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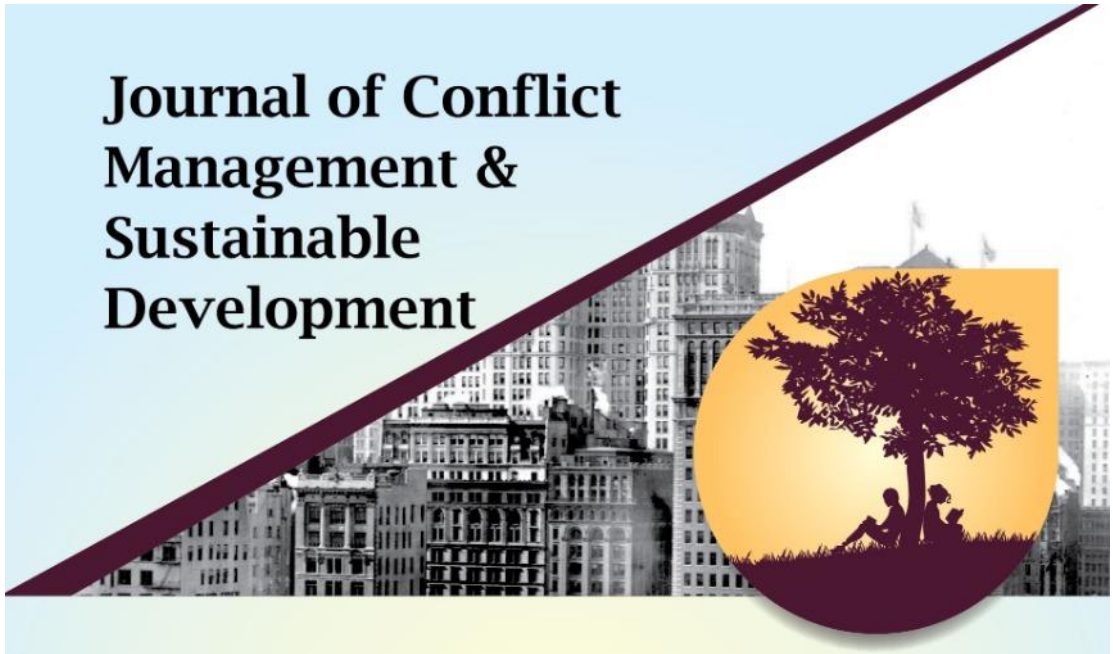

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Editor's Note

Welcome to Volume Three Issue Number Two of the Journal of Conflict Management and Sustainable Development (Journal of CMSD, Vol 3(2)).

The same is available online at https://journalofcmsd.net. It can also be downloaded and printed.

The Journal is peer reviewed so as to enhance quality.

The articles cover the theme of sustainable development noting to highlight the role of conflict management.

This Issue contains articles that examine the following themes: the place of Socio-Economic Rights in achieving Sustainable Development agenda; challenges arising in protecting traditional knowledge using the intellectual property system; Applicability of Arbitration in Management of Community Land Disputes; and the modernisation of Legal Practice in Kenya. These are all diverse but relevant topical issues in the sustainable development agenda.

The Journal of CMSD is growing by the day. It is a useful reference resource for academics and the keen reader with an interest in conflict management and sustainable development.
I thank the authors, editorial team, reviewers and other team members who make publication possible.

Dr Kariuki Muigua, **PhD, FCIArb, Chartered Arbitrator, Accredited Mediator.**
Managing Editor, October, 2019.

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A Journal Published Twice a Year – Volume 3 Issue 2

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Regional Economic Integration Agreements in Southern Africa and the World Trade Organization Guidelines

By: *Wilfred Mutubwa*

1.0 Introduction.

The General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS) and their successor the World Trade Organization (WTO) are instruments which bespeak an ideal of ultimate free global trade with minimum, if any, restrictions or barriers. But this ideal is far from achieved seven decades after the conclusion of the original GATT in 1947 and its subsequent modification in 1994.

Free global trade in goods and services has largely remained a mirage for the last two decades the WTO has existed. It remains bedevilled primarily by obstacles referred to as tariff and non-tariff barriers to trade. These impediments are a result of a myriad factors such as the desire by states to exercise control of trade within their territories in an expression of their sovereignty; varying levels of social and economic development of states; deeply entrenched differences in political ideological inclinations; production of similar primary goods among a host of other reasons.

The aforesaid WTO instruments seem to acknowledge the challenges that confront the march towards a truly free global marketplace devoid of barriers. In so acknowledging, the WTO encourages, by providing a framework for a multilateral and regional approach, to achieving the ideal of free global trade. Article XXIV of the WTO/GATT 1994 is one such effort or function. Regional Integration Agreements (RIAs) and Free Trade Areas (FTA) are therefore seen as building blocks towards a truly international global free trade.

On the other hand, RIAs are also suspiciously viewed as a clog to a truly multilateral global free trade by isolating regions and thus delaying the march towards global free trade. The rapid increase in RIAs with overlapping membership by states, multiplicity or duplicity in objectives and mandates, production of similar primary/raw materials, weak administrative and dispute resolution mechanisms which remain moribund, has not helped disabuse the notion or view that RIAs tend to encourage *Regionalism* as opposed to *Multilateralism* ,which is the real purport of the WTO.

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The two competing schools of thought are therefore interrogated in this paper through the prism of the three major RIAs in Southern Africa to wit: The Southern Africa Customs Union (SACU), The Southern Africa Development Community (SADC) and The Common Market for Eastern and Southern Africa (COMESA). The three are a microcosm of the RIAs in Southern Africa and are chosen as case studies because of their histories, scope, mandate and membership which are representative of the character of RIAs in the sub region.

This paper therefore assesses the nature, structure and statutory policies attendant to RIAs in Southern Africa in light of the WTO guidelines on regional integration. The study is in essence an introspective look at RIAs in Southern Africa through the lenses of Article XXIV of the WTO ideals on RIAs so as to determine or postulate whether the same accord with the said lofty ideals espoused therein. It will also entail an assessment of whether and how the RIAs in Southern Africa impact on member states' economies in terms of poverty eradication, increased Gross Domestic Product (GDP) and per capita incomes for their populations.

2.0 Regional Integration Agreements in Southern Africa.

In this part, I will briefly highlight the salient features of the RIAs in Southern Africa under study.

2.1 The Southern African Customs Union (SACU).

SACU is the oldest RIA in Southern Africa. It is also equally acknowledged as the oldest customs union in the world.[1] It is said to have a unique history that is impossible to replicate.[2] It encompasses four states namely: South Africa, Lesotho, Botswana and Namibia which joined in 1990 upon its independence. It is a creature of Britain, the four nations' dominant colonial power. Though having existed for over a century, its structures largely remain nascent in comparison to RIAs in the developed world such as the European Union (EU) in terms of implementation of its common external tariff, which is its principal object. For example, the SACU Tariff Board and national bodies which should manage this function for SACU are provided for in the 2002 SACU Agreement, but have not yet been established.[3]

2.2 The Southern African Development Community (SADC).

SADC was first created in 1980 as the Southern African Development Co-ordinating Conference (SADCC). Its underlying principal objective was to reduce its members' dependence on the then apartheid South Africa. In anticipation of the democratization of South Africa, SADCC transformed into SADC in 1992 and South Africa joined it in 1994.

[1] Established in 1910.
[2] Hartzenberg, T., *Regional Integration in Africa*: Trade law Centre for Southern Africa (Tralac) WTO Manuscript October 2011 Staff Working Paper ERSD 2011-14.
[3] *Supra* Note 2 at p.7.

SADC's predecessors SADCC was not a market integration arrangement in its strict sense but one whose members, known as front line states[4] adopted a broad development mandate. SADCC therefore engaged in cross-border sector specific projects in infrastructure and energy such as the regional development corridors and the Southern African Power Pool.

The SADC treaty (and subsequently SADC Trade Protocol) does not elaborate a detailed integration plan but such detail is to be found articulated in the Regional Indicative Strategic Development Plan (RISDP) of 2003. The RISDP articulates a roadmap for SADC integration from a free trade area by 2008, to a customs union in 2010, a common market in 2015, a monetary union in 2016 and the introduction of a single currency in 2018. Though not a legally binding instrument, the RISDP bears significant political legitimacy and is recognized as a blueprint towards the integration of SADC member states.

The SADC approach has been likened to that of the East African Community (EAC)[5]. Both are said to be based on the linear model or linear Market Paradigm[6] with the only striking difference being that whereas the EAC envisages a political federation, the SADC Integration only ends at economic integration.

Article 16 of the SADC treaty establishes the SADC tribunal whose role is to interpret the treaty and its subsidiary instruments and to adjudicate upon such disputes as may be referred to it. It can also give advisory opinions to the summit of heads of states and government and council of ministers if called upon.

2.3 The Common Market for Eastern and Southern Africa (COMESA).

COMESA began as the Preferential Trade Area (PTA) in 1981 and was, by way of treaty transformed into COMESA in 1994. Its objectives go beyond economic integration to include promotion of peace and security, besides developing the member states' natural and human resources. It establishes a Free Trade Area (FTA) and a Customs Union. It currently consists of 19 members[7]. COMESA has established a trade and development bank, a clearing house, leather institute, Association of Commercial Banks and a Reinsurance company. The COMESA Court of Justice is also established under Article 7 of the treaty and became operational in 1998.

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[4] The front line states included Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe.

[5] *Supra* note 2 at p.6.

[6] The linear model (also referred to as the linear Market paradigm) is discussed in more detail in part 4.2(a) of this paper.

[7] Burundi, Comoros, D R Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Seychelles, Swaziland, Madagascar, Malawi, Mauritius, Rwanda, Sudan, Uganda, Zambia and Zimbabwe.

Like SADC and most other RIAs, its hierarchy of decision making starts with the summit of heads of states at the apex, council of ministers responsible for policy making, technical committees and several advisory bodies, in that order.

2.4 The WTO/GATT ARTICLE XXIV Substantive Requirements/Guidelines on RIAs.

This part of the paper sets out and discusses the principles or guidelines promulgated by the WTO/GATT with regard to formation and conclusion of RIAs. The discourse in this part will focus on the Southern African context and particularly the microcosm of the aforementioned RIAs identified for this study. A general overview/background of the WTO/GATT and its objectives is therefore imperative in laying a basis for the discourse.

The WTO/GATT is an effort towards a multilateral free trade system or regime with minimum or no barriers, be they tariff or non-tariff. However, in recognition of the fact that a truly global free trade system is still a distant ideal, the WTO/GATT recognises and acknowledges RIAs as viable vehicles or building blocks towards a multilateral trade system. Thus, Article XXIV of the GATT/WTO 1994 encourages the establishment of RIAs and proceeds to prescribe ideals for RIAs. For ease of reference, the pertinent provisions of Article XXIV aforesaid is reproduced verbatim hereunder because it is central and critical to this study:

> "4 The contracting parties recognize the desirability of increasing freedom of trade by the development through voluntary agreements, of closer integration between the economies of countries parties to such agreements. They also recognise that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties within such territories
>
> 5. Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a custom union or of a free trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free trade area; provided that:
>
> a) with respect to a customs union, or an interim agreement leading to formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not party to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the

formation of such union or the adoption of such interim agreement, as the case may be;

b) [essentially identical to (a) but for free trade agreements]; and c) any interim agreement referred to in sub paragraph (a) and (b) shall include a plan and schedule for the formation of such a custom union or of such a free-trade are within a reasonable length of time.

6. If in fulfilling the requirements of sub paragraph 5(a), a contracting party proposes to increase any rate of duty inconsistently with the provisions of Article II, the procedure set forth in Article XXVII (modification of schedules) shall apply. In providing for compensatory adjustments, due account shall be taken of the compensation already afforded by the reduction brought about in the corresponding duty of the other constituents of the union.

7(a). Any contracting party deciding to enter into a customs union or free trade area, or an interim agreement leading to the formation of such a union or area shall promptly notify the members and shall make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate.

b) if, after having studied the plan and schedule included in an interim agreement referred to in paragraph 5 in consultation with the parties to that agreement and taking due account of the information made available in accordance with the provisions of sub paragraph (a), the members find that such agreements is not likely to result in the formation of a customs union or of a free-trade area within the period contemplated by the parties to the agreements or that such period is not a reasonable one, the members shall make recommendations to the parties to the agreements. The parties shall not maintain or put into force, as the case may be, such agreements, if they are not prepared to modify it in accordance with these recommendations...

8. For the purposes of this Agreement:
a) A customs union shall be understood to mean the substitution of a single Customs territory for two or more customs territories, so that

(i) duties and other restrictive regulations of commerce (except where necessary, those permitted under Article XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the

constituent territories of that union or at least with respect to substantially all the trade in products originating in such territories, and,

(ii) Subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union;

b) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated or substantially all the trade between the constituent territories in products originating in such territories…

10. The members may by a two-thirds majority approve proposals which do not fully comply with the requirements of paragraph 5 to 9 inclusive provided that such proposals lead to the formation of a customs union or a free-trade area in the sense of this Article".

Sub-paragraphs 8(a) and 8(b) of the afore-quoted Article XXIV define a Customs Union and a Free Trade Area, respectively. Article XXIV in a nutshell prescribes rules of engagement, regulations or requirements for effective establishment and management of FTAs and Customs Unions. These are the substantive concern of this study. From a reading of Article XXIV afore-quoted the following prerequisites of an RIA/FTA are discernible:

a) ***Substantial Trade coverage***

First and foremost an RIA, be it an FTA or Customs Union, should cover substantially all the trade in goods within members of the RIA. This is in accordance with Article XXIV paragraph 8 of the GATT.

b) ***Abolition of internal trade Restrictions***.

RIAs/RTAs also have to remove all tariffs and quantitative restrictions within a reasonable time. The elimination of discrimination and the granting of national treatment are required to take place either at the date of entry into force of the agreement or within a reasonable time frame. RIAs/RTAs should not result in stricter or severer barriers to trade for non-members or third parties. Third parties should not suffer upon liberalization through RTAs.

c) ***Minimum Requirements on Preferential Rules of Origin.***

Article XXIV prescribes a minimal, if any, rules of origin so as to discourage discrimination of goods from third party states. The rationale can be understood from the reasoning that rules

of origin exist to not only discourage "trade deflection" but also ensure that imports of product will not always enter the region through low tariff countries hence depriving the other members of revenue and any protection the tariff may provide to the higher tariff party's enterprise.

d) ***Ultimate Multilateral Aspiration***

Under Article XXIV paragraph 4 of GATT and indeed running through the entire edifice of the article is an emphasis on the ultimate goal of multilateral free-trade with minimum, if any, restrictions. The article seems, even in its rather permissively couched language, to deliberately not only acknowledge the place of RIAs as building blocks towards multilateralism but also encourage free trade with third parties and growth of the RIAs into much larger viable multilateral trade systems.

Professor Schulze (1997) examines the corpus of various RTAs/FTAs entered the world over and identifies the three distinguishing requirements or features of an RTA/FTA under Article XXIV of the GATT as follows. First, is the concept of preferential treatment without discrimination of non-members trading within the bloc of members. Secondly, that RTA/FTAs must eliminate duties and the restrictive regulations in commerce or substantially all trade, meaning elimination of tariff and non-tariff barriers to trade in both goods and services. This, Professor Schulze states, should be achieved progressively with an aim of the attainment of a complete or true free trade within a reasonable time. Thirdly, that RTA/FTAs should not provide for duties or tariffs higher or more restrictive than those existing in the party nations or prior to the agreements.[8]

Professor Schulze's analysis of Article XXIV minors in all respects the principles I have distilled from the said article and which proffer yardsticks against which the conformity or otherwise of the Southern African RIAs therewith shall be measured.

2.0 RIAs in Southern Africa And Their Compatibility with Article XXIV of the WTO/GATT Guidelines

3.1 Benefits of RIAs.

This part of the study shall focus on the requirements of RIAs under Article XXIV of the GATT/WTO 1994 as distilled hereinabove as yardsticks for determining the compliance therewith by the RIAs in Southern Africa, the subject of the study.

[8] Schulze, H.G.A.W, 1997. *International Tax-Free Trade Zones & Free Ports*. Durban. Butterworths p.69.

David A. Gantz (2009) advances that RIAs may provide "a depth of international trade reform" and achieve free-trade at a much faster rate than agreements reached among the entire membership of the WTO which numbers 153.[9] According to Gantz, following frustrations in achieving free global trade, particularly after the stalling of the Doha Development Agenda[10] round of talks under the WTO, more states are of the thinking that trade liberalization may be achieved more easier in a sub-global level. This, to him, is the real motivation for the proliferation of RIAs in what is generally referred to as *Regionalism*, a concept he suggests has emerged and manifested itself particularly after the GATT 1994.

Gantz acknowledges that debate still persist on whether by entering into an RIA or RTA, a state thereby being required to make internal legislative and policy adjustments such as to its tax regime, such state is less likely to adopt protectionist policies since that would trigger retaliatory acts or requests for dispute settlement by other parties. He however is optimistic that although RIAs are often criticized as a claw-back to the doctrine of state sovereignty and its exercise, entering into RIAs would discourage protectionist internal policies of member states and would be good for free global trade.[11]

One other benefit of RIAs is that it gives an opportunity to negotiating states to learn from that experience in readiness for global trade negotiations. It acts either as an incubation laboratory for ideas on free trade with the ultimate intention of escalating the same to the global platform.

RIAs particularly in the developing world and specifically in Africa were conceived on a pan African platform and are said to espouse an aura of comradeship and lend a strength in numbers to emerging economies particularly in multilateral negotiations with bigger and better economically endowed trading partners such as the EU, USA and within the context of the WTO.[12]

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[9] Gantz, D.A., "Regional Trade Agreements" in Daniel Bethlehem *et al* (Eds) 2009 *The Oxford Handbook of International Trade Law*. Oxford. Oxford University Press, at p. 241.

[10] Also referred to as the Doha Development Round, is the current multilateral trade-negotiation round of the World Trade Organization (WTO) which commenced in 2001 and whose objective is to lower trade barriers around the world and hence facilitate increased global trade.

[11] *Supra* note 9 at p. 242.

[12] Forere M. "Is the discussion of the United States of Africa Premature? Analysis of ECOWAS and SADC Integration Efforts". 2012. *Journal of Africa Law* 56 1(2012) 29-54. Forere argues that the pan African sentiment influenced the formation of most RIAs in Africa shortly after most African states gained independence and that perhaps this explains the motivation behind the envisaged African Economic Community and the ultimate aspiration of an Africa Union government. This pan African sentiment was the quest for a new found ambition for self-reliance and economic independence (from their imperial or colonial masters) by newly independent states. She however warns that this sentiment does not help absolve the continent and its RIAs from the chronic ailments that restrict its achievement

3.2 Limitations of RIAs.

The flipside to the afore-discussed benefits or merits of RIAs is a host of bottlenecks or demerits which limit RIAs in Southern Africa from achieving the ideals set out in Article XXIV of the WTO/GATT 1994. These will now form the basis of my next area of study.

