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Editor's Note

Welcome to the latest issue of the *Journal of Conflict Management and Sustainable Development.*

This issue, Volume 6 issue 2, marks the second publication of the Journal in the year 2021 demonstrating our commitment and dedication in promoting scholarly discourse and engagement on the subjects of Conflict Management and Sustainable Development.

Conflict Management and Sustainable Development are concepts that are inextricably linked to each other. Development is not tenable in an environment marred with conflicts. The Journal offers insight on these concepts with the aim of promoting effective and efficient conflict management systems and processes that will trigger Sustainable Development.

Since its inception, the Journal has grown in strength and now commands a wide audience in Kenya and across the globe. It is recognized as one of the most credible and authoritative publications in the fields of Conflict Management and Sustainable Development. The journal is peer reviewed and refereed so as to ensure the highest quality of academic standards and credibility of information.

This volume captures relevant and pertinent topics on conflict management and sustainable development including: *Integrating Community Practices and Cultural Voices into the Sustainable Development Discourse; Towards Effective Management of Community Land Disputes in Kenya for Sustainable Development; The Impacts of Emerging Technologies in the Future of Law and Legal Practice in Kenya; Combating Climate Change in Kenya for Sustainable Development;The Intergovernmental Authority on Development's (IGAD's) Protocol on Transhumance and the need for an IGAD's Common Policy on Disarmament of Pastoralists; Access to Justice in the Era of COVID-19; Criminal Liability of Corporate Entities and Public Officers in Kenya; Dispute Management Mechanisms under the Kenya-United Kingdom Economic Partnership Agreement, 2020 and Lessons from the Collapse of the Roman Empire on Political Transitions.* The volume also contains a book

review for the book by Dr. Kariuki Muigua titled *Achieving Sustainable Development, Peace and Environmental Security,Glenwood Publishers 2021*.

The discussions are expected to spur political, economic, social, technological, environmental and legal reforms aimed at promoting effective conflict management for the attainment of sustainable development.

I wish to thank our hardworking and committed team of reviewers, editors, contributors and everyone who has made publication of this Journal possible. We are receptive to feedback from our readers to enable us improve the Journal.

The editorial team welcomes submissions of papers, commentaries, case reviews and book reviews on the themes of conflict management and sustainable development or other related fields of knowledge for publication in subsequent issues. These submissions should be channeled to editor@journalofcmsd.net and copied to admin@kmco.co.ke

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Managing Editor,
March, 2021.

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Journal of Conflict Management and Sustainable Development

Volume 6 Issue 2

Access to Justice in the Era of COVID-19: Adaptations and Coping Mechanisms of the legal Services Industry in Kenya

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and "An Inventory of Kenya's Compliance with International Rights Obligations: A Case Study of the International Covenant on Civil and Political Rights" the East African Journal of Human Rights and Democracy Vol. 1, Issue No. 1, September 2003 at page 91-104; "Sectoral Legal Aid in Kenya: The Case of the Rift Valley Law Society Juvenile Legal Aid Project", published in various journals including the Advocate, the Lawyer, and the Newcastle Law Bulletin; "Surrogate Motherhood and the Law in Kenya: A Comparative Analysis in a Kenya Perspective"; "Polygamous Marriages and Succession in Kenya: Whither "the other woman?"; "Reflections on the Implementation of Clinical Legal Education in Moi University, Kenya" published in the International Journal of Clinical Education Edition No. 2, June 2002 at page 49-63; "Taking a Bold Step Towards Reform: Justifying Calls for Continuing Legal Education and Professional Indemnity" published in Law society of Kenya Publication (2003); "Terrorism: Justifying Terror in Kenya?" published in The East African Lawyer, Issue No. 5 at pages 18-22; "Land Law and Tenure Reform in Kenya: A Constitutional Framework for Securing Land Rights"; "A Commentary on Understanding the East African Court of Justice" published in the East African Lawyer, Issue No. 6 at pages 52-56; "Where Medicine Meets the Law: The Case of HIV/AIDS Prevention and Control Bill 2003" published in The Advocate at page 36-40; "The Advocates Disciplinary Process-Rethinking the Role of the Law Society" published in The Lawyer, Issue No. 78 at pages 15-16; "Ramifications of a Customs Union for East Africa" published in The East African Lawyer, Issue No. 4 at pages 17-25; "Gender Question: Creating Avenues to Promote Women Rights after the Defeat of the proposed Constitution" published in the Moi University Journal Vol. 1 2006 No.1, pages 82–92; "Of Mare Liberum and the Ever Creeping State Jurisdiction: Taking an Inventory of the Freedom of the Seas" published in the Moi University Journal Vol. 1 2006 No. 1, pages 105 – 131; "Legal and Ethical Issues Surrounding HIV and AIDS: Recommending Viable Policy and Legislative Interventions" published in The East African Lawyer, Issue No. 12 at pages 19-24; "Implementing the New Partnership for Africa's Development (NEPAD): Evaluating the Efficiency of the African Peer Review Mechanism" published in the Kenya Law Review, 2007 Vol. 1, pages 81-119; "Protection and Restitution for Survivors of Sexual and Gender Based Violence: A case for Kenya." (with R. A. Ogwang and R. Aura) 90 Pages, ISSN:1812–1276; "Legal and Institutional Framework of the TJRC - Way Forward" published in the Law Society of Kenya Journal Vol. 6 2010 No. 1, pages 61 – 95; "A Critical Look at the Land Question in the New Constitution" published in Nairobi Law Monthly, Vol. 1, Issue No. 1 of 2010 at pages 76 – 81; and a Book Chapter entitled "Land Law in the New Dispensation" in a book edited by P.LO. Lumumba and Dr. Mbondenyi Maurice.

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Abstract

The Coronavirus Disease 2019 (COVID-19) pandemic has taken a toll on countries and most, if not all, sectors of their economies. From early 2020, countries across the globe, including Kenya, went into battle with this common enemy, the COVID-19 or coronavirus pandemic. The cure for the virus is still fully unknown although use of hand sanitizers, washing of hands using soap and water, regular disinfecting of surfaces, coughing and sneezing etiquette, not touching the face, and social distancing have been recommended as means to break down and stop the spread of the virus from one person to another. As such, the immediate remedy to curb the spread of COVID-19 has been the avoidance of contact with those infected and the surfaces touched by the infected persons. Consequently, as a means to suppress and control the spread of the virus, various countries announced partial or total lockdowns. The COVID-19 directives equally entailed stay-at-home directives and closure of private businesses and public institutions, including those in the legal services industry. The COVID-19 measures and directives have necessitated adaptations and coping mechanisms for businesses and public institutions in Kenya and the world over. This article considers adaptations and coping mechanisms of the legal services industry in Kenya in the face of the COVID-19 directives and measures put in place in the course of the pandemic.

Keywords: *COVID-19 directives; legal services industry; business adaptations; access to justice; Kenya; COVID-19 economic relief packages*.

Introduction

Who knew we would start a new decade battling a virus that threatens all humankind, age, gender, race, class, ethnicity, nationality, religious, political and other human differences notwithstanding! On 11 March 2020, the World Health Organization (WHO) declared the outbreak of the Coronavirus disease 2019 (COVID-19)[1] a global pandemic.[2] WHO stated that the mantra or tools

[1] Hereinafter also referred to as 'coronavirus' or 'the virus'.

[2] World Health Organization (WHO), 'WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020'

for suppressing and controlling the spread of COVID-19 is for countries to 'detect, test, treat, isolate, trace, and mobilize their people in the response' to the COVID-19 pandemic.[3] The measures to suppress and control COVID-19 have aimed to ensure that countries strike a balance between protecting health, minimizing economic and social disruption, and respecting human rights, a fight which has faced drawbacks as countries struggle with the of lack of capacity, lack of resources and the lack of resolve.[4]

At first, the COVID-19 pandemic took a greater toll on particular countries such as China, Iran, the Republic of South Korea, Italy and the United States of America (US), amongst other countries that have been worst hit by the pandemic, but the whole world, including Kenya, went into battle with this common enemy, the COVID-19 pandemic.[5] The symptoms of the virus have included, fever, coughing and sneezing, sore throat, headache, difficulty breathing, and loss of smell and taste, and while some have survived the virus, others have succumbed to it. The cure for the virus is still fully unknown

<https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> accessed 24 March 2020.

[3] *Ibid* (According to WHO 'countries must take a whole-of-government, whole-of-society approach, built around a comprehensive strategy to prevent infections, save lives and minimize impact.' WHO has further summarized COVID-19 response measures in four key areas: 'First, prepare and be ready. Second, detect, protect and treat. Third, reduce transmission. Fourth, innovate and learn.' Therefore, the WHO Director-General in his rallying call to the nations of the world stated that, 'I remind all countries that we are calling on you to activate and scale up your emergency response mechanisms; Communicate with your people about the risks and how they can protect themselves – this is everybody's business; Find, isolate, test and treat every case and trace every contact; Ready your hospitals; Protect and train your health workers. And let's all look out for each other, because we need each other'.

[4]*Ibid*. However, it goes without saying that the COVID-19 pandemic caught countries unawares hence the impact of the aftermath of the pandemic will be unprecedented. No one saw it coming! See e.g., World Economic Forum, 'Insights on handling coronavirus from an earlier report on business and outbreaks' <https://www.weforum.org/reports/outbreak-readiness-and-business-impact> accessed 24 March 2020.

[5]See World Health Organization (WHO), 'Situation report – 63: Coronavirus disease 2019 (COVID-19)' (23 March 2020) <https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200323-sitrep-63-covid-19.pdf?sfvrsn=2176eb7a_2> accessed 24 March 2020.

although use of hand sanitizers, washing of hands using soap and water, regular disinfecting of surfaces, coughing and sneezing etiquette, not touching the face, and social distancing have been recommended as means to breakdown and stop the spread of the COVID-19 from one person to another.[6] As a result, the immediate remedy to curb the spread of COVID-19 has entailed the avoidance of contact with those infected and the surfaces touched by the infected persons. Consequently, as a means to suppress and control the spread of the virus, various countries announced partial or total lockdowns. The COVID-19 directives and measures equally entailed stay-at-home directives and closure of private businesses and public institutions, including those in the legal services industry. Economic sectors and businesses were categorized into essential and non-essential sectors in order to determine which businesses stayed open while the rest remained closed until further notice. Accordingly, it goes without saying that the COVID-19 measures and directives have necessitated adaptations and coping mechanisms for businesses and public institutions in Kenya and the world over.

COVID-19 Directives and Measures Put in Place in Kenya to Curb the Pandemic

In the life cycle of the COVID-19 pandemic, the Government of Kenya put in place a number of directives and measures to suppress and control the spread of COVID-19 among the Kenyan populace. On 28 February 2020, the President issued Executive Directive No. 2 of 2020, the first of the COVID-19 directives put in place by the national government, and made orders directing that:[7]

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[6]See e.g., World Health Organization (WHO), 'Pass the message: Five steps to kicking out coronavirus; WHO, FIFA launch joint campaign to equip football community to tackle COVID-19', (*News Release*, 23 March 2020) <https://www.who.int/news-room/detail/23-03-2020-pass-the-message-five-steps-to-kicking-out-coronavirus> accessed 24 March 2020 (For the five key steps for people to follow to protect themselves from contracting COVID-19; which are 'hand washing, coughing etiquette, not touching your face, physical distance and staying home if feeling unwell.')

[7]See Ministry of Foreign Affairs, 'Executive Order No. 2 of 2020' <http://www.mfa.go.ke/wp-content/uploads/2020/03/executive-order-2-2.pdf> accessed 24 March 2020; Vincent Kejitan, 'Uhuru issues five orders regarding coronavirus' (Standard *media*, 28 February 2020)

i) The national isolation and treatment facility at Mbagathi Hospital be completed and ready to receive patients within seven days from the issuance of the Executive Order;

ii) The identification and preparation of isolation and treatment facilities in Level V and Referral Hospitals across the country be concluded by 15 March 2020;

iii) The National Emergency Response Committee on Coronavirus is hereby established;

iv) The Cabinet's Ad-hoc Committee on Health and the Inter-Ministerial Technical Committee on Government Response to the Coronavirus Outbreak are hereby subsumed into the National Emergency Response Committee and stand dissolved;[8] and

v) The National Emergency Response Committee shall be constituted with the Cabinet Secretary for Health as chairperson, the Director of Public Health as the Secretariat, and the following as Members of the Committee: Cabinet Secretary for Foreign Affairs; Cabinet Secretary for Transport, Infrastructure, Housing, Urban Development and Public Works; Cabinet Secretary for Defence; Cabinet Secretary forICT, Innovation and Youth Affairs; Chairperson Health Committee, Council of Governors; Principal Secretary, Interior and Citizen Services; Chief of Staff, Office of the President; Principal Administrative Secretary, Office of the President; Principal Secretary, Health; Principal Secretary, National Treasury; Principal Secretary, Foreign Affairs; Principal Secretary, Transport; Principal Secretary, Telecommunications and Broadcasting; Director-General, Medical Services; Director-General, Kenya Civil Aviation Authority; Director-General, Kenya

<https://www.standardmedia.co.ke/ureport/article/2001362253/uhuru-issues-five-orders-regarding-coronavirus> accessed 24 March 2020.

[8] Daniel Wesangula, 'President disbands disaster team as fear mounts over Corona' (*Standard Digital*, 29 February 2020)
<https://www.standardmedia.co.ke/health/article/2001362289/uhuru-disbands-disaster-team-as-fear-mounts-over-corona> accessed 26 March 2020.

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It is noteworthy that the legal services industry is not represented in the National Emergency Response Committee as constituted. Hence, the legal services industry has had to adjust itself in response to the COVID-19 directives and measures put in place by the national government, with the Ministry of Health on the lead. The terms of reference of the National Emergency Response Committee on Coronavirus (NERC) entail:[9]

i) Co-ordinate Kenya's preparedness, prevention and response to the threat of Coronavirus Disease;
ii) Co-ordinate capacity building of medical personnel and other professionals so as to enable the Country respond quickly and effectively to any suspected cases or outbreak of the Disease anywhere within the Republic;
iii) Enhance surveillance at all Ports/Points of Entry in Kenya;
iv) Coordinate the preparation of national, County and Private isolation and treatment facilities;
v) Coordinate the supply of testing-kits, critical medical products/supplies, pharmaceuticals, masks and other protective gear within the Republic;
vi) Conduct Economic Impact Assessments and develop mitigation strategies with regard to the Disease;
vii) Co-ordination of both local and international technical, financial and human resource assistance efforts with development partners and key stakeholders;
viii) Formulating, enforcing and reviewing of processes and requirements that regulate the entry into Kenya of any persons or class of persons known or suspected to have travelled from a Coronavirus affected area;
ix) Conduct any other matter ancillary to or in furtherance of any of the foregoing Terms of Reference; and

[9]Executive Order No. 2 of 2020.

x) The committee may co-opt any other persons as may be required to assist it in the discharge of its functions.

On 12 March 2020, NERC presented its initial report to President Uhuru Kenyatta stating that no positive cases of COVID-19 had been reported in the country.[10] NERC proceeded to brief the President on various measures that had been taken to cushion the country against the COVID-19 pandemic. Such measures included: the mandatory screening of all persons entering Kenya through airports, sea ports and land crossings; an isolation and treatment capacity at Mbagathi Hospital which was ready for use; establishment of isolation capacity in level 4 and 5 hospitals across the country in collaboration with County Governments; provision of backup capacity for treatment at Kenyatta University Teaching Research and Referral Hospital, Kenyatta National Hospital and Moi Teaching and Referral Hospital as well as privately owned health facilities; training and sensitization of healthcare workers, service providers in the transport sector including matatu crews, taxis, security personnel, airport and border staff among others; suspension of international conferences, meetings and events scheduled to take place in Kenya for a period of 30 days; suspension of non-essential international travel by Government officials; provision of personal protective equipment to all County health facilities, security and response teams; and enhanced diagnostic capability at the National Influenza Center and KEMRI.[11]

Following the NERC meeting with the President, additional COVID-19 measures were agreed upon. The measures entailed: enforcement of the directive barring Government officials from undertaking non-essential travel out of the country; businesses and private citizens were advised not to engage in non-essential travel especially to high-risk areas; all returning Kenyans and other visitors from high risk areas were directed to self-quarantine for not less than 14 continuous days in line with global practice and as recommended by the WHO; as part of the continuous messaging on safe hygiene, all educational

[10]The Presidency, 'President Kenyatta Receives Initial Report of the National Emergency Response Committee on Coronavirus' (*Latest News*, 12 March 2020) <https://www.president.go.ke/2020/03/12/17428/> accessed 24 March 2020.
[11]*Ibid*.

institutions were directed to ensure that safe hygiene is practiced and enforced daily, especially the washing of hands with soap and water; and direction on the development of specific prevention strategies to take care of low income and vulnerable populations especially in informal settlements by leveraging on existing community structures including chiefs, ward administrators, religious leaders and 'Nyumba Kumi' (means ten houses clusters neighbourhood concept) elders to raise awareness and coordinate responses.[12] The President also directed that the necessary review and adjustment of budgets towards prevention and management response actions and to cushion the economy against the negative effects of the COVID-19 pandemic be undertaken.

However, on 13 March 2020, Kenya announced the first positive COVID-19 test result,[13] and since then, the Kenyan national government, through the Ministry of Health and NERC, has been keeping tabs on the number of positive COVID-19 test results across the country, recoveries, and deaths.[14] On 15 March 2020, two additional positive COVID-19 test results were reported. As a consequence, additional COVID-19 measures were announced through a press statement by President Uhuru Kenyatta. The measures were as follows:[15]

1. The Government is suspending travel for all persons coming into Kenya from any country with reported Coronavirus cases.
2. Only Kenyan Citizens, and any foreigners with valid residence permits will be allowed to come in provided they proceed on self-quarantine or to a government designated quarantine facility.

[12]*Ibid*.
[13]See e.g., Ministry of Foreign Affairs, 'Press Statement by H.E. Uhuru Kenyatta' (*Recent media*, 16 March 2020) <http://www.mfa.go.ke/?p=3115> accessed 24 March 2020.
[14]See e.g., Nasibo Kabale, 'Kenya's Covid-19 cases rise to 31' (*The East African*, 26 March 2020) <https://www.theeastafrican.co.ke/scienceandhealth/Kenyas-Covid-19-cases-rise-to-31/3073694-5505040-ctd7bjz/index.html> accessed on 26 March 2020; Adonijah Ochieng', 'Kenya reports first coronavirus-related death' (Business Daily, 26 March 2020) https://www.businessdailyafrica.com/news/Kenya-reports-the-first-coronavirus-related-death/539546-5505372-nexpy2z/index.html> accessed 26 March 2020.
[15]See *Ministry of Foreign Affairs* (n 15).

