times promote the application of TDRMs provided they operate within the scope stipulated under Article 159(3) of the Constitution.

Over time, courts in Kenya in promoting the application of TDRMs in Kenya have heavily relied on these provisions of the Constitution. Buttressing this *Justice Edward M. Muriithi* in the case of; *Mary Kinya Rukwaru v Office of the Director of Public Prosecutions & another [2016] eKLR*[13]stated as follows;

> *"I would agree with Counsel for the Interested Party that "the Constitution of Kenya 2010 recognises that justice is not only about prosecution, conviction and acquittals [and that] it reaches out to issues of restoration of the parties [with] court assisted reconciliation and mediations are the order of the day with Article 159 being the basic test for that purpose. Accordingly, Alternative Dispute Resolution (ADR) "including reconciliation, mediation, arbitration and* ***traditional dispute resolution mechanisms****" are available means of settlement of criminal cases under the Constitution, and the Court is enjoined Article 159 to promote ADR."*

Apart from Article 159 of the Constitution, other few articles of the Constitution encourage the use of TDRMs. It is important to appreciate that TDRMs as earlier stated is part and parcel of culture and/or cultural practices. As such, where the Constitution or statutes promote application, preservation and promotion of culture and/or cultural practices, TDRMs is part and parcel of the same. The preamble of the Constitution states that we are proud of our ethnic,

[13]eKLR, Petition No. 285 of 2016 at paragraph 17 & 18

cultural and religious diversity. Article 2(4) of the Constitution recognizes the existence of customary law which governs TDRMs, though it limits its application where it is inconsistent with the Constitution.

Article 11 of the Constitution recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation. To this end, it advocates for the promotion of cultural expressions.

Article 44 of the Constitution posits that every person has the right to enjoy their language, and culture though no one should be compelled to perform, observe or undergo any culture or rite. The Constitution under Article 45(4) requires the parliament to enact legislation that recognizes traditional marriages. Such marriages are based on cultural practices. Article 60 (1)(g) of the Constitution encourages communities in Kenya to settle land disputes through recognized local community initiatives consistent with this Constitution.

Lastly, Article 67(2)(f) of the Constitution enlists one of the functions of the National Land Commission is to encourage the application of traditional dispute resolution mechanisms in land conflicts.

A statutory basis for application of TDRMs can be derived from Marriage Act[14], under Section 68 encourages the use of TDRMs. Buttressing, Article 67(2)(f) of the Constitution, Section 5(1) (f) of the National Land Commission Act[15] provides that one of the functions

[14]Cap No. 4 of 2014
[15]Cap No. 5 of 2012

of the National Land Commission is to encourage the application of traditional dispute resolution mechanisms in land conflicts.

Under Section 3(5) (b) of the Environmental Management and Co-ordination Act[16], the Environment and Land Court in the exercise of its jurisdiction is required to be guided by the cultural and social principles traditionally applied by any community in Kenya for the management of the 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.

Section 7(3) of the Magistrates Court Act[17] offers an enumeration of Civil matters that are subject to African Customary Law and a great extent TDRMs.

On 4th March 2016, his Lordship the Chief Justice, Hon. (Dr.) Willy Mutunga (as he then was), *vide The Kenya Gazette* (Special Issue) *Gazette Notice. Vol. CXVIII-No.21*, appointed the Taskforce on Alternative Justice Systems to look at the various *Traditional, Informal and Other Mechanisms Used to Access Justice in Kenya (Alternative Justice Systems).* The tenure of the Taskforce was subsequently extended by Chief Justice emeritus Hon. David Maraga.[18]

The Taskforce was required to examine the legal, policy and institutional framework for the furtherance of the endeavour by the Judiciary to exercise its constitutional mandate under Article 159 (2) and its plans to develop a policy to mainstream the Alternative Justice

[16]Cap No.8 of 1999
[17] Cap No.26 of Laws of Kenya
[18] Alternative Justice System Policy, Executive Summary page xiv

System (*hereinafter AJS*) to enhance access to and expeditious delivery of justice as espoused at Pillar one of the *Judiciary Transformation Framework*, which was the blueprint which undergirded transformation in the Judiciary in the period 2012-2016. This objective was later included in the *Sustaining Judiciary Transformation* Blueprint.[19]

On 27th August 2020, which was the 10th Anniversary of the adoption of the Kenya Constitution, Chief Justice emeritus David Maraga presided over the launch of the Alternative Justice System Baseline Policy(AJS) after the completion of its preparation by the Taskforce. The Alternative Justice System Baseline Policy [20] (hereinafter the policy) outlines steps to embrace and implement alternative justice systems per Article 159(2) (c) of the Constitution 2010. This policy best encapsulates the effectiveness and application of TDRMs in Kenya comprehensively.