Rathumbu (2008) identified the goals of regional integration as benefits for all and improvement of and development of both the economies and lives of the residents of the party states.[13]

His view is one that can be said to be social economic. He identifies the weaknesses and challenges of RIAs in Southern Africa to include high and chronic poverty levels, stunted economic growth, poorly developed infrastructure, multiple membership of regional economic communities and low industrialization. He submits that these challenges have stifled or hindered the full achievement of the ideals of regional economic communities and/or industrialisation in Southern Africa.

It is against the backstop of the matters identified by Rathumbu that we proceed to analyse the compatibility of the Southern Africa RIAs under study against the Article XXIV GATT 1994 requirements.

a) The Linear Market Paradigm.

The linear Market paradigm is a term coined by Trudi Hartzenberg (2011) in her paper *Regional Integration Africa.*[14] Hartzenberg argues that this model, favoured by most RIAs in Africa is marked by "stepwise integration of goods, labour and capital markets and eventually monetary and fiscal integration". In other words, African RIAs are inspired by an aspiration to evolve over time into a single economic unit, some even into a political federation.[15]

Hartzenberg however criticises this model on two fundamental grounds. First, that supply side constraints may be more significant than the linear integration model. She opines that a

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of a truly free global trade. Beyond inspiration, it offers little solution to the real issues that hold back intra Africa trade.

[13] Rathumbu, I.M., 2008. *Regional Economic Integration and Economic Development in Southern Africa.* Unpublished Master's Thesis (UNISA).

[14] *Supra,* note2 at p.1.

[15] For example, the East Africa Community has as one of its objectives, its evolution into a political federation. See also Bachinger, and Hough J "New Regionalism in African of integration". 2009. *Africa Insight* Vol. 3912 at p. 43-44 A similar aspiration is shared by the African Union through the African Economic Community with an ultimate envisaged goal of an African government. For insights into the economic –political aspirations and the transitional problems, see Forere *Supra* note 12.

deeper integration agenda that encompasses services, investments, competition policy and other behind-the-border issues can address the national level supply side constraints better effectively as compared to an agenda which focuses exclusively on border measures.

Another criticism Hartzenberg levels upon African RIAs is that the continent itself is not only geographically and politically but also economically fragmented and marginalized. Hartzenberg observes that Africa continues to engage on the periphery of the global economy and its share of the world trade continues to shrink.

Hartzenberg blames the said state of affairs to the low per capita income levels and small populations which result in small markets.[16] Most of the countries produce similar primary agricultural good or raw materials without value addition. This therefore makes trade among them unviable. Many sub-Saharan African economies are also landlocked. These factual prepositions are true for Southern Africa RIAs hence contributing to high costs of doing business. Intra-regional trade has remained low. Empirical data is demonstrative of this fact. More than 80 percent of Africa's exports are still destined for outside markets with the EU and the US forming more that 50% of this total. Asia and China are the other significant markets. On the other hand, Africa imports more than 90 per cent of her goods from outside the continent[17].

Hartzenberg concludes by questioning the appropriateness of the linear model in addressing the real problems that inhibit regional and global trade performance. The proliferation or rise in the number of RIAs in sub-Sahara Africa has done little to promote intra-regional trade or indeed to enhance the global trade performance of African countries.

b) **Inherent Discrimination.**

The very fact that RIAs are agreements only binding among state parties, it therefore follows that they are by nature discriminatory and are thereby in conflict (though this conflict is legally permissible) with the non-discrimination principle under Article I GATT 1994 (most favoured nation treatment). Geographically discriminating arrangements also find place in RIAs and tend to be designed so as to increase regional rather than global trade. It has been argued that infact such geographical arrangements are often of minimal economic benefit and may actually

[16] *Supra* note 2 at p. 3 Trudi Hartzenberg observes:

> "In 2008, 12 SSA (Sub Sahara Africa) states had populations of less than US $ 2 million while 19 had a gross domestic product (GDP) of less than US 5 billion, six of which had a GDP of less than US $1 billion"

Further empirical data can be seen in the analysis by Gibb, R. "The State of Regional Integration. The Intra and Inter-Regional Dimensions in Regional Integration in Southern Africa" in Clampman, C., 2001. *Regional Integration in Southern Africa*. Johannesburg. South African Institute of International Affairs.

[17] *Ibid,* p. 9-12.

cause more economic harm than benefit[18]. This can be said to be true for the Southern Africa RIAs under scrutiny which are mostly geographically discriminatory.

c) **Rules of Origin.**

Although Article XXIV of the GATT 1994 bespeaks elimination or near elimination of tariff and non-tariff barriers to trade (save for necessary circumstances or for limited periods) rules of origin remain common place. The rules exist in almost all FTAs and are always complex. They pose a real potential for disputes both in their administration and comprehension. Ideally the rules are designed to prevent trade deflection in a free trade area where external trade barriers such as tariff levels differ. They are employed to also discourage producers from using what Gantz calls "final assembly screw-driver operations" where such producers use non regional parts and components from duty free states or regions to enjoy the free trade status of the RIA[19]. Rules of origin are a critical non-tariff barrier to export and import trade and are difficult or near impossible to enforce by developing countries' customs authorities.

d) **The "Spaghetti Bowl" problem.**

This is a term coined from the works of Professors Bhagwati and Panagariya, P*referential Trade Areas and Multilateralism -Strangers, Friends, or Foes(1996)*[20] in which they argue that the multiple membership of countries in RIAs has resulted in overlapping of tariff regulations, objectives, divided loyalty and other obligations with the undesirable effect of "a hub and spoke system"[21] of RIAs with complex and multiple regulation which has in turn led to the weakening of the global trade system. It equally creates an enforcement nightmare to customs officials and observance difficulties to traders. This is a situation whose consequences even the WTO secretariat has warned of.[22]

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[18] *Ibid*, p. 3 the writer further observes:

> "Low per capita densities of rail and road transport infrastructure which in colonial times was designed to transport primary products to ports. Poorly developed cross country connections are the outcome".

[19] Gantz, *supra* note p. 9 243-244.

[20] In Bhagwati, J., and Panagariya A., (Eds,) *The Economics of Preferential Trade Agreements (*Washington DC: AE Press, 1996) at 7.8-27.

[21] This is Gantz' s description of the "spaghetti bowl" problem. *Supra*, note 9 p. 244. Also see the same problem discussed by Bachinger, K and Hough, J., "New Regionalism in Africa; Waves Integration" 2009. *Africa Insight* Vol. 39/2 at P.43-44

> "… today every African country is an average member of four different trade blocs, creating the famous spaghetti bowl of RIAs. The Plan of the AU (African Union) is to integrate the various RIAs into one large economy with the ultimate goal of unifying the continent and create a United States of Africa by 2030".

[22] *Ibid.*

In the Southern African context, SACU members are also parties to an economic partnership agreement with the EU. South Africa is also a party to a free trade agreement with the EU which four other member states of SACU have not accepted.[23] Some state parties to SADC are also members of the COMESA, while some member of the EAC are also members of the SADC and COMESA[24]. Perhaps the only saving grace is the tripartite agreement signed between the members of SADC, COMESA and EAC to merge into the three blocs into one RIA.[25]

e). Negotiating Imbalances, Administrative costs, and Geography.

There is a real capacity problem within developing nations with regard to negotiations with the cost of negotiating RIAs outweighing the benefits of training large and well qualified trade bureaucrats to conduct complex negotiations simultaneously at both WTO and RTA levels.[26] This leads to unbalanced negotiations with bias towards the well-funded and prepared larger states.

The states in Southern African are at different stages of development and economic prosperity. South Africa for instance is the highest ranked economy in sub-Sahara Africa, has a sea port and a relatively large population.[27] Its institutions are more advanced or developed.[28] Its partners in RIAs formed in the region mostly comprise of land locked nations with low populations, low GDP and low per capita incomes.[29] Obviously, the result in an uneven negotiating playing field, with South Africa seemingly engaging to draw advantage in its favour.

Geographical proximity can both be a blessing and a curse depending on the prism through which you view the matter. RIAs with more complementary economies and exports may use geographical proximity to their advantage.[30] However in countries in many parts of sub-

[23] Kirk R., and Stern, M., "The New South African Customs Union. Agreement 2005. *The World Economy 28(2) 169.*

[24] For Example Zambia, Tanzania and Zimbabwe are members of both SADC and COMESA. Tanzania is also a member of EAC.

[25] A tripartite summit of the heads of states and governments of COMESA, SADC and EAC countries was held in Kampala, Uganda on 22nd October 2008. The summit approved the expeditious establishment of a Free Trade Area encompassing the member states of the three RIAs. This agreement is seen as an important step towards the building of the African Economic Community envisaged in the Abuja Treaty. The tripartite Agreement was signed by member states of the three blocs on the 10th day of June, 2015.

[26] *Supra* Note 9 p. 244.

[27] See Hartzenberg, *supra* note 2 p. 13 for a detailed comparison of the economies of Southern Africa.

[28] *Ibid.*

[29] I*bid.*

[30] See Gantz, *Supra* Note 9 p. 244.

Sahara Africa, including Southern Africa, the rail and road infrastructure per capita among other infrastructural deficiencies, particularly in land locked countries makes geographical contiguity a disadvantage rather than benefit of entering into n RIA.

4.0 Conclusions.

Having traversed both the principles enunciated by Article XXIV of GATT and the major RIAs in Southern Africa, it is a fair conclusion to posit that Southern Africa RIAs are founded on both pan African and economic justifications. They are structured towards conforming to the prescriptions of the WTO regulations aforesaid but are bedevilled by a myriad of impediments that are classical to RIAs in sub-Sahara Africa. This has hindered their realization of the said RIAs often quite lofty and ambitious objectives and aspirations. Intra Africa trade remains at its lowest ebb and perhaps this sad state of affairs can only be remedied by the actualization of the envisaged Africa Economic Community (AEC). To this extent RIAs, such as those under study in this paper, offer viable building blocks and learning curves for negotiating in the much larger multilateral trade system.

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Ideological conundrums and technical challenges in protecting traditional knowledge using the intellectual property system

By: **Francis Kariuki***

Abstract

Most legal efforts aimed at protecting traditional knowledge (TK) have sought to use the prevailing intellectual property (IP) regime. This paper articulates the ideological conundrums and technical challenges that arise in using the IP system to protect TK. After examining the rationale and objectives of TK protection and promotion among TK holders, the study demonstrates that there are unfathomable variances between the rationale for TK and IP protection. These variances generate huge epistemological, ideological, methodological and technical problems in protecting TK.

1.1 Rationale and objectives for TK protection

The main features of TK are reflected in its holistic nature and the fact that it is collectively and intergenerationally held (unwritten but preserved in the oral tradition and collective memory); has cultural, historical, ecological and spiritual value; is culturally situated (and informed by customs, practices, rituals, proverbs, oral stories); governed by customary laws, and is dynamic and fluid.[1] Objectives that underlie the protection of TK vary among and between traditional communities.[2] The objectives are neither exhaustive nor mutually exclusive and some may overlap or conflict with each other. As such, frameworks for TK protection must not focus exclusively on selected objectives as they may lack enough buy-in from stakeholders.[3] These objectives can be collapsed into: moral/cultural, legal and utilitarian theorems.[4]

1.1.1 The cultural and moral theorem

In this study, the cultural and moral theorem is framed through the lens of conservation and preservation both of which are key objectives for TK protection. Preservation and

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[1] Elmien du Plessis 'Protection of Traditional Knowledge in South Africa: The Troubled Bill, the Inoperative Act, and the Commons Solution' in Caroline Ncube & Elmien du Plessis (eds) *Indigenous Knowledge & Intellectual Property* (2016) at 76.

[2] Deepa Varadarajan 'A Trade Secret Approach to Protecting Traditional Knowledge,' (2011) 36(2) *Yale Journal of International Law* 371-420, at 382.

[3] Peter K. Yu 'Cultural Relics, Intellectual Property, and Intangible Heritage' (2008) 81 *Temple Law Review* 433-506, at 483.

[4] However, these justifications are neither exhaustive nor mutually exclusive.

conservation benefits not only traditional communities and the developing countries, but also nontraditional peoples and developed countries.[5] Conservation recognises the biodiversity rights of TK holders which include rights to: their TK and genetic resources, grant or deny prior informed consent, veto, monitor, control and determine grounds for access to their resources, benefit-sharing, full disclosure of research results and file lawsuit against anyone violating access terms.[6] Conservation takes place within a biocultural context that ensures that indigenous lifestyles and the related TK are not disturbed or destroyed.[7]

TK holders are also interested in the recognition of their contributions over the centuries either through having greater control over their TK or a requirement to disclose prior art in new creations or inventions.[8] A disclosure requirement ensures a legitimate exchange between communities and 'follow-on authors or inventors' and informs the public of the origin of the underlying prior art.[9] A major weakness of the disclosure requirement is the inherent difficulty in determining the source or origin of the underlying materials which may lead to 'uncertainty and inconsistency and may ultimately reduce incentives for creation and innovation.'[10]

Preservation is key where TK is being lost rapidly. Globalisation, digital revolution and increasing commodification of TK paves way for instantaneous loss of TK and materials that are sacred or intended to be kept secret.[11] At times, TK is entrusted to certain specialists and disclosure to other unqualified members destroys it. Other times, TK may be shared among all community members, but not with outsiders. Moreover, TK plays an integral role in characterising and expressing the shared identity and essence of a community, a people and a nation.[12] Hence, even if TK is not sacred, it should not be used in a way that offends traditional communities.[13] But still in as much as the use may not be offensive, TK holders may prefer to

[5] Yu op cit note 3 at 471.
[6] Tonye Marcelin Mahop *Intellectual Property, Community Rights and Human Rights: The biological and genetic resources of developing countries* (2010) at 17. See also Tonye Marcelin Mahop 'Biodiversity Regulatory Options: Involvement of Rural Communities in Decision-making Processes in South Africa' (2005) 8(6) *The Journal of World Intellectual Property* 809-824 at 810.
[7] Sophia Twarog 'Preserving, Protecting and Promoting Traditional Knowledge: National Actions and International Dimensions' in S. Twarog & P. Kapoor (eds.) *Protecting and Promoting Traditional Knowledge: Systems, National Experiences and International Dimensions* (2004), 61-69, at 64.
[8] Yu op cit note 3 at 461. See Doris Schroeder 'Informed Consent: From Medical Research to Traditional Knowledge' in R. Wynberg *et al* (eds.), *Indigenous Peoples, Consent and Benefit Sharing: Lessons from the San-Hoodia Case* (2009) at 37.
[9] Yu op cit note 3 at 462.
[10] Ibid at 463.
[11] Secrecy is important for both cultural and spiritual purposes.
[12] Yu op cit note 3 at 455.
[13] Ibid at 456.

keep their knowledge preserved and out of commercial channels.[14] Concerns about potential loss of TK explain why communities are 'generally skeptical of open access arrangements, such as those relying on the development of a commons.'[15] Some of the tools that can be used to preserve TK include: the recognition of the rights of communities to their traditional lands and TK documentation, registries or databases.[16] There is consensus that because the need for preservation is probably immediate, abstract IP rights (IPRs) are probably not an efficient solution to the preservation problem.[17] The preservation approach faces certain practical limitations and is troubling in its emphasis on state control of genetic resources and TK.[18] Another problem arises in locking up culture through preservation of TK versus the society's interest in accessing the knowledge for health and nutrition.[19]

1.1.2 The legal theorem

Protection of TK is largely advocated for through the IP framework. However, the term protection has been interpreted variedly, and consequently TK protection 'initiatives and measures vary considerably in their form and substance.'[20] For example, in the classic IP sense, protection generally seeks to grant exclusive rights to inventors and creators using different IP tools (patents, copyright, trademarks, et cetera) and/or preventing unauthorised dealings in protected IP.[21] According to other scholars, TK protection measures include: compensation; social recognition of certain rights (e.g. the right to be asked for consent; right to be acknowledged as creators or descendants or share benefits); safeguarding; and maintaining, preserving and controlling access to and uses of TK through unfair competition principles.[22] But as Andanda postulates, the protection of TK is 'distinguishable from the efforts that have been made to promote and safeguard TK.'[23] Safeguarding measures aim at

[14] Ibid at 457. See Schroeder op cit note 8 at 37.
[15] Yu op cit note 3 at 458.
[16] Twarog op cit note 7 at 64.
[17] Paul J. Heald 'The Rhetoric of Biopiracy' (2003) 11 *Cardozo Journal of International and Comparative Law* at 519-546 at 525.
[18] Such an approach is taken in the Convention on Biological Diversity.
[19] Heald op cit note 17 at 529.
[20] Manuel Ruiz Muller 'Legal protection of widely shared and dispersed traditional knowledge' in Daniel F. Robinson et al (eds.) *Protecting Traditional Knowledge: The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (2017), 123-140 at 123.
[21] Ibid at 123. See also Ken Chisa & Ruth Hoskins 'African customary law and the protection of indigenous cultural heritage: Challenges and issues in the digitization of indigenous knowledge in South Africa' (2016) 15 *African Journal of Indigenous Knowledge Systems* 1-15 at 3.
[22] Muller op cit note 20 at 123. See also Sue Farran 'Access to Knowledge and the Promotion of Innovation: Challenges for Pacific Island States' in Caroline Ncube & Elmien du Plessis (eds) *Indigenous Knowledge & Intellectual Property* (2016) at 22-23.
[23] Pamela Andanda 'Striking a Balance between Intellectual Property Protection of Traditional Knowledge, Cultural Preservation and Access to Knowledge' (2012) 17 *Journal of Intellectual Property Rights* at 547-558 at 547.

preserving aspects of TK through photographs, sound recordings, films and manuscripts, itineraries, cultural mapping, video recordings, and the preservation of artefacts in libraries and museums.[24] It is however noteworthy that 'protection' is not tantamount to 'safeguarding'. Whereas safeguarding may engender the identification, documentation, transmission, revitalization and promotion of TK to ensure its continued existence and viability, it also risks placing TK unintentionally in the public domain, hence the need for protection in the legal sense.[25]

While proponents of TK protection suggest that legal protection would, among other things, promote respect for TK; deter misappropriation of TK; empower TK holders; and protect tradition-based innovations, some query whether IP protection is in order.[26] Others contend that although IP protection is inadequate for full protection of TK[27] 'there is room in that system for flexible, local initiatives driven by indigenous peoples to remedy the situation.'[28] Others argue that there are common policy objectives underlying the protection of TK and IP[29] such as the right to exclude others, economic incentives and innovation. First, the right to exclude others is common to both TK and IP 'insofar as traditional knowledge holders seek to prevent others from making use of their intangible goods without consent.'[30] But unlike in IP, in the case of TK it may be difficult to identify the 'other (s)' to be excluded as the boundaries of TK holders are amorphous[31] as will be explained later. Be that as it may, it is argued that exclusive rights in TK could offer incentives to TK holders to innovate, maintain and preserve their knowledge and plant genetic resources.[32] But some disagree with this view arguing that if TK holders have developed and maintained TK for generations without the carrot of IPRs protection, then new rights are unnecessary to provide incentives to create.[33]

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[24] Ibid at 547. See also Farran op cit note 22 at 22.
[25] Andanda op cit note 23 at 547.
[26] Stephen R. Munzer & Kal Raustiala 'The Uneasy Case for Intellectual Property Rights in Traditional Knowledge' (2009) 27 *Cardozo Arts & Entertainment*, 37-97 at 39-40.
[27] J. Janewa Osei Tutu 'Emerging Scholars Series: A Sui Generis Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property Law' (2011) 15 *Marquette Intellectual Property Law Review* at 164. See also Enyinna Nwauche 'The sui generis and intellectual property protection of expressions of folklore in Africa' 2016 Phd thesis available at https://dspace.nwu.ac.za/bitstream/handle/10394/19787/Nwauche_ES_2016.pdf?sequence=1&isAllowed=y accessed on 10 July 2019.
[28] Roger Chennells 'Putting Intellectual Property Rights into Practice: Experiences from the San' in R. Wynberg *et al* (eds.) *Indigenous Peoples, Consent and Benefit Sharing: Lessons from the San-Hoodia Case* (2009) at 211.
[29] Janewa op cit note 27 at 181.
[30] Ibid.
[31] Ibid.
[32] Tonye 1 op cit note 6 at 14.
[33] Heald op cit note 17 at 525 argues that although external incentives may be necessary to preserve TK from loss, the solution may not be the grant of IPRs over TK.