This will take effect within the next 48 hours to cater for any passengers who may be enroute. This directive will remain in effect for the next 30 days or as varied by the National Emergency Response Committee.

3. All persons who have come into Kenya in the last 14 days must self-quarantine. If any person exhibits symptoms such as cough, or fever, they should present themselves to the nearest health facility for testing;
4. We have suspended learning in all our education institutions with immediate effect. Consequently, and to facilitate a phased approach, primary and secondary day schools are to suspend operations from tomorrow.
5. For those in boarding schools, the school administration is to ensure that students are home by Wednesday, 18th March 2020 while Universities and Tertiary Institutions are to close by Friday, 20th March 2020;
6. Where possible, government offices, businesses and companies are encouraged to allow employees to work from home, with the exception of employees working in critical or essential services.
7. In order to avoid the risk of transmission through physical handling of money, we encourage the use of cashless transactions such as mobile money and credit cards. We appeal to mobile operators and banks to take into consideration the situation, and reduce the cost of transactions during this period.
8. In line with the directive to avoid crowded places, citizens are encouraged to:
    a. Avoid congregating including in places of worship;
    b. Minimize attendance to social gatherings including weddings and funerals, and restrict the same to immediate family members;
    c. Avoid crowded places including shopping malls and entertainment premises;
    d. Minimize congestion in public transport wherever possible;

e. Limitation of visitors to hospitalised patients in both public and private hospitals.

9. Hospitals and shopping malls are encouraged to provide soap, water and hand sanitizers and ensure that all their premises are regularly cleaned and disinfected.

NERC, under the leadership of the Ministry of Health, has been issuing updates and additional directives aimed at suppressing and controlling the spread of COVID-19 in Kenya as the number of positive tests of COVID-19 have continued to increase.[16] The directives issued on 22 March 2020 by NERC, through the Cabinet Secretary for Health, Honourable Mutahi Kagwe, in a bid to curb the spread of coronavirus in the country were as follows:[17]

1. All international flights are suspended effective Wednesday March 25th, 2020 at midnight with the exception of cargo flights whose crew must observe strict guidelines. Those coming into the country between now and Wednesday will undergo mandatory quarantine at a government designated facility at their own expense.
   Countries wishing to evacuate their nationals must make their arrangements to do so within this period. Kenyans who are currently in foreign countries, and will not have come back within the period are advised to observe the guidelines issued in the respective countries wherever they are.
2. Whereas we had allowed Kenyans and foreigners with valid residence permits to come in to the country, we have observed that there are those who are not observing the self-quarantine protocol. Consequently, NERC has decided that all persons who violate the self-quarantine requirement will be forcefully quarantined for a

[16]See e.g., Ministry of Health, Press Releases on COVID-19, <http://www.health.go.ke/press-releases/> accessed 26 March 2020.

[17]Ministry of Foreign Affairs, 'National Emergency Response Committee Press Statement on the Update of Coronavirus in the Country and Response Measures as at 22nd March 2020' (*Recent media*, 22 March 2020) <http://www.mfa.go.ke/?p=3260> accessed 24 March 2020.

full period of 14 days at their cost, and thereafter arrested and charged under the Public Health Act.

3. Effective midnight tonight, all BARS will remain closed until further notice. Restaurants are to remain open but only for purposes of facilitating take away services. This is meant to secure the social distance requirement, noting the increased risk of transmission these facilities cause.
4. Further in order to give effect to the social distance requirement in the public transport sector all public service vehicles must adhere to the directive issued on Friday March 20th, 2020 failure to which the respective Sacco licenses will berevoked. The Inspector General of Police has been already directed to enforce this directive.
5. Lastly, having noted the non-compliance of religious institutions to the social distance requirement as issued on Friday March 20th, 2020, the NERC has directed the suspension of all church, mosques, and other religious gatherings. This also include weddings, funerals and other social gatherings which are restricted to immediate family members only. These directives take effect immediately until further notice.

On 25 March 2020, President Uhuru Kenyatta made a *Presidential Address on the State Interventions to Cushion Kenyans against Economic Effects of Covid-19 Pandemic* and ordered and directed that:[18]

1 That the National Treasury implements the following immediate reliefs and increase disposable income to the people of Kenya, through:

I. 100 % Tax Relief for persons earning gross monthly income of up to Ksh. 24,000.

[18] The Presidency, 'Presidential Address on the State Interventions to Cushion Kenyans Against Economic Effects of Covid-19 Pandemic on 25th March, 2020' <https://www.president.go.ke/2020/03/25/presidential-address-on-the-state-interventions-to-cushion-kenyans-against-economic-effects-of-covid-19-pandemic-on-25th-march-2020/> accessed 26 March 2020.

II. Reduction of Income Tax Rate (Pay-As-You-Earn) from 30% to 25%.
III. Reduction of Resident Income Tax (Corporation Tax) from 30% to 25%;
IV. Reduction of the turnover tax rate from the current 3% to 1% for all Micro, Small and Medium Enterprises (MSMEs);
V. Appropriation of an additional Ksh. 10 Billion to the elderly, orphans and other vulnerable members of our society through cash-transfers by the Ministry of Labour and Social Protection, to cushion them from the adverse economic effects of the COVID-19 pandemic;
VI. Temporary suspension of the listing with Credit Reference Bureaus (CRB) of any person, Micro, Small and Medium Enterprises (MSMES) and corporate entities whose loan account fall overdue or is in arrears, effective 1st April, 2020.

1. The National Treasury shall cause immediate reduction of the VAT from 16% to 14%, effective 1st April, 2020;
2. That all Ministries and Departments shall cause the payment of at least of Ksh. 13 Billion of the verified pending bills, within three weeks from the date hereof. Similarly, and to improve liquidity in the economy and ensure businesses remain afloat by enhancing their cash flows, the private sector is also encouraged to clear all outstanding payments among themselves; within three weeks from the date hereof.
3. That the Kenya Revenue Authority shall expedite the payment of all verified VAT refund claims amounting to Ksh. 10 Billion within 3 weeks; or in the alternative, allow for offsetting of Withholding VAT, in order to improve cash flows for businesses.
4. That Ksh. 1.0 billion from the Universal Health Coverage kitty, be immediately appropriated strictly towards the recruitment of additional health workers to support in the management of the spread of COVID-19.

5.1 In that regard, I further direct the Ministry of Health, the County Governments and the Public Service Commission to expedite the recruitment process.

5. In sharing the burden occasioned by the present global health pandemic, over the duration of the global crisis and commencing immediately, my Administration has offered a voluntary reduction in the salaries of the senior ranks of the National Executive, as follows:

6.1 The President & Deputy President – 80%;

6.2 Cabinet Secretaries – 30%;

6.3 Chief Administrative Secretaries – 30%;

6.4 Principal Secretaries – 20%

6. I call on the other arms of Government and tiers of Government to join us in this national endeavour, by making similar voluntary reductions; which will free-up monies to combat this pandemic.

7. Further to the guidelines issued encouraging State Agencies to establish and implement frameworks for staff to work from home;

8.1 I hereby order and direct that all State and Public Officers with pre-existing medical conditions and/or aged 58 years and above, serving in Job Group S and below or their equivalents, take leave or forthwith work from home, excluding personnel in the security sector and other essential services as outlined in the circular issued to the Public Service on 16th March, 2020. (…)

8. The Central Bank of Kenya has additionally rolled out the following Measures:

9.1 The lowering of the Central Bank Rate (CBR) to 7.25% from 8.25% which will prompt commercial banks to lower the interest rates to their borrowers, availing the much needed and affordable credit to MSMEs across the country.

9.2 The lowering of the Cash Reserve Ratio (CRR) to 4.25 percent from 5.25 percent will provide additional liquidity of Ksh. 35 Billion to commercial banks to directly support borrowers that

are distressed as a result of the economic effects of the COVID-19 pandemic.

9.3 The Central Bank of Kenya shall provide flexibility to banks with regard to requirements for loan classification and provisioning for loans that were performing as at March 2,2020 and whose repayment period was extended or were restructured due to the pandemic.

9. I have re-organized the ordinary calendar of Cabinet, its committees and key State Agencies so as to apply a whole-of-government approach to the COVID-19 Pandemic, and to foster enhanced responses to the same.

10. We have further introduced close co-ordination and collaboration with the County Governments; in addition to the establishment of sectoral Working Groups to more effectively and expeditiously implement action-points. (…)

11. On behalf of a grateful nation, I extend our heartfelt and eternal gratitude to our Medical Professionals and Health Workers, for their exemplary work that is the backbone of our continuing successes in limiting COVID-19 within our Borders.

12. I also wish to recognize and thank all Kenyans serving in critical and essential service sectors, for their excellent efforts which have ensured the continuity of our supply-chains and the provision of critical and essential services.

13. To honour their hard work and sacrifice, it is incumbent on every Kenyan to support the efforts of our Medical Professionals, Health Workers, Critical and Essential Services Providers, and the Government as a whole by reducing movement and congregating in large groups.

14. To that end, the National Security Council has sanctioned and caused the issuance of a Public Order Number 1 on the Coronavirus Pandemic, with the following key aspects:

15.1 That effective Friday, 27th March, 2020; a Daily Curfew from 7 p.m. to 5 a.m. shall be in effect in the territory of the Republic of Kenya, with all movement by persons not authorized to do so or not being Medical Professionals, Health Workers, Critical and

> Essential Services Providers, being prohibited between those hours (The full list of Critical and Essential Service Providers is annexed to this Statement); and
>
> 15.2 That with immediate effect, the management of the Kenya Ferry Services is vested in the National Police Service, the Coast Guard and the National Government Administration Officers (NGAO). (…)

The list of critical and essential services annexed to the President's statement of 25 March 2020, as far as the 7 p.m. to 5 a.m. curfew is concerned, are: Medical Professionals & Health Workers; National Security, Administration and Co-ordination Officers; Public Health and Sanitation officers in the County Governments; Licensed Pharmacies and Drug Stores; Licensed Broadcasters and Media Houses; Kenya Power & Lightening Company Limited; Food Dealers, Distributors, Wholesalers & Transporters of Farm Produce; Licensed Supermarkets, Mini-Markets and Hypermarkets; Licensed Distributors and Retailers of Petroleum and Oil Products and Lubricants; Licensed Telecommunication Operators and Service Providers; Licensed Banks, Financial Institutions and Payment Financial Services; Fire Brigade and other Emergency Response Services; Licensed security firms. It is notable that legal services were not listed among the critical and essential services. However, the Law Society of Kenya (LSK) petitioned the court and the court made orders to the effect that members of LSK be included in the list of services, workers and personnel exempted from the dusk to dawn curfew order.[19]

Various sectors of Kenya's economy have been hard-hit by the directives and measures taken by the Kenyan national government, and the county governments alike, in response to the COVID-19 pandemic. These include banking and capital markets,[20] health, transport, education, tourism and the

[19] *Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service & 4 others ; Kenya National Commission on Human Rights & 3 others (Interested Parties)* [2020] eKLR, HCCHR, Petition No. 120 of 2020 (COVID 025) <http://kenyalaw.org/caselaw/cases/view/193192/> accessed 15 October 2020.

[20]See e.g., Scot Baret, Anna Celner, Monica O'Reilly and Mark Shilling, 'COVID-19 potential implications for the banking and capital markets sector' (*Deloitte Insights*,

larger hospitality industry. The judiciary and the larger legal services industry have not been spared either.[21]

Actions taken by the Judiciary of Kenya as a result of the COVID-19 Directives and Measures taken by the Kenyan National Government

The Judiciary, an independent arm of government, is not part of and is not represented in the Executive's NERC. However, the Judiciary has issued its own COVID-19 directives in line with the directives and measures taken by the Kenyan national government, the Executive, through NERC. On 15 March 2020, the National Council on the Administration of Justice (NCAJ), through the Chief Justice and President of the Supreme Court, David Maraga, SCJ, issued a *Press Statement on 'Administrative and Contingency Management Plan To Mitigate Covid-19 In Kenya's Justice Sector'*.[22] The measures taken by the Judiciary in order to protect the court officers and staff, litigants, and members of the public from the spreading COVID-19 pandemic were as follows:

1. In compliance with the directive issued by the National Emergency and Response Committee, we shall forthwith scale

16 March 2020) <https://www2.deloitte.com/us/en/insights/economy/covid-19/banking-and-capital-markets-impact-covid-19.html> accessed 24 March 2020.

[21]See e.g., Joseph Wangui, 'Maraga's vision on case backlogs in doubt as virus, budget cuts take toll' (*Daily Nation*, 24 March 2020) <https://www.nation.co.ke/news/Maraga-vision-on-case-backlogs-in-doubt-as-virus-takes-toll/1056-5501678-r8bisqz/index.html> accessed 24 March 2020. ('… the courts shut down operations for one month following the outbreak of the Covid-19 pandemic. At least 20 tribunals under the judiciary have also scaled down operations. The Co-operative Tribunal has suspended fresh filings while the Transport Licensing Appeals Board has postponed cases. This is on top of the budget cuts and the few number of judges and magistrates.')

[22]National Council on the Administration of Justice, 'Press Statement: Administrative and Contingency Management Plan to Mitigate Covid-19 in Kenya's Justice Sector' (15 March 2020) <https://www.judiciary.go.ke/download/press-statement-administrative-and-contingency-management-plan-to-mitigate-covid-19-in-kenyas-justice-sector/> accessed 24 March 2020; Judiciary, 'Press Statement: Administrative and Contingency Management Plan to Mitigate Covid-19 in Kenya's Justice Sector' (*News Release*, 15 March 2020) <https://www.judiciary.go.ke/press-statement-administrative-and-contingency-management-plan-to-mitigate-covid-19-in-kenyas-justice-sector/> accessed 24 March 2020.

down court activities throughout the country over the next two weeks effective tomorrow, March 16, 2020 in order to allow further consultations and design appropriate measures to prevent the spread of the virus.

2. During this time, prisoners and remandees will not be presented to court.
3. With regard to new arrests, all cases except serious ones will be dealt with at the police stations in accordance with guidelines to be issued by the Inspector General of Police.
4. All appeals, hearings and mentions in Criminal and Civil cases in all courts are suspended with immediate effect.
5. All execution proceedings are also suspended during the two weeks.
6. Courts will continue to handle certificates of urgency and taking plea for serious cases.
7. During this time, all judicial officers and staff will continue being on duty. However, there will be no open court appearances.
8. Judges in all stations will in the meantime review the deserving cases already identified by Prisons authorities and issue appropriate revision orders in an effort to decongest the prisons. Magistrate Courts will also review bail terms for those in remand.
9. All conferences, workshops, colloquia and training programmes are suspended until further notice.
10. There will be no foreign travel for the next 30 days for staff of the justice sector institutions, whether official or private, save for exceptional circumstances.
11. An ad-hoc Inter-Agency Committee has been established to liaise with the National committee and advise the NCAJ on further precautionary measures on an ongoing basis.
12. NCAJ will review these directions from time to time as need arises.

As a result, the Judiciary was left with no option but to provide only minimal essential services in the various court stations across the country in order to ensure access to justice as much as was possible in the prevailing circumstances, especially as concerns plea taking in serious criminal cases and other civil matters filed under certificate of urgency.

However, '*Further Directions on Court Operations in Mitigating the Effects of COVID-19'* were issued on the 23 March 2020 through an internal memo from the Chief Registrar of the Judiciary, Anne Amadi directing all judiciary staff to work from home until further advised, in order to protect them from the COVID-19 pandemic.[23] The further directions were informed by the press statement released by the Cabinet Secretary for Health on 22 March 2020 on the seriousness of the COVID-19 pandemic in Kenya. Per these further directions, the only access to the court was through telephone and email inquiries to the two contacts provided for each court station in respect of urgent matters, with the hope that the inquiries from litigants and the public would be responded to promptly and appropriately.

The directions also called on litigants to embrace the *Electronic Case Management Practice Directions, 2020* where practicable.[24] The *Electronic*

[23]See Judiciary, 'Judiciary directs all its staff to work from home' (*News Release*, 24 March 2020) <https://www.judiciary.go.ke/judiciary-directs-all-its-staff-to-work-from-home/> accessed 24 March 2020; Joseph Wangui, 'Coronavirus: Judiciary staff directed to work from home' (*Daily Nation*, 24 March 2020) <https://www.nation.co.ke/news/Judiciary-staff-to-work-from-home/1056-5502168-l94bh0/index.html> accessed 24 March 2020.

[24]See Kenya Law Reports, 'Gazette Notice No. 2357'<http://kenyalaw.org/kl/index.php?id=10211> accessed 16 October 2020. The Electronic Case Management Practice Directions, 2020 were put in place by the Chief Justice acting pursuant to Articles 159 (2) and 161 (2) (a) of the Constitution of Kenya, 2010<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010>, section 10 of the Judicature Act, Cap. 8, Laws of Kenya <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%208>, and section 81 (3) of the Civil Procedure Act, Cap. 21, Laws of Kenya <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2021>, in order to keep the Judiciary running even in the face of the COVID-19

Case Management Practice Directions, 2020 provide guidance on the integration of Information Communication Technology (ICT) in judicial proceedings, especially: electronic filing and electronic service of court documents (e-filing and e-service); electronic case search; electronic court diary; electronic case tracking system; electronic payment and receipting of case filing fees and other court fees; electronic signature and electronic stamping of documents; exchange of electronic documents, including pleadings and statements; and use of technology in case registration and digital recording of proceedings for the expeditious resolution of cases.[25]

The Impact of the COVID-19 Pandemic on the Legal Services Industry in Kenya

The COVID-19 pandemic has impacted on the legal services industry in a number of ways. One, the courts and tribunals are not yet fully in session and the various registries which were closed at some point are not yet fully accessible for in-person services. Filing of new cases, case management, mentions, hearings and judgment delivery are mostly proceeding virtually via electronic media and less through in-person sessions. The *Judiciary E-Filing System* was launched on 16 June 2020 for Nairobi Courts and the filing of cases and documents is now being done through the said platform since 1 July 2020 with the help of the *Electronic Case Management Practice Directions, 2020*.[26]

Two, most of the law firms closed because of the COVID-19 pandemic except for those running on low staff. Three, the various law schools and the Kenya

pandemic. See also, Moses Odhiambo, 'Managing Disruption: CJ Maraga team sets up infrastructure for e-courts' (*The Star*, 23 March 2020) <https://www.the-star.co.ke/news/2020-03-23-cj-maraga-team-sets-up-infrastructure-for-e-courts/> accessed 24 March 2020; and Jemimah Mueni, 'Court Holds Skype Session as Corona Effects Take Toll in Kenya' (*Capital FM News*, 23 March 2020) <https://www.capitalfm.co.ke/news/2020/03/courts-hold-skype-session-as-corona-effects-take-toll-in-kenya/> accessed 24 March 2020.

[25] Electronic Case Management Practice Directions, 2020, directions 5 and 6.
[26] See <https://efiling.court.go.ke/> accessed 15 October 2020.