The policy analyses:[21]

a) *Alternative Justice Systems and the need for an AJS policy in context.*
b) *Conceptual framework and imperatives for Alternative Justice Systems.*
c) *Challenges and responses on Alternative Justice Systems.*
d) *How is AJS practised? Existing models of AJS.*

[19] Alternative Justice System Policy, Executive Summary page xiv
[20]Alternative Justice Systems Baseline Policy <*https://www.judiciary.go.ke/resources/publications/*> accessed on 09/04/21
[21]The table of Contents Alternative Justice Systems Baseline Policy page x to xi <*https://www.judiciary.go.ke/resources/publications/*> accessed on 09/04/21

e) Operational doctrines of interaction between Courts and matters determined by or before AJS institutions.
f) Key areas of intervention and implementation.
g) Operationalizing the AJS policy—the roles of different actors.
h) Operationalizing the AJS policy: The implementation matrix.

The policy in a nutshell emphasizes the importance of AJS and the need for them to be adopted in our justice system to promote access to justice in Kenya. TDRMs form part of Alternative Justice Systems in Kenya as such the policy promotes TDRMs.

The significance of the policy lies in the fact that, unlike the other legislations which seeks to promote TDRMs in Kenya, the policy identifies; the k*ey areas of intervention and proposes ways for operationalizing the AJS policy.*

3.0 Against the Obnoxious Repugnancy Clause as a limitation to Application of Traditional Dispute Resolution Mechanisms in Kenya

To appreciate why there is a need to scrape off the repugnancy clause in our laws there is a need to appreciate the historical basis of TDRMs in Kenya, which led to the introduction of the repugnant clause in our laws. As earlier pointed out, TDRMs existed even before colonialization.[22] These mechanisms were geared toward fostering peaceful co-existence among the members of each community. The existence of traditional conflict resolution mechanisms such as

[22] Kariuki Muigua, Traditional Conflict Resolution Mechanisms and Institutions, page 2-3.

negotiation, reconciliation, mediation and others is evidence that these concepts are not new in Kenya.[23]

Communities in Kenya had their ways of dealing with day to day challenges. They relied on their customs and practices to resolve their disputes. However, during colonialization, the colonial masters deliberately suppressed customs and practices allowing them to be applied '*only if they were not repugnant to justice and morality*.[24] This is formed the origin of the repugnancy clause[25] as currently constituted in the Kenyan legal framework. Subsequently, the repugnant clause has since been retained in Kenya legal framework for example the Judicature Act, Cap 8 and the Constitution of Kenya 2010 as a limitation to the application of TDRMs in Kenya.[26]

It is fair to state that, the repugnancy clause as stipulated under Article 159 (3)(b) of the Constitution reflects the continuing conflict between African legal systems and legal systems which began in the colonial era.

[23] See generally, Brock-Utne, B., "Indigenous conflict resolution in Africa," A draft presented to week-end seminar on Indigenous Solutions to Conflicts held at the University of Oslo, Institute of Educational Research, 2001, pp. 23-24 ;See also Ajayi, A.T., & Buhari, L.O., "Methods of conflict resolution in African traditional society," African research review,Vol.8, No. 2, 2014, page 138-157

[24]Kariuki Muigua, Alternative Dispute Resolution and Access to Justice in Kenya page 59

[25] Repugnant Clause-'only if they were not repugnant to justice and morality or results in outcomes that are repugnant to justice or morality'

[26]The clause is retained under Section 3(2)Judicature Act, Cap 8 and Article 159(3) of the Constitution of Kenya 2010

The view that African legal systems are inferior to legal systems which began in the colonial era hence the need to have the repugnancy clause has been captured in writing by various foreign writers.

Arthur Phillips, [27] in a report he prepared, propounds that it is inevitable and indeed desirable that Africans should eventually attain a system of law and justice that is similar to though not necessarily identical to the British system of law. *Frederick Lugard* argued that only from native courts employing customary law was it possible to create rudiments of law and order, to inculcate a sense of responsibility and evolve among a primitive community some sense of discipline and respect for authority.[28] The view of African cultural practices like TDRMs as 'primitive' has always downgraded African legal systems which are primarily based on different cultural practices of communities.