Second, some argue that legal protection results in increased dissemination of information which creates economic incentives.[34] For example, the requirement to fully describe inventions and avail them to patent offices results in the dissemination of valuable information. But dissemination may also facilitate access to TK by outsiders which may create tension with the interests of TK holders[35] who may be opposed to the commercialisation of aspects of their TK unless they exercise control over that access and use.[36] Likewise, scientists and archaeologists may place higher values on research and discoveries than cultural privacy and respect thus privileging the nontraditional worldview over the traditional one.[37] Additionally, whereas TK holders' believe that access by outsiders may occasion cultural, ecological and spiritual harm, scientists claim that research benefits all humanity.[38] It is the economic objective of TK protection that informs demands for equitable benefit sharing among TK holders.

Third, both IP and TK aim at innovation and development of new intangible goods. TK is innovative in so far as it is constantly evolving in response to a changing environment while IP seeks to incentivise innovators of new works even if they only build upon the prior works of others. However, although innovation is a shared objective, it is broader in the TK context than in IP due to the lower threshold for innovation.[39]

Fourth, protection aims at preventing unauthorised or inappropriate use (which includes unauthorised commercial use or IPR applications that are based on TK but without the prior informed consent of the TK holders and without benefit sharing) of TK by third parties.[40] Inappropriate use also includes stopping inaccurate use or transmission of TK.[41] However, some scholars argue that as indigenous people await reforms in the IPR system, they can prevent the misappropriation of their TK by using the existing IPR system.[42]

Fifth, there are equity-oriented goals of protection in that "if developed countries can protect their intangible goods, commercialise them and benefit economically, developing countries should be entitled to the same treatment for their intangible good."[43] Lastly, protection may

[34] Ibid.
[35] Ibid. Deepa op cit note 2 at 378.
[36] Tonye I op cit note 6 at 17.
[37] Yu op cit note 3 at 475.
[38] Ibid at 476-77.
[39] Ibid.
[40] Twarog op cit note 7 at 64.
[41] Chennells op cit note 28 at 216.
[42] Ibid.
[43] Janewa op cit note 27 at 185.

promote respect for TK, TK holders and their development (including cultural)[44] since protection of TK cannot be dealt with satisfactorily in isolation from the more fundamental needs, interests and rights of the holders of TK.[45]

Within the IP framework, there are two broad approaches to TK protection: *positive* (or offensive) and *defensive* protection. Positive protection 'entails the active assertion of IP rights in protected subject matter, with a view to excluding others from making specific forms of use of the protected material.'[46] It can give TK holders the 'right to take action or seek remedies against certain forms of misuse of their TK' and includes the use of existing IP systems, adaptations and *sui generis* aspects of existing IP regimes, and wholly *sui generis* frameworks[47] such as the recognition of customary laws.[48] Since it aims at propertising TK for market purposes,[49] it may be appropriate where TK holders want economic benefits from protection.

Defensive protection seeks to prevent others from 'asserting or acquiring IP rights over TK subject matter'.[50] Some opine that defensive protection can halt the misuse of TK, especially sacred TK that cannot be owned at all or at least by outsiders.[51] It allows TK information to be published so as to count as prior art and ensure its availability in a search for prior art.[52] Defensive protection does not replace formal recognition of positive rights in TK nor does it earn royalties like patents or copyrights. A good example of defensive protection is the use of TK databases that are available to patent and trademark examiners. Such databases prevent the grant of IP rights for TK that is in the public domain.[53]

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[44] Ibid at 188.

[45] Graham Dutfield 'Developing and Implementing National Systems for Protecting Traditional Knowledge: Experiences in Selected Developing Countries' in S. Twarog & P. Kapoor (eds.) *Protecting and Promoting Traditional Knowledge: Systems, National Experiences and International Dimensions* (2004) at 146. See also John T Cross 'Property Rights and Traditional Knowledge' (2010) 13(4) *Potchefstroom Elec. L.J* at 32.

[46] WIPO 'Elements of a Sui Generis System for the Protection of Traditional Knowledge' WIPO/GRTKF/IC/4/8, 30 September 2002, para 13.

[47] Ibid.

[48] Twarog op cit note 7 at 65. Although the use of customary laws may work well within communities, outside the communities they may have little effect, unless they are recognised in law.

[49] Munzer & Raustiala op cit note 26 at 40.

[50] See also WIPO op cit note 80; Marisella Ouma 'The Policy Context for a Commons-Based Approach to Traditional Knowledge in Kenya' in Jeremy de Beer, Chris Armstrong, Chidi Oguamanam & Tobias Schonwetter (eds.) *Innovation & Intellectual Property: Collaborative Dynamics in Africa* (2014) at 138; Munzer & Raustiala op cit note 26 at 50.

[51] Munzer & Raustiala op cit note 26 at 40, 50.

[52] Ibid, at 82.

[53] Documentation may however undermine the unique spiritual and cultural value of TK which may even endanger the survival of a community.

For both types of protection, there have been cases where TK holders have used conventional IP tools to protect their TK but since these tools 'were not developed with TK in mind, but rather modern industrial intellectual property, the fit is not always perfect.'[54] Moreover, enforceability of IPRs can be a huge problem for TK holders, most of whom have limited resources.[55] Stronger protection using IPRs would restrict communities' access to TK and their ability to exploit it.[56] Further, according to TK advocates, the philosophy of conventional IP is too narrow or too hostile to their concerns and thus draw on the language of human rights, indigenous rights and biodiversity preservation to protect TK.[57] A human rights approach offers a broader framework for protecting TK[58] as it 'readjusts the inequality of the IP regime in failing to provide protection not geared towards commercial or trade advantages'[59] such as cultural or sacred value of TK and avoids the hierarchical difference between knowledge (that is protectable under IPR and TK which is assumed to be in the public domain and freely available to all).[60] It is apparent that efforts aimed at extensive protection of TK, require a substantial deviation from standard philosophies of property and substantial changes to existing IP law.[61]

1.1.3 The utilitarian theorem

In this study, the utilitarian theorem covers objectives that aim at the promotion of TK in order to harness it for trade and development. Objectives that result in the promotion of TK can be classed into three. First, there is the objective of promoting the use and further development of TK systems and TK-based innovations. Because TK is highly valuable to the survival of TK holders, there is need for measures aimed at strengthening and developing TK and TK systems.[62]

The second objective aims at promoting appropriate and sustainable commercialisation of TK. Nevertheless, the commercialisation of TK is controversial for several reasons. It is commonplace that much of TK is not appropriate for commercialisation (particularly TK that is sacred or secret). Moreover, most TK holders' are not 'as interested in commercialising

[54] Twarog op cit note 7 at 65.
[55] Ibid, at 65.
[56] Yu op cit note 3 at 480.
[57] Munzer & Raustiala op cit note 26 at 43. Deepa op cit note 2 at 374.
[58] Philipe Cullet 'Human Rights, Knowledge and Intellectual Property Protection' (2006) 11 *Journal of Intellectual Property* at 12; Peter K. Yu 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework' (2007) 40 *University of California, Davis*, at 1039-1149 at 1148-1149. See Madhavi Sunder 'The Invention of Traditional Knowledge' (2007) 70 *Law and Contemporary Problems*, 97-124 at 124.
[59] Cullet op cit note 58 at 12.
[60] Ibid at 12.
[61] Ibid at 12.
[62] Tonye I op cit note 6 at 13.

the TK themselves as in preventing the inappropriate commercial use of it by others.'[63] In addition, commercialisation of TK often refers to the commercialisation of a product developed using TK as the 'know-how.'[64] Further, TK holders' ignorance of the market value of TK makes it difficult to establish a reliable market with those who wish to exploit TK.[65] Yu reminds us that it is important to let communities determine which knowledge is appropriate for outsiders based on customary laws, and allowing commercialisation only where it will not infringe on cultural privacy or religious dictates.[66]

A third objective relates to TK holders' interest in sharing the benefits arising from the use of their TK. Sharing benefits enables communities to continue with their traditional lifestyle which preserves TK. Nonetheless, problems remain. First, benefit-sharing arrangements imply a commitment to the money economy and that TK can be freely commodified, which is untrue with respect to sacred TK.[67] Second, there is no enough altruism and community spirit to ensure that the benefits reach those who contributed to advancement of TK and resulting products.[68] Third, there is a representation difficulty. For instance, in negotiations with bioprospectors, ascertaining the legitimate representatives of a community can be extremely onerous. Who decides when communities have shared TK?[69] Can one community decide over the other? If so, would the other community be able to claim prior users' rights?'[70] Can the state speak for communities, or must they speak for themselves?[71] It is suggested that where TK-holders cannot be identified or the TK is more or less in the public domain, fees could be paid by an interested party into a community development fund.[72] It is also urged that an understanding of concurrent ownership, joint authorship, and derivative works may shed some light on how to resolve the dispute although difficulties remain 'if the original community has yet to be identified, no longer exists, or chooses to stay out of the dispute, for whatever reasons.'[73]

[63] Twarog op cit note 7 at 66.
[64] Ibid at 67.
[65] Heald op cit note 17 at 537.
[66] Yu op cit note 3 at 459.
[67] See Schroeder op cit note 8 at 37.
[68] Doris Schroeder 'Justice and Benefit Sharing' in R. Wynberg *et al* (eds.), *Indigenous Peoples, Consent and Benefit Sharing: Lessons from the San-Hoodia Case* (2009) at 24.
[69] Ibid at 18, Schroeder explains that among some communities decision-making is very complex. For example, among the San, decisions are taken by consensus, which is reached when significant opposition no longer exists.
[70] Yu op cit note 3 at 488.
[71] Ibid at 469.
[72] Twarog op cit note 7 at 68.
[73] Yu op cit note 3 at 490.

TK holders also demand compensation for economic, social, cultural, psychological and spiritual injuries occasioned by the unauthorised use of TK.[74] Even so, Yu identifies several reasons why compensation can be problematic.[75] First, compensation may not cover all the injuries fully. Second, sometimes it may be difficult to identify the beneficiaries especially where the TK is shared. Third, detecting the uses of TK and genetic resources can be difficult, time consuming and technology intensive. Fourth, researchers may find that a bioactive ingredient has a different use from the one suggested by the original collectors. Fifth, some may consider monetary compensation inadequate. For example, it is hard to quantify cultural erosion in monetary terms.

The unfathomable variances between the rationale for TK and IP protection generates epistemological, ideological, methodological and technical problems in protecting TK.

1.2 Assessing the conundrums attending the protection of TK using the IP system

1.2.1 A methodological, epistemological and conceptual problem

Protecting TK generates an epistemic, conceptual and methodological problematique. This polemical portends a cultural-hierarchical divergence between western and non-western empiricism that creates difficulties in TK protection. While Western empiricism is unabashedly heralded as 'scientific' and universal in character, non-western empiricism has largely been rubbished as 'folk-lore', 'culture-specific', unsystematic and as belonging to the 'realm of the natural, the mystical and the irrational'.[76] TK especially in Africa, operates on two entwined levels-empirical and cognitive level.[77] The empirical level is unpacked further into, natural,[78] technological and architectural[79] and socio-cultural spheres[80] while the cognitive level delineates a structure in which theories and perceptions of both nature and culture are conceptualised. Therefore, the relationship between TK, its holders, and the

[74] Ibid at 463.
[75] Ibid at 463-465.
[76] Ikechi Mgbeoji 'Bio-Cultural Knowledge and the Challenges of Intellectual Property Rights Regimes for African Development' in Chukwuemeka G. Nnona (ed.) *Law, Security and Development: Commemorative Essays of the University of Nigeria Law Faculty* (2013) at 483. See Andre Lalonde 'African Indigenous Knowledge and its Relevance to Sustainable Development' in Julian T Inglis (eds.) Traditional Knowledge: Concepts and Cases (1993) at 57.
[77] Anwar Osman 'Indigenous Knowledge in Africa: Challenges and Opportunities' available at http://www.ufs.ac.za/docs/librariesprovider20/centre-for-africa-studies-documents/all-documents/osman-lecture-1788-eng.pdf?sfvrsn=0 accessed on 29 May 2016.
[78] The natural sphere includes ecology, biodiversity, soil, agriculture, medicinal and pharmaceutical.
[79] The technological and architectural sphere consists of all the crafts such as metallurgy, textiles, basketry, food processing, building, etc.
[80] The socio-cultural sphere consists of aspects of life e.g. social welfare, governance, conflict resolution, music, art, etc.

technologies and devices used for its application are bound to an indigenous cosmology that is about 'the co-evolution of spiritual, natural and human worlds.'[81] Because the epistemology of TK also rests on the metaphysical perceptions without necessarily having proven that empirically, critics claim that it is an incomplete knowledge or at worst a questionable understanding or conception of knowledge.[82] Such claims may make TK epistemes to be denied legitimacy, scholarly recognition and legal protection.

In Africa, the subordination and delegitimisation of TK and epistemic frameworks is said to be part of the colonial-cultural assault mounted on Africans through western legal and institutional frameworks.[83] These frameworks occasioned consistent inferiorisation of African TK as being unworthy of legal protection and concerted efforts to erase existing systems of knowledge and their replacement with Western-driven belief and knowledge systems.[84] Although this inferiorisation may have been necessary in view of the power embedded in knowledge systems and traditional epistemes, some dispute for instance, that the British colonial rule was responsible for undermining the ability of the different East African Protectorate communities to organise their means of survival.[85]

The interface between TK and IPRs presents an interesting dichotomy of cross-cultural relationship between a western-liberal ideology and an indigenous worldview.[86] Oftentimes, difficulties play out at the ideological interface seeing that the objectives of TK are diametrically opposed to western intellectual foundations of IPRs. Moreover, the interface may raise issues that straddle both legal and non-legal aspects especially because from an indigenous worldview, problems are not always legal or commercial in nature but can also assume cultural, historical, spiritual, ecological and moral dimensions.[87] There is thus an existing gap in the protection of TK within prevailing frameworks.

A traditional framework views TK as a worldview and looks beyond its instrumental value 'to the value systems within which it is situated, and to listen to that wisdom with our minds as

[81] Osman op cit note 77. See also Lalonde op cit note 76 at 56.
[82] Osman op cit note 77.
[83] Ikechi op cit note 76 at 455; Lalonde op cit note 76 at 57; and Charles Takoyoh Eyong 'Indigenous Knowledge and Sustainable Development in Africa: Case Study on Central Africa' in E.K. Boon & L. Hens (eds.) *Indigenous Knowledge Systems and Sustainable Development: Relevance for Africa* (2007), 121-139, at 131.
[84] Ikechi op cit note 76 at 469. See also Osman op cit note 77.
[85] James T. Gathii 'Imperialism, Colonialism, and International Law' (2006-2007) 54 (4) *Buffalo Law Review* 1013-1066, at 1027.
[86] Ken Chisa & Ruth Hoskins 'Decolonising Indigenous Intellectual and Cultural Rights in Heritage Institutions: A Survey of Policy and Protocol in South Africa' (2015) 33(3) *South African Journal of Information Studies* at 56.
[87] Ibid at 2.

well as our hearts.'[88] Scholars agree that there is need for approaching the IP system 'from below' by modifying it to ensure it takes into account the divergent views, histories and philosophies of developing countries and indigenous peoples.[89]

Others have suggested an intercultural approach to this problem which allows for the interaction of cultures when crafting theoretical postures from which to survey phenomena. An intercultural examination of phenomena seems to reside in the examination of power relationships between people.[90] Perceived power and status makes the relationship between TK and IPRs difficult because 'power relationships dictate so much of what is right, correct, logical and reasonable…The limits are drawn by those who wield the economic, political, and cultural power.'[91] As such in the intercultural encounters, TK holders must be allowed to define for themselves their own power and status vis-à-vis another.

1.2.2 Ideological and political conundrums in TK protection

The IP-TK interface in Africa raises colonial and post-colonial (neo-colonial) reverberations whose articulation creates some conundrums in the protection of TK. Some of the conundrums can be traced to the development of international law (including IP and human rights law) which consisted of a set of rules that largely had a geographical bias (European law), a religious-ethical aspiration (it was a Christian law), an economic motivation (it was a mercantilist law) and political aims (it was an imperialist law).[92]

First, IP law is largely western/European because developing countries were not participants and signatories to the early international IP treaties yet the treaty provisions were often extended to them through colonialism.[93] Because the cultural values of TK holders were not taken into account, IP instruments are ill-fitted to protect TK.[94] Equally, in the development of human rights frameworks, the communitarian ethos of indigenous communities were ignored yet they are the main claimants of IP protection today.[95] For example, an individualistic

[88] Nancy Doubleday 'Finding Common Ground: Natural and Collective Wisdom' in Julian T Inglis (eds.) Traditional Knowledge: Concepts and Cases (1993) at 52.
[89] Janewa op cit note 27 at 203. See also Munzer & Raustiala op cit note 26 at 51.
[90] Molefi Kete Asante 'The Ideological Significance of Afrocentricity in Intercultural Communication' (1983)14 *Journal of Black Studies* 3-19 at 4.
[91] Ibid at 5.
[92] Ikechi op cit note 76 at 473.
[93] Ibid at 453-493; Ruth L. Gana 'The Myth of Development, The Progress of Rights: Human Rights to Intellectual Property and Development' (1996) 18 *Law & Policy* 315, 329; Olufunmilayo B. Arewa 'TRIPS and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks' (2006) 10 *Marquette International Property Law Review*, 160-163.
[94] Janewa op cit note 27 at 159, 201; Sunder op cit note 58 at 100 and Twarog op cit note 7 at 65.
[95] Cullet op cit note 58 at 10. See K. Yu (2007) op cit note 58 at 1073. See also Jacob Cornides 'Human Rights and Intellectual Property: Conflict or Convergence' (2004) 7 *Journal of World Intellectual Property*,

focus is evident in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic Social and Cultural Rights (ICESCR) both of which 'safeguard the right to the protection of moral and material interests in intellectual creations.'[96] Likewise, under the Kenyan Constitution, 'property' is defined as including IP[97] and IPRs are protected in the Constitution 2010 within the 'right to property'.[98] Chennells explains that framing and protecting IP rights within a human rights framework (as the Kenyan constitution does) has dire consequences for TK and TK holders, as it can be used to accord strong IP protection and in creating new rights.[99] Similarly, it may end up removing communally held TK from its paradigm and importing it into another worldview occasioning harm to it and its holders.[100] This incompatibility yields ineffectual solutions in the protection of TK[101] and necessitates a search for alternative frameworks.