School of Law closed too following the government directive for the closure of all learning institutions until further notice. Four, currently Continuous Professional Development (CPD) Programs, and other workshops, trainings and conferences run by LSK for its members and those led by other legal stakeholders were either cancelled, postponed or put on hold until further notice; these have now resumed but mostly through virtual means.

In essence, nothing was really happening in the legal services industry during the early stages of the COVID-19 pandemic as legal actors downed their tools to stay at home in order to remain safe and alive. The same could be said of their clients who, like the rest of the Kenyan populace and the world, were staying at home trying to remain alive and safe from COVID-19.

The Legal Services Industry as a Critical and Essential Service during the COVID-19 Pandemic

The almost total shut-down of the Judiciary as a response to the COVID-19 pandemic, hence zero activity within the legal services industry during the earlier stages of the COVID-19 pandemic was however a dangerous move. This is because the legal services industry is still critical and essential even in the face of an epidemic or a pandemic such as the COVID-19 pandemic.

As already highlighted above, per WHO the measures taken by countries to suppress and control COVID-19 must strike a balance between protecting health, minimizing economic and social disruption, and respecting human rights.[27] Since the Judiciary and the larger legal services industry is not represented in NERC, this means that the Judiciary and the courts must remain active to keep tabs on the COVID-19 directives issued by the Executive, in order to ensure that that the WHO balance is adhered to. That aside, there is necessity for the courts to continue to make pronouncements on critical petitions and applications that cannot be avoided despite the occurrence of a pandemic or an epidemic.

[27] *WHO* (n 4).

In that regard, a comparative study of other jurisdictions shows varied responses as various legal jurisdictions gave the COVID-19 pandemic a fight in a bid not to bring the wheels of justice to a complete halt.[28] This comparative study mainly relates to the very early stages of the COVID-19 pandemic. In South Africa, the Office of the Chief Justice issued a media statement on 25 March 2020 regarding the operations of South African Courts during the COVID-19 pandemic, and stated that 'the courts will, as an essential service, remain open for the filing of papers and hearing of urgent applications, bail applications and appeals or matters relating to violations of liberty, domestic violence, maintenance and matters involving children'.[29] However, pursuant to *Section 165 of the Constitution of South Africa* and *Section 8 of the Superior Courts Act*, the Chief Justice delegated the authority to all Heads of Superior and Lower or Magistrate Courts to make customised directives that would enable courts to remain open and operational to a limited extent as they deem fit.

Courts in some other countries are opted to continue working behind closed doors or remotely, by employing the aid of video or telephone conference facilities while restricting such measures to urgent and essential matters only and postponing the not-so-urgent matters. A good example is the United Kingdom (UK) where the Supreme Court Building and Registry were closed on 20 March 2020 because of the COVID-19 pandemic, but the Court proceeded to operate remotely hearing and handing judgments in all cases.[30] On 24 March 2020, the UK Supreme Court heard an appeal remotely

[28]See e.g., Clyde & Co, 'Covid-19 - Impact on courts and arbitration' (26 March 2020) <https://www.clydeco.com/insight/article/covid-19-impact-on-courts-and-arbitration> accessed 26 March 2020); and Hugo Miller, Ellen Milligan and Gaspard Sebag, 'UK Courts Carry on While Virus Halts E.U. Cases, Lawsuits' (*Bloomberg*, 16 March 2020) <https://www.bloomberg.com/news/articles/2020-03-16/virus-closes-european-courts-but-can-t-stop-u-k-tradition> accessed 26 March 2020).

[29]See<https://www.judiciary.org.za/images/news/2020/Media_Statement_-_Courts_to_be_Operational_to_a_Limited_Extent_During_the_Lockdown_Period_From_27_March_to_16_April_2020.pdf> accessed 26 March 2020.

[30]See The Supreme Court, 'Registry Update' (23 March 2020) <https://www.supremecourt.uk/news/registry-update.html> accessed 26 March 2020; and William James and Andy Bruce, 'UK supreme court switches to video conferencing' (*Reuters*, 23 March 2020) <https://www.reuters.com/article/health-

and the delivery of judgment also followed suit. The first judgment of the Court (delivered remotely in the history of the Court through the use of video conferencing) was handed down on the 25 March 2020 in the case of *Elgizouli (AP) v. Secretary of State for the Home Department*.[31]

On the hand, the operations of the other courts and tribunals in the UK was restricted to urgent matters only, which were being heard remotely where possible in order to avoid physical hearings and introducing social distancing measures in courts and tribunals where physical attendance was necessary.[32] *Practice Direction 51Y*, passed pursuant to the UK's *Coronavirus Act, 2020*[33] allows for video or audio hearings in the duration of the coronavirus pandemic, which must be recorded in either format as hearings take place in private, with public hearings being allowed only where live streaming is possible.[34]

Owing to the court directives in other jurisdictions that allowed courts to somehow continue operating, there was pressure on the NCAJ, and the Chief Justice of Kenya to review the Judiciary directives issued in response to the government's directives in relation to the COVID-19 pandemic. Some of the recommendations to keep the Judiciary in Kenya running were as follows:

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coronavirus-britain-courts/uk-supreme-court-switches-to-video-conferencing-idUSS8N28M0IT> accessed 26 March 2020.

[31][2020] UKSC 10 <https://www.supremecourt.uk/watch/uksc-2019-0057/judgment.html> accessed 26 March 2020.

[32]See The Government of the United Kingdom, 'Guidance: HMCTS daily operational summary on courts and tribunals during coronavirus (COVID-19) outbreak' (Updated 26 March 2020) <https://www.gov.uk/guidance/hmcts-daily-operational-summary-on-courts-and-tribunals-during-coronavirus-covid-19-outbreak> accessed 26 March 2020; Court of Session, 'Guidance Note for Practitioners – 25 March 2020: COVID-19'<https://www.scotcourts.gov.uk/docs/default-source/default-document-library/cos-covid-guidance---updated-25-03-2020.pdf> accessed 26 March 2020.

[33]See <http://www.legislation.gov.uk/ukpga/2020/7/pdfs/ukpga_20200007_en.pdf> accessed 26 March 2020 (Sections 53-57 of the Coronavirus Act, 2020 make provision for the use audio and video conferencing technology in courts and tribunals during the coronavirus pandemic.)

[34]See <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part51/practice-direction-51y-video-or-audio-hearings-during-coronavirus-pandemic> accessed 26 March 2020.

i) In respect to petitions and applications requiring the appearance of two advocates, the High Court and the Court of Appeal should hear the litigants in person in chambers;
ii) For petitions and applications that were coming up for hearing, the High Court and the Court of Appeal should give the litigants five minutes to highlight submissions in chambers or open court as applicable;
iii) Alternatively, where litigants consent in writing, the judges of the High Court and the Court of Appeal should be able to proceed to rely on the written submissions of the litigants and expedite the delivery of judgments and rulings in respect of such petitions and applications;
iv) Other than the judges and their assistants, only the litigants and the parties they are representing should be allowed to attend the judges in chambers or in open court as applicable;
v) The matters to be heard on each particular day must be limited to a maximum of five and each matter should be heard at a specified time to avoid congestion in the court as the litigants wait for their matters to be called out; and
vi) Social distancing, coughing and sneezing etiquette and other hygiene requirements to suppress the spread of coronavirus must still be adhered to by the judges, court staff, litigants and the parties being represented.

Subsequently, courts have put in place standard operating procedures during the COVID-19 pandemic to ensure access to justice while protecting the judicial officers, court staff, litigants and the public.[35] Each court and tribunal has customized operations as necessitated by its own needs and the resources available to it.

[35] See e.g., Milimani Law Courts and Milimani Commercial Courts, 'Court Standard Operating Procedures During the COVID-19 Pandemic' <http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Court-Processes-During-The-Upscaling-Of-Court-Service-At-Milimani-Law-Courts.Pdf> accessed 16 October 2020.

Impact on the Legal Services Industry in the aftermath of the COVID-19 Pandemic

After the COVID-19 or coronavirus pandemic has passed, the legal services industry will inevitably suffer a number of impacts even as various sectors of the Kenyan economy fight to salvage themselves from the impacts of the directives and measures put in place by the Kenyan national government to curb the spread of the virus. The directives and measures put in place to curb the spread of coronavirus entailed stay-at-home directives and closure of businesses among others as already highlighted above.

The impacts on the legal services industry in the aftermath of the COVID-19 pandemic are numerous. One, an economic meltdown as both legal practitioners and their clients struggle to stay afloat and in business. Two, job layoffs because of struggling businesses and a nationwide economic struggle. Three, a backlog of cases with hearings and mentions having been put on hold as a result of the stay-at-home directives and complete closure of the courts at the beginning of the pandemic.

Remedies to cushion the Legal Services Industry from the Negative Impacts of the COVID-19 pandemic

The following are some of the measures that the Kenyan national government and the Judiciary may consider in salvaging the legal services industry in the aftermath of the COVID-19 or coronavirus pandemic:

i) The President should confirm the appointments of the forty one superior court judges recommended for appointment by the Judicial Service Commission in order to ease the workload on the current judges of the superior courts of Kenya;[36]
ii) The government, through the Kenya Revenue Authority, should look into further tax waivers and other tax reliefs and incentives to ease the economic burden on businesses, including law firms, especially in the 2019/2020 and the 2020/2021 fiscal years;

[36] See *Adrian Kamotho Njenga v Attorney General; Judicial Service Commission & 2 others (Interested Parties)* [2020] Eklr <http://kenyalaw.org/caselaw/cases/view/189157/> accessed 30 March 2020.

iii) The National Treasury should consider more budgetary allocation to the Judiciary to take care of the backlog of cases created by the stay-at-home directives issued in a bid to suppress and control the spread of COVID-19.

iv) The Judiciary should encourage and fast track the use of alternative dispute resolution mechanisms, especially mediation, in resolving disputes so as to reduce the inevitable pressure that will be put on court processes and resources. On 27 August 2020, the Judiciary launched the *Alternative Justice Systems Baseline Policy* and *Policy Framework*.[37]

On a different note, during the early stages of the COVID-19 pandemic, it was also thought necessary for the legal services industry, being one of the noble professions, to come up with Corporate Social Responsibility (CSR) initiatives in response to the COVID-19 pandemic. This has been done through the Law Society of Kenya and individual law firms and advocates acting alone or in partnerships to contribute to efforts to suppress and control the spread of COVID-19 in Kenya. The CSR initiatives have taken the form of monetary donations to a kitty established by LSK in response to the negative economic impacts of the COVID-19 outbreak on the vulnerable populations both within and outside the legal services industry.[38] Other monetary and non-monetary CSR initiatives and activities have aimed to boost government endeavours to ensure that critical medical and hygiene products or supplies in the fight against the COVID-19 pandemic are available for our counterparts in the health sector, other critical and essential services actors, and the general public, such as hand sanitizers and surgical masks.

[37] See Judiciary, 'Launch of Alternative Justice Systems' <https://www.judiciary.go.ke/launch-of-alternative-justice-systems/> and <https://www.judiciary.go.ke/download/alternative-justice-systems-baseline-policy-and-policy-framework/> accessed 16 October 2020.

[38] See e.g., 'LSK to cushion struggling lawyers against Covid-19 effects' (*Daily Nation*, 13 May 2020) <https://nation.africa/kenya/news/LSK-to-cushion-members-against-Covid-19-effects/1056-5535536-i7flvvz/index.html> accessed 15 October 2020.

Economic Reliefs in the Face of the COVID-19 Pandemic

The COVID-19 pandemic has rampaged the world in varying degrees from country to country. Many have been infected and died in some countries more than others. The economic impact of the COVID-19 pandemic has also varied from country to country depending on each country's collective economic standing. The economic impact of the COVID-19 pandemic has equally varied across the sectors of the economy, whether the sector has proven to be essential or non-essential during the pandemic. It is notable that in coming up with directives and measures to suppress and control the spread of COVID-19 in Kenya, Kenya has looked up to the rest of the world.

In the course of the COVID-19 pandemic, various countries came up with tax reliefs and other economic aid packages to cushion their nationals and businesses from the negative economic effects of the COVID-19 pandemic, as follows:[39]

[39]See Cristina Enache, Elke Asen, Daniel Bunn and Justin Dehart, 'Tracking Economic Relief Plans Around the World during the Coronavirus Outbreak' (*Tax Foundation*, 26 March 2020) <https://taxfoundation.org/coronavirus-country-by-country-responses/> accessed 26 March 2020 (for a breakdown of the fiscal reliefs by various countries in response to the COVID-19 pandemic); and Matt Apuzzo and Monika Pronczuk, 'Covid-19's Economic Pain Is Universal. But Relief? Depends on Where You Live' (*New York Times*, 23 March 2020) <https://www.nytimes.com/2020/03/23/world/europe/coronavirus-economic-relief-wages.html> accessed 26 March 2020; Danske Bank 'The Big Picture: Global fiscal and monetary responses to COVID-19' (*Research*, 20 March 2020) <https://research.danskebank.com/research/#/Research/articlepreview/6bbaf621-3014-4bd4-87bd-3d2b75bbd479/EN> accessed 26 March 2020; and EY, 'Staying up-to-date with COVID-19 stimulus responses' (*Tax COVID-19 Stimulus Tracker* updated 25 March 2020) <https://globaltaxnews.ey.com/news/2020-5400-breaking-tax-news-staying-up-to-date-with-covid-19-stimulus-responses?uAlertID=i0IR2QZBkNsmSALRwpFeXw%3d%3d> accessed 26 March 2020.

No.	Country	Fiscal/Economic Reliefs
	United States of America[40]	–Extension of deadline for filing of tax returns from 15 April 2020 to 15 July 2020. –Various economic reliefs under COVID-19 influenced legislation.[41]
	Iceland[42]	–Icelandic Government took up to seventy five per cent of salaries to allow employers to keep workers on their payrolls rather than laying them off—this included wage benefits for the self-employed and freelancers too; –State-backed bridging loans for companies;

[40]See IRS, 'Filing and Payment Deadline Extended to July 15, 2020 – Updated Statement' (*News*, 21 March 2020) <https://www.irs.gov/newsroom/payment-deadline-extended-to-july-15-2020> accessed 24 March 2020; and IRS, 'Treasury, IRS and Labor announce plan to implement Coronavirus-related paid leave for workers and tax credits for small and midsize businesses to swiftly recover the cost of providing Coronavirus-related leave' (*News Releases*, 20 March 2020) <https://www.irs.gov/newsroom/treasury-irs-and-labor-announce-plan-to-implement-coronavirus-related-paid-leave-for-workers-and-tax-credits-for-small-and-midsize-businesses-to-swiftly-recover-the-cost-of-providing-coronavirus> accessed 24 March 2020.

[41] See also, Coronavirus Aid, Relief, and Economic Security Act, 2020 (CARES Act), Public Law No. 116-136 <https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf> accessed 1 April 2020; Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020, Public Law 116-123 <https://www.congress.gov/116/plaws/publ123/PLAW-116publ123.pdf> accessed 1 April 2020; and Families First Coronavirus Response Act, 2020, Public Law 116-127 <https://www.congress.gov/116/bills/hr6201/BILLS-116hr6201enr.pdf > accessed 1 April 2020.

[42]See Government of Iceland, 'Icelandic Government announces 1.6bn USD response package to the COVID-19 crisis' (Article, 21 March 2020) <https://www.government.is/diplomatic-missions/embassy-article/2020/03/21/Icelandic-Government-announces-1.6bn-USD-response-package-to-the-COVID-19-crisis/> accessed 26 March 2020.

		–Deferral of tax payments as companies were given the opportunity to postpone the payment of taxes until next year to improve liquidity in business operations; –Financial support for the tourism sector as hotel taxes were abolished until the end of 2021; –A one-off child benefit payment was made on 1 June 2020 to all families with children under the age of eighteen, whereby those with an average monthly income lower than a set amount were paid higher than those with an average income higher that the set amount; –Access to third-pillar pension savings (private/voluntary pension savings), whereby monthly withdrawals of up to a set limit are allowed for the next 15 months; –Extension of Value Added Tax (VAT) reimbursement provision to the third sector organizations including charities and sports associations; –The Government of Iceland, along with local municipalities, initiated a special project, aimed at increasing investment in transport, public construction and technology infrastructure; and –Government contributions to research and science were also increased.

	United Kingdom[43]	–A Coronavirus Job Retention Scheme for all UK businesses for an initial period of three months starting from 1 March 2020, to be extended if necessary, which applied to employees who had been asked to stop working, but who were being kept on the pay roll ('furloughed workers') and in which Her Majesty's Revenue and Customs (HMRC) would reimburse eighty per cent of their wages, up to £2,500 per month; –Deferring VAT payments for three months, from 20 March 2020 to 30 June 2020; –Income Tax Self-Assessment payments due on the 31 July 2020 could be deferred until 31 January 2021; –A Self-employment Income Support Scheme to support self-employed individuals (including those in partnerships) who have lost income due to COVID-19 by allowing them to claim a taxable grant worth eighty per cent of their trading profits up to a maximum of £2,500 per month for three months—to be extended where necessary; –A Statutory Sick Pay relief package for small and medium sized businesses (SMEs) for sickness absence due to

[43]Government of the United Kingdom, 'COVID-19: guidance for employees, employers and businesses' (Updated on 26 March 2020) <https://www.gov.uk/government/publications/guidance-to-employers-and-businesses-about-covid-19/covid-19-support-for-businesses> accessed 26 March 2020.

		COVID-19 from the date of the stay-at-home directive; –A twelve-month business rates holiday for all retail, hospitality, leisure and nursery businesses in England for the 2020 to 2021 tax year; –A one-off small business grant funding of £10,000 for all business in receipt of small business rate relief or rural rate relief to help them meet their ongoing business costs; –The Retail and Hospitality Grant Scheme which provides businesses in the retail, hospitality and leisure sectors with a cash grant of up to £25,000 per property depending on the rateable value of the property; –The Coronavirus Business Interruption Loan Scheme offering loans of up to £5 million for SMEs through the British Business Bank; –The COVID-19 Corporate Financing Facility from the Bank of England to help support liquidity among larger firms to allow them to meet their short-term liabilities, e.g. the Bank of England was to buy short term debt from the firms; and –All businesses and self-employed people in financial distress, and with outstanding tax liabilities, could be eligible to receive support with their tax affairs through the HMRC Time To Pay Scheme.