It is observable that, where African ideas of custom and law were retained by the legal systems imposed on the Africans during the colonial era the same was based on necessity. This was observed by *Karen Fields*[29] who verbatim stated "*...Britain had not the manpower, the money nor the mettle to rule by force of arms alone. Essentially, to make the colonial rule work with only a `thin white line ' of European administrators, African ideas of custom and law had to be incorporated into the new state*

[27] Arthur Phillips, Report on Native Tribunals (Nairobi: Government Printer, Colony and Protectorate of Kenya, 1945), 5±6 on the powers of Native Tribunals,
[28] Lord Lugard, The Dual Mandate in British Tropical Africa (London, 1965 [1922]),547-8, 549-50.
[29] See Karen Fields, *Revival and Rebellion in Colonial Central Africa* (Portsmouth, NH,1997), chs. 1±2.

systems. In a very real way, customary law and African courts provided the ideological and financial underpinnings for European colonial rule."

It is on this background, then that one can appreciate why even where cultural practices like TDRMs are promoted by the existing legal framework the same is subject to various caveats and limitations like the repugnant clause.[30]

However, there is a need to question the relevance of the *repugnant clause* in the 20th century, especially where Kenya as a country seeks to promote the application of alternative dispute resolution mechanisms.[31] TDRMs and in general customary law, has gone through a period of expropriation, suppression and subversion.[32] The consistency with which the repugnancy clause has been retained in various laws is living proof.

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[30]Article 159 3(b) of the Constitution of Kenya 2010 - "TDRMs are not used in a way that is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality

[31] The Emeritus Chief Justice Dr Willy Mutunga stated as follows in his keynote speech during the judicial marches week *"Let me reiterate our main aims in undertaking the judicial marches: …We want to encourage the public to use alternative dispute resolution mechanisms, including traditional ones, as long as they do not offend the Constitution."* (Keynote Speech by The Chief Justice, Hon. Dr. Willy Mutunga, At The Commencement of 'the Judicial Marches Week' Countrywide On August 21, 2012 <*http://kenyalaw.org/kenyalawblog/commencement-of-the-judicial-marches-week-countrywide/*> accessed on 09/04/21)

[32] Okoth- Ogendo, "The Tragic African Commons: A Century of Expropriation, Suppression and Subversion" (2010) Available at<*http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/8098/The%20Tragic%20African%20Commons.pdf?sequence=1*> accessed on 09/04/21

The features of TDRMs which include inter alia; informality, affordability/less expensive, exhaustion of issues in dispute, are not time-consuming, reconciliatory in nature, familiarity and simplicity have ensured TDRMs have stood the test of time.[33] This is despite being battered by clauses like the repugnancy clause.

It is not lost on the author that TDRMs are considered to be accessible by the rural poor and the illiterate people, flexible, voluntary, foster relationships, proffer restorative justice and give some level of autonomy to the parties in the process.[34]

Most TDRMs are concerned with the restoration of relationships (as opposed to punishment), peace-building and parties' interests and not the allocation of rights between disputants.[35] This nature of TDRMs informs their resilience and endurance despite deliberate attempt to curtail their application.

This paper opines that the repugnant clause is against the spirit of the law to promote the application of TDRMs as captured under Article 159(2)(c) of the Constitution. In essence, the impact of the repugnant clause is to inhibit without justification the application of TDRMs in

[33]ICJ-Kenya Report, 'Interface between Formal and Informal Justice Systems in Kenya,' (ICJ,2011), page 32; See also A.N. Allott, 'African Law,' in Derrett, J.D An Introduction to Legal Systems, (Sweet & Maxwell, 1968), page 131-156.

[34] Francis Kariuki 'Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of Republic v Mohamed Abdow Mohamed [2013] eKLR, Alternative Dispute Resolution, Vol. 2, No. 1 (2014), page 202-228.

[35] ICJ-Kenya Report, 'Interface between Formal and Informal Justice Systems in Kenya,' (ICJ, 2011), page 32

Kenya and especially as one of the principles that ought to guide courts and tribunals in the exercise of their judicial authority. Further, all the provisions of the law that seek to promote cultural practices which include TDRMs are in essence diluted and/or rendered ineffective by the repugnant clause. For example; Article 11 of the Constitution recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.

It is also apparent that the repugnant clause as a limitation only surprisingly and discriminatorily exists against TDRMs in exclusion of all the other formal systems of dispute resolution. Such a discriminatory application approach makes it only necessary to scrape off the repugnant clause in the current legislation.