Second, international law (and IP in particular) had a religious-ethical aspiration as Africans were viewed as uncivilised savages in immediate need of civilisation and enlightenment. In the colonial encounter of the 'Gods', traditional medicine and the herbalist/healer were the target of colonial vilification as witchcraft or sorcery.[102] This is also evident in statutes that create the offence of witchcraft and criminalise activities that are carried out by traditional herbalists.[103] This explains the trend where the IP regime seems to aim at accessing TK and the 'active' ingredients of medicinal plants without reference to the cultural and belief systems amongst TK holders.[104] However, in South Africa there are reports showing that traditional

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at 135, 137. Article 27(2) of UDHR and Article 15(1)(c) of ICESCR recognise the right 'to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which *he* [or *she] is the author*.'

[96] Yu op cit note 3 at 436.

[97] Article 260.

[98] Article 40(5).

[99] Chennells op cit note 28 at 212.

[100] Ibid at 51. See Aled Dilwyn Fisher & Maria Lundberg 'Human rights' legitimacy in the face of the global ecological crisis – indigenous peoples, ecological rights claims and the Inter-American human rights system' (2015) 6(2) *Journal of Human Rights and the Environment* at 177, they argue that using a human rights framework 'as the key to all indigenous claims is unsatisfactory because such an approach does not provide comprehensive enough protection of indigenous rights.'

[101] Chisa & Hoskins op cit note 86.

[102] See Pamela Andanda & Hajjat Khademi 'Protecting Traditional Medical Knowledge through the Intellectual Property Regime Based on the Experiences of Iran and South Africa' in Caroline B Ncube & Elmien Du Plessis *Indigenous Knowledge and Intellectual Property: Contemporary Legal and Applied Research Series* (2016) at 58, where they note that in South Africa 'the concept of African Science' or secret knowledge is used to describe harmful activities of witches and the healing activities of traditional healers. See also Ikechi op cit note 76 at 478.

[103] See for instance the Witchcraft Act, Cap. 67 of the laws of Kenya which is a 1925 law.

[104] Ikechi op cit note 76 at 478. See also Reyes-Garcia 'The relevance of traditional knowledge systems for ethnopharmacological research: theoretical and methodological contributions' (2010) 6(32) *Journal of Ethnobiology and Ethnomedicine* 1-12 at 4, who explains that although identifying active compounds in

healers are commonly using 'over-the-counter' pharmaceuticals and patented drugs in their practice[105]casting doubt on the efficacy of their traditional remedies.

Third, IP law has an economic motivation as it is built on principles meant to curtail monopolies, but these monopolies use IP in order to extend their monopolistic tendencies in their relation with TK and TK holders.[106] As explained earlier, the commercialisation of TK and biological resources using the IP regime without respect for TK's wider cultural and holistic context portends great challenges for TK holders.[107] But again as stated previously, TK subject matter has commercial value and TK holders are not entirely opposed to commercialisation of aspects of their TK.

Fourth, IP laws had political aims achieved through repressive colonial political and ideological apparatuses. Colonial powers used law and brutal force to displace, dislocate and subjugate the African people in order to acquire full control over their lands and resources.[108] Such laws and policies contributed to the estrangement of Africans, delegitimisation of TK epistemes and occasioned the loss of knowledge systems making the restoration of TK a daunting challenge today.[109] It is reported, for instance, that the apartheid political context in South Africa 'forced the San people to hide their identity, especially with the enactment of the Coloured Registration Act of 1955 that officially erased the San communities as an identifiable ethnic group.'[110] Consequently, in the negotiations over the Hoodia and the associated knowledge, the South African Council for Scientific and Industrial Research (CSIR) is reported to have said to its international partners that 'the San people had all died.'[111] Such narratives explain why TK holders' challenge of IPR systems is linked to a political struggle, 'not merely to change the existing intellectual property regime, but to pursue the self-determination and

a plant is useful in the pharmacological industry, 'it requires the accompanying practices and beliefs that provide the medicinal 'meaning' to the plant.'

[105] Andanda & Khademi op cit note 102 at 58.

[106] Ikechi op cit note 76 at 478.

[107] Ibid at 464.

[108] Ibid at 455. See also HWO Okoth Ogendo 'The tragic African commons: A century of expropriation, suppression and subversion' (2003) *University of Nairobi Law Journal* 107-117 at 110-112.

[109] Ogendo op cit note 108 at 111; Ikechi op cit note 76 at 454; and Djims Milius 'Justifying Intellectual Property in Traditional Knowledge' (2009) 2 *IPQ* 185-216 at 199, who comments on the legacy of indigenous groups' oppression and how they were not permitted to speak their languages and punished corporally for taking part in practices or ceremonies considered primitive by the slave masters yet oral tradition is the mechanism through which TK is passed on from one generation to the next.

[110] Tonye 2 op cit note 6 at 815.

[111] Ibid at 816.

even sovereignty of indigenous peoples.'[112] Withal, critics opine that TK and related systems are eroding due to the 'acculturation of indigenous people, their assimilation into the dominant society, and the failure of elders to transmit traditional knowledge to younger generations.'[113]

The project of western domination that privileges Western episteme while sabotaging TK regimes and epistemes persists in contemporary forms through post-colonial articulations in the IP, economic and political domains.[114] For example, economic globalisation contributes to the dispossession of local communities' knowledge systems, resources and products while cultural globalisation continues to add to the erosion and erasure of TK systems by dismissing it as undocumented and 'unscientific' knowledge.[115] Nevertheless, developments at the international level in IP[116] and the recognition of indigenous people's rights suggest that there is a gradual move towards privileging traditional epistemes, beliefs and practices.[117]

1.2.3 Technical and pragmatic problems

Because of the nature and divergent aims of TK and IP protection, there are technical and practical challenges of protecting TK within the IP regimes.[118] First, due to the narrow focus of the IP regime on material interests, it fails to offer robust protection to TK which is holistic while 'ensuring cultural preservation and access to knowledge.'[119] For example, whereas products based on TK and genetic resources are protected by IP law, the underlying TK and

[112] Chennells op cit note 28 at 216. See also Janewa op cit note 27 at 155 who argues that extending the existing IPR system to TK 'does not rectify the inequities caused by the excesses of the current system'.

[113] Erin Sherry & Heather Myers 'Traditional Environmental Knowledge in Practice' (2002) 15 (4) *Society & Natural Resources*, 345-358, at 349.

[114] Ikechi op cit note 76 at 456; Osman op cit note 77; and Saskia Widenhorn 'Towards Epistemic Justice with Indigenous Peoples' Knowledge? Exploring the potentials of the convention on biological diversity and the philosophy of *Buen Vivir*' (2014) 56(3) *Development* 378-386 at 380.

[115] See Osman op cit note 77.

[116] See for example the work of the Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore (IGC) established by WIPO, which provides a forum for international policy debate and development of legal mechanisms and practical tools concerning the protection of TK and TCEs.

[117] Key international milestones in this regard include: the Convention Concerning the Protection of the World Cultural and Natural Heritage 1972 (the UNESCO Heritage Convention); the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 (the UNESCO Cultural Property Convention); the Convention Concerning Indigenous Peoples in Independent Countries 1986 (ILO Convention 169); the Convention on Biological Diversity 1992 and United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) G.A. Res 61/295, UN. Doc. A/61/295 (2007).

[118] Thomas Cottier & Marion Panizzon 'Legal Perspectives on Traditional Knowledge: The Case for Intellectual Property Protection' (2004) 7(2) *Journal of International Economic Law* at 375-376.

[119] Andanda op cit note 23 at 547-558; Chennells op cit note 28 at 212 and Munzer & Raustiala op cit note 26 at 66.

genetic resources are not.[120] Without respecting the holistic nature of TK and customary laws governing TK, current IP regimes cannot protect TK and afford fair and equitable access to it.

Second, IP vests exclusive ownership rights in the author or inventor thus fundamentally contradicting the ethos of TK in a number of ways. For example, with TK it is difficult to determine who 'owns' the knowledge within a given community[121] as TK is collectively and communally held.[122] In spite of this, however, customary law at times recognises the 'special status of certain individuals (like healers or medicine men)' who are viewed as informal creators or inventors distinct from the community.[123] Moreover, instead of viewing TK as property, most groups view it in terms of community and individual responsibility where TK holding gives rise to 'a bundle of relationships' rather than a 'bundle of economic rights.'[124] Essentially, TK holders are more concerned with 'people's obligations towards each other and the resources (nature), than with the rights of people in property.'[125]

In addition, TK is transgenerational being the product of generational indigenous efforts rather than the creativity of one living heir or those that contributed to it but no longer alive.[126] This creates a difficulty in identifying a creator or innovator. But some disagree arguing that descendants of originators may serve as a 'good enough' kind of representative. According to Robert Merges,

> 'the current inhabitants of traditional leadership roles are assumed to adequately represent the generations past and future who have an interest in protecting and profiting from the traditional knowledge. There is no pretense that this is perfect or even procedurally fair representation. But it is assumed to be the best we can do… What is needed in cases of dispersed creativity is to identify similar representative people or entities. They may not speak perfectly for all contributors, but they can be assumed to be good enough.'[127]

[120] Kal Raustiala 'Density and Conflict in International Intellectual Property Law' (2007) 40 *U.C. Davis Law Review*, at 1021, 1033. See also Munzer & Raustiala op cit note 26 at 40.
[121] Srividhya Ragavan 'Protection of Traditional Knowledge' (2001) 2 *Minnesota Intellectual Property Review* at 5-27 at 35; Cross op cit note 45 at 12, 18.
[122] Ibid at 35. See also Cottier & Panizzon op cit note 118 at 381-383.
[123] Deepa op cit note 2 at 378.
[124] Yu op cit note 3 at 467.
[125] Elmien op cit note 1 at 81.
[126] Milius op cit note 109 at 193-194. See also Robert P. Merges 'Locke for the Masses: Property Rights and the Products of Collective Creativity' 36 *Hofstra Law Review* 1179-1191 at 1190.
[127] Merges op cit note 126 at 1190.

This suggests that if TK holders are not owners, inventors or innovators, they are basically stewards, custodians or trustees explaining why it is common to find some TK kept within the custody of a selected few, along family lineages or between particular role-players[128] on behalf of the community. For example, amongst the East African Maasai, specific families or individuals hold TK related to medicine as custodians of the community. Similarly, in most communities specific music composers are often rewarded for their creativity by being recognised as custodians of the compositions.[129] Such custodians act as trustees of the components or aspects of TK entrusted to them.[130] In giving permission to outsiders to use TK 'a recognised group of elders or trustees appointed by the community must determine how and with whom a part of the entirety of their traditional knowledge is to be shared.'[131] Although every member of the community does not give assent to the use of TK, it is argued that it is a 'pragmatic compromise which ensures the legitimacy of whatever decision is reached on the matter.'[132] A custodianship model seems to take into account TK holders collective obligations towards their TK as it does not result in exclusion, alienation, and transfer-of some of the main concerns of traditional communities[133] without their assent. However, the concept of state's trusteeship over biological resources[134] may pose difficulties to TK holders' claim of custodianship over TK.

Moreover, TK is also held in a context of communal spirit of sharing and free exchange of resources such as seeds and related knowledge although customary norms may 'impose restrictions on the way traditional knowledge is shared within the community and with outsiders.'[135] It is clear then that protection of TK does not necessarily mean 'closing off links with other cultural communities-or of the related commercial domain-to exploit that knowledge' but 'deciding what aspects of the collective identity may be used and disseminated beyond the community, and on what terms.'[136] This argument casts doubt into the assertion by IP proponents that TK is in the public domain.[137] According to TK proponents, TK could

[128] Ouma op cit note 50 at 133.
[129] Ibid at 133.
[130] Milius op cit note 109 at 195.
[131] Ibid at 195.
[132] Ibid. See also Ogendo op cit note 108 at 109, where he clarifies that decision-making does not demand collective participation by all members within a community.
[133] Yu op cit note 3 at 468.
[134] Article 15, Convention on Biological Diversity thereof places all biological resources within a territory under the sovereignty of the State.
[135] Deepa op cit note 2 at 378. See also Ouma op cit note 50 at 133.
[136] Milius op cit note 109 at 197.
[137] Cullet op cit note 58 at 11. See also Sunder op cit note 58 at 109.

not have entered the public domain as it was never protected as IP, and even if it was, some of it such as herbal remedies are secret and hence not known to outsiders.[138]

Third, demarcating explicitly the ethnic and cultural boundaries of a people is problematic due to the dynamic nature of culture, changes over time and geographical spread across communities and nations. Where a culture has been in existence for centuries, 'determining the "originating culture" can require herculean effort.'[139] It is thus argued that the culture should not have a broad property right to 'lock up' knowledge and thereby exclude all other potential users but only a right to prevent wrongs directed at the culture.[140] A property right designed to preserve culture, may also directly contradict the policy of dissemination as it allows the owner to prevent others from using the knowledge.[141] Where cultures are shared there may arise difficulties, if a joint property right is granted and one joint owner decides to allow outsiders to use the knowledge.[142] This act may threaten the continued existence of the other culture thus defeating the purpose of the property right.

Fourth, IPRs are protected for a limited duration of time which may not be apt for TK. [143] For instance, how would that time be measured? Would it make sense to create rights for ancient knowledge? Some suggest that given the intergenerational nature of TK, it should be protected perpetually and possibly retroactively to protect historical works.[144] However, if perpetual protection is offered to TK, access to the knowledge by outsiders would be hampered. Similarly, it is contended that granting new rights over TK would mean a retraction of knowledge that is already in the public domain thus requiring TK holders to 'provide a solid public policy rationale for limiting access to, and use of, such information.'[145]

Fifth, there are objections to IPRs in TK rooted in IP policy. Generally, the grant of a property right is viewed as 'society's reward to the innovator for his creative efforts' and as 'a financial incentive to encourage innovative activity.'[146] Because the reward theory provides incentives for new creations, it is not apt in justifying the protection of existing knowledge like TK.[147]

[138] Janewa op cit note 27 at 191; Ikechi op cit note 76 at 453-493; and Munzer & Raustiala op cit note 26 at 53.
[139] Cross op cit note 45 at 21. See also Janewa op cit note 27 at 190.
[140] Cross op cit note 45 at 25.
[141] Ibid at 39.
[142] Ibid at 40. See also Deepa op cit note 2 at 374.
[143] Cross op cit note 45 at 21.
[144] Janewa op cit note 27 at 190. See Munzer & Raustiala op cit note 26 at 52.
[145] Janewa op cit note 27 at 190.
[146] Cross op cit note 45 at 23. Early IPRs were often granted simply as a favour to someone who had pleased the government. Today, IPRs are justified as useful tools to improve the general lot of society and a grant of exclusivity that does not further these social goals is regarded improper.
[147] Heald op cit note 17 at 519-546.

But because of the intergenerational nature of TK, it is rather difficult to justify property rights in TK under the reward theory not because of lack of creativity but rather because the grant of exclusive rights does not provide the right sort of reward for that creativity.[148] Moreover, the intergenerational nature of TK would suggest that property rights in TK would give the reward to the wrong party[149] thus violating the basic policies of the prevailing reward theory. And even if the knowledge is of recent origin and the originator can be identified, most proposals for IP in TK would vest the rights not in the person but in the person's culture or an agency that simply owes fiduciary duties to the culture. Therefore, a grant of IPRs in TK would run afoul of these fundamental policy concerns. Clearly, TK fits poorly within standard justifications of IP rights.[150]

The failure of the IP regime to pay adequate attention to the unique nature of TK and the concerns, beliefs, worldviews and customary laws and practices of indigenous peoples encourages continual loss of TK without attribution or compensation to the TK-generating community.[151]

1.3 Conclusion and suggestion on way forward

Due to the varying objectives of TK protection among TK holders, and the proponents of the IP regimes, there arises huge incompatibilities when IP frameworks are used to protect TK. This necessitates a search for alternative frameworks outside the IP system. One such alternative is the use of TK holders' governance structures. Those structures can effective in preserving and fostering equitable access to TK. These institutions are respectful of, and are appropriate in securing the indigenous cosmologies, territories, relationships with nature and people, epistemes, beliefs, and innovation processes that generate and perpetuate TK. Again, since TK holders are custodians rather than owners of TK, it is more appropriate to use traditional frameworks that respect customary governance structures under which TK is held. This study recommends further investigation on the role of TK holders' institutions in the protection of TK.

[148] Cross op cit note 45 at 24.
[149] Ibid at 24.
[150] Munzer & Raustiala op cit note 26 at 40; and Deepa op cit note 2 at 374. See also Heald op cit note 17 at 542-3, that advocating IPRs for TK is a poor rhetorical strategy for maintaining the world's biodiversity and helping indigenous groups that hold so much critical knowledge about plant genetic resources.
[151] Saskia Vermeylen 'The Nagoya Protocol and Customary Law: The Paradox of Narratives in the Law' (2013) 9(2) *Law, Environment and Development Journal* at 190. See also Hans Morten Haugen 'Traditional Knowledge and Human Rights' (2005) 8 *Journal of World Intellectual Property,* at 667.

Actualising Socio-Economic Rights for Sustainable Development in Kenya

By: **Kariuki Muigua***

Abstract

This paper argues that social and economic rights are an important part of the sustainable development agenda and as such, there is need for increased efforts and investment in the quest for socio-economic development as a prerequisite for the realisation of sustainable development in Kenya. It calls for empowerment of the people in line with the constitutionally guaranteed social and economic rights which must be actualised through the concerted efforts of all stakeholders.

1.0 Introduction

The last decade and a half has seen successive governments mostly seeking to improve the national economic status through major infrastructural investments which are geared towards impacting on the lives of their people. Such governments thus put in place measures, programmes and plans that are geared towards meeting their election promises. What has however been consistent with each successive government is the limited investments on socio-economic development and investment on the ordinary people, perhaps with attempts directed at education and health. However, even in these two sectors, the investment has not been sufficient. Despite the laudable development in terms of infrastructures, poverty levels have not been reducing at acceptable rates. If anything, it has increased for certain classes of people in society.[1] This paper discusses some of the ways in which the actualisation of social economic rights for sustainable development can be fast tracked through the combined efforts of all the relevant stakeholders.

2.0 Socio-Economic Development as Part of Sustainable Development

Socio-economic rights are considered to be a central feature of the sustainable development agenda as evidenced by Agenda 2030 for sustainable development agenda as well as other derivative instruments. It is meant to give the sustainable development agenda an anthropocentric perspective.[2]

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[1] Kenya National Bureau of Statistics, *Economic Survey 2018,* available at http://www.knbs.or.ke/download/economic-survey-2018/ [Accessed on 31/1/2019].