		–The UK enacted the Coronavirus Act, 2020[44]
	The Netherlands[45]	–Three-months deferral of tax payments for wage taxes, personal income taxes, VAT and corporate income tax; –Reduction of tax and levy interest to 0.01 per cent for wage taxes, personal income taxes, VAT and corporate income tax; –Waiver of administrative fees for late payment for wage taxes, personal income taxes, VAT and corporate income tax –A Temporary Emergency Measure for the Preservation of Jobs (NOW) to compensate salary costs for three months for businesses that expected to lose at least twenty per cent of their revenue, up to ninety per cent of the business' wage bill— to be eligible, a business was not to dismiss any employees from their jobs for economic reasons during the period covered by the allowance; –Emergency relief for the self-employed whereby had recourse to an expedited procedure allowing them to apply for additional income support to help them pay their costs of living for a three-month period—alternatively, the self-employed could apply for support in the form of a

[44] See <http://www.legislation.gov.uk/ukpga/2020/7/pdfs/ukpga_20200007_en.pdf>.
[45] The Government of the Netherlands, 'Coronavirus: Dutch government adopts package of new measures designed to save jobs and the economy' (*News Item*, 17 March 2020) <https://www.government.nl/latest/news/2020/03/19/coronavirus-dutch-government-adopts-package-of-new-measures-designed-to-save-jobs-and-the-economy> accessed 26 March 2020.

		working capital loan at a favourable interest rate; –Expanding existing government corporate guarantee financing scheme to allow for guarantee of loans to small to medium enterprises; –A temporary emergency measure for government-provided microfinancing, whereby small companies impacted by the COVID-19 pandemic are granted a six-month deferment of repayment, and the interest rate on their loans are automatically lowered to two per cent during the COVID-19 pandemic period; –The government temporarily underwrote working capital granted to farms and horticultural companies as part of the Guarantee SME Loans scheme for small and medium-sized farms; and –The government equally worked on a Compensation Scheme for Impacted Sectors (affected by the COVID-19 measures) such as cafes, restaurants and the travel industry.
	Ireland[46]	–A €3 billion economic aid package inclusive of loans and direct subsidies; –A Temporary COVID-19 Wage Subsidy Scheme whereby employers were refunded up to seventy per cent of an employee's wages up to a maximum

[46] Department of the Taoiseach, 'Government announces new COVID-19 Income Support Scheme' (*gov.ie*, 24 March 2020) <https://www.gov.ie/en/press-release/a6d8fa-government-announced-new-covid-19-income-support-scheme/#supports-for-business> accessed 26 March 2020.

		weekly tax free amount of €410 per week to help affected companies keep paying their employees during the COVID-19 pandemic;[47] –COVID-19 pandemic unemployment payment of €350 (initially, €203) per week for workers who are laid off; –COVID-19 illness payment of €350 per week; –Enhanced protections for people facing difficulties with their mortgages, rent or utility bills; legislation to prevent termination of residential tenancies and any rent increases for the duration of the COVID-19 pandemic. –Suspension of interest on late payments for January/February VAT and both February and March "pay as you earn" (PAYE) employers' liabilities; –Suspension until further notice of all debt enforcement activity; –Current tax clearance status to remain in place for all businesses over the COVID-19 affected months; – Suspension of the Relevant Contract Tax (RCT) rate review scheduled to take place in March; and –Critical pharmaceutical products and medicines were given a Customs 'green

[47]Office of the Revenue Commissioners, 'Temporary COVID-19 Wage Subsidy Scheme' <https://www.gov.ie/en/service/578596-covid-19-wage-subsidy/> accessed 26 March 2020.

		routing' to facilitate uninterrupted importation and supply.

The above are merely examples of fiscal reliefs put in place by five countries selected randomly.

Following in those footsteps and as already highlighted above, the Government of Kenya also came up with economic reliefs to cushion Kenyan businesses, including law firms, from the economic shock waves brought about by the COVID-19 pandemic.[48] Kenyans anticipated Parliamentary interventions in the nature of a comprehensive COVID-19 legislation to back the presidential directives in order for the directives to obtain the force of law and longevity.[49] Further consideration by the Parliament of Kenya seemed imperative to improve the economic directives wherever necessary in order to pass a favourable and workable economic aid package for Kenyans and Kenyan businesses in response to the COVID-19 pandemic, as had been done elsewhere.[50] However, with the Parliament of Kenya having gone on

[48] See The Presidency, 'Presidential Address on the State Interventions to Cushion Kenyans Against Economic Effects of Covid-19 Pandemic on 25th March, 2020' <https://www.president.go.ke/2020/03/25/presidential-address-on-the-state-interventions-to-cushion-kenyans-against-economic-effects-of-covid-19-pandemic-on-25th-march-2020/> accessed 26 March 2020. See also Paul Wafula, 'Uhuru Offers tax breaks to cushion Kenyans, traders' (*Daily Nation*, 26 March 2020) <https://www.nation.co.ke/news/Uhuru-offers-tax-breaks-to-cushion-Kenyans/1056-5504426-ro2ycu/index.html> accessed 26 March 2020.

[49]See e.g., Kepha Muiruri, 'Coronavirus: Hits and misses in Government's relief measures' (*Citizen Digital*, 26 March 2020) <https://citizentv.co.ke/business/coronavirus-hits-and-misses-in-governments-relief-measures-328089/> accessed 26 March 2020; and Jackson Okoth, 'Uhuru's Fiscal Plan Needs Parliamentary Approval' (*The Kenyan Wall Street*, 26 March 2020) <https://kenyanwallstreet.com/uhurus-fiscal-plan-needs-parliamentary-approval/> accessed 26 March 2020.

[50]See e.g., 'Germany's Lower House Passes Massive Coronavirus Economic Aid Package' (*VOA News*, 25 March 2020) <https://www.voanews.com/science-health/coronavirus-outbreak/germanys-lower-house-passes-massive-coronavirus-economic-aid> accessed 26 March 2020; Prime Minister's Office, 10 Downing Street and the Rt Hon Boris Johnson, MP, 'PM address to the nation on coronavirus: 23 March 2020' (*GOV.UK*, 23 March 2020) <https://www.gov.uk/government/speeches/pm-address-to-the-nation-on-

lockdown too at some point, the economic directives have largely operated as presidential directives, except for the enactment of the *Tax Laws (Amendment) Act, 2020* on 25 April 2020.[51] Thus, apart from the tax laws, the longevity of any other COVID-19 economic directives is up to the President as he thinks fit.

Conclusion

Gradually, countries across the globe have eased down on the measures and directives put in place to combat the COVID-19 pandemic. Kenya too has relaxed its directives and measures on COVID-19 to allow normalcy to resume. Nonetheless, the negative economic impact of the COVID-19 pandemic will be felt for some time beyond the pandemic. Accordingly, it is hoped that Kenya will equally look at and adopt, with necessary adaptations, the best practices of the other nations of the world as we ease out of the

coronavirus-23-march-2020> accessed 27 March 2020; and the United Kingdom's Coronavirus Act, 2020 <http://www.legislation.gov.uk/ukpga/2020/7/pdfs/ukpga_20200007_en.pdf>. *See also*, the United State of America's: Coronavirus Aid, Relief, and Economic Security Act, 2020 (CARES Act), Public Law No. 116-136 <https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf> accessed 1 April 2020; Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020, Public Law 116-123 <https://www.congress.gov/116/plaws/publ123/PLAW-116publ123.pdf> accessed 1 April 2020; and Families First Coronavirus Response Act, 2020 Public Law 116-127 <https://www.congress.gov/116/bills/hr6201/BILLS-116hr6201enr.pdf> accessed 1 April 2020.

[51]See <http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2020/TaxLaws_Amendment_Act_No.2of2020.pdf>; and The Presidency, 'President Kenyatta Assents to the Tax Laws (Amendment) Bill, 2020' (Latest News, 25 April 2020) <https://www.president.go.ke/2020/04/25/president-kenyatta-assents-to-the-tax-laws-amendment-bill-2020/> accessed 15 October 2020. The Tax Laws (Amendment) Act, 2020 amended tax-related laws in Kenya such as the Income Tax Act (Cap. 470), the Value Added Tax Act, 2013 (No. 35 of 2013), the Excise Duty Act, 2015 (No. 23 of 2015), the Tax Procedures Act, 2015 (No. 29 of 2015), Miscellaneous Levies and Fees Act, 2016 (No. 29 of 2016) , the Kenya Revenue Authority Act, 1995 (No. 2 of 1995), and the Retirement Benefits Act, 1997 (No. 3 of 1997) in light of the COVID-19 economic directives issued by the President on 25 March 2020.

pandemic, especially in a bid to heal and restore our economy, which was nonetheless hailing already before COVID-19 struck.

Even so, the legal services industry in Kenya, like any other businesses, and Kenya, like any other country, must be prepared to cushion themselves and the economy against global disease outbreaks in the nature of the COVID-19 pandemic in the future, and not allow themselves to be caught unawares again. For businesses, preparedness for the outbreak of global pandemics and epidemics would entail enhanced corporate resilience and responsiveness to emerging threats of infectious diseases; for example, through enhanced data and communication technology and vigilant corporate governance that is capable of protecting business assets, employees and the surrounding communities.[52] For the legal services industry, embracing and making technology work in the delivery of legal services from the law schools to the courts, and the law firms to the law society is no longer an option but a necessity.

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41. The Presidency, 'Presidential Address on the State Interventions to Cushion Kenyans Against Economic Effects of Covid-19 Pandemic on 25th March, 2020' <https://www.president.go.ke/2020/03/25/presidential-address-on-the-state-interventions-to-cushion-kenyans-against-economic-effects-of-covid-19-pandemic-on-25th-march-2020/> accessed 26 March 2020.
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48. World Economic Forum, 'Insights on handling coronavirus from an earlier report on business and outbreaks' <https://www.weforum.org/reports/outbreak-readiness-and-business-impact> accessed 24 March 2020.
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51. World Health Organization (WHO), 'Situation report – 63: Coronavirus disease 2019 (COVID-19)' (23 March 2020) <https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200323-sitrep-63-covid-19.pdf?sfvrsn=2176eb7a_2> accessed 24 March 2020.
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Integrating Community Practices and Cultural Voices into the Sustainable Development Discourse

By: ***Kariuki Muigua****

Abstract

This paper calls for more efforts towards ensuring that community practices and cultural voices are incorporated and play a more active and influential role in shaping the government's agenda in achieving sustainable development goals. As things stand now, there is little evidence of communities being actively involved in plans, programmes and actions that are geared towards achieving sustainable development goals. This is despite the fact that these groups of persons are equally if not more affected by the ills that bedevil the society such as poverty, environmental degradation and conflicts. While the Kenyan law recognises the place of culture in development, this paper argues that the same has not been translated into action and thus calls for more active integration of the community practices and culture in development plans.

1. Introduction

The United Nations 2030 Agenda for Sustainable Development Goals seeks to not only achieve sustainability under the various aspects of development but also aims at an inclusive society where all voices are heard and considered in the development agenda. As rightly pointed out, everyone is needed to reach these ambitious targets.[1]This is to be achieved through such aspects as public participation in decision making, and the integration of all forms of knowledge, including scientific and traditional forms of knowledge. The process of sustainable development binds in a relationship of interdependence,

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[1]'Sustainable Development Goals | UNDP in Kenya' (*UNDP*) <https://www.ke.undp.org/content/kenya/en/home/sustainable-development-goals.html> accessed 6 January 2021.

the protection and enhancement of natural resources to the economic, social, in order to meet the needs of the present generation, without compromising the ability of future generations to meet their own needs.[2] It also follows that it would be incompatible with any practice either by private persons or the government that contributes to the degradation of heritage and natural resources, as well as the violation of human dignity and human freedom, poverty and economic decline, and the lack of recognition of the rights and equal opportunities.[3]

The social aspect of sustainable development agenda requires that 'a socially sustainable system must achieve distributional equity, adequate provision of social services including health and education, gender equity, and political accountability and participation'.[4]

Notably, in many African societies, culture and traditions have been at the centre of affairs of rural communities, especially in the conservation of natural sites earmarked as sacred.[5] However, in reality, cultural and traditional forms of knowledge have not received as much attention in the sustainable development debates as the scientific or western forms of knowledge, especially in relation to environmental and natural resources governance and management. As things stand currently in Kenya and many parts of the world, communities seem sidelined in the efforts sustainable development agenda in the country, with the state organs leading the same and communities together with their cultural and traditional expertise especially on environmental matters getting directions on what to do without any meaningful participation or contribution. The frequent evictions from forest areas is one such example.[6]

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[2]Nocca F, 'The Role of Cultural Heritage in Sustainable Development: Multidimensional Indicators as Decision-Making Tool' (2017) 9 Sustainability 1882, 2 <https://www.agbs.mu/media/sustainability-09-01882-v3.pdf>accessed 6 January 2021.

[3] *Ibid*, 2.

[4]Harris J, 'Basic Principles of Sustainable Development' (2001).

[5] 'The Place and Voice of Local People, Culture, and Traditions: A Catalyst for Ecotourism Development in Rural Communities in Ghana' (2019) 6 Scientific African e00184.

[6]'Kenya: Abusive Evictions in Mau Forest' (*Human Rights Watch*, 20 September 2019) <https://www.hrw.org/news/2019/09/20/kenya-abusive-evictions-mau-forest> accessed 6 January 2021.

It is against this background that this paper argues for the need for more efforts towards ensuring that the community knowledge and practices as well as cultural voices are incorporated into the sustainable development discourse in Kenya, as a platform for boosting communities' participation in pursuit of the sustainable development agenda.[7] Communities are more likely to embrace the same if they feel like part of it.

2. The Place of Community Practices and Cultural Voices in International and Domestic Laws

2.1 Community Practices and Cultural Voices under International Law

Principle 22 of the *1992 Rio Declaration on Environment and Development* states that indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. In light of this, States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

It has been argued that many, if not all of the planet's environmental problems and certainly all of its social and economic problems, have cultural activity and decisions – people and human actions – at their roots.[8] As such, solutions are likely to be also culturally-based, and the existing models of sustainable development forged from economic or environmental concern are unlikely to be successful without cultural considerations.[9] Culture in this context, has been defined as: culture as the general process of intellectual, spiritual or aesthetic

[7]'Kenya: Sustainable Development Knowledge Platform' <https://sustainabledevelopment.un.org/memberstates/kenya> accessed 6 January 2021.

[8]Dessein, J. et al (ed), 'Culture in, for and as Sustainable Development: Conclusions from the COST Action IS1007 Investigating Cultural Sustainability,' (University of Jyväskylä, Finland, 2015), p. 14.
Available at *http://www.culturalsustainability.eu/conclusions.pdf* accessed 6 January 2021.

[9] *Ibid*, p.14.

development; culture as a particular way of life, whether of people, period or group; and culture as works and intellectual artistic activity.[10]

The United Nations Educational, Scientific and Cultural Organization (UNESCO) asserts that 'culture is who we are and what shapes our identity. No development can be sustainable without including culture.'[11] The Agenda 2030 for Sustainable Development captures the states' pledge to foster intercultural understanding, tolerance, mutual respect and an ethic of global citizenship and shared responsibility, and their acknowledgement of the natural and cultural diversity of the world and recognition that all cultures and civilizations can contribute to, and are crucial enablers of, sustainable development.[12]

African States and other stakeholders, in the *Ngorongoro Declaration*[13] have acknowledged that Sustainable development can ensure that appropriate efforts are deployed to protect and conserve the cultural and natural resources of a region faced with the challenges of climate change, natural and human-made disasters, population growth, rapid urbanization, destruction of heritage, and environmental degradation for present and future generations.[14] As such, they declared that on the one hand, African heritage is central to preserving and promoting African cultures thereby uplifting identity and dignity for present and future generations in an increasingly globalised world, and on the other hand, heritage, including World Heritage properties, is a driver of sustainable development and critical for achieving regional socio-economic benefits, environmental protection, sustainable urbanization, social cohesion and peace.[15]

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[10] *Ibid*, p. 21.
[11] United Nations Educational, Scientific and Cultural Organization (UNESCO), 'Culture for Sustainable Development,' available at *http://en.unesco.org/themes/culture-sustainable-development* Accessed 6 January 2021.
[12] United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, Resolution adopted by the General Assembly on 25 September 2015, para. 36.
[13] The Ngorongoro Declaration on Safeguarding African World Heritage as a Driver of Sustainable Development, adopted in Ngorongoro, Tanzania on 4 June 2016.
[14] *Ibid*, p.2.
[15] *Ibid*, p. 3.

3. Community Practices and Cultural Voices under Kenyan Law: Prospects and Challenges

The Constitution of Kenya 2010 recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.[16] In light of this, it obligates the State to, inter alia, 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.[17]

Parliament is also obligated to enact legislation to: ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage; andrecognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya.[18]

The Ministry of Sports, Culture and Heritage was established through the Executive Order No. 2 "Organization of the Government of the Republic of Kenya dated May 2013" and comprises of departments of Sports, Office of the Sports Registrar, Culture, Permanent Presidential Music Commission, Kenya National Archives and Documentation Services, Library Services, Records Management, The Arts Services.[19] Part of their mandate includes 'developing, promoting and coordinating research, copyrights and conservation of Culture' and to 'develop, promote & coordinate the national culture policy, heritage policy and its management'.[20] Notably, the core functions of the Department of Culture under the Ministry are: the promotion, revitalization and development of all aspects of culture- including performing, visual arts, languages indigenous health, nutrition, environment, and oral traditions; and,

[16] Article 11 (1), Constitution of Kenya, 2010.
[17] *Ibid*, Article 11 (2).
[18] *Ibid*, Article 11 (3).
[19] 'The Ministry' (*The Ministry of Sports, Culture and Heritage*) <http://sportsheritage.go.ke/the-ministry/> accessed 6 January 2021.
[20] *Ibid*.

education, information and research on all aspects of the tangible and intangible cultural heritage.[21]

The Department's core mandate includes, to: advise the government on cultural matters; set policy standards to guide the development of cultural programmes; develop national cultural infrastructure and actively engage in the promotion, preservation and development of culture, in collaboration with other likeminded government agencies, County governments, and local communities based on the principles of Free Prior and Informed Consent; coordinate the documentation of national cultural inventories, and support cultural programmes and events; promote the use of Kiswahili, sign and indigenous languages in Kenya; coordinate safeguarding of Kenya's intangible cultural heritage and promotion of the diversity of cultural expressions; conduct capacity building for county governments, and disseminating cultural information; coordinate and facilitate cultural exchange programmes for groups and individuals; liaise with cultural offices and Offer technical support for cultural development programmes; and register cultural groups, associations and agencies.[22]

Notably, the Department of Culture acknowledges that 'while it has been playing some of the key roles in promotion of cultural integration, formulation of policies and standards that will guide the development of culture, Kenyan identity and social cohesion, both at the national and international levels, little information has been available to the Kenyan public'.[23] However, while the Department, in line with its constitutional mandate, seeks to use its website to disseminate information, and open up an online forum, where all Kenyans can contribute towards realisation of our shared dreams and aspirations; our pride in ethnic, cultural, and religious diversity, and the determination to live in peace and unity, as one indivisible and sovereign nation, there are challenges that come with this. Arguably, most of the custodians of the cultural practices and knowledge of Kenyan communities are either not able to access the

[21] 'Department of Culture' (*The Ministry of Sports, Culture and Heritage*) <http://sportsheritage.go.ke/culture-heritage/department-of-culture/> accessed 6 January 2021.
[22] *Ibid.*
[23] *Ibid.*

internet due to infrastructure challenges or do not simply have the formal education required to enable them do so. This therefore means that the Department's initiative, however well meaning, will either not reach a large section of the target group or will not benefit from added knowledge that would be gained from the input of elders from the villages. There may therefore, be a need for the Department to organize physical forums where they can meet the communities' elders and leaders and share their dream with them in a bid to enrich their cultural knowledge database. The only way that the Department of culture and heritage can effectively achieve their mandate of advising the government on cultural matters, dissemination of cultural information, conducting capacity building for county governments, coordination and facilitate cultural exchange programmes for groups and individuals, offering technical support for cultural development programmes and registering cultural groups, associations and agencies would be through organizing forums where communities, without the limitation of technology or distance would come forward and share what they have with the Department. This cannot certainly be the online platform. Physical meetings should thus be organized at the grassroots level. Through such forums, the Department can collaborate with the other stakeholders especially in matters that are relevant to the sustainable development agenda in order to tap into the communities' knowledge and practices where such can help in promoting sustainability.