Premised on the foregoing, it is this paper view that the repugnancy clause has no use at all. It is sufficient to limit the application of TDRMs by providing that they will not be applicable where the law provides so, without invoking the negative connotation of the *"repugnant clause"*.

4.0 Conclusion

The repugnancy clause has outlived its usefulness and it's a clause of no significance especially where there is a need to promote the application of alternative dispute resolution mechanisms like TDRMs in Kenya.

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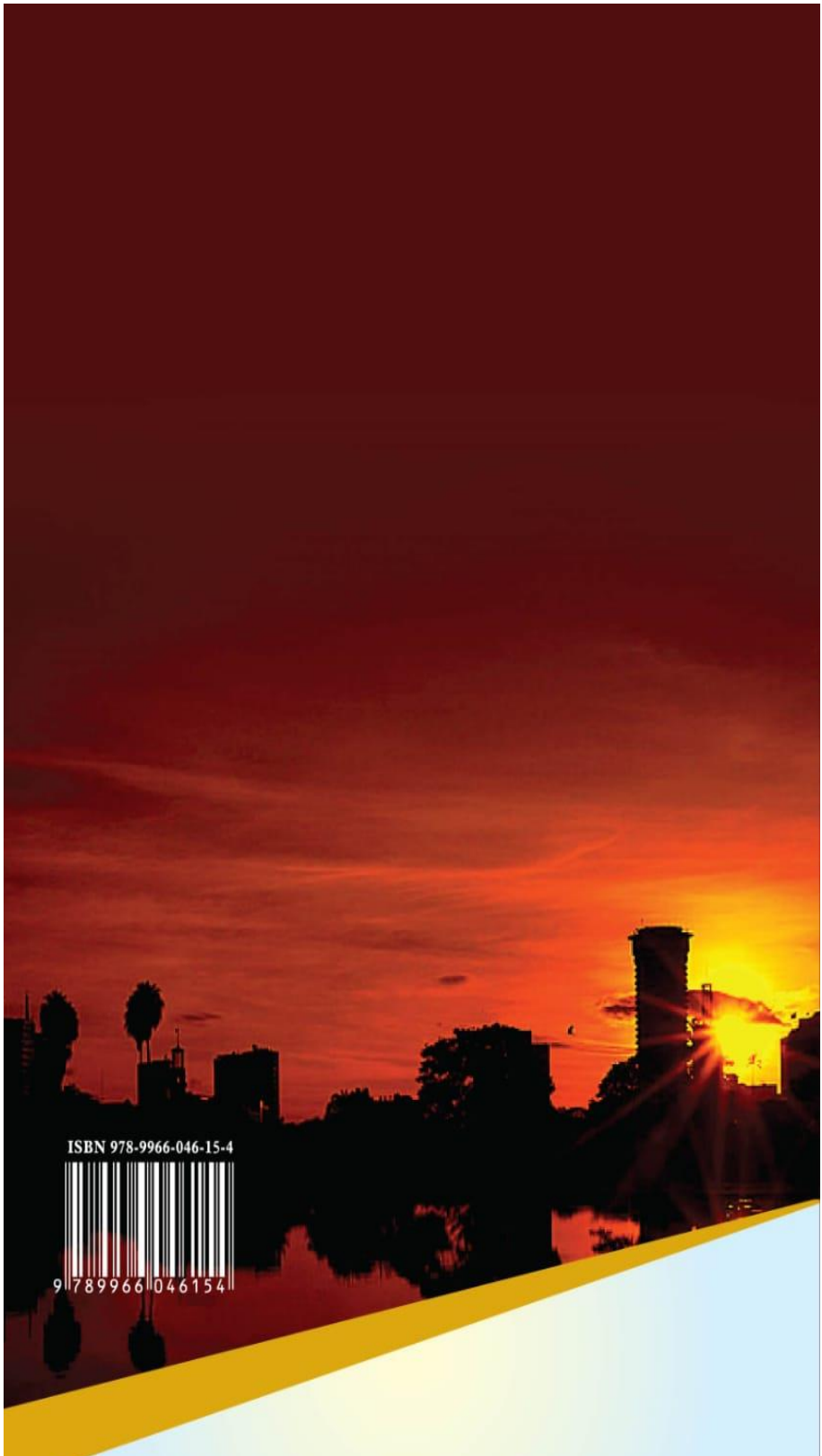
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