[2] United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015, [without reference to a Main Committee

The Constitution of Kenya, 2010 also provides for sustainable development as one of the national values and principles of governance.[3] Sustainable development is linked to the right to development, human rights and good governance, when it is described as sustainable human development. Sustainable human development focuses on material factors such as meeting basic needs and non-material factors such as rights and participation.[4] It also seeks to achieve a number of goals to wit, poverty reduction, promotion of human rights, promotion of equitable opportunities, environmental conservation and assessment of the impacts of development activities.[5] Vision 2030 adopts sustainable human development as it seeks to address the economic, social and political pillars. It thus fosters both material factors and non-material factors.[6] Sustainable human development is, therefore, inextricably linked to people's livelihoods, and is thus requisite in moving towards environmental justice.

Regional economic development is one of the major goals of devolution under the Constitution of Kenya. Greater control over one's own livelihood is a key factor to development, empowerment and poverty alleviation.[7] Local democratic control over natural resources can improve local livelihood and have positive ecological effects as well.[8] Development comes with associated problems of soil degradation and waterways, altered landscape and destroyed biodiversity and habitat.[9] Consequently, environment and development issues should be considered as integral activities. Local people should be empowered in a collaborative manner to enable them deal with negative environmental effects.

(A/70/L.1)], Seventieth session, Agenda items 15 and 116, 21 October 2015; See also generally, Muigua, K., *Nurturing Our Environment for Sustainable Development,* Glenwood Publishers, Nairobi, 2016.

[3] Art. 10(2)(d), Constitution of Kenya.

[4] United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015, [without reference to a Main Committee (A/70/L.1)], Seventieth session, Agenda items 15 and 116, 21 October 2015.

[5] See generally Amartya S., *Development as Freedom* (Anchor Books, New York, 1999), pp.35-53; See also UNDP, *Human Development Report 2011, The Real Wealth of Nations: Pathways to Human Development*, (Palgrave Macmillan Houndmills, Basingtoke, Hampshire, 2011), p. (i)-12. This report defines sustainable human development as *the expansion of the substantive freedoms of people today while making reasonable efforts to avoid seriously compromising those of future generations*.

[6] Kenya Vision 2030, Government of Kenya, 2007.

[7] Larson, A.M., "Decentralisation and Forest Management in Latin America: Towards a Working Model," *Public Admin. Dev.,* Vol. 23, 2003, pp. 211–226, p. 212.

[8] *Ibid.*

[9] 'Policy, Legal and Institutional Framework Governing Environmental Management in Kenya,' p. 305, available at *http://www.tanariverdelta.org/tana/975DSY/version/default/part/AttachmentData/data/MUMIAS_Tana_EIA_part5.pdf* [Accessed on 29/1/2019].

Sustainable development should, in the long term, ameliorate the negative effects of poverty, provide basic needs, and meet people's aspirations for a better life. Sustainable development can be satisfactorily achieved through the meaningful involvement of the people in the counties in the natural resources exploitation. The devolved system of government holds a promise to deal with rampant poverty in many parts of the country.[10]

3.0 Socio-Economic Rights in Kenya: The Scope

Kenya seeks to build a society that is based on the following national values and principles of governance: patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development.[11] These principles are to bind all State organs, State officers, public officers and all persons whenever any of them applies, or interprets, the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.[12]

Article 19 of the Constitution of Kenya affirms that: the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies;[13] and that the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.[14]

Notably, the Constitution obligates the State to ensure protection and implementation of these rights by requiring that in applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles: it is the responsibility of the State to show that the resources are not available; in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.[15]

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[10] *Sessional paper on Environment and Development* [Government Printer, Nairobi, 1999].
[11] Art. 10(2), Constitution of Kenya.
[12] Art. 10(1), Constitution of Kenya.
[13] Art. 19(1), Constitution of Kenya.
[14] Art. 19(2), Constitution of Kenya.
[15] Article 20, Constitution of Kenya.

In implementing rights and fundamental freedoms, the Constitution requires that: the State should take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43;[16] and all State organs and all public officers have the duty 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.[17]

These obligations have been canvassed in various cases in Kenya including the case of *Mitu-Bell Welfare Society v Attorney General & 2 others*, **Nairobi**[18] **where** the Court observed that: *"the argument that social economic rights cannot be claimed at this point, two years after the promulgation of the Constitution, also ignores the fact that no provision of the Constitution is intended to wait until the state* **feels** *it is ready to meet its constitutional obligations. Article 21and 43 require that there should be* **'progressive realization'** *of social economic rights, implying that the state must begin to take steps, and* **be seen** *to take steps, towards realization of these rights.*[19] *The Court also observed that these rights are progressive in nature, but there is a constitutional obligation on the state, when confronted with a matter such as this, to go beyond the standard objection.... Its obligation requires that it assists the court by showing if, and how, it is addressing or intends to address the rights of citizens to the attainment of the social economic rights, and what policies, if any, it has put in place to ensure that the rights are realized progressively, and how the petitioners in this case fit into its policies and plans."*[20]

*The issue of socio-economic rights was also canvassed i*n the case of *John Kabui Mwai and 3 Others v Kenya National Examinations Council & Others,* Nairobi[21] where the High Court was to determine whether a government policy restricting the number of pupils from private primary schools who could join national high schools was discriminatory and in violation of the right to education. The court observed that: *the inclusion of economic, social and cultural rights in the Constitution is aimed at advancing the socio-economic needs of the people of Kenya, including those who are poor, in order to uplift their human dignity. The protection of these rights is an indication of*

[16] Article 21(2), Constitution of Kenya.
[17] Article 21(3), Constitution of Kenya.
[18] Petition No. 164 of 2011 (Unreported).
[19] Para. 53, *Mitu-Bell Welfare Society v Attorney General & 2 others.*
[20] Para. 78, *Mitu-Bell Welfare Society v Attorney General & 2 others*; See also the jurisprudence from the Constitutional Court of South Africa, such as: Government of the Republic of South Africa v Grootboom & Others 2001 (1) SA 46 (CC); Minister of Health and Others v Treatment Action Campaign and Others (No 1) (CCT9/02) 2002 (5) SA 703 (5 July 2002).
[21] John Kabui Mwai and 3 Others v Kenya National Examinations Council & Others, Petition No. 15 of 2011 [2011]eKLR.

the fact that the Constitution's transformative agenda looks beyond merely guaranteeing abstract equality. There is a commitment to transform Kenya from a society based on socio-economic deprivation to one based on equal and equitable distribution of resources. This is borne out by Articles 6(3) and 10 (2) (b).[22]

In addition, the Court in *John Kabui Mwai* case observed that: *the realisation of socio-economic rights means the realization of the conditions of the poor and less advantaged and the beginning of a generation that is free from socio-economic need. One of the obstacles to the realisation of this objective, however, is limited financial resources on the part of the Government. The available resources are not adequate to facilitate the immediate provision of socioeconomic goods and services to everyone on demand as individual rights. There has to be a holistic approach to providing socio-economic goods and services that focus beyond the individual* (emphasis added).[23]

In addition to the foregoing, the Court stated that: *Socio-economic rights are by their very nature ideologically loaded. The realisation of these rights involves the making of ideological challenges which, among others, impact on the nature of the country's economic system. This is because these rights engender positive obligations and have budgetary implications which require making political choices. In our view, a public body should be given appropriate leeway in determining the best way of meeting its constitutional obligations* (emphasis added).[24]

In Mathew Okwanda v Minister of Health and Medical Services & 3 others [2013] eKLR[25] the Court also convincingly argued that: *even where rights are to be progressively achieved, the State has an obligation to show that at least it has taken some concrete measures or is taking conscious steps to actualize and protect the rights in question….It must be recalled that the right guaranteed under Article 43(1) (a) is premised on establishment of a "standard." This standard must be judged in a holistic manner* (emphasis added).[26]

Anyone seeking to enforce social and economic rights in Kenya does not have to only rely on the constitutional provisions on these rights since Article 2(6) of the Constitution provides that treaties and conventions ratified by Kenya shall form part of the law of Kenya[27]. This thus means that there are other relevant instruments which include the *International Covenant on*

[22] *John Kabui Mwai and 3 Others v Kenya National Examinations Council & Others,* p.6.
[23] Ibid, p.6.
[24] *John Kabui Mwai and 3 Others v Kenya National Examinations Council & Others,* p.6.
[25] Mathew Okwanda v Minister of Health and Medical Services & 3 others [2013] eKLR, Petition No. 94 of 2012.
[26] Ibid, paras 16 & 21.
[27] See also Treaty Making and Ratification Act, No. 45 of 2012, Laws of Kenya.

Civil and Political Rights (ICCPR)[28], the *International Covenant on Economic and Social Rights* (ICESR)[29]; *Universal Declaration of Human Rights* (UDHR)[30]; and *Africa Charter on Human and People's Rights* (ACHPR)[31], amongst others.

The State is expected to take into account their international obligations when coming up with their development agenda and their implementation frameworks. These development frameworks are usually pegged on policy, legal and institutional frameworks. There are also constitutional principles of governance in place that the government of the day must follow while executing its plans and mandate. The 2010 Constitution outlines national values and principles of governance which must bind all State organs, State officers, public officers and all persons whenever any of them: applies or interprets this Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.[32] Some of the relevant national values and principles of governance include: human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; and sustainable development.[33] These values and principles form a firm basis for pursing socio-economic development for the Kenya people. This is further reinforced by Article 43 of the Constitution on economic and social rights, which guarantees that: every person has the right- to the highest attainable standard of health, which includes the right to health care services, including reproductive health care; to accessible and adequate housing, and to reasonable standards of sanitation; to be free from hunger, and to have adequate food of acceptable quality; to clean and safe water in adequate quantities; to social security; and to education.[34]

The Constitution of Kenya provides that the objects of devolved government are, *inter alia,* to promote democratic and accountable exercise of power; to foster national unity by recognising diversity; to give powers of self-governance to the people and enhance their participation in the exercise of the powers of the State and in making decisions affecting them; to recognise the right of communities to manage their own affairs and to further their development; to protect and promote the interests and rights of minorities and marginalised communities; to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya; to ensure equitable sharing of national and local

[28] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.
[29] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.
[30] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).
[31] Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).
[32] Constitution of Kenya 2010, Art. 10(1).
[33] Constitution of Kenya 2010, Art. 10(2).
[34] Constitution of Kenya 2010, Art. 43(1).

resources throughout Kenya; and to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya.[35]

The Constitution provides for participation of persons with disabilities,[36] youth,[37] minorities and marginalized groups,[38] and older members of society,[39] in governance and all other spheres of life.

It is within the foregoing framework that social and economic development of the people of Kenya can be pursued in Kenya.

4.0 Realising Socio-Economic Rights in Kenya: Are We Yet There?

While successive governments in Kenya have put in place varying efforts geared towards achieving 'development' in the country, results have often been skewed with most of these efforts concentrating mainly on infrastructural development and inadequate resources being directed at the social economic empowerment of the citizenry.[40] The right of every person to self-determination as envisaged under the international bill of rights allows them to freely determine their political status and freely pursue their economic, social and cultural development.[41] This paper is not concerned with the political aspect of this right but the pursuit of economic and social development. However, it is acknowledged that achieving this kind of development for the citizenry is not completely devoid of political influence as, it has been argued, social and political structures may shape government policy toward the welfare state.[42]

[35] Art. 174, Constitution of Kenya 2010.
[36] Art. 54.
[37] Art. 55
[38] Art. 56
[39] Art. 57.
[40] Miriam Omolo, D., Wanja, R. and Jairo, S., "Comparative Study of Kenya, US, EU and China Trade and Investment Relations," (Institute of Economic Affairs (IEA Kenya), 2016). Available at https://www.africaportal.org/publications/comparative-study-kenya-us-eu-and-china-trade-and-investment-relations/ [Accessed on 2/2/2019].
[41] Article I of the Charter of the United Nations; African Charter of Human and Peoples' Rights of 1981; See also International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.
[42] Gilens, M., *Why Americans hate welfare: Race, media, and the politics of antipoverty policy*, University of Chicago Press, 2009.

The founding father of the nation, President Jomo Kenyatta in his agenda listed following as the greatest enemies of the country and which required to be addressed urgently: *Ugonjwa* (disease), *Umaskini* (poverty), *Ufisadi* (corruption) and *Ujinga* (ignorance and illiteracy).[43]

While there may be evidence of economic development in the country, it is arguable that such economic growth has only benefited small numbers of people, with great disparities of wealth leading most Kenyans continue to suffer under very low living standards.[44]

The recent move by the Government of Kenya to pursue its 'Big Four Agenda' which targets: enhancing manufacturing; food security and nutrition; universal health care; and affordable housing, is a step in the right direction. These pillars could be deemed to be part of the government's efforts towards fulfilling its constitutional obligations on the 'progressive realisation of social economic rights'.[45]

5.0 Actualising Socio-Economic Rights under the Constitution of Kenya for Sustainable Development

This section offers suggestions on some of the ways that policy makers and other stakeholders can ensure inclusive, meaningful and impactful socio-economic development as an ingredient for realisation of sustainable development agenda in the country. It is however worth mentioning that this cannot be achieved through unilateral efforts and must be done through the concerted efforts of all stakeholders.

5.1 Addressing Unemployment and Low Incomes for Poverty reduction and Empowerment

The United Nations *2030 Agenda for Sustainable Development*[46] includes a set of 17 Sustainable Development Goals (SDGs) to end poverty, fight inequality and injustice, and tackle climate

[43] Wekesa, E., 'Jomo Kenyatta's agenda still big enough to guide us today,' *Daily Nation*, Friday February 23 2018. Available at https://www.nation.co.ke/oped/letters/Jomo-Kenyatta-s-agenda-/440806-4317322-wt7l5v/index.html [Accessed on 31/1/2019].

[44] The World Bank, "Poverty Incidence in Kenya Declined Significantly, but Unlikely to be Eradicated by 2030," April 2018. Available at https://www.worldbank.org/en/country/kenya/publication/kenya-economic-update-poverty-incidence-in-kenya-declined-significantly-but-unlikely-to-be-eradicated-by-2030 [Accessed on 31/1/2019]; Kondo, V., "World bank report says poverty still high in Kenya at 29.2 percent," *Standard Digital,* 18th October, 2018. Available at https://www.standardmedia.co.ke/article/2001299505/world-bank-report-says-poverty-still-high-in-kenya-at-29-2-percent [Accessed on 31/1/2019]; Kenya National Bureau of Statistics, *Economic Survey 2018,* available at *http://www.knbs.or.ke/download/economic-survey-2018/* [Accessed on 31/1/2019].

[45] See Constitution of Kenya, articles 20; 21.

[46] UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development,* Resolution adopted by the General Assembly on 25 September 2015, [without reference to a Main Committee (A/70/L.1)], Seventieth session, Agenda items 15 and 116, 21 October 2015.

change by the year 2030.[47] The *2030 Agenda for Sustainable Development* also seeks to strengthen universal peace in larger freedom and was formulated in recognition that eradicating poverty in all its forms and dimensions, including extreme poverty, is the greatest global challenge and an indispensable requirement for sustainable development.[48]

SDG Goal 8 seeks to promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all. One of the ways that is to be achieved will be promotion of development-oriented policies that support productive activities, decent job creation, entrepreneurship, creativity and innovation, and encourage the formalization and growth of micro-, small- and medium-sized enterprises, including through access to financial services.[49] Such policies are a good foundation for the empowerment of the poor in the Kenyan society.

Empowering the poor sections of the population in the society is the first step towards building a sustainable economic growth and development. A society that seeks to empower its men and women both socially and economically can have reasonable expectations as far as poverty reduction or even elimination is concerned.[50]

It has been argued that any given growth scenario can generate different poverty outcomes for a given rate of growth, the extent of poverty reduction depends on how the distribution of income changes with changes in growth, and on initial inequalities in income, assets and access to opportunities to allow the poor to share in growth.[51] Equi-proportional growth leaves income distribution intact, whereas by improving the position of some at the lower scale of distribution, it reduces poverty. Pro-poor growth and development policies, however, will by definition improve the status of the poor and affect income distribution.[52]

[47] United Nations Development Programme, 'Sustainable Development Goals (SDGs),' available at *http://www.undp.org/content/undp/en/home/mdgoverview/post-2015-development agenda.html* [Accessed on 31/1/2019].
[48] Agenda 2030 for Sustainable Development Goals, Preamble.
[49] Target 8.3.
[50] See 2030 Agenda on Sustainable Development.
[51] Quartey, P., "Financial sector development, savings mobilization and poverty reduction in Ghana," In *Financial development, institutions, growth and poverty reduction*, pp. 87-119. Palgrave Macmillan, London, 2008, p.11. Available at https://link.springer.com/chapter/10.1057/9780230594029_5 [Accessed on 29/01/2019].
[52] Quartey, P., "Financial sector development, savings mobilization and poverty reduction in Ghana," op. cit., p.11.

This supports the argument that unless any perceived or real economic growth reported in a country is as a result of economic policies, plans and programmes that take into account the interests of the poor, then it cannot rightly be used as a measure of how well the citizenry is doing.[53]

Investing in pro-poor development projects is one of the best ways that poverty can be addressed in the country, instead of short-term projects.[54] Economic empowerment of the various groups in Kenya can go a long way in improving the lives of families and addressing the ever rising levels of poverty in the country.

Empowerment is defined as a process through which individuals or organised groups increase their power and autonomy to achieve certain outcomes they need and desire.[55] Empowerment focuses on supporting disadvantaged people to gain power and exert greater influence over those who control access to key resources.[56]

Social empowerment on the other hand may be defined as the process of developing a sense of autonomy and self-confidence, and acting individually and collectively to change social relationships and the institutions and discourses that exclude poor people and keep them in poverty.[57] Poor people's empowerment, and their ability to hold others to account, is strongly influenced by their individual assets (such as land, housing, livestock, savings) and capabilities of all types: human (such as good health and education), social (such as social belonging, a sense of identity, leadership relations) and psychological (self-esteem, self-confidence, the ability to imagine and aspire to a better future). Also important are people's collective assets and capabilities, such as voice, organisation, representation and identity.[58]

Reduction of crime rates and other social ills can arguably be achieved through addressing social inequalities in the society. Some scholars have argued that there exists a link between

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[53] See generally, World Commission on Environment and Development, *Our Common Future*, Oxford: Oxford University Press, 1987.
[54] An example of such short-term projects is the clean-up programme launched in Kibera by President Uhuru Kenyatta in 2014 in partnership with National Youth Service, which, although well meaning, may actually have been knee-jerk reactions to deeper problems in society.
[55] Combaz, E. & Mcloughlin, C., *Voice, Empowerment and Accountability: Topic Guide*, Birmingham, UK: GSDRC, University of Birmingham, 2014, p.4.
Available at https://gsdrc.org/wp-content/uploads/2015/07/GSDRC_VEA_topic_guide.pdf [Accessed on 29/01/2019].
[56] Ibid, p.4.
[57] Ibid.
[58] Ibid.

unemployment and crime, incarceration and family breakup.[59] Empowering the different groups in society can help them take charge of their economic and social lives thus effectively participating economic development and realisation of sustainable development agenda.