Some of the main challenges that have been identified especially in relation to the implementation of the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*[24] in Kenya, in the past include; Lack of a coordinated national framework on implementation of the Convention; Lack of official cultural statistics that has negatively affected fiscal and political decisions; Inadequate legislative and institutional framework to promote the cultural and creative cultural sector; Inadequate cultural infrastructure and

[24]Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005, Paris, 20 October 2005.

spaces for cultural expression; and Lack of awareness and non-appreciation on the role of culture in development by key policy makers.[25]

Cultural expressions, services, goods and heritage sites can contribute to inclusive and sustainable economic development, thus making a vital contribution to eradication of poverty as envisaged under sustainable development goal 1 of the 2030 Agenda on Sustainable Development Goals.[26] This is because the natural and environmental resources form the basis of the 2030 SDGs Agenda for provision of the resources required for eradication of poverty. These resources however require conservation for the sake of the current and future generations. It is also true that conservation principles and practices evolve and adapt to the cultural, political, social and economic environments in which they take place.[27] It is for this reason that cultural practices of communities become critical in giving communities a chance to participate in sustainable development discourse. It has been observed that conservation practices are intimately linked to codes of ethics dictated by local and/or international systems of values. In turn, these values are inscribed in legal frameworks or they comply with legal texts.[28] Arguably, it is not enough for the laws in Kenya to acknowledge the place of communities' cultural practices; there is a need to actually implement and incorporate these practices in environmental management and conservation measures through engaging communities in national plans and strategies geared towards the realisation of the sustainable development goals. Notably, while Kenya has been making progress towards realisation of the SDGs, if a 2017 Report by the Ministry of Devolution dubbed '*Implementation of the Agenda 2030 for Sustainable Development in Kenya* is anything to go by, there is little evidence of

[25] 'The Convention on the Protection and Promotion of the Diversity of Cultural Expressions' (*Diversity of Cultural Expressions*, 15 February 2018) <https://en.unesco.org/creativity/convention> accessed 6 January 2021.

[26]Cities U and Governments L, *Culture in the Sustainable Development Goals: a Guide for Local Action* (Academic Press 2015) <https://www.uclg.org/sites/default/files/culture_in_the_sdgs.pdf> accessed 3 January 2021.

[27] Anne-Marie Deisser and Mugwima Njuguna, *Conservation of Cultural and Natural Heritage in Kenya* (2016) 1 <http://www.jstor.org/stable/10.2307/j.ctt1gxxpc6> accessed 6 January 2021.

[28]*Ibid*, 3.

incorporation of communities' practices and indigenous knowledge in tackling the challenges that are likely to derail the realisation of the Agenda 2030. The process seems to be state-led, with communities playing a peripheral role. They only seem to be included in making peace, which in itself is critical for development, but that is just about all. The farthest the Report has gone in demonstrating communities' inclusion is 'the Government putting in place mechanisms to foster peace among warring communities through initiatives like joint Cultural Festivals, and signing treaties on cultural exchange programmes with 51 countries hosting Kenya Missions' in pursuit of SDG Goal 16 on 'promoting peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all level'.[29] Thus, while there are admittedly policy, legal and institutional frameworks meant to promote the utilization of cultural and traditional community knowledge in national development, there is little evidence that the same is actively being pursued.

4. Community Practices and Cultural Voices under the Sustainable Development Goals

Sustainable development is one of the national values and principles of governance that binds 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.[30] This is in addition to democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; and good governance, integrity, transparency and accountability.[31] Arguably, this should include participation of communities and their cultural knowledge especially in matters related to the sustainable development agenda.[32]

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[29] Republic of Kenya, *Implementation of the Agenda 2030 For Sustainable Development In Kenya*, June, 2017, 45 https://www.un.int/kenya/sites/www.un.int/files/Kenya/vnr_report_for_kenya.pdf accessed 6 January 2021.

[30] Article 10, Constitution of Kenya 2010.

[31] Article 10(2), Constitution of Kenya 2010.

[32]Nocca F, 'The Role of Cultural Heritage in Sustainable Development: Multidimensional Indicators as Decision-Making Tool' (2017) 9 Sustainability 1882.

Target 11.4 of the 2030 Agenda on Sustainable Development Goals seeks to, inter alia, "strengthen efforts to protect and safeguard the world's cultural and natural heritage". It has however been argued that this is a weak reference because it is not specific on cultural heritage, but it is mentioned together with natural one; furthermore, this specific target deals only with the protection and safeguard of cultural heritage.[33]

Arguably, culture has received insufficient attention as an intrinsic component of sustainable development and must be translated and embedded in national and local development.[34] Indeed, some commentators have argued that culture, sustainability and sustainable development are complicated concepts that are not always easy for scientists, policy makers or practitioners to grasp or apply.[35]

Culture can play a significant role in the attainment of the Sustainable Development Goals (SDGs), especially those related to quality education, sustainable cities, the environment, economic growth, sustainable consumption and production patterns, peaceful and inclusive societies, gender equality and food security.[36] According to UNESCO, from cultural heritage to cultural and creative industries, culture is both an enabler and a driver of the economic, social and environmental dimensions of sustainable development.[37] This is due to its potential to have community-wide social, economic and environmental impacts.[38]

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[33]*Ibid*, 3.

[34]Energy and Resources Institute, *Global Sustainable Development Report 2019: The Future Is Now : Science for Achieving Sustainable Development.* (2019) 117.

[35]Dessein, J., Soini, K., Fairclough, G. and Horlings, L. (eds) 2015. Culture in, for and as Sustainable Development. Conclusions from the COST Action IS1007 Investigating Cultural Sustainability. University of Jyväskylä, Finland, 8 <https://jyx.jyu.fi/bitstream/handle/123456789/50452/1/978-951-39-6177-0.pdf> accessed 5 January 2021.

[36] UNESCO, 'Culture for Sustainable Development' (*UNESCO*, 15 May 2013) <https://en.unesco.org/themes/culture-sustainable-development> accessed 5 January 2021.

[37] *Ibid.*

[38]UNESCO. "Culture: A driver and an enabler of sustainable development." *Thematic Think Piece. UN System Task Team on the Post-2015 UN Development Agenda* (2012), 3.

Notably, traditional knowledge can and should be used to contribute to the realization of sustainable development agenda, where most indigenous and local communities' contribution can go beyond conservation and sustainable use of biological diversity to include their skills and techniques which provide valuable information to the global community and a useful model for biodiversity policies.[39] Furthermore, as on-site communities with extensive knowledge of local environments, indigenous and local communities are most directly involved with conservation and sustainable use.[40]The relevance of this traditional knowledge in the sustainable development debate is premised on the fact that it is based on the experience, often tested over centuries of use, adapted to local culture and environment, dynamic and changing especially in relation to knowledge and skills on how to grow food and to survive in difficult environments, what varieties of crops to plant, when to sow and weed, which plants are poisonous, which can be used for control of diseases in plants, livestock and human beings.[41]

SDG Goal 2 seeks to end hunger, achieve food security and improved nutrition and promote sustainable agriculture. As also acknowledged under the Constitution of Kenya, traditional knowledge related to the preservation of existing genetic resources, including the genetic diversity of seeds, should be recognized and maintained, and the fair sharing of the relevant benefits should be promoted.[42] However, for effectiveness, it has been recommended that there should be integration of cultural factors, including the knowledge, traditions and practices of all people and communities, into local strategies on environmental sustainability.[43] The indigenous knowledge based on cultural

[39]Unit B, 'Introduction' (6 October 2011) <https://www.cbd.int/traditional/intro.shtml> accessed 3 January 2021.
[40] *Ibid.*
[41] CN Atoma, 'The Relevance of Indigenous Knowledge to Sustainable Development in Sub-Saharan Africa' (2011) 5 International Journal of Tropical Agriculture and Food Systems 72.
[42]Cities U and Governments L, *Culture in the Sustainable Development Goals: A Guide For Local Action* (Academic Press 2015)<https://www.uclg.org/sites/default/files/culture_in_the_sdgs.pdf>accessed 3 January 2021.
[43] *Ibid.*

practices should be utilized in achieving such goals as SDG Goal 2 on food security.

Thus, while there is little by way of mention in the 2030 Agenda on SDGs on the role of culture and communities' traditional knowledge in achieving sustainable development goals, practically, these communities have a lot to contribute in tackling the challenges that face the world today, ranging from food insecurity, poverty, and environmental degradation, among others. The global community cannot therefore afford to ignore their role in the same.

5. Development from the Global South Perspective

The 'Global South' is a term used to refer to less economically developed countries and these comprise a variety of states with diverse levels of economic, cultural, and political influence in the international order.[44] It has rightly been pointed out that 'when major global events are told from a Western perspective, the voices of the colonised and oppressed often go missing, which leads to a different basis for theorising'.[45] It is thus it is important to incorporate non-Western actors and non-Western thinking in order to explore the ways in which different actors challenge, support, and shape global and regional orders.[46]

While the term 'development' carries different connotations to different people, more so those in the developing world, it is worth pointing out that development is not purely an economic phenomenon but rather a multi-dimensional process involving reorganization and reorientation of entire economic and social system.[47] In addition, development is process of improving the quality of all human lives with three equally important aspects, namely: raising peoples' living levels, that is, incomes and consumption, levels of food, medical services, and education through relevant growth

[44] 'Global South Perspectives on International Relations Theory' (*E-International Relations*, 19 November 2017) <https://www.e-ir.info/2017/11/19/global-south-perspectives-on-international-relations-theory/> accessed 6 January 2021.
[45] *Ibid.*
[46] *Ibid.*
[47] Abyu G, *Concept of Development* (2020)<https://www.researchgate.net/publication/340127781_Concept_of_Development/link/5e7a0844299bf1b2b9ac2b0b/download> accessed 3 January 2021.

processes; creating conditions conducive to the growth of peoples' self-esteem through the establishment of social, political and economic systems and institutions which promote human dignity and respect and increasing peoples' freedom to choose by enlarging the range of their choice variables, such as varieties of goods and services.[48]

It has been argued that indigenous knowledge builds on long-term understanding and practices of socio-ecological systems of various societies across the world. It is a social learning process by which practices and behaviours are adjusted towards embracing better uses of the surrounding environment and contributing to the well-being at individual, communal and societal levels.[49] If these communities are to overcome the challenges that face them in their day to day lives, western and scientific notions of development will not help; they must be meaningfully involved in the development plans to not only enable them appreciate the same but to also ensure that these challenges are addressed using local solutions, where possible. Sometimes, all they need is the support of the government and other stakeholders to enable them come up with suitable solutions.

6. Integrating Community Practices and Cultural Voices into the Sustainable Development Discourse: Way Forward

6.1 Call for Diversity in Development Voices

People-centred development is inclusive and participatory and rooted in local culture and heritage.[50]

While the national government should continually strengthen efforts to implement policies/legislation aimed at addressing cultural practices such as female genital mutilation and child marriage, which slow access to education and affect attainment of gender equality and equity, the positive

[48]'GEO 260 - Third World Development' <http://www.uky.edu/AS/Courses/GEO260/glossary_development.html> accessed 6 January 2021.
[49]Energy and Resources Institute, *Global Sustainable Development Report 2019: The Future Is Now : Science for Achieving Sustainable Development.* (2019) 120.
[50]Energy and Resources Institute, *Global Sustainable Development Report 2019: The Future Is Now : Science for Achieving Sustainable Development.* (2019) 92.

aspects of culture should be tapped into especially in relation to natural resources management.[51]

SDG Goal 17 calls for countries to 'strengthen the means of implementation and revitalize the global partnership for sustainable development'. One of the targets under this goal is tackling systemic issues which include countries respecting each country's policy space and leadership to establish and implement policies for poverty eradication and sustainable development, and encouraging and promoting effective public, public-private and civil society partnerships, building on the experience and resourcing strategies of partnerships.[52] The Global South should tap into all available knowledge including traditional knowledge to tackle the unique problems that may exist in their territories. Communities are more likely to identify and offer plausible solutions to the problems found within their localities better than the scientific or western knowledge would do.

6.2 Equitable Access of Resources by Communities and Fair Benefit Sharing

Communities should tap into the available resources, enjoy equitable access, to enable them utilize these resources to achieve tangible development within their regions. The government should thus continually look for ways through which this can be achieved. This would give these communities incentives to not only participate in the sustainable development of resources but also to proffer solutions to degradation challenges where they feel that their traditional knowledge can be utilized.[53]

[51] SDGs Kenya Forum, 'The Third Progress Report on Implementation of SDGs in Kenya,' 2020 <https://sdgkenyaforum.org/content/uploads/documents/8b832986477dddbd.pdf>accessed 6 January 2021.

[52] '#Envision2030 Goal 17: Partnerships for the Goals | United Nations Enable' <https://www.un.org/development/desa/disabilities/envision2030-goal17.html> accessed 6 January 2021.

[53] 'Indigenous Peoples and the Nature They Protect' (*UN Environment*, 8 June 2020) <http://www.unenvironment.org/fr/node/27724> accessed 8 January 2021.

The law should therefore not be used to limit communities' access and enjoyment of the accruing benefits from natural resources but should instead be used to guarantee the same.[54]

The cultural and creative industries have been rated among the fastest growing sectors in the world, with an estimated global worth of 4.3 trillion USD per year, accounting for 6.1% of the global economy and nearly 30 million jobs worldwide, employing more people aged 15 to 29 than any other sector.[55] Thus, cultural and creative industries are considered to be essential for inclusive economic growth, reducing inequalities and achieving the goals set out in the 2030 Sustainable Development Agenda.[56]

There is a need for the government to rise to the occasion and promote a conducive environment for communities to benefit from the intellectual property of their indigenous knowledge for economic advancement and achievement of sustainable development agenda.[57]

6.3 Guaranteed Cultural Security

While the phrase "cultural security" is used to mean different things in different regions of the world, in Australia, the phrase is used when speaking about how modernization threatens to change the way of life of Aborigines,

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[54] Elisa Morgera, 'The Need for an International Legal Concept of Fair and Equitable Benefit Sharing' (2016) 27 European Journal of International Law 353; Norfolk, Simon. "Examining access to natural resources and linkages to sustainable livelihoods." *A case study of Mozambique. FAO Livelihood support programme Working Paper* 17 (2004): 69; 'Managing Natural Resources for Development in Africa: A Resource Book' <https://www.idrc.ca/sites/default/files/openebooks/506-9/index.html> accessed 8 January 2021; Yolanda T Chekera and Vincent O Nmehielle, 'The International Law Principle of Permanent Sovereignty over Natural Resources as an Instrument for Development: The Case of Zimbabwean Diamonds' (2013) 6 African Journal of Legal Studies 69; 'Tenure, Governance, and Natural Resource Management' (*LandLinks*) <https://land-links.org/issue-brief/tenure-governance-and-natural-resource-management/> accessed 8 January 2021;.

[55] 'The Convention on the Protection and Promotion of the Diversity of Cultural Expressions' (*Diversity of Cultural Expressions*, 15 February 2018) <https://en.unesco.org/creativity/convention> accessed 6 January 2021.

[56] *Ibid*.

[57] See Protection of Traditional Knowledge and Cultural Expressions Act, 2016 (No. 33 of 2016), Laws of Kenya.

while in Africa, leaders have applied the phrase in voicing concerns over the impact of development on local traditions.[58] While modernization is desirable, the constitutional safeguards against erosion of culture should be upheld and used to ensure that communities are afforded a chance to celebrate their culture and meaningfully participate in the development agenda through the use of the beneficial aspects of their culture.[59] It should not only be a source of pride for them but also a source of livelihood where possible, through the support of the government.[60] They should be involved in what is referred to as Primary Environmental Care (PEC), 'a process by which local groups or communities organise themselves with varying degrees of outside support so as to apply their skills and knowledge to the care of natural resources and environment while satisfying livelihood needs'.[61]

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[58]Nemeth E, 'What Is Cultural Security? Different Perspectives on the Role of Culture in International Affairs' (23 April 2016).

[59] Rivière, François, ed. *Investing in cultural diversity and intercultural dialogue*. Vol. 2. Unesco, 2009; 'Kenya's New Constitution Benefits Indigenous Peoples' <http://www.culturalsurvival.org/news/kenyas-new-constitution-benefits-indigenous-peoples> accessed 8 January 2021; EO Wahab, SO Odunsi and OE Ajiboye, 'Causes and Consequences of Rapid Erosion of Cultural Values in a Traditional African Society' (*Journal of Anthropology*, 5 July 2012) <https://www.hindawi.com/journals/janthro/2012/327061/> accessed 8 January 2021; Campese, Jessica. *Rights-based approaches: Exploring issues and opportunities for conservation*. CIFOR, 2009; Bockstael, Erika, and Krushil Watene. "Indigenous peoples and the capability approach: taking stock." *Oxford Development Studies* 44, no. 3 (2016): 265-270; Kanyinga, Karuti. "Kenya: Democracy and political participation." (2014).

[60]'2. Cultural Characteristics Of Small-Scale Fishing Communities'<http://www.fao.org/3/y1290e05.htm> accessed 8 January 2021; Daskon, Chandima Dilhani. "Cultural resilience—the roles of cultural traditions in sustaining rural livelihoods: a case study from rural Kandyan villages in Central Sri Lanka." *Sustainability* 2, no. 4 (2010): 1080-1100; Soh, Mazlan Bin Che, and Siti Korota'aini Omar. "Small is big: The charms of indigenous knowledge for sustainable livelihood." *Procedia-Social and Behavioral Sciences* 36 (2012): 602-610.

[61]Melissa Leach, Robin Mearns and Ian Scoones, 'Challenges to Community-Based Sustainable Development: Dynamics, Entitlements, Institutions' (1997) 28 IDS Bulletin 4, 5, <https://www.researchgate.net/publication/227736698_Challenges_to_Community-Based_Sustainable_Development_Dynamics_Entitlements_Institutions>accessed 6 January 2021.

7. Conclusion

The paper has highlighted some of the initiatives or areas of collaboration that reflect the existing relationship between culture and sustainable development, thus affirming the fact that cultural issues cannot be wished away in the discussion and efforts towards achieving sustainable development in Kenya and the world over.[62] This is, however, not to say that there are no cultural practices that are counterproductive in their effect as far as development and sustainability are concerned. Such retrogressive practices ought to be shunned while embracing the ones that are compatible with progress and sustainable development goals.[63]

If the sustainable development goals are to be accomplished in a way that leaves no one behind, there is a need for the stakeholders to adopt a bottom-up approach that includes traditional and cultural institutions and the associated knowledge in tackling the problems that afflict the society.
Integrating Community Practices and Cultural Voices into the Sustainable Development Discourse is indeed a step in the right direction.

[62] See also Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016), chapter Eleven, for the full discussion.

[63] See 'Cultural Practices That Hinder Children's Rights among the Digo Community - Msambweni District, Kwale County - Kenya' (*Resource Centre*) <https://resourcecentre.savethechildren.net/node/7573/pdf/report_on_cultural_practices_-_mswambweni1.pdf> accessed 6 January 2021.

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'The Convention on the Protection and Promotion of the Diversity of Cultural Expressions' (*Diversity of Cultural Expressions*, 15 February 2018) <https://en.unesco.org/creativity/convention> accessed 6 January 2021.

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2 <https://www.agbs.mu/media/sustainability-09-01882-v3.pdf>accessed 6 January 2021.

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Characterization of Political Transitions: Lessons from the Collapse of the Roman Dynasty, Republic, Roman Empire

By: ***Henry Murigi****

Abstract

Political transitions generally refer to political change from one order of leadership or type of government to another. A political transition is the act or process of changing and evolving of one form of government to a different type of government[1]. The focus of the transition usually is to present a different order in politics. Most of the time transitions are chaotic and seek to empower people to ensure their choices, voice and will is heard and responded to appropriately by the government of the day. The background idea is that the Roman Republic has been projected by several historians and scholars as a stable and organized institution. One would then automatically expect that the transitions were equally orderly. Rome went through several transitions from a Monarchy to Republic and later Empire. These transitional periods are the focus of this paper. This paper seeks to show the true character of these transitions. This paper seeks to examine the character of the political transitions in Roman republic and establish whether the transitions had anything to do with the decline of the Roman Empire. The paper attempts to consider whether these transitions were unstable or seamless. The period under inquiry in this paper encompasses the Roman Kingdom (753 BCE–509 BCE), Roman Republic (509 BCE–27 BCE) and Roman Empire (27 BCE–476 CE) until the fall of the western empire.

Introduction

Scholars and historians alike are not in agreement on the exact character of the transformation of Rome. This calls for adopting different theoretical and

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[1] Definition of "transition" from the **Cambridge Advanced Learner's Dictionary & Thesaurus** © Cambridge University Press

conceptual framework for the study of Rome. This paper will adopt the following conceptual ideas. First, some scholars who study Rome take a revisionist view. Revisionists consider the emergence of new facts on what is commonly known as a historical event and suggest an alteration of the view to that event[2]. Their theory begins by questioning historical records which may including the validity of an event. In regard to Rome, some question its rise and fall while others theorize the radical break between periods of the Roman Empire in the history of the Modern east and West[3]. Even with the elaborate work of Edward Gibbon (1946)[4] historians still disagree on the rise of Roman Republic as well as the causes of the collapse of the Roman Empire. Gibbon is one of the leading scholars who has contributed greatly to the narration of the decline of Roman Empire. Gibbon[5] argues that Rome's progressive loss of civil and military capacity was taken over by the Barbarian mercenaries who were recruited to fill a vacuum left by the failure of Rome to defend itself. Since nothing lasts forever, the question should be why Rome's dominance lasted as long as it did.

The second argument is that the decline of the Roman Republic and Empire was inevitable. The declinist argument consists of different recognizable rhetoric[6]. To begin with the declinist view considers a phenomenon or group of phenomena as illustrative of the seriousness of contemporary decline. Another view is that it is important to identify an agent a causal role that spurred the observed decay, in addition to explaining what was wrong in the decline narratives. Yet other declinist view suggests that there must be a proposed time period in which the agent of decline appeared and became entrenched to cause the deterioration however gradual[7]. The idea is to trace

[2] Guy Middleton, The Fall of the Western Roman Empire: What led to the collapse of Rome: Ancient History of Modern Myths (2017 Cambridge University Press). pp 182-212.
[3] *Ibid* pp. 182-212
[4] Edward Gibbon, The History of the Decline and Fall of the Roman Empire, ed. J.B. Bury with an Introduction by W.E.H. Lecky (New York: Fred de Fau and Co., 1946), Vol. 1 &2.
[5] *Ibid*
[6] Andrew Murphy, "Augustine and the Rhetoric of Roman Decline". History of Political Thought, Volume 26 Issue No 4. (2005) pp 586-606.
[7] *Ibid*

the decline by presenting unfavorable contrast between contemporary narratives and the world as it existed prior to appearance of decline. In sum, there is always an agent in any transition whether internal or external. In this paper the agent of the rise or and decline will be contextualized to offer better understanding of the transitions.

Many factors that led to the transitions from one political order to the other. There are four themes that can be considered as central to the rise and decline of the Roman Empire[8]. In the context of the Empire they include barbarian invasion, poor performance of the Roman armies, Christianization leading to the growth of the Church and lastly the failure to accommodate or adjust political order of governance in the growing empire[9]. These relate to the decline of the empire. This paper will focus on the failure to accommodate or adjust the political order while also acknowledging that all the other factors did contribute to the eventual collapse of the Roman State.

Transition from Monarchy to Republic

Rome's era as a monarchy ended in 509 BCE with the overthrow of its seventh and final King, Lucius Tarquinius Superbus[10]. It was as a result of internal revolution that Rome underwent regime change[11]. The change from monarchy to republic was gradual and based on a series of events[12]. First, it all began with the structure that a king, or at least a sole ruler of some sort, was replaced by a governmental system in which power was distributed amongst a wider aristocratic group[13]. This was not easy since what the aristocratic group and

[8] Edward Gibbon, The History of the Decline and Fall of the Roman Empire, ed. J.B. Bury with an Introduction by
W.E.H. Lecky (New York: Fred de Fau and Co., 1946),pp 112-114

[9] *Ibid* pp 122-130

[10] Oakley, S. P. "Early Rome - T. J. Cornell: The Beginnings of Rome: Italy and Rome from the Bronze Age to the
Punic Wars." *The Classical Review* 47, no. 2 (1997): pp 359

[11] Glinister, Fay. "Politics, Power, and the Divine: The Rex Sacrorum and the Transition from Monarchy to
Republic at Rome." *Antichthon* 51 (2017): pp 61–69

[12] Anthony Kamm, The Romans: An Introduction 2nd Ed (New York, 2008). pp. 12-16

[13] *Ibid* p. 17

the institutional reality complicated the order that was established under the monarchy system and was to be repeated in the Republic[14]. The composition of the aristocratic group at that point in time remains open to question. Second, the rape of Lucretius by the King was one of the reasons for the decline of the rule of Tarquinius Superbus and his son Sextus[15]. Following this ordeal there was the rise of 'noble' men such as Lucius Junius Brutus who strongly opposed kingship and exceeded his constitutional brief of being an Interrex. The behavior by Brutus displeased the people in Rome and therefore he could not be trusted with the power of a King[16]. The scenario that presented itself was on the one hand a dislike for Kings and on the other hand an interrex who could not be trusted. This gave the basis for the idea that power should be in the hands of more than one person of the aristocratic group later known as the plebeians and patricians[17].

Third, it has been argued that there was a belief that the King was more vulnerable when the poor and needy were idle[18]. This gave rise to several ideas on how to keep the people busy. For instance, the idea for planning of the great temple to Jupiter on the Capitoline hill are attributed to Tarquinius Priscus is one of such initiatives. Also, the King would isolate those from the loyal lineage and those fit for military service. He would then direct to carry out free public works[19]. The idea of insisting on forced work by the poor was seen as an encroachment into the liberty of the Romans. It definitely did not sit well with all of them and contributed to the negative view of Kings[37]. Fourth, the fall of Kings is attributed to Religion which was at play in the decline of the

[14] *Ibid*

[15] *Ibid* p. 33

[16] *Ibid* p 34

[17] Oakley, S. P. "Early Rome - T. J. Cornell: The Beginnings of Rome: Italy and Rome from the Bronze Age to the Punic Wars." *The Classical Review* 47, no. 2 (1997): pp 361

[18] Richard W. Mass "Political Society and Cicero's Ideal Stat" Scholarly Incursion, Historical Methods, Volume 45, No 2, (2012). Routledge Taylor & Francis Group pp 79

[19] Ibid pp 81-83

monarchy system toward formation of the Republic[20]. The place of religion cannot be ignored as a factor for these transitions. Fifth, there was a conspiracy to bring back the dethroned King to power which was called the Tarquinian Conspiracy. This led to the use of "the Republic" as the name for the on-monarchical period of Roman history from the expulsion of the kings in 509 BCE to the Battle of Actium in 31 CE[40].

The Roman Republic

When the Roman Republic was properly constituted the Government it was organized around religious and philosophical ideas[21]. The *Auctoritas* was the power composed within a group of distinguished people. The word *auctoritas* applied to *auctor* specific function in the political sphere[22]. Cicero is the main proponent of the idea of *auctoritas*. He discusses this subject in the context of the role of a priestly college in order to address a specific political situation[23]. The priestly *auctoritas* was considered the main pillar in the foundation of the Republican idea of religion. The Priest exerted a level of influence that other centers could not manage. Their actions had strong political implications but can be justified as actions that have religious significance.

The system of governance under the Republic according to Polybius[24] was dived into three categories. First, the consul which was concerned with the conduct of war and operations the consul needed both the support of the senate and the citizens. Second, the Senate, which decided whether to approve the consul plans, whether to retain his service at the end of his tenure or terminates in the end. Thirdly, the People who were respected and honored the senate in every aspect. Polybius[25] asserts the importance of a mixed system as the sure

[20] Glinister, Fay. "Politics, Power, and the Divine: The Rex Sacrorum and the Transition from Monarchy to Republic at Rome." *Antichthon* 51 (2017): pp 68

[21] Santangelo, Federico. "PRIESTLY AUCTORITAS IN THE ROMAN REPUBLIC." *The Classical Quarterly* 63, no. 2 (2013): pp. 743–763.

[22] Santangelo, Federico. "Priestly Auctoritas in the Roman Republic." The Classical Quarterly Volume 63, Issue No. 2 (2013): pp. 743–763.

[23] *Ibid* pp 753-757

[24] Curtis, Michael. *The Great Political Theories: Volume 1*. New York: HarperPerennial ModernClassics, 2008. pp. 124-126

[25] *Ibid*

way to generate accord for the republic in war and in peace and to achieve the highest good for society. With the gradual decline of monarchy in Rome the role of the King was taken up by two consuls of equal power the patrician and plebeian[26]. This readily presents a challenge for governance when power is in the hands of two people. However, the two held together the Republic[27]. Cicero describes the transformation from King to Republic as being a series of events which had a cyclical character. The ruling power of the state (*res publica*), like a ball, was grabbed from the hands of the Kings by tyrants, then from tyrants by aristocrats or the people, and from aristocrats again by an oligarchical faction or a tyrant, and as such there was no government that maintained itself for a long time[28].

The transition from monarchy to the republic produced a mixed constitution which adopted the three forms of government: the aristocratic, democratic and monarchical models[29]. Government could therefore take more than one form as opposed to what was suggested by Aristotle that is, tyranny (for preservation of Kings), oligarchy (sovereignty of few for wellbeing of many) and democracy (for interests of the poor)[30]. The mixed constitution is the only form of government capable of preserving a political society over the long term, but not just any mix will do[31]. Polybius interestingly argues that every constitutional order contains a vice engendered in it and cannot be separated from that vice[32]. Cicero thought was profound such that, Machiavelli would echo many years later, that all kinds of government are not perfect and are indeed defective. That the idea of three arms of government being qualified as

[26] Morley, Neville. The Roman Empire: Roots of Imperialism. London; New York: Pluto Press, 2010.
[27] *Ibid*
[28] Curtis, Michael. *The Great Political Theories: Volume 1*. New York: HarperPerennial ModernClassics, 2008. pp.
[29] Richard Alston, Aspects of Roman History, AD 14-117. (London 2002) Routledge. pp 115
[30] Curtis, Michael. *The Great Political Theories: Volume 1*. New York: Harper Perennial Modern Classics, 2008. pp.
[31] Wood, Neal. Cicero's Social and Political Thought. University of California Press, 1988. pp 163-168
[32] *Ibid* pp 173

ideal is short-lived since they contain in themselves viciousness seen in most governments in transition to democracy[33].

Transition from Republic to Empire

To understand this transition it would be critical to understand the Roman society generally[34]. The interactions between Rome and the Empire offers a good understanding of Roman society[35] Rome began to become a super power in the region by conquering territory by engaging just war principles[36] The spark that ignited the metamorphosis of Rome from an a normal state to a Mediterranean hegemony can be traced back to a small incident which led to the Punic Wars. The first Punic war (264–241 BC) was a small accident occasioned by a criminal gang that had its enterprise in the Greek city of Massena at the tip of Sicily[37]. It is argued that there was a treaty that was entered into between Carthage and Rome leading to the end of the first Punic War[38]. The Second Punic war (218–201 BC) is most remembered for the Carthaginian general Hannibal's crossing of the Alps in Rome[39]. This consolidated the resolve in the Republic which led to the tendency to seek hegemony. The Third Punic War (149–146 BC) involved an extended siege of Carthage, which marked the end of the City through utter destruction.

The Second aspect touches on several generals who attempted to introduce radical reform in Rome's army. For instance Gaius Marius (156-86BCE) who was not initially a soldier introduced military reforms. The other reforms were introduced by Sulla (138-78 BCE) who reorganized the constitutional order

[33] Barlow, J.J. "The Fox and the Lion: Machiavelli Replies to Cicero." History of Political Thought Volume 20, Issue No 4 (1999): 629
[34] Hankins, James. "Exclusivist Republicanism and the Non-Monarchical Republic." Political Theory Volume 38, Issue No. 4 (2010): pp 452–82
[35] Anthony Kamm, The Romans: An Introduction 2nd Ed (New York, 2008). pp. 57
[36] G. A. HARRER, "Cicero on Peace and War," *The Classical Journal*, Volume 14, Issue 1, 1918, pp. 26-38
[37] T. J. Cornell. The Beginnings of Rome: Italy and Rome from the Bronze Age to the Punic Wars. London (1995). pp 22-33
[38] *Ibid* pp 40
[39] *Ibid*

and placed power back to the upper class in society[40]. He virtually nullified the traditional influence of the tribunes of the people by increasing the membership of senate. Sulla is also famous for introducing the clarity on the legal system by establishing a clear distinction between criminal and civil law[41]. These reforms introduced by Sulla brought back what appears to be an absolute monarchy type of government. Several years after the death of Sulla, Crassus, Pompey and Julius Caesar who ruled as what was referred to as the first triumvirate. Thirdly, the government in the Roman Republic which had designed checks and balances became characterized by political strife[42]. General Gaius Marius and Lucius Cornelius Sulla demonstrated that a successful general could control Rome solely with the army leading to a militarized Republic. Maintaining and controlling army in the Republic, being an expensive affair, was a source of political strife between the different arms of government[43]. General Gaius Julius Caesar (100BCE to 44BCE) exploited the idea of ruling Rome with the army to the greatest extent possible[44]. He was able to conquer Gaul and Pompey which led him to being declared dictator for life.

The Rise of the Roman Empire

To maintain control, Rome had to preserve its military values while instilling pacifism and submissiveness in its new subjects[45]. To maintain control several things were done to ensure submissions by the conquered. First, the conquered assimilated into Roman society. Many became citizens and, as such, enjoyed rights and protections[46]. Second, the Rome no longer had to be so violent with

[40] Curtis, Michael. *The Great Political Theories: Volume 1*. New York: HarperPerennial ModernClassics, 2008. pp.

[41] Frost, Peter. "The Roman State and Genetic Pacification." Evolutionary Psychology, (July 2010)

[42] *Ibid*

[43] Edward Gibbon, The History of the Decline and Fall of the Roman Empire, ed. J.B. Bury with an Introduction by W.E.H. Lecky (New York: Fred de Fau and Co., 1946), Vol. 1. pp 144-166

[44] *Ibid*

[45] Henderson, M. M. "Tiberius Gracchus and the Failure of the Roman Republic." Theoria: A Journal of Social and Political Theory, Issue No. 31 (1968): 55-61.

[46] Frost, Peter. "The Roman State and Genetic Pacification." Evolutionary Psychology, (July 2010)

its subjects. Piracy largely disappeared following the battle of Actium in 31 BC. After the emperor Hadrian (117-138 AD), there were no new provinces to pacify and fewer rebellions in the older ones[47]. Third, a profound behavioral change was spreading through the population. People were less willing to become soldiers than earlier generations had been, and many would pay gold or cut off their thumbs to avoid military service[48]. A new kind of Rome was emerging, one less interested in violence and more submissive to authority. In fact, the new Romans were coming to see arrogant, aggressive conduct as wrong, even wicked.

Lessons from the Decline of the Roman Empire

There have been several attempts in the scholarly works seeking to perpetuate a narrative that there was an issue with Roman liberties that led to the collapse or Rome. This is supported by the fact that the Empire became so big for control. The provinces conquered in Italy, Spain and Mediterranean Africa, Greece, and the Hellenistic east as far as Euphrates constituted an empire too great for the Citizen to control without losing the capacity of managing the Military and civil societies[49]. The *cui bono* question is who benefits from the narrative of the collapse or decline of the Roman Republic? It is difficult to find an agreement among scholars on which verb to use best to describe the end of the influence of the Roman Empire. In addition, dating the decline of the Empire is difficult since it was not a onetime event, it was gradual, and varied reasons could be contributed to it[50]. Instead of considering the question of decline which demonstrates negativity, poverty, and weakness the emphasis should be on the positive, rich and active period which presents valuable lessons[51]. The school of late antiquity adopts the definitive period for the decline to stretch from the middle of the third to the end of 19th Century CE[52].