It has been observed that empowerment of those living in poverty is both a critical driver and an important measure of poverty reduction.[60] This is because the decisions and actions of poor people themselves can bring about sustainable improvements in their lives and livelihoods.[61] The need for empowerment of the poor is justified on the fact that sustainable poverty reduction needs poor people to be both the agents and beneficiaries of economic growth to directly participate in, contribute to and benefit from growth processes.[62] Strengthening poor people's organizations, providing them with more control over assets and promoting their influence in economic governance will improve the terms on which they engage in markets.[63] Thus, economic empowerment combined with political and social empowerment will make growth much more effective in reducing poverty.[64]

5.2 Enhanced and Diverse Education Opportunities

Some scholars have rightly argued that certain kinds of education such as vocational training and higher education, equip a man to perform certain jobs or functions, or enable a man to perform a given function more effectively.[65] This is justified on the theory that education enhances one's ability to receive, decode, and understand information, and that information processing, and interpretation is important for performing or learning to perform many jobs.[66] Thus, the process of education can be viewed as an act of investment in people; that educated people are bearers of human capital.[67] However, it must be pointed out that such education

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[59] Reid, C., "Addressing the challenges of unemployment in low-income communities," *Community Investments* Spr (2009): 3-7 at p. 4.
Available at https://www.frbsf.org/community-development/files/Reid_Carolina_CI_Spring_2009.pdf [Accessed on 29/01/2019]; Mehlum, H., Miguel, E. and Torvik, R., "Poverty and crime in 19th century Germany," *Journal of Urban Economics* 59, no. 3 (2006): 370-388;

[60] OECD, *Poverty Reduction and Pro-Poor Growth: The Role of Empowerment*, OECD Publishing, Paris, 2012. Available at https://doi.org/10.1787/9789264168350-en [Accessed on 29/01/2019].

[61] OECD, *Poverty Reduction and Pro-Poor Growth: The Role of Empowerment*, OECD Publishing, Paris, 2012, op. cit.; "As he thinks, so he is; as he continues to think, so he remains."— James Allen, *As a Man Thinketh*.

[62] Ibid.

[63] Ibid.

[64] Ibid.

[65] Nelson, R.R. and Phelps, E.S., "Investment in humans, technological diffusion, and economic growth," *The American economic review* 56, no. 1/2 (1966): 69-75 at p.69.

[66] Ibid, at p.69.

[67] Nelson, R.R. and Phelps, E.S., "Investment in humans, technological diffusion, and economic growth," *The American economic review* 56, no. 1/2 (1966): 69-75 at p.75.

must be capable of empowering the citizenry not just any foreign narrative packaged as education and meant to brainwash the recipients.

In the local Kenyan scene, it has been argued that some of the so-called foreign investors source the bulk of their investment money from local and foreign banks domiciled in these developing countries. Technology transfer is equally elusive because these investors demand and are allowed to bring in their own key staff.[68]

It has convincingly been argued that in order to develop the knowledgeable and skilled people, first, the people need to be educated to very high levels, university, preferably, and second, the individuals who have had advanced education are trained in the workplace.[69] This is justified on the belief that education develops the mind and character and equips the individual with the ability to think and provide theoretical solutions to present and future problems while training equips the individual with practical skills.[70] Acquiring both theoretical knowledge and practical skills is the only way to produce a versatile and productive workforce need for real development.[71]

Proper equipment of educational institutions should therefore form part of the strategies employed in not only achieving practical and tangible development of a country but should also be considered important for empowering individuals and in turn help realise socio-economic development through tackling unemployment and poverty crisis.

Some scholars have specifically recommended that developing nations, African nations in particular, need to set up a framework for training university graduates in a curriculum-based scheme for 3 – 4 years, so as to acquire the skills for modernizing their traditional activities and for studying, servicing, maintaining, and duplicating, and eventually improving upon the things they import today.[72]

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[68] Mbatau wa Ngai, 'This is how to tackle the poverty gap,' *Standard Digital,* Posted on: 29th Jan 2019 10:07:19 GMT +0300. Available at https://www.standardmedia.co.ke/business/article/2001311195/tackling-widening-rich-poverty-gap [Accessed on 29/01/2019].

[69] Ogbimi, F.E., "Promoting sustainable economic growth and industrialisation: solution to mass unemployment and poverty", African *journal of traditional, complementary, and alternative medicines: AJTCAM,* vol. 4, No. 4, 2007, pp. 541-52, at p.549.

[70] Ibid, p.549.

[71] Ibid, p.549.

[72] Ogbimi, F.E., "Promoting sustainable economic growth and industrialisation: solution to mass unemployment and poverty", op. cit., at p.549.

Thus, even as the government seeks to attract more foreign direct investments projects in the country, there is a need to review the investment policies in the country as well as equipping the Kenyan people with relevant skills and education as a way to build capacity for effective technology transfer.

The various legal provisions on incorporation of local content as a prerequisite to the approval of foreign investments in Kenya are also a laudable step to empowering the locals both socially and economically in order to build capacity for sustainable individual and national growth.[73]

5.3 Role of Businesses in Socio-Economic Development

The Agenda 2030 on SDGs recognises the role of businesses in improving the lives of people and acknowledges that private business activity, investment and innovation are major drivers of productivity, inclusive economic growth and job creation.[74] The Agenda also calls upon all businesses to apply their creativity and innovation to solving sustainable development challenges. The goal is to foster a dynamic and well-functioning business sector, while protecting labour rights and environmental and health standards in accordance with relevant international standards and agreements and other ongoing initiatives in this regard.[75]

Businesses can go a long wain improving the lives of local communities where they operate through corporate social responsibility activities as well as local sourcing of materials and labour thus directly empowering these communities.

5.4 Tackling Corruption in Governance Matters

Although Kenya dropped one point in the 2018 global Corruption Perceptions Index (CPI) released by Transparency International on 29th January 2019, there are still rampant cases of corruption in the country.[76]

This is despite the national values and principles of governance which demands for a system of governance that is based on, inter alia: patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity,

[73] See *Petroleum (Exploration, Development and Production) Bill, 2015 (*provisions on local content); Mining Act, 2016; Community Land Act, 2016.
[74] Target 67, 2030 Agenda on Sustainable Development Goals.
[75] Ibid.
[76] Ibrahim Oruko and Francis Mureithi, 'Rwanda, Tanzania outperform Kenya in TI corruption index,' *Daily Nation*, Tuesday, January 29 2019. Available at https://www.nation.co.ke/news/Kenya-drops-in-graft-index-despite-govt-crackdown/1056-4956238-156tulz/index.html [Accessed on 29/01/2019].

social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability.[77]

This is complemented by the *Leadership and Integrity Act*, 2012[78] which was enacted to give effect to, and establish procedures and mechanisms for the effective administration of Chapter Six of the Constitution and for connected purposes.[79] The primary purpose of this Act is to ensure that State officers respect the values, principles and requirements of the Constitution, including the national values and principles provided for under Article 10 of the Constitution.[80] There is need for a sustained onslaught on corruption in the country for long-term improvement of the state of governance in the country and ensure that all the funds meant for development projects and any benefits accruing from investments meant to improve the socio-economic status of the average citizen have a trickledown effect that reaches all.

5.5 Investing in Science and Technological Development for Socio-Economic Empowerment

Investment in educational institutions to produce highly educated and skilled population sets the foundation for embracement of the scientific and technological development. The Constitution of Kenya obligates the State to: promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage; recognise the role of science and indigenous technologies in the development of the nation; and promote the intellectual property rights of the people of Kenya.[81] The Constitution also guarantees the right of every person to freedom of expression, which includes, inter alia: freedom to seek, receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research.[82]

These constitutional provisions are also complemented by the *Science, Technology and Innovation Act, 2013*[83] which was enacted to facilitate the promotion, co-ordination and regulation of the progress of science, technology and innovation of the country; to assign priority to the development of science, technology and innovation; to entrench science, technology and innovation into the national production system and for connected purposes.[84]

[77] Article 10, Constitution of Kenya.
[78] Leadership and Integrity Act, No. 19 of 2012, Laws of Kenya.
[79] Ibid, Preamble.
[80] Ibid, sec. 3.
[81] Article 11, Constitution of Kenya.
[82] Article 33, Constitution of Kenya.
[83] Science, Technology and Innovation Act, No. 28 of 2013, Laws of Kenya.
[84] Ibid, Preamble.

Notably, the Act defines "technology" to mean the application of knowledge to meet the goals, goods and services for sustainable development.[85] The Act establishes the National Commission for Science, Technology and Innovation[86] which is mandated to regulate and assure quality in the science, technology and innovation sector and advise the Government in related matters[87]. The Act also spells out the specific functions of the Commission.[88] This commission can work closely with other stakeholders including communities to facilitate penetration and use of science, technology and innovation in various sectors, as envisaged within its mandate under the Act.

The 2030 Agenda on SDGs also recognise the role of Science, technology and innovation in realisation of the sustainable development agenda. It acknowledges that the spread of information and communications technology and global interconnectedness has great potential to accelerate human progress, to bridge the digital divide and to develop knowledge societies, as does scientific and technological innovation across areas as diverse as medicine and energy.[89]

5.6 Duties of Citizens towards securing Socio-Economic Empowerment

While it is acknowledged that the State and other stakeholders have a major role to play in securing the social and economic rights for all, citizens also have a role to play towards the same also. Even as the State seeks to empower its citizenry through education and creating a conducive environment for business and self actualisation, the target citizens should also cultivate the right attitude and spend their time towards bettering their lives and acquire the necessary skills.[90] They must work closely with the State in actualising the social and economic rights as guaranteed under the Constitution. A lazy citizenry will not achieve social economic development.

The duty to work should be built into the national legal framework as it is currently missing from the existing labour laws[91]. There is a need for the Kenyans to improve on their work

[85] Ibid, Sec. 2.
[86] Ibid, Sec. 3.
[87] Ibid, Sec. 4.
[88] Ibid, Sec. 6.
[89] Target 15, 2030 Agenda on Sustainable Development Goals.
[90] Muigua, K., *Utilising Time as a Natural Resource, and Innovation for Development in Kenya*, available at http://kmco.co.ke/wp-content/uploads/2018/08/Utilising-Time-as-a-Natural-Resource-and-Innovation-for-Development-in-Kenya-PAPER-6th-OCTOBER-2015.pdf [Accessed on 2/02/2019].
[91] Art. 41, Constitution of Kenya; labour laws of 2007(Employment Act, Labour Relations Act, Occupational Safety and Health Act and Work Injury Benefits Act).

ethics; effective use of time for self actualisation, as is the case in Japan.[92] Prayers alone will not get us there; people must work.[93]

6.0 Conclusion

Actualising social economic rights for sustainable development requires the concerted efforts of all the stakeholders who include the government (National and County governments), the populace, Non-Governmental Organisations and global partners, amongst others. It is a prerequisite for the realisation of the sustainable development agenda.

Kenya can sustainably develop economically and socially until it is a first world economy. Actualising social economic rights for sustainable development in Kenya is a goal that can be achieved. It is possible.

[92] Muigua, K., *Utilising Time as a Natural Resource, and Innovation for Development in Kenya*, op cit.
[93] The Holy Bible, 2 Thessalonians 3:10-"For even when we were with you, we gave you this rule: 'The one who is unwilling to work shall not eat.'"; *Man will not get anything unless he works hard*" (Surah al-Najm, 53:39) Al- Quran; Bhagavad Gita - Chapter 3 - Verse 8 | Srimad Bhagavad Gita-"You should perform your prescribed duties, since action is better than inaction. You cannot maintain your existence without action."

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Applicability of Arbitration in Management of Community Land Disputes

By: **James Ndungu Njuguna***

Abstract

Pursuant to the spirit of Article 159 (2) (c) of the Constitution of Kenya, 2010, the Community Land Act, No. 27 of 2016 envisages the use of ADR mechanisms in managing disputes related to community land. These mechanisms include arbitration as provided for under section 41 of the Community Land Act.

The paper seeks to interrogate the viability of managing community land disputes through arbitration. It proceeds on the hypothesis that arbitration is not an appropriate tool in managing community land disputes.

The paper first examines the nature of community land disputes in Kenya. Indigenous communities in Kenya are bound by certain values and principles whereby they prioritise the 'common good' over 'individual interest'. The paper argues that arbitration may not achieve this goal since it is a form of settlement and does not address the underlying issues in a dispute. It examines the characteristics and shortcomings of arbitration vis-à-vis the nature of community land disputes and the underlying needs in managing such disputes.

The paper then offers suggestions on how to achieve effective management of community land disputes under the Community Land Act.

1.0 Introduction

Arbitration is one of the forms of Alternative Dispute Resolution that has been recognised by the Constitution of Kenya. Alternative Dispute Resolution refers to the set of mechanisms that are used to manage disputes without resort to litigation.[1] The Constitution requires that courts and tribunals, while exercising judicial authority, to be guided by several principles such as the promotion of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.[2] Constitutional recognition of ADR

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[1] Muigua, K., *'Alternative Dispute Resolution and Access to Justice in Kenya'*, Glenwood Publishers Ltd, 2015, p 19.
[2] Constitution of Kenya, 2010, Article 159 (2) (c).

as a dispute resolution mechanism can be attributed to the unique advantages inherent in the various ADR mechanisms. They have been heralded as being expeditious, efficient, flexible and cost effective.[3] It is thus not surprising that most of the legislations enacted subsequent to the promulgation of the Constitution of Kenya, 2010 have upheld the principle of ADR. The Community Land Act is one of such legislations.

The Community Land Act[4] was enacted to give effect to Article 63 (5) of the Constitution of Kenya on community land; to provide for the recognition, protection and registration of community land rights; management and administration of community land; to provide for the role of county governments in relation to unregistered community land and for connected purposes.[5] Part 8 of the Act provides for management of disputes relating to community land and encapsulates various dispute resolution mechanisms that may be adopted by a registered community for purposes of managing disputes and conflicts relating to community land. Under this part, the Act provides that where a dispute relating to community land arises, the parties to the dispute may agree to refer the dispute to arbitration.[6] Despite arbitration being one of the forms of ADR recognised under the Constitution of Kenya due to its unique advantages, the paper argues that it might not be effective in managing community land disputes. Community land disputes are sui generis in nature requiring a carefully customized approach. Owing to the adversarial nature of arbitration, it is contended in this paper that the use of arbitration may not resolve the underlying issues in such disputes.[7]

2.0 Dispute Resolution within Kenyan Communities

This part gives an overview of the characteristics of Communities in Kenya and the dispute management processes that have been utilized by these communities over the course of time. Against this backdrop, the paper proceeds to discuss whether arbitration is a viable tool in management of community land disputes.

For purposes of use of community land, the Act defines a community as a consciously distinct and organized group of users who are citizens of Kenya and share any of the following

[3] See generally, Muigua, K., *'Alternative Dispute Resolution and Access to Justice in Kenya'*, Glenwood Publishers Ltd, 2015.
[4] Community Land Act, No. 27 of 2016, Laws of Kenya.
[5] Ibid.
[6] Ibid, Section 41 (1).
[7] Njuguna, J.N., *'Arbitration as a tool for Management of Community Land Conflicts in Kenya' Journal of Conflict Management and Sustainable Development*, Volume 3, Issue 1 (2019).

attributes: Common ancestry; similar culture or unique mode of livelihood; Socio-economic or other similar common interest; geographical space; ecological space; or ethnicity.

Communities in Kenya are normally identifiable by a common ancestry, language and shared geographical location.[8] Due to these characteristics, Kenyan communities normally identify themselves as a group with a high degree of brotherhood and collectivity. Peaceful co-existence is always emphasized and conflicts are abhorred as they are viewed as a threat to the social fabric holding the community to together.[9] Throughout Africa and Kenya in particular, African traditions have since time immemorial emphasized harmony/togetherness over individual interests.[10] Thus, African communities developed dispute resolution mechanisms aimed at fostering healing and reconciliation and re-establishing social solidarity and restoring broken relationships in the community.[11]

Even before promulgation of the Constitution of Kenya, 2010 and the enactment of the Community Land Act 2016, the concept of community land existed especially among the pastoralist communities in Kenya. In many communities, the grazing and watering points were accessed equally by members of a particular clan that possessed them.[12] Whenever a dispute arose over such land, the communities had elaborate forms of dispute resolution that effectively managed such disputes before they escalated in order to ensure harmony in the community. In such communities, the council of elders determined the use of water and grazing land.[13]

Indigenous communities in Kenya have always had their own Traditional Justice System Resolution mechanisms to effectively manage disputes within such communities. These are based on cooperation, communitarism, strong group coherence, social obligations, consensus-

[8] See generally, Sobania, N.W., *Culture and customs of Kenya*. Greenwood Publishing Group, 2003. Available at https://www.sahistory.org.za/sites/default/files/file%20uploads%20/neal_sobania_culture_and_customs_of_kenya_cultubook4you.pdf.
[9] Muigua, K., 'Traditional Conflict Resolution Mechanisms' available at http://kmco.co.ke/wp-content/uploads/2018/08/Traditional-Conflict-Resolution-Mechanisms-and-Institutions-24th-October-2017.pdf accessed on 17/09/2019.
[10] Supra note 1.
[11] Muruthi, K., *'A Survey on ADR Strengths, Weaknesses and Policy Gaps: A Case Study of Meru, Isiolo and Nairobi Counties, Kenya'* Alternative Dispute Resolution, ClArb (K), Volume 4, No. 1 (2016).
[12] Supra note 7.
[13] Pkalya, R., Adan, M. & Masinde, I., *'Indigenous Democracy: Traditional Conflict Reconciliation Mechanisms Among the Pokot, Turkana, Samburu and the Marakwet '(*ed. Rabar, B.& Kirimi, M., Intermediate Technology Development Group-Eastern Africa, 2004), 89-95.

based decision-making, social conformity, and strong social sanctions.[14] Whenever disputes arise amongst many African communities, parties often resort to negotiations or to the institution of council of elders or elderly to aid in the resolution of conflicts. The Council of elders is an established institution in most indigenous Kenyan communities and normally comprises of the elderly and 'wise' members of the community. It is often mandated to manage disputes within the community and its decisions are based on accepted norms, beliefs, cultural values and common good of the community.[15] Due to the composition of the council of elders and its understanding of the values and beliefs of the particular community, it has the advantage of making decisions that reflect the common good of the community and which have the ability of fostering peace and co-existence within the community.[16]

The underlying principle in these conflict management processes is maintaining social harmony and restoring social bonds. The process was wholesome and tried to resolve all the underlying causes of conflict by ensuring that the parties to the conflict participated and reached an amicable solution. In some cases, fines and compensation were used but only as means to acknowledge the wrongs done and restore the parties.[17] These were not retributive in nature but were compensatory.[18] This is unlike in arbitration whereby the arbitral tribunal renders an award that may result in more division rather than restoring the parties.

3.0 Applicability of Arbitration in Management of Community Land Disputes

Under the Community Land Act, disputes may range from members of a registered community over the use of community land, an individual member against the whole community or between a registered community and another registered community.[19] In managing such disputes, the Act envisages various dispute resolution mechanisms that include Arbitration.[20]

[14]Kariuki, F., *'African Traditional Justice Systems'* available at http://kmco.co.ke/wp-content/uploads/2018/08/African-Traditional-Justice-Systems.pdf accessed on 17/09/2019.
[15]Supra note 7.
[16] See generally, Muigua, K., *Resolving Conflicts through Mediation in Kenya,* Glenwood Publishers, Nairobi, 2013.
[17] Kariuki, F.,*'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities'* available at http://kmco.co.ke/wp-content/uploads/2018/08/Conflict-Resolution-by-Elders-successes-challenges-and-opportunities-1.pdf accessed on 17/09/2019.
[18] Ibid.
[19] Sec. 39, Community Land Act, No. 27 of 2016.
[20] Sec. 41, Community Land Act, 2016.