[47] *Ibid*

[48] *Ibid*

[49] *Ibid* p 609

[50] Brown, Peter. "The Rise and Function of the Holy Man in Late Antiquity." Journal of Roman Studies 61 (1971): 80–91

[51] *Ibid* 97

[52] Guy Middleton, The Fall of the Western Roman Empire: What led to the collapse of Rome: Ancient History of Modern Myths (2017 Cambridge University Press). pp 182-212.

Such expansive periods readily introduce a challenge since then the consideration is how factual it could be in the context of the Eastern and Western Rome. Admittedly deciding what is meant by collapse is a daunting task.

For purpose of this paper we adopt the three ways to consider dating the collapse or fall of the empire[53]. First, the fact that the Empire was shrinking from maximum extent that had been achieved under Septimius Severus (193-211 BCE). Second, Rome is considered as not having political might or being the most powerful state in the Mediterranean. Third, Rome as not being able to rule Italy the home ground of the Roman Empire. These three alternatives bring the dates from 410 BCE to 476[54]. What is more attractive is to consider the end of key institutions such as the Roman army in the West. This may include Emperors such as Romulus Augustus one of the youngest Emperors who lacked control over the entirety Rome. He is argued to be the last Emperor in the Western Roman Empire[55] It is hard to hinge the collapse of Rome to a single cause or event. It was a long and rough process through a series of events some connected, and others interconnected, personalities, and other internal and external factors[56]. One of the factors leading to the disintegration of the empire was existence of a critical fault-line between the imperial government and the interest of the regional elites. This was unseen but eventually uncovered if the ties binding Rome together[57]. Some of the reason attributed to the decline of the empire are firstly, the empire was big and impossible for one man to govern so power was shared in one way or the other with the pyramid with the emperor at the top. The emperor relied on senatorial aristocracy as well as on his household. When the central institution of power failed the increased bureaucracy to cope with administration was not helpful,

[53] *Ibid*
[54] *Ibid*
[55] *Ibid*
[56] Brown, Peter. "The Rise and Function of the Holy Man in Late Antiquity." Journal of Roman Studies 61 (1971):
[57] Guy Middleton, The Fall of the Western Roman Empire: What led to the collapse of Rome: Ancient History of Modern Myths (2017 Cambridge University Press). pp 182-212.

instead the provinces created their own armies and leaders[5859] The Empire was prone to fragmentation and division simply because no one could rule it alone.

Secondly, the relationship between the Empire and the cities can be seen as a relatively harmonious one. But around 200 BCE changes occurred which ultimately led to the collapse of the Roman Empire in the West[60]. Some of the changes include attacks on the Empire by Germans, financial resources from the cities were lessened and the process of centralization was not effective operationally among others. Access to the law became impossible for the poor inhabitants of the Empire because of bribes and charges demanded for services. The unity of the legal system was pierced by the head of departments obtaining legal authority from members of the departments[61]. Christian communities also founded their own circles of relationships. The growth of the Empire offers a model which was ultimately dysfunctional due to the incoherence of the state in the late antiquity. This dominance and integration which was cascaded downwards to the entire Empire that led to the collapse of the Roman Empire[62].

Thirdly, control of the economic resources was at play in the Roman Empire. The structural foundation of the economic conditions in Rome were family. Domination and aristocracy have been aptly demonstrated since the participation in decision making by the Magistrates, patrons, grown up sons of the family can be seen as being very essential[63]. There was a good appreciation of the role foreigners played in state development as a citizen. The economic arrangement that was to go with the governance structure did work initially.

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[58] Brown, Peter. "The Rise and Function of the Holy Man in Late Antiquity." Journal of Roman Studies 61 (1971):
[59] –91
[60] Martin, Jochen. "The Roman Empire: Domination and Integration." Journal of Institutional and Theoretical Economics (JITE) / Zeitschrift Für Die Gesamte Staatswissenschaft Volume 151, Issue No. 4 (1995): pp 717.
[61] Wickham, Chris, "The Other Transition. From the Ancient World to Feudalism," Past & Present, Oxford University Press, Issue No. 103 (May, 1984), pp. 13
[62] *Ibid* pp 30
[63] Martin, Jochen. "The Roman Empire: Domination and Integration." Journal of Institutional and Theoretical Economics (JITE) / Zeitschrift Für Die Gesamte Staatswissenschaft Volume 151, Issue No. 4 (1995): pp 719

The collection of taxes relied on the convention that existed prior to the Roman conquest. This was to become a challenge because it could not respond to all the dynamics of as the Empire extended its dominance.

Fourth, the Roman Empire is portrayed as being orderly which is critical to appreciation of the effect of dominance[64]. The Senators and Governors were indeed central to the administration of justice and command of the military in the Provinces[65]. The structure of the administration was not expanded by the Emperors to respond to the hegemonic tendencies which was to become one of the fatal flaws leading to the collapse of Roman Empire. The relationship between Rome and the provinces led to a build-up to the expansion tendencies without adequately adjusting the governance structure[66].

Fifth, the role of the Emperor which was central to the functioning of the Empire did not adequately respond to the increased governance needs. There is a good appreciation by the author that the Emperor's control over the affairs and festivities of the cities would not be maintained successfully in the context of increased number of cities and provinces[67]. It would become unmanageable to expect that permission for all constructions would be given by the Emperor[68].

Six, the increasing size of the Roman Republic and Empire made tax collection and management of the Empire very difficult. The Roman Empire grew to about 2 million square miles, and its population rose to about 54 million[69]. The size of the Roman state administration tended to lag behind of the empire, and the republican administration had too few magistrates to govern the provinces

[64] *Ibid* p 720
[65] Wickham, Chris, "The Other Transition. From the Ancient World to Feudalism," Past & Present, Oxford University Press, Issue No. 103 (May, 1984), pp. 13
[66] *Ibid* 16
[67] Martin, Jochen. "The Roman Empire: Domination and Integration." Journal of Institutional and Theoretical Economics (JITE) / Zeitschrift Für Die Gesamte Staatswissenschaft Volume 151, Issue No. 4 (1995): pp 719
[68] *Ibid* 721
[69] Temin, Peter. "The Economy of the Early Roman Empire." The Journal of Economic Perspectives Volume 20, Issue No. 1 (2006): 133-151

adequately. The size of the Roman state administration grew substantially under the Empire[70]. Under Augustus there were about 150 civil servants in Rome and 150 senatorial and equestrian administrators with small staffs of public slaves in the provinces[71] Even then its ability to control the provinces was limited due to poor communications and its small size[72]

Lastly, one of the famous debates over the collapse of the Roman Empire involves Religion. The question is whether Christianity destroyed Rome. Or did Rome destroy itself by pacifying its subjects while more and more unpacified barbarians pressed on its borders? The answer probably lies somewhere in-between. All State societies are prone to collapse because their existence depends on the State's ability to repress religious and communal violence[73]. On the one hand, the State could no longer hold down the potential for religious violence that still existed among its citizenry and on the other, it could no longer keep out unpacified populations that lie beyond its borders[74]. This new social environment reduces economic output, thus worsening the initial instability and causing a downward spiral that may spin out of control.

Conclusion

While the ideal state according to Cicero was everlasting, it is not self-sustaining[75]. Its preservation depends on three pillars: justice, a mixed constitution, and an active citizenry. The mixed constitution—the best type of *res publica*—thus comes to be seen not as the ideal state itself, but a key real-

[70] *Ibid*

[71] Slootjes, Daniëlle. "Local Elites and Power in the Roman World: Modern Theories and Models." *The Journal of Interdisciplinary History* 42, no. 2 (2011): pp 235-249

[72] Kiser, Edgar, and Danielle Kane. "The Perils of Privatization: How the Characteristics of Principals Affected Tax
Farming in the Roman Republic and Empire." Social Science History Volume 31, Issue No 2 (2007): 191-212

[73] Frost, Peter. "The Roman State and Genetic Pacification." Evolutionary Psychology, (July 2010)

[74] *Ibid*

[75] Richard W. Mass "Political Society and Cicero's Ideal Stat" Scholarly Incursion, Historical Methods, Volume 45, No 2, (2012). Routledge Taylor & Francis Group pp. 79-92

world mechanism needed to approach that ideal[76]. Rome started as a Kingdom and developed into a power sharing nobility only to fall back to individual rule which was untenable in practice due to the expansive jurisdiction. Hence the old adage Rome was not built in a day. Towards the end there existed a tension between managing the empire in its expansive state and local problems. Also, the challenge between the internal and external problems were real. Such problems beset many Empires and in the absence of failure to acknowledge the instability of expansion, change, adaptation, the eventuality is collapse. The lesson of Rome is often taken as a warning about collapse that could happen to any state. Rome is a useful example of collapse because it teaches us that while historical change happens, modern attempts to explain it can involve seriously different interpretations of the same evidence. Even with textual history and contemporary sources commenting on what was happening, in addition to archaeological evidence, Rome's collapse is still debated in terms of whether it even happened, whether there was a clean break, or whether we should think instead of a period and process of transition and transformation. One may therefore suggest avail more evidence. Having more evidence does not necessarily make it any easier to understand a collapse it can make it much harder. The way we interpret the evidence and the stories we tell with it are also very much affected by our current concerns. It should be obvious that, across such a large territory, change took many forms and that many people, processes, and events were responsible. In examining other collapses, recalling the complexity of what happened in the Roman Empire caution should be taken against simple or simplistic explanations and characterizations of what was happening. Seeing as there was no apocalyptic collapse of empire that wiped the slate clean or killed everyone off, a great degree of continuity is assured, but that does not mean there was no imperial collapse, or that such a collapse was insignificant historically, even if it was a steady erosion of imperial power that took place in the Rome over a century.

[76] Curtis, Michael. The Great Political Theories: Volume 1. New York: Harper Perennial Modern Classics, 2008. pp. 102-146

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22. Richard W. Mass "Political Society and Cicero's Ideal Stat" Scholarly Incursion, Historical Methods, Volume 45, No 2, (2012). Routledge Taylor & Francis Group pp. 79-92

23. Richard Alston, Aspects of Roman History, AD 14-117. (London 2002) Routledge. pp 110150

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25. Slootjes, Daniëlle. "Local Elites and Power in the Roman World: Modern Theories and Models." *The Journal of Interdisciplinary History* 42, no. 2 (2011): pp 235-249

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29. Wood, Neal. Cicero's Social and Political Thought. University of California Press, 1988. pp 159-205

Towards Effective Management of Community Land Disputes in Kenya for Sustainable Development

By: James Ndungu Njuguna [*]

Abstract

Article 61 (2) of the Constitution of Kenya, 2010 classifies land as public, community and private. This is a huge departure from the previous constitution order where community land was not specifically recognised. Classification of community land presents huge potential for communities in Kenya to pursue a common agenda in relation to the land in line with traditional African values of inclusivity, harmony and togetherness. However, the likelihood of disputes arising in respect of community land is also high due to the large number of individuals claiming a stake in such land.

The paper thus seeks to critically analyse the current legal framework for management of community land disputes under the Community Land Act. It will examine the viability of each of the mechanisms stipulated under the Act in management of community land disputes and point out their strengths, weaknesses and opportunities. Finally, the paper will propose recommendations aimed at facilitating effective management of community land disputes in Kenya in order to foster sustainable development.

1. Introduction

Land has always held a central position among African communities. It was the basis upon which the struggle for independence was waged in most countries. [1] In Kenya, land has traditionally dictated the pulse of the nationhood and continues to occupy a central position in the country's

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[1] Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land., available at http://kenyalaw.org/kl/fileadmin/CommissionReports/A_Report_of_the_Land_Commission_of_Inquiry_into_the_Illegal_or_Irregular_Allocation_of_Land_2004.pdf (accessed on 23/02/2021)

economic, social, political and legal relations.[2] Natural resources including land play an important cultural role for many local communities and may even be a point of pride for the nation as a whole serving historical and cultural significance.[3] The importance of land means that land and land based resources must be managed, utilized and exploited in a sustainable, efficient, productive and equitable manner.[4]

The Community Land Act[5] was enacted to give effect to article 63 (5) of the Constitution in respect to community land. It inter alia provides for the recognition, protection, management, registration and administration of community land.[6] One of the salient features of the Act is the stipulation of a set of mechanisms to govern management of disputes relating to community land.[7] The classification of community land is important since it will encourage land management by communities.[8]

However, despite its recent recognition, the concept of community land is not novel in Kenya. Before colonialism, the land system tenure in Kenya comprised of communities who held land in common and used it either for agrarian activities or pastoralism.[9] Under this system that was prevalent in other African communities, individuals obtained land rights by virtue of

[2] *Ibid*

[3] Muigua. K., Conflict Management Mechanisms for Effective Environmental Governance in Kenya, available at http://kmco.co.ke/wp-content/uploads/2018/09/Conflict-Management-Mechanisms-for-Environmental-Governance-Kariuki-Muigua-September-2018.pdf (accessed on 04/03/2021)

[4] Muigua.K., Wamukoya.D & Kariuki.F;, *'Natural Resources and Environmental Justice in Kenya'* Glenwood Publishers Limited, 2015

[5] Community Land Act, No. 27 of 2016, Government Printer Nairobi

[6] *Ibid*, Preamble

[7] *Ibid*, Part VIII

[8] Muigua. K., Integrated Natural Resources and Environmental Management for Sustainable Development in Kenya, available at http://kmco.co.ke/wp-content/uploads/2019/01/Integrated-Natural-Resources-and-Environmental-Management-for-Sustainable-Development-in-Kenya-Kariuki-Muigua-January-2019.pdf (accessed on 04/03/2021)

[9] Wamicha W N and Mwanje J I, 'Environmental management in Kenya; Have the national Conservation Plans Worked?' Organization for Social Science Research in Eastern and Southern Africa, (2000) Addis Ababa, Ethiopia.

residence in a particular community.[10] Individuals did not own such land but could cultivate and use it for other purposes. When not in use, the land reverted back to the community.[11] Consequently, Land ownership and use was also governed by the respective customary laws of the various ethnic communities.[12] Disputes involving land were managed through existing traditional justice systems which played a major role in managing conflicts and maintaining social order among the communities.[13] These communities had rules to ensure that individuals lived in harmony with one another and that justice was done when conflict broke out.[14] This was administered by institutions such as the council of elders. Traditional conflict resolution mechanisms were geared towards fostering peaceful co-existence in the community.[15]

Colonialism impacted the social, economic, cultural and political life of indigenous African communities in a radical manner. The land tenure system was massively impacted due to the implementation of laws and policies that resulted in mass disinheritance of African communities.[16] Land was thus held by colonial officials in trust for the crown through laws and policies such as

[10] Kajoba. G., 'Land Use and Land Tenure in Africa: Towards an Evolutionary Conceptual Framework', available at https://www.codesria.org/IMG/pdf/Kajoba.pdf (accessed on 23/02/2021)

[11] *Ibid*

[12] HWO Okoth Ogendo, 'The Tragic African Commons: A Century of Expropriation, Suppression and Subversion' Amplifying Local Voices: Striving for Environmental Justice, Centre for International Environmental Law, et. al.". In: Cent. Afri. J. Pharm.Sci. 5(3): 60-66. Cent. Afri. J. Pharm.Sci. 5(3): 60-66; 2002.

[13] Kariuki. F., 'Conflict Resolution by Elders in Africa; Successes, Challenges and Opportunities', available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3646985 (accessed on 23/02/2021)

[14] Muigua.K., Nurturing Our Environment for Sustainable Development, Glenwood Publishers Limited, 2016

[15] Muigua. K., Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya, 2010, available at http://kmco.co.ke/wp-content/uploads/2018/08/Paper-on-Article-159-Traditional-Dispute-Resolution-Mechanisms-FINAL.pdf (accessed on 04/03/2021)

[16] Republic of Kenya, *National Land Policy*, 2009, Government Printer, Nairobi

the 1901 East African Lands Order in Council, Crown Land Ordinance of 1915, the Trust Land Act and the Swynnerton Plan.[17]

The dawn of independence was met with optimism that the transfer of power to indigenous communities would dramatically change the policies that were in place, especially with regards to land; this however was not the case.[18] The ensuing period witnessed a general re-entrenchment and continuity of oppressive land policies, laws and administrative structures that resulted in massive land injustices.[19] The power of the President to allocate and alienate land was misused through a culture of selective land allocation by the political elite to gain political support and mileage. These problems were well addressed by the 1999 Njonjo Report and the 2002 Ndung'u Report that advocated for radical land reforms that would recognize and address historical land injustices, customary land rights and conflict resolution.[20]

Promulgation of the Constitution of Kenya, 2010 thus ushered in an era of hope in relation to the proverbial land issue in Kenya. The Constitution dedicates an entire chapter on land and environment and further sets out certain principles to guide land policy in Kenya key among them equitable access to land; security of land rights and encouragement of communities to settle land

[17] See generally Ojienda T., 'Principles of Conveyancing in Kenya: A Practical Approach' May 2008; see also S. Wanjala, 'Land Ownership and Use in Kenya; Past, Present and Future' in Wanjala S (ed), Essays on Land Law: The Reform Debate in Kenya, University of Nairobi, Nairobi, 2000

[18] Njuguna. J., 'Arbitration as a Tool for Management of Community Land Conflicts in Kenya,' (2019), Journalofcmsd Volume 3 (1).

[19] Muigua.K., Wamukoya.D & Kariuki.F;, *'Natural Resources and Environmental Justice in Kenya'* Glenwood Publishers Limited, 2015; See also Kameri-Mbote P, 'The Land Question in Kenya: Legal and Ethical Dimensions' International Environmental Law Research Centre (2009) Strathmore University and Law Africa.

[20] Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land., available at http://kenyalaw.org/kl/fileadmin/CommissionReports/A_Report_of_the_Land_Commission_of_Inquiry_into_the_Illegal_or_Irregular_Allocation_of_Land_2004.pdf; See also Report of the Commission of Inquiry into the Land System of Kenya of Kenya on Principles of a National Land Policy Framework; Constitution Position of Land and New Institutional Framework for Land Administration., available at http://www.archives.go.ke/wp-content/uploads/2016/10/List-of-Commission-Reports.pdf (accessed on 25/02/2021)

disputes through recognized local community initiatives consistent with the Constitution.[21]

The paper seeks to critically analyze the dispute management mechanisms set out under the Community Land Act. It argues that disputes relating to community land are sui generis in nature and their management requires a well customized approach. The paper will give an overview of these disputes and how they pose a threat to the sustainable development agenda in Kenya. It will then propose reforms aimed at effective management of these disputes in order to promote sustainable development in Kenya.

2. Nature of Community Land Disputes

Sustainable development has been defined as development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs.[22] It has become one of the central pillars of the development agenda across the globe and has been enshrined as a principle of governance under the Constitution.[23] Further, it is also one of the principles governing land policy in Kenya.[24] To this extent, the Community Land Act requires every person dealing with community land to be guided by certain principles including sustainable development.[25] It is a key pillar in the management of natural resources that is inextricably linked to people's livelihoods thus requisite in moving towards environmental justice.[26] Use and management of community land can aid the attainment of sustainable development due to indigenous knowledge and skills on how to grow food, varieties of crops to plant and how to control diseases in plants and livestock.[27]

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[21] Constitution of Kenya, 2010, Chapter Five, Article 60 (1)

[22] World Commission on Environment and Development, *Our common future*. Oxford, (Oxford University Press, 1987).