Despite being one of the methods of Alternative Dispute Resolution as envisaged under Article159 (2) (c) of the Constitution, arbitration has several drawbacks especially with regards to courts' interference; and thus, may not accord the parties in case of community land disputes the benefits envisioned under the Constitution. Arbitration has received increasing criticism based largely on the contention that it closely resembles conventional litigation, producing undue burdens and costs.[21] The issues of delay, costs and binding nature of the arbitral award makes the process less suitable in managing disputes relating to community land in Kenya.

The Community Land Act envisions an arbitration process conducted under the provisions of the Arbitration Act, No. 4 of 1995.[22] The Arbitration Act governs all issues with regards to arbitration including composition and jurisdiction of arbitral tribunal, conduct of arbitral proceedings, arbitral award and termination of arbitral proceedings. The first problem that may arise in using arbitration to manage community land disputes is the appointment of the arbitral tribunal. Under the Community Land Act, where the parties to an arbitration agreement fail to agree on the appointment of an arbitrator or arbitrators, the provisions of the Arbitration Act, No.4 of 1995, relating to the appointment of arbitrators should apply.[23] These provisions are contained in section 12 of the Arbitration Act where by in default of agreement by parties, the High Court has powers to appoint an arbitrator.

It has been identified that community land disputes are peculiar in nature and requires a person with a deep understanding of the affairs of the community to effectively deal with the underlying issues in such a dispute. Where an arbitrator is appointed by the High Court, this purpose may be defeated. Further, community land disputes would not normally occur in urban areas where most of the arbitrators in Kenya are located. These disputes are likely to arise in rural areas where pastoralist or agriculturist communities are located. Appointing someone with little or no background knowledge on such disputes may not effectively resolve them. The law on ADR in Kenya contemplates some formal process in appointing these experts, which may not necessarily be synonymous with possession of actual expertise.[24] It

[21] Steven C Bennett, *'Hard Tools for Controlling Discovery Burdens in Arbitration'* The International Journal of Arbitration, Mediation and Dispute Management, Vol. 84, No. 4 (2018), p 295
[22] Community Land Act, No. 27 of 2016, S 41 (2)
[23] Ibid
[24] See *Draft Alternative Dispute Resolution Policy 2019 (Zero draft)*. Draft developed through the joint efforts of the Judiciary, the IDLO, USAID, and the Nairobi Center for International Arbitration (NCIA). Available at https://www.ncia.or.ke/wp-content/uploads/2019/08/ZERO-DRAFT-NATIONAL-ADR-POLICY_P.pdf; See also Draft Alternative Dispute Resolution Bill, 2019, Senate Bills No. 19 (Government printer, Nairobi, 2019). Available at

has also been argued that the impact of arbitration is yet to be felt especially among the local population, since it has been presented as an exotic idea oblivious to the prevailing circumstances of the local populace.[25]

It has been pointed out that the spirit of conflict management among indigenous Kenyan communities emphasizes harmony/togetherness over individual interests for the common good of the community.[26] This is more so important when it comes to disputes relating to community land where there in need to effectively resolve such disputes in order to keep the community together. The Arbitration Act requires an arbitral tribunal to make an award after the proceedings.[27] An arbitral award is a determination by the arbitral tribunal on the merits of the arbitration.[28] It is synonymous to a judgment in a court of law and is binding and enforceable in the same manner unless challenged in court.[29] The award may be monetary or non-monetary in nature.

In community land disputes, the arbitral award may be a recipe for chaos. The aim of dispute resolution within the context of a community is not to punish an action since this would be viewed as harming the group a twice. It is geared towards re-establishing harmony and reintegrating the deviant members with the ultimate goal of restoring good relations.[30] In the context of community land, where an arbitral award has been made, this goal may not be achieved. The party being dissatisfied with the decision may end up challenging the award in court in accordance with the provisions of the Arbitration Act.[31] This will ultimately strain the relationship between the parties and result in delays contrary to the principles underpinning dispute resolution among indigenous Kenyan communities where there is need to expeditiously resolve disputes and maintain relationships between parties in order to enhance peace and harmony in the community. Further, in case of a dispute between an individual member and the community over the use of community land, where the award is made in favour of the individual, the community may feel aggrieved. Such an individual will end

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http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2019/AlternativeDisputeResolutionBill_2019.pdf.

[25] Gakeri J. K., 'Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR,' *International Journal of Humanities and Social Science*, Vol. 1 No. 6; June 2011.

[26] Supra note 1.

[27] Arbitration Act, No. 4 of 1995, S 32.

[28] Muigua*, K., 'Settling Disputes Through Arbitration in Kenya'* Glenwood Publishers Limited (2017), 3rd edition, p 146.

[29] Ibid.

[30] Wanende, E.O., 'Assessing the Role of Traditional Justice Systems in Resolution of Environmental Conflicts in Kenya,' thesis, University of Nairobi, Centre for Advanced Studies in Environmental Law and Policy.

[31] Arbitration Act, No. 4 of 1995, S 35.

up being treated with contempt and suspicion and it may end up being difficult to integrate with the rest of the community. This is irrespective of whether the individual has a valid claim against the community.

Thus, where arbitration is used to resolve community land disputes, it is hard to draw a line between individual interests and communal interests since arbitration is a formal process based on established legal principles and the arbitrator is required to issue an award based on law. As discussed, traditional justice systems give preference to communal interests over individual interests and it is possible to suppress individual rights and interest for the good of the entire community.[32]

Another drawback with the use of arbitration in resolving community land disputes is that arbitration does not settle the underlying issues in a dispute posing the risk of a dispute re-emerging in future. In the case of community land disputes where there is need to preserve peace and co-existence among members of the community, this may affect the fabric of the community. Land holds an important position among indigenous Kenyan communities and is much more than just physical soil.[33] As pointed out by the *Njonjo Commission Report*, 'For indigenous Kenyans, land also has an important spiritual value. For land is not merely a factor of production; it is; first and foremost, the medium which defines and binds together social and spiritual relations within and across generations. Land ownership and control therefore touch on the structure of social and cultural relations as well as access to material livelihoods.' [34] Due to the nature of land among indigenous Kenyan communities, disputes related to land necessitates the use of an approach that would resolve rather than settle them.

Settlement is a power-based approach which focuses on interests of parties to a dispute.[35] It fails to address needs that are inherent in all human beings, parties' relationships, emotions, perceptions and attitudes in dealing with a dispute. Resolution on the other hand entails an outcome based on mutual problem-sharing whereby parties to a conflict engage with each

[32] Supra note 14.
[33] Ojienda T, *Principles of Conveyancing in Kenya: A Practical Approach*, May 2007.
[34] Republic of Kenya, *Report of the Commission of Inquiry into Land Law System of Kenya on Principles of a National Land Policy Framework Constitutional Position of Land and New Institutional Framework for Land Administration*, Government Printer, Nairobi, November 2002; See also Ojienda, T. "Principles of conveyancing in Kenya, A practical approach." (2008).
[35]Muigua, K., 'ADR: The Road to Justice in Kenya' available at http://kmco.co.ke/wp-content/uploads/2018/08/PAPER-ON-ADR-THE-ROAD-TO-JUSTICE-IN-KENYA-CIArb-Conference-Presentation.pdf accessed on 17/09/2019.

other in order to redefine their conflict and their relationship [36] This results in outcomes that are non-coercive, enduring and which address the root cause of conflicts.[37] Thus, community land disputes are better managed through resolution rather than settlement in order to guarantee long lasting and mutually acceptable solutions. Since arbitration is a form of dispute settlement, it may not guarantee the desired outcomes.

4.0 Conclusion

The paper has explored the viability of using arbitration in managing community land disputes. It has discussed the constitutional underpinnings of ADR mechanisms including arbitration and the subsequent adoption of the use of ADR in managing disputes related to community land under the Community Land Act. The paper has also brought out the unique nature of community land disputes based on the structure and composition of indigenous Kenyan communities. The aspect of communalism over individualism has been discussed where the common good of the community is valued over individual interests. The shortcomings of arbitration as a form of settlement have been brought out and the paper argues that arbitration might not resolve underlying issues in a dispute creating uncertainty and the likelihood of the dispute reoccurring in future. In the context of community land, there is need to effectively deal with any dispute to ensure harmony and cohesion within the community. Where this has not been achieved, the social structure of the community may be in jeopardy. There is thus need for a customized approach to ensure effective management of disputes relating to community land.

5.0 Recommendations

5.1 Public Awareness on Community Land Rights

Though not a novel concept in the country, most Kenyans may not be familiar with the idea of community land ownership. Land holding is primarily understood to be either private or public. The ideal starting point would be to create public awareness on matters related to community land such as ownership, utilization and administration. This should majorly focus in areas where community land ownership is practices especially among the pastoralists communities in Kenya. Once the populace has appreciated the issues related to community land, disputes will be mitigated since each person will appreciate his/her rights and interests in relation to those of other members of the community.

[36] Ibid
[37] Ibid

5.2 Efficiency in the Process of Recognition, Registration, Management and Utilisation of Community Land

This is another process that can help in reducing conflicts related to community land. The Community Land Act provides for the process of recognition, adjudication and registration of community land. The Community Land Registrar appointed under section 9 of the Act and the Adjudication Officers appointed under section 11 of the Act should ensure efficiency in the process of adjudication and registration of community land. Further, the Community Land Management Committees appointed under section 15 of the Act should ensure efficient management and utilization of community land for sustainable development and common good of the entire community.

5.3 Streamlining the Dispute Management Mechanisms under the Community Land Act

Part 8, of the Community Land Act enshrines various dispute resolution mechanisms including internal dispute resolution, mediation, arbitration and judicial proceedings. However, as discussed, community land disputes are sui generis in nature and there are underlying issues that needs to be addressed in such disputes to ensure that unity and cohesion is maintained within the community. Some of these mechanisms such as judicial proceedings and arbitration may not achieve this ultimate goal due to the endless litigation that may ensue. It has also been identified that indigenous Kenyan communities had their own dispute resolution mechanisms premised on negotiation and mediation through institutions such as the Council of Elders. The advantages of such mechanisms have been highlighted which include long lasting and mutually acceptable decisions. Management of Community Land disputes should thus be geared more on such internal dispute resolution mechanisms.

However, there is need to streamline these mechanisms in line with the provisions of the Constitution and formulation of an institution and regulatory framework to govern these mechanisms.[38] This would ensure certainty in the application of these mechanisms and ensure that they abide by the constitutional provisions of equality and non-discrimination since these mechanisms may discriminate against women due to the patrilineal nature of most indigenous Kenyan communities.

[38] Muigua, K., *'Institutionalising Traditional Dispute Resolution Mechanisms and Other Community Justice Systems'* available at http://kmco.co.ke/wp-content/uploads/2018/08/Institutionalising-Traditional-Dispute-Resolution-Mechanisms-and-other-Community-Justice-Systems-25th-April-2017.pdf accessed on 17/09/2019.

5.4 Use of Med-Arb to Manage Community Land Disputes

Med-Arb is a hybrid form of dispute resolution mechanism that combines the use of both mediation and arbitration.[39] Parties to a dispute first subject their dispute to mediation and then resort to arbitration in case the mediation fails. Med-Arb recognizes the weaknesses of these two processes and seeks to give parties to a dispute an opportunity to benefit from both mediation and arbitration. With the aid of relevant experts in the field of mediation and arbitration, this form of dispute resolution can be embraced as a form of ADR in Kenya. In the context of community land disputes, this form can be adopted with focus being given on the mediation to resolve such dispute and arbitration being used only as a last resort. Med-Arb can be effective in managing community land disputes by removing the barriers posed by both mediation and arbitration by providing finality to a dispute whilst preserving the relationship among the disputants.

6.0 Conclusion

While the Constitution of Kenya and the Community Land Act has commendably expanded the use of ADR mechanisms in addressing land conflicts, this paper has clearly demonstrated that not all ADR mechanisms can effectively be applied to all disputes. The discourse particularly challenges the use of arbitration in addressing community land disputes due to the unique nature of these disputes and the intrinsic characteristics of arbitration which make it difficult to apply to these types of conflicts or disputes.

The paper has not however fully condemned arbitration; it has made some recommendations that, if considered, would make arbitration applicable to some aspects of these kinds of disputes.

[39] Pappas, B., 'Med-Arb and the Legalization of Alternative Dispute Resolution,' *Harvard Negotiation Law Review*, Vol 20 (2015) pp 159-200.

Embracing Online Dispute Resolution in Kenya: Feasibility of an Online Dispute Resolution Portal for E-commerce Disputes in Kenya

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Abstract

With the significantly rapid developing ICT sector and the corresponding growth of e-commerce, there is an urgent need for a direct and more efficient dispute resolution mechanism for online trade disputes in Kenya. Proliferation of online commerce comes with the inevitable increase of disputes in the area. It has become difficult to ignore the changes brought about by online commerce to the world of dispute resolution. This paper therefore seeks to evaluate the feasibility of the establishment of an online portal purposed for the efficient resolution of online trade disputes in Kenya. It will outline the legal framework necessary to serve as a foundation for the ODR-portal. The paper will also highlight the structure of European Union's ODR model currently in place as a point of reference. The aforementioned information will be analysed with the general intention of assessing what possible direction Kenya needs to take to embrace Online Dispute Resolution as an amicable dispute resolution mechanism for e-commerce disputes and in the same spirit contribute to the enhancement of access to justice in Kenya.

1.0 Introduction

The e-commerce scene in Kenya has grown alongside the general global growth in the area.[1] Many Kenyans have better access to the internet thanks to the proliferation of technology, such as smartphones and other portable devices such as laptops and tablets, and as a result is often dubbed as the 'Silicon Savannah' of East Africa.[2] Consequently, Kenyans are able to transact on e-commerce platforms available in their region.

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[1] International Chamber of Commerce (ICC) on Digital trends, available at: https://iccwbo.org/global-issues-trends/trade-investment/digital-trade/ -accessed on 13 January 2018.

[2] Price Waterhouse Coopers (PWC) Report, Disrupting Africa: Riding the Wave of the Digital Revolution available at: https://www.pwc.com/g x/en/issues/high-growth-markets/assets/disrupting-africa-riding-the-wave-of-the-digital-revolution.pdf -accessed on 13 January 2018.

There are various models of e-commerce. The common ones include Business-to-Consumer (B2C) where transactions are between individual customers and businesses that usually involve the transfer of the final good or service to the consumer and Business-to-Business (B2B) where two businesses transact online e.g. between a wholesaler and a retailer.[3] Others include Consumer-to-Business (C2B) where consumer's sell their commodities to businesses[4] and Consumer-to-Consumer (C2C) there transactions are made between consumers aided by a platform which allows them to interact e.g. eBay.[5]

One of the main advantages of e-commerce is the fact that is saves time and costs that would otherwise arise from performing the transaction through brick and mortar means. However, where a dispute arises, parties still eventually resort to physical interaction so as to facilitate the resolution of the dispute. This diminishes the aforementioned advantage of having to transact without physical interaction ergo, creating an avenue for dispute resolution within the online sphere would greatly reduce the exertion and expenses associated with conventional (offline) means.

2.0 The Concept of Online Dispute Resolution (ODR)

ODR refers to Online Dispute Resolution. There is no universal definition of ODR. It is however considered by some as the online extension of ADR mechanisms.[6] Others are of the view that forms of ADR significantly incorporate Information and Communication Technology in their execution, result in ODR[7]. Additionally, ODR has also been conceived as the transposition of the traditional ADR mechanisms online without substantive differences from their traditional counterparts except being more convenient and effective.[8]

United Nations Commission on International Trade Law (UNCITRAL) established a working group on Cross-Border ODR in 2010. The group assigned was 'Working Group III'. It is tasked with the development of rules that will govern cross-border ODR for disputes arising

[3] Kumar, V., & Raheja, E. G, 'Business to Business (b2b) and Business to Consumer (b2c) Management', *International Journal of Computers & Technology*, *3*(3b), (2012), 447-451.

[4] Chen, D. N., Jeng, B., Lee, W. P., & Chuang, C. H. (2008). An agent-based model for consumer-to-business electronic commerce. *Expert Systems with Applications*, *34*(1), 469-481

[5] Dan, C., 'Consumer-To-Consumer (C2C) Electronic Commerce: The Recent Picture', *International Journal of Networks and Communications*, *4*(2), (2014) 29-32.

[6] Kallel S, 'Online Arbitration', *25 Journal of International Arbitration* (2008), 345.

[7] Mercedes M A and Gonzalez N M, 'Feasibility Analysis of Online Dispute Resolution in Developing Countries', *44:1 Inter-American Law Review* 2012, 44.

[8] Zheng S T, *Electronic Consumer Contracts in the Conflict of Laws*, Hart: Oxford and Portland, Oregon, 2009, 152.

out of e-commerce transactions.[9] The group, on the 16th of December 2016, came up with the Technical Notes on Online Dispute Resolution which define ODR as a "mechanism for resolving disputes through the use of electronic communications and other information and communication technology".[10]

From the above, it is clear that the underlying common feature of ODR is that it is a mechanism for resolving disputes that incorporates various aspects of information and communication technology to facilitate the resolution of the dispute.

3.0 Kenyan Legal Framework

3.1 Constitution of Kenya (2010)

The Constitution of Kenya recognises Alternative Dispute Resolution as an avenue to justice in Kenya. It states that, *'in the exercise of judicial authority, courts and tribunals shall be guided by alternative forms of dispute resolution including mediation arbitration and traditional dispute resolution mechanisms*.'[11] It further bestows responsibility of the state to ensure access to justice for all persons at a reasonable fee that shall not impede them.[12]

In addition to the above express provisions on access to justice the Constitution also obligates the court not to impede justice on the account of procedural technicalities. It urges the court to minimise on formalities related to proceedings so as to give room for proceedings on the basis of informal documentation. It also states that no fees should be charged for the commencement of proceedings.[13]

The constitution also recognises every citizen's right of access to information held by the state. This right facilitates access to justice by providing the citizen with adequate knowledge of their respective rights. This makes it possible for them to seek redress from the court or any other ADR mechanism.[14]

[9] NCTDR, available at< http://odr.info/uncitral-cross-border-odr/ >accessed on 13 January 2018.
[10] Paragraph 24, *Technical Notes on Online Dispute Resolution of the United Nations Commission on International Trade Law (UNCITRAL)* 2016.
[11] Article 159, *Constitution of Kenya* (2010).
[12] Article 48, *Constitution of Kenya* (2010).
[13] Article 22, *Constitution of Kenya* (2010).
[14] Article 35, *Constitution of Kenya* (2010).

Access to justice in the Constitution is also advocated through upholding one's right to administrative action that is efficient, expeditious, lawful, reasonable and procedurally fair.[15] Another right critical to the enhancement of one's access to justice that is upheld by the constitution is the right to a fair and public hearing.[16] Only by exercising fairness during the hearing process can the proper procedural execution of the available mechanisms result in justice to the one who seeks it.

It is clear from the above provisions that the Constitution promotes access to justice through ADR. From the language applied in Article 159, the Constitution does not limit alternative means to those expressly provided.[17] This means that the Constitution is able to accommodate other methods of dispute resolution not been expressly provided for as long as they fall in line with the general principle of the promotion of access to justice.

It can therefore be derived that ODR as a form of dispute resolution will be in conformity with the primary legislation relating to ADR mechanisms in the country. It incorporates the use of technology to enhance access to justice in Kenya as well as serve as an alternative to litigation and adjudication through the courts.

3.2 Consumer Protection Act

In online and related disputes, the Consumer Protection Act states that a supplier in an internet agreement must disclose all prescribed information to the consumer.[18] It also provides an opportunity for the consumer to accept or decline the agreement or correct any errors in it.[19] In addition, the supplier must deliver a copy of the agreement in writing within the prescribed period after the consumer enters the agreement.[20] Since most of the relevant contractual information mentioned above is communicated online, the practicality of ODR is enhanced.

Parties may agree to resolve the dispute using any procedure available in law.[21] The effect of this provision is the fact that parties to a consumer agreement can chose to adopt ADR

[15] Article 47, *Constitution of Kenya* (2010).
[16] Article 50, *Constitution of Kenya* (2010).
[17] Chief Bayo Ojo, 'Achieving Access to Justice Through Alternative Dispute Resolution' *Chartered Institute of Arbitrators (Kenya) Journal*, 1 2013 1.
[18] Section 31 (1), *Consumer Protection Act* (No. 46 of 2012).
[19] Section 31 (2), *Consumer Protection Act* (No. 46 of 2012).
[20] Section 32, *Consumer Protection Act* (No. 46 of 2012).
[21] Section 88, *Consumer Protection Act* (No. 46 of 2012).

mechanisms to resolve their disputes. Although ODR is not expressly recognised under any Kenyan law, it can be incorporated once a recognised procedure for the process is enacted.

The Act aims to promote the social and economic welfare of Kenyan consumers by providing a consistent, accessible and efficient system of resolution of disputes arising from consumer transactions.[22] ODR for e-commerce disputes will therefore acts as an actualisation of this aim as it intends to ease the dispute resolution procedures within e-commerce.

4.0 Feasibility of E-commerce ODR in Kenya *vis-a-vis* the European Union Model

4.1 European Union ODR Model in England

England has benefitted from significant strides in the European Union (EU) regarding the development of ODR. The EU established an online dispute resolution platform for online disputes.[23] This applies to member states through the Online Dispute Resolution for Consumer Disputes and Amending Regulations (Regulation on consumer ODR).[24]

These regulations apply to all out-of-court dispute resolution processes concerning contractual obligations stemming from online sales or service contracts between consumers and traders.[25] It dictates that the platform ought to provide an electronic complaint form which can be filled in by the complainant.[26] More importantly, the platform offers an electronic case management tool free of charge, which enables the parties to conduct the dispute resolution procedure online through the ODR platform.[27]

For this system to work, member states are obliged to establish 'ODR contact points'. These will provide a local platform to lodge claims in respective state.[28]

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[22] Section 3 (4) (g), *Consumer Protection Act* (No. 46 of 2012).

[23]EU ODR Platform, available at< https://webgate.ec.europa.eu/odr/main/index.cfm?event=main.home.show&lng=EN >accessed on 22 December 2017.

[24] *Regulation on Consumer ODR*, Regulation (EC) No 2006/2004 and Directive 2009/22/EC.

[25] Article 2, *Regulation on Consumer ODR*, Regulation (EC) No 2006/2004 and Directive 2009/22/EC.

[26] Article 5 (4) (a), *Regulation on Consumer ODR*, Regulation (EC) No 2006/2004 and Directive 2009/22/EC.

[27] Article 5 (4) (d), *Regulation on Consumer ODR,* Regulation (EC) No 2006/2004 and Directive 2009/22/EC.

[28] Article 7, *Regulation on Consumer ODR,* Regulation (EC) No 2006/2004 and Directive 2009/22/EC.

The Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations bring the regulation into force in England. It mandates online traders within England to provide a link to the EU online platform on their website which is easily accessible to the consumers.[29] In England, online platforms such as the 'ODR Contact Point' have been set up to educate the public on what they need to know before they engage in online dispute resolution and to link them to the EU site.[30]

When a dispute arises, the consumer will need to fill in an online complaint form and submit it to the ODR Platform. This includes details about the trader, the consumer, the purchase item and the complaint itself. Relevant support documents such as the invoice should be uploaded as well.[31] The complaint will be sent from the ODR Platform to the respective trader, who will propose a dispute resolution body to the consumer. The trader and the consumer have 30 days to agree on the dispute resolution body that will deal with the dispute.[32]

Where the disputants cannot agree on a dispute resolution body to handle the dispute within 30 days, the ODR Platform will not be able to proceed with the complaint any further.[33]
If they both agree on a dispute resolution body to handle their dispute, the ODR Platform will automatically transfer the complaint to that entity. Once the transfer has occurred, the dispute resolution body will have three weeks to determine if it is competent to handle the dispute. If it is competent to do so, it will handle the case and should reach an outcome in 90 days.[34]

4.2 E-commerce ODR in Kenya

This part seeks to identify what would be the most practical approach to be taken in the actualisation of ODR in Kenya. This will involve the level of involvement of the state, private institutions and individuals in the development of the process.

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[29] Regulation 19A, *Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations* 2015.
[30] ODR Information website, available at< https://www.odrcontactpoint.uk/ >accessed on 22 December 2017.
[31] European Union Online Dispute Resolution Procedure, available at: https://webgate.ec.europa.eu/odr/main/index.cfm?event=main.complaints.timeLine&uuid=#step-one - accessed on 22 December 2017.
[32] European Union Online Dispute Resolution Procedure, available at: https://webgate.ec.europa.eu/odr/main/index.cfm?event=main.complaints.timeLine&uuid=#step-one - accessed on 22 December 2017.
[33] Ibid
[34] Ibid

The Judiciary has recently taken steps to embrace ADR in a bid to enhance access to justice as well as reduce the backlog of cases through the enactment of the court-annexed mediation program.[35] In the same light, the Judiciary has also taken other steps to improve the justice system through the Judiciary Transformation Framework (2012-2016).

The Judiciary Transformation Framework pushed for the promotion of ADR mechanisms in the administration of justice.[36] At the core of the framework, the judiciary intended to put in place an elaborate ICT strategic plan that will enable the judiciary to harness technology in the pursuit of justice.[37] Apart from the management applications of ICT that the judiciary intended to apply, the framework fell in line with the promotion of ODR. It proposed a tele-justice system which simply refers to the incorporation of teleconferencing into the justice system.[38]

The framework also proposed the digitalisation of court records. The effect of this could be less reliance on physical copies of documents thus facilitating the shift to an independent online platform for administering justice. It also proposed an SMS inquiry system that is going to be part of an overall complaints management system. The framework proposed the extension of the application of ICT to incorporate training programmes that will disseminate the know-how on dispute resolution to the public. The framework also proposed the implementation of a Local Area Network within the court areas so as to facilitate a communication portal that will serve as a platform for the incorporation of virtual court systems.[39] Despite the timeline for the framework expiring in 2016 the judiciary maintained the above agenda and is still in the process of implementation as seen in their current strategy document, 'Sustaining Judiciary Transformation: A Service Delivery Agenda' (2017-2021). Chapter 5 of the document on their digital strategy reflects this.[40]

This Judiciary, a central player in the administration of justice, thus is arguably in an ideal position to spearhead the establishment of an ODR portal.

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[35] Kenya Judiciary, FAQ's on Court Annexed Mediation, available at: http://kenyalaw.org/kenyalawblog/wp-content/uploads/2016/04/Court-Annexed-Mediation-at-the-Judiciary-of-Kenya..pdf -accessed on 14 January 2018.
[36] The Judiciary, Republic of Kenya, *Judiciary Transformation Framework 2012-2016*, 2012, 14.
[37] Ibid 21.
[38] Ibid 46.
[39] Ibid 47.
[40] The Judiciary, Republic of Kenya, *Sustaining Judiciary Transformation: A Service Delivery Agenda 2017-2021,* 44.

Additionally, the Communications Authority of Kenya is mandated to regulate communication services in the country.[41] Among its functions, it is also mandated to facilitate the development of e-commerce in Kenya.[42] This makes it another potential key player in the development of ODR for e-commerce. Besides the Judiciary, it can also work with local ADR experts as well as key local ADR institutions such as the recently established Nairobi Centre for International Arbitration (NCIA) [43], the Chartered Institute of Arbitrators (Kenya) (CIArb-K)[44] and/or the Strathmore Dispute Resolution Centre (SDRC)[45], in the development of an ODR platform. It can also provide the licence for the operation of the online platform as well as its general compliance with internet regulations.[46]

The development of ODR procedures is made possible by ODR platforms[47] and ODR providers.[48] On one hand, ODR platforms host ODR services and can be managed by third party providers and the other hand, ODR providers are professionals or institutions that become involved at the request of the parties in conflict.[49] Institutions poised to provide ADR services such as the CIArb-K, NCIA and SDRC as well as individual experts in the area can act as ODR providers once they have taken the necessary steps to embrace ODR. ODR can also greatly benefit government services. The government can set up an alternate ODR platform and actively act as an ODR provider. This can be done through the incorporation of ODR in institutions that provide public services online. Institutions such as the Insurance Regulatory Authority(IRA) through their ERS and Agents portals,[50] the Kenya Revenue Authority(KRA) through their online services such as customs online payment,[51] and the

[41] Section 5, *Information and Communications Act*, (2011).
[42] CAK Website 'What we do', available at: http://ca.go.ke/index.php/what-we-do -accessed on 10 January 2018.
[43] Nairobi Centre for International Arbitration website available at: http://ncia.or.ke/about-ncia/ - accessed on 11 January 2018.
[44] Chartered Institute of Arbitrators (Kenya) website available at: http://www.ciarbkenya.org/ - accessed on 11 January 2018.
[45] Strathmore Dispute Resolution Centre available at: https://www.strathmore.edu/sdrc/ - accessed on 11 January 2018.
[46] Section 10, *Kenya Information and Communications Act* (2009).
[47] These are internet-based locations where interested parties can submit their claims to be resolved online.
[48] These are the organizations that give rise to locations on the internet where disputes can be resolved online
[49] Nicuesa V, 'Resoluci´on electr´onica de conflictos' in Peguera M (ed), *Principios De Derecho De La Sociedad*, Aranzadi, 2010, 409.
[50] IRA Website, available at< http://www.ira.go.ke/ >accessed on 16 January 2018.
[51] KRA Website, available at< http://www.kra.go.ke/index.php/kra-portal >accessed on 16 January 2018.

Postal Corporation of Kenya (PCK) through their soon to come Virtual Post Office services,[52] just to mention a few, are some that would benefit from an ODR portal.

An inevitable debate in the actualisation of ODR for e-commerce in Kenya will be the level of government involvement. It has been argued by some that ODR does not need government interference and that many ODR services should take root on their own.[53] Facilities such as Anywhere Arbitration,[54] Ujuj,[55] and Modria[56] operate online free from government interference. The use of email correspondence e.g. G-Mail and Yahoo Mail may also be free from government regulation However, self-regulation resulted to several disagreements between consumer groups the most prominent of which the internet based businesses were suggesting that a mandatory ODR process should be integrated before going to court thus restricting immediate recourse to the court.[57]

This prompted consumer to demand the retention of direct access to court. Similarly, this is seen in our Consumer Protection Act where any acknowledgement in a consumer agreement that requires a dispute to be submitted to an arbitration is invalid since it prevents the party from filing an action in the High Court.[58]

This was further encouraged by the shortcomings of ODR providers through their lack of transparency, neutrality, appropriate complaint mechanisms and poor recognition of cultural and linguistic differences.[59]

As Kenya begins to embrace ODR, we should take the above situations into account. Government involvement in the process is indeed critical in that it will be able to create favorable standards that ODR providers should abide by. This is the case in the UK through

[52] Postal Corporation Website, available at< https://www.posta.co.ke/virtualoffice/ >accessed on 16 January 2018.
[53] Chornenki G, *The Corporate Counsel Guide to Dispute Resolution*, Canada Law Book Inc., Aurora, 1999, 7-10.
[54] Anywhere Arbitration <available at: http://www.anywherearbitration.com/ >accessed on 12 January 2018.
[55] Ujuj, available at: http<//www.ujuj.org/whatisujuj.html >accessed on 12 January 2018.
[56] Modria, available at< http://modria.com/product/ >accessed on 12 January 2018.
[57] United Nations Conference on Trade and Development, 'E-Commerce and Development Report 2003 (Internet edition prepared by the UNCTAD secretariat): Chapter 7: Online dispute resolution: E-commerce and beyond', available at http<//www.unctad.org >accessed on 8 January 2018.
[58] Section 88, *Consumer Protection Act* (No. 46 of 2012).
[59] Rabinovich-Einy O, 'Balancing the Scales: The Ford-Firestone Case, the Internet, and the Future Dispute Resolution Landscape', *6 Yale J. L. & Tech*, 2003-2004, 12.

their ODR regulations. The state will have to take initiative to come up with new standards that will regulate ODR as an avenue for dispute resolution due to the complexities that arise in dealing with technology and cyberspace.

From the above, it would be adequate to propose a hybrid system of operation where the state, through the Communications Authority of Kenya in collaboration with the Judiciary could propose policy general regulations that would govern online platforms. This would be complemented by current local ADR providers who can also assist to develop policy in the area that can later concretize into regulations that will provide the structure of the process. At the same time, they can provide required professional services through the ODR portal. This way, there will be a combination of both the state's resources and those of the private individuals and bodies to further the establishment and growth of ODR for e-commerce in Kenya.

As is often the case, innovation presents itself with its own challenges and in this case, there are challenges that may hinder the application and operation of ODR for e-commerce disputes in Kenya. For one, the online world in general has been plagued with issues surrounding cybersecurity.[60] The security of information online can be compromised and this may affect ODR by tampering with the confidentiality associated with the dispute resolution procedures applied through the platform.

Despite the proliferation of technology in Kenya, a significant portion of the populace have not benefitted enough from this development in that they cannot afford or access the technology.[61] As a result, they may not have access to the supporting technology required to sustain ODR such as a stable internet connection and/or an input device e.g. computers and smart-devices. This in turn limits those who can partake in the process.

The efficiency associated with ODR comes at the price of greatly diminishing face-to-face interaction. Some benefits associated with personal interaction include real time improvising in the face of unforeseen circumstances and personal verification of the identities of the parties and other participants in the dispute. It is easier to falsify your identity online thus may be a

[60] Singer, P. W., & Friedman, A., '*Cybersecurity: What Everyone Needs to Know*', Oxford University Press. 2014, 11.

[61] National Information & Communications Technology (ICT) Policy (2016) available at < http://icta.go.ke/pdf/National-ICT-Policy-20June2016.pdf > accessed on 25 January 2018.

potential loophole for fraud in the application of ODR. However, this can be mitigated by incorporating audiovisual communication such as video-conference calls.

5.0 Conclusion and the Way Forward

As commerce takes an online direction, dispute resolution procedures ought to adapt to the shifting landscape so as to maintain the speed, efficiency and accessibility brought about by the online world and the technology that supports it.

Online Dispute Resolution is keen on maintaining these qualities by utilising the same online resources to facilitate timely communication of issues and the eventual resolution of disputes.

Kenya has the legal, institutional and individual capacity necessary to bring ODR mechanisms to fruition. Kenya has also embraced e-commerce greatly enough to substantiate the need for an online dispute resolution mechanism.

Thus, the development of an online portal and corresponding dispute resolution procedure will be an invaluable improvement to access to justice in the field of e-commerce.

To charter a way forward, the following are some of the areas where action would be key to the foundation for the actualisation of ODR for e-commerce in Kenya:

a) Need to formulate ODR policy and legislation

The current institutions and individual experts dealing with the promotion of alternative methods of dispute resolution should engage in the development of policy that will be aimed at formulating legislation that will specifically regulate ODR for e-commerce and its practice in Kenya.

b) Establishment of online platforms

The State with assistance from experts in the field of ADR should mobilise to create an online platform for the resolution of disputes online. Guidelines on how the platform will be utilised and governed should be contained in the proposed ODR legislation. Government's involvement in the initiative is essential for the maintenance of standards that are favourable to the general citizenry.

Government institutions such as KRA and the others aforementioned should engage in establishing dispute resolution links to their online platform guided by the proposed ODR legislation to address the specific grievances associated with the services they provide to the public.

c) Defining a clear and practicable ODR procedure

This would entail clearly outlining the steps that a party seeking ODR will use in order to seek recourse. The following series of steps may form the crux of the ODR process.

First, the aggrieved party should make a submission describing the dispute in question. This can be done through email or directly from the proposed ODR platform. The platform may also link its domain to a mobile application which will greatly improve access to the platform.

The second step would involve the classification of the dispute by the ODR providers and allocating the dispute to the most appropriate method. The platform should also give an opportunity for the parties in dispute to select their desired method. e.g. online arbitration, mediation etc.

The third step would outline the details behind the exchange of information regarding the case such as the complaint, the corresponding defences, evidence and even witness statements if any. This could be communicated through the ODR platform.

Where the process necessitates a hearing, all the participants may be brought together virtually through audio-visual means such as a video conference. Alternatively, participants can also be brought together through a teleconference setting. These instances create real-time interaction without physical confrontation.

The final determination will be made by the ODR provider within a predetermined period of time. As ODR develops, future determinations may even be made by a fully autonomous programme specialised for the task or an actual human being with the requisite qualifications. In some instances, the programme may be semi-autonomous relying, to a certain degree, on a human aspect.

However, as a first step, into the field of ODR, actual (human) practitioners should be the only resolvers to begin with as the latter autonomous methods may be utilised once confidence in them is established

The final decision can be communicated to the parties through an electronically-written communication such as an email. Alternatively, the decision can be communicated to the parties in another hearing setting, either audio-visual or just audio which can be later put down in writing.

This example doesn't cover all the aspects of the process but it demonstrates the feasibility of ODR for e-commerce with regard to its applicability here in Kenya.

d) ODR Education

Learning institutions should engage in including ODR an avenue for dispute resolution. In Kenya, this can be incorporated into our local universities' curriculums for courses such as Law, IT and related courses. The consequence of these actions would be the increased

awareness of the existence of ODR as a mechanism to resolve disputes. More so, it would lead to growth of localised expertise thus prompting further development in the area.

e) Updating the existing legal framework

The law ought to adapt to changes in technology where novel aspects emerge and regulation is needed for its smooth application. However, the rate at which technology changes is significantly faster than the rate at which the law can keep up. This creates a discrepancy between the two and this discrepancy drags the adaptation process limiting the optimisation potential of new technologies. Changes in the operation of e-commerce enterprises in Kenya will directly affect the operation of ODR thus, lawmakers should be keen to act upon these changes as soon as they arise.

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