[23] Constitution of Kenya, 2010, Article 10 (2) (d)

[24] *Ibid*, Article 60 (1) (c)

[25] Community Land Act, Op Cit, S 3 (b)

[26] Muigua.K., Wamukoya.D & Kariuki.F;, *'Natural Resources and Environmental Justice in Kenya'* Glenwood Publishers Limited, 2015

[27] Muigua. K., Integrating Community Practices and Cultural Voices into the Sustainable Development Discourse, available at http://kmco.co.ke/wp-content/uploads/2021/01/Integrating-Community-Practices-and-Cultural-Issues-into-

Community land as a natural resource is a possible breeding ground for conflicts due to the multiple interests at stake. This could take the form of conflict between communities over community land interests; Conflict between an individual community member and the community; conflict between the community and county or national government over community land interests; and conflicts between county governments for community land that crisscross the county boundary.[28] Effective management of such disputes is integral in achieving sustainable development by enhancing social cohesion, peace and harmony. When such disputes spiral out of control, it threatens the core fabric that has sustained indigenous communities since time immemorial and affects the development agenda of a particular community in relation to community land.

3. Current Legal Framework on Management of Community Land Disputes in Kenya

The Community Land Act stipulates a set of mechanisms to be applied in management of disputes relating to community land. Under the Act, a registered community may use alternative dispute resolution mechanisms for purposes of settling disputes and conflicts involving community land.[29] This is in line with the vision of the Constitution of Kenya which advocates for the promotion of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms in the exercise of judicial authority by courts and tribunals.[30]

Where, a dispute relating to community land arises, such dispute shall in the first instance be resolved using any of the internal dispute resolution mechanisms set out in the respective community by-laws.[31] This provision envisages formulation of internal rules by respective communities for management of disputes concerning community land. However, where such

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the-Sustainable-Development-Debates-8th-January-2021-Kariuki-Muigua-PhD.pdf (accessed on 04/03/2021)

[28] Njuguna. J., 'Arbitration as a Tool for Management of Community Land Conflicts in Kenya, Op Cit

[29] Community Land Act, No. 27 of 2016, S 39 (1), Government Printer, Nairobi

[30] Constitution of Kenya, 2010, Article 159 (2) (c), Government Printer, Nairobi

[31] Community Land Act, Op Cit, S 39 (2)

rules do not exist, the Act encourages a registered community to give priority to alternative methods of dispute resolution.[32]

Among the ADR mechanisms recognised under the Act is mediation. Mediation is a voluntary, informal, consensual, strictly confidential and non-binding dispute resolution process in which a neutral third party helps the parties to reach a negotiated solution.[33] It is a continuation of the negotiation process and arises where parties to a conflict have attempted negotiations but have reached a deadlock.[34] Parties thus agree to involve a third party to assist them continue with the negotiations and ultimately break the deadlock.[35] The Act provides that parties to a dispute relating to community land may agree to refer the dispute to mediation.[36] Such mediation shall take place in private or informal setting where the parties participate in the negotiation and design the format of the settlement agreement.[37] This is in line with attributes of mediation which include party autonomy, privacy, confidentiality and informality. Under the Act, the mediator's role is limited to helping parties to resolve their dispute.[38]

Another form of ADR recognised under the Community Land Act is arbitration. The Act provides that where a dispute relating to community land arises, the parties to the dispute may agree to refer it to arbitration.[39] Arbitration is a mechanism for settlement of disputes which usually takes place in private pursuant to an agreement between two or more parties under which they agree to be bound by the decision of a neutral third party (arbitrator).[40] It has a number of attributes including privacy, confidentiality,

[32] *Ibid*, S 39 (3)

[33] Fenn.P., 'Introduction to Civil and Commercial Mediation', Chartered Institute of Arbitrators, *Workbook on Mediation*, (CIArb, London, 2002)

[34] Muigua.K., 'Resolving Conflicts Through Mediation in Kenya', Glenwood Publishers Limited, 2nd Edition, 2017

[35] *Ibid*

[36] Community Land Act, Op Cit, S 40 (1)

[37] *Ibid*, S 40 (2)

[38] *Ibid*, S 40 (3) (c)

[39] *Ibid*, S 41 (1)

[40] Barnstein.R., *'The Handbook of Arbitration Practice: General Principles* (Part 2) (Sweet & Maxwell, London, 1998), p.313.

flexibility and party autonomy.[41] However, the process is adversarial in nature and resembles litigation in certain aspects thus raising concerns over its viability in the management of community land disputes.[42]

The Act further envisages the use of traditional dispute resolution mechanisms in management of community land disputes. It provides that court or any other dispute resolution body shall apply the customary law prevailing in the area of jurisdiction of the parties to a dispute or binding on the parties to a dispute in settlement of community land disputes so far as it is not repugnant to justice and morality and inconsistent with the Constitution.[43] This provision mirrors that of the Constitution which provides that traditional dispute resolution mechanisms shall not be used in a way that contravenes the bill of rights; is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or is inconsistent with the constitution or any written law.[44] Finally, the Act also provides for recourse to judicial proceedings in management of community land disputes as a measure of last resort. It states that where all efforts of resolving a dispute under the Act fail, a party to the dispute may refer the matter to court which may confirm, set aside, amend or review the decision which is the subject of the appeal or make any order as it may deem fit.[45]

4. Efficacy of The Current Legal Framework on Management of Community Land Disputes in Kenya

The current legal framework on management of community land disputes in Kenya as set out under the Community Land Act comprises of a set of mechanisms including traditional dispute resolution mechanisms, mediation, arbitration and judicial proceedings.

[41] Muigua.K., 'Settling Disputes Through Arbitration in Kenya', Glenwood Publishers Limited, 3rd Edition, 2017

[42] Njuguna. J., 'Arbitration as a Tool for Management of Community Land Conflicts in Kenya, Op Cit

[43] Community Land Act, Op Cit, S 39 (4).

[44] Constitution of Kenya, 2010, Op Cit, Article 159 (3)

[45] Community Land Act, Op Cit, S 42

Traditional dispute resolution mechanisms can play an important role in management of community land disputes and enhancing the sustainable development agenda in Kenya. It has been asserted that culture is an essential aspect of sustainable development since it represents identity, creativity and innovation of a community and is an important factor in building social inclusion.[46] Indigenous knowledge, cultures and traditional practices contribute to sustainable and equitable development and proper management of the environment.[47] Thus, effective application of traditional dispute resolution mechanisms can facilitate proper management of community land disputes and promote sustainable development. These mechanisms emphasize harmony/togetherness over individual interests.[48] However, these mechanisms suffer from a number of drawbacks such as the potential disregard for basic human rights; application of abstract rules and procedure; absence of a legal framework; lack of consistency in decisions made and mixing up of different cultures thus eroding traditions.[49]

Mediation is also a viable mechanism for management of community land disputes since it addresses the root causes of conflicts. In the context of community land, this is important in maintaining relationships and promoting social cohesion in the community. However, it requires the goodwill of the parties and is non-binding in nature which affects enforceability of decisions. [50] Further, it has been asserted that it creates no precedents and it is not suitable when one party needs urgent protection like an injunction.

Despite being an ADR mechanism with advantages such as flexibility, expediency and cost-effective dispute resolution, the efficacy of arbitration as

[46] United Nations Development Group, Delivering the Post-2015 Development Agenda: Opportunities At the National and Local Levels, 2014, p 28.

[47] United Nations Declaration on the Rights of Indigenous Peoples, Preamble, available at https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf (accessed on 25/02/2021)

[48] Muigua.K., Alternative Dispute Resolution and Access to Justice in Kenya, Glenwood Publishers Limited, 2015

[49] *Ibid*

[50] Muriithi, T. & Ives, P.M, Under the Acacia: Mediation and the Dilemma of Inclusion, (Centre for Humanitarian Dialogue, April 2007),

a mechanism for management of community land disputes has been subject of ongoing debate. It has been argued that although arbitration is not as formal as adjudication, it does follow the same general style as a courtroom proceeding. The process resembles a courtroom because "the arbitrator accepts evidence, listens to witnesses called by the parties, and hears the arguments of the parties."[51] This may not be the ideal setting for disputes or conflicts with need for or close relationship since it can feel adversarial.[52] Further, it has been argued that arbitration may not address the psychological issues that arise in community land disputes which could potentially result in the dispute remerging in future.[53]

Litigation as a mechanism for management of community land disputes has been criticised for being slow which could result in prolonging of such disputes when there is need for expeditious dispute resolution to maintain harmony within the community.[54] The process is also expensive, riddled with technicalities and does not address the root causes of conflicts.[55] These factors make litigation an ineffective mechanism in the management of community land disputes.

5. Way Forward: Towards Effective Management of Community Land Disputes in Kenya

5.1 Effective Utilisation of TDRMs in the Management of Community Land Disputes

Tradition Dispute Resolution Mechanisms represent the most viable mechanism of managing community land disputes. They reflect principles of reconciliation based on long-standing relationships and values.[56] They tend to be effective in addressing intra-community and even inter-community

[51] Vorys, Y., "The best of both worlds: the use of med-arb for resolving will disputes," p. 884.
[52] *Ibid*
[53] Njuguna. J., 'Arbitration as a Tool for Management of Community Land Conflicts in Kenya, Op Cit
[54] *Ibid*
[55] *Ibid*
[56] Myers, L.J. & Shinn, D.H., 'Appreciating Traditional Forms of Healing Conflict in Africa and the World,' Black Diaspora Review, Vol.2(1)

conflict, where relationships and shared values are part of the reconciliation process.[57] However, these mechanisms suffer from a number of challenges including informality and lack of consistency in decision making. Further, due to the patriarchal nature of most African communities, there may be bias against women while applying traditional dispute resolution mechanisms in the management of community land disputes.

There is need to integrate traditional dispute resolution mechanisms in conflict management in a way that ensures that the informality of these mechanisms is not lost.[58] This would ensure consistency in decision making and protection of human rights whilst promoting the principles of reconciliation that is embedded in these mechanisms.

1.1.1 5.2 Strengthening the Legal Framework on ADR in Kenya

Both the Constitution of Kenya and the Community Land Act capture the spirit of Alternative Dispute Resolution.[59] However, the uptake of ADR in Kenya has been curtailed by among other factors, the lack of a harmonised legal framework. The Alternative Dispute Resolution Policy (Zero Draft)[60] represents a good starting point in enhancing the legal framework on ADR in Kenya. The purpose of the policy is to strengthen, guide and support the growth of Alternative Dispute Resolution (ADR) in the Country in order to achieve optimal delivery of access to justice for all Kenyans.[61] It is intended to create a well-coordinated, well capacitated and cohesive ADR system that is strategically linked to the formal system, while at the same time maintaining its autonomy as an informal system and providing quality justice services to

[57] *Ibid*

[58] Muigua. K., 'Effective Application of Traditional Dispute Resolution Mechanisms in the Management of Land Conflicts in Kenya: Challenges and Prospect' available at http://kmco.co.ke/wp-content/uploads/2019/10/Effective-Application-of-Traditional-Dispute-Resolution-Mechanisms-in-Management-of-Land-Conflicts-in-Kenya-Challenges-and-Prospects-October-2019-5.pdf (accessed on 25/02/2021)

[59] Constitution of Kenya, 2010, Article 159 (2) (c), Government Printer, Nairobi; Community Land Act, No. 27 of 2016, S 39 (1), Government Printer, Nairobi

[60] Alternative Dispute Resolution Policy (Zero Draft), 2019, available at https://www.ncia.or.ke/wp-content/uploads/2019/10/DRAFT-NATIONAL-ADR-POLICY.pdf

[61] *Ibid*

Kenyans across the country.[62] The policy recognises the applicability of ADR in different sectors including land disputes.[63] Adoption of the policy will therefore strengthen the legal framework on ADR in Kenya and enhance its effectiveness towards management of community land disputes in Kenya.

5.3 Use of Hybrid ADR Mechanisms in the Management of Community Land Disputes

The foregoing discussion has demonstrated that despite their inherent advantages, ADR mechanisms suffer from a number of challenges and would ideally not be suitable on their own in management of community land disputes. One possible remedy is the utilisation of hybrid ADR mechanisms such as med-arb. This ensures that parties are able to benefit from the advantages of each of these mechanisms and mitigate their shortcomings.

Med-arb is a combination of mediation and arbitration where the parties agree to mediate but if the mediation process fails to achieve a settlement, then the dispute is referred to arbitration.[64] This allows parties to benefit from the advantages of mediation and arbitration in the dispute management process by striking a balance between party autonomy and finality in dispute resolution.[65] The finality, efficiency and flexibility of Med-Arb makes it a viable mechanism in management of disputes related to community land.

6. Conclusion

Effective dispute management is a key pillar of sustainable development by creating a conducive environment that fosters the development agenda. The Community Land Act sets out a number of mechanisms to be utilised in the management of disputes relating to community land including traditional dispute resolution mechanisms, mediation, arbitration and litigation. However, despite the advantages of each of these mechanisms, there are inherent shortcomings that curtail effective management of disputes relating to community land. To cure these challenges, there is need for streamlining of

[62] *Ibid*
[63] *Ibid*
[64] Muigua.K., Alternative Dispute Resolution and Access to Justice in Kenya, Op Cit
[65] *Ibid*

traditional dispute resolution mechanisms, strengthening of the legal framework on ADR in Kenya and use of hybrid ADR mechanisms in the management of community land disputes. This would facilitate effective management of community land disputes and promote sustainable development in Kenya.

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The Intergovernmental Authority on Development's (IGAD'S) Protocol on Transhumance and the Need for an IGAD Common Policy on Disarmament of Pastoralists

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Abstract

In 2018 IGAD concluded a protocol on transhumance. The Protocol on Transhumance in the IGAD Region is aimed at enhancing free movement of pastoralists living at the border areas of the IGAD member countries in search for pastures for their livestock especially during periods of drought. This is hoped to enhance security of pastoralists and their host communities. It is consequently hoped that the protocol will prevent loss of livestock due to the perennial droughts experienced by pastoralists in the IGAD region. Many pastoralists within the IGAD region mainly those living along the borders of the member countries are in possession of illegal arms. This poses a major challenge to the implementation of the protocol. Although the member countries welcome the protocol, they are afraid of the dangers posed by illegal small arms and light weapons (SAWLs) in the hands of pastoralists. The countries have called on each other to disarm their pastoralists. Uganda, for instance, which has worked very hard to disarm its Karamojong calls on Kenya, South Sudan and Ethiopia to disarm their pastoralists for the implementation of the protocol to succeed. IGAD does not have a common disarmament policy. This paper argues that a common disarmament policy for pastoralist communities in the IGAD region is therefore urgently necessary in order to enhance the implementation of the Protocol on transhumance. The paper further offers policy recommendations to that end.

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Introduction

Pastoralism is an essential means of livelihood in the Horn of Africa. It accounts for the livelihood of about 15-20 million people at the Horn (Mkutu, 2003). Most pastoralist areas in the IGAD region span international borders. The IGAD region is comprised of the following countries in the Horn of Africa: Djibouti, Ethiopia, Eritrea, Somalia, Kenya, Uganda, Sudan and South Sudan. The pastoralists practice transhumance which contributes 6-10% to the countries' and supports more than 70 % of the pastoral livelihoods in the IGAD region making it the only region in Africa that has a self sufficient supply of meat (IGAD, 2020). Consequently, transhumance pastoralism is a major driver of the region's economy supporting large populations in terms of livelihoods and employment and thus forms an imperative ecosystem that cannot be brushed aside (Waweru, 2018).

Competition for dwindling pastures and cattle rustling coupled with extreme weather variations and conditions such as persistent droughts and climate change often lead to violent confrontations between different pastoralist groups within and across borders. This results in persistent insecurity and hinders efforts towards peace building and provision of sustainable peace (Pavanello & Scott-Villiers, 2013). Possession of illegal arms worsens the situation.

Recognizing the importance of transhumance and the indispensability of pastoralism in the region, IGAD member states and the Secretariat have carried out various measures to take care of pastoralists who often tend to be marginalized. One of the key measures was the establishment of the IGAD Centre for Pastoral Areas and Livestock Development (ICPALD) in 2012 whose mandate is to promote, facilitate and advocate for a people centered gender responsive sustainable development in arid and semi arid areas in the IGAD region (ICPALD, 2020). Other measures include the establishment of transhumance corridors through mapping of cross-border stock routes; management of animal health through signing of MOUs between member countries on cross border animal health and the establishment of an integrated early warning system on climate change (IGAD, 2020).

In 2018, IGAD proposed a Transhumance Protocol which would be of great help in supporting the pastoralists in their livelihoods. The aim of the IGAD transhumance protocol is to facilitate a legal framework for free movement in the region in order to enhance orderly cross border mobility, migration, regional economic integration and development (IGAD, 2018). This article however maintains that the implementation and the success of the protocol is however dependent on proper disarmament of the pastoralist communities within IGAD region. The article thus reviews the proliferation of small arms in the IGAD region, presents and assesses the disarmament efforts that have been pursued by different states in the IGAD region. Projecting the problems that illegal firearms in the hands of pastoralists would pose to the implementation and success of the protocol on transhumance, the article then makes recommendations for a common IGAD policy for the disarmament of pastoralists in the region.

Proliferation of Small Arms among Pastoralists in the IGAD Region

Small arms have proliferated at a very high rate among pastoralist communities in the IGAD region. Indeed, studies have indicated that cattle rustling is increasingly carried out using small arms and light weapons (SALWs) (Leff, 2009). Traditional weapons such as spears, bows and arrows are no longer being used. According to Small Arms Survey for instance, small arms are used in 96.9 percent of cattle rustling occurrences in the Kenya-Sudan border region (Bevan, 2008).

Various factors drive pastoralist communities within the IGAD region to arm themselves. Leff, (2009) identified three main reasons as to why pastoralist communities arm themselves. The first and most crucial is provision of security. In the absence of government security apparatus, many pastoralist resort to arming themselves in order to provide security for their families and their livestock. Secondly, pastoralists arm themselves so as to leverage themselves as they raid other communities in order to replenish their stocks. Thirdly, the arms have become a tradable commodity that can be traded for livestock and other commercial goods.

Small arms are however not a new phenomenon among pastoralists within the IGAD region. They have been in existence since the early twentieth century (Leff, 2009). However, inter and intra-state conflicts within IGAD states in the post-colonial period increased the circulation of small arms. Past conflicts and wars in Uganda, Ethiopia and Sudan left large amounts of small arms within the hands of pastoralists. The collapse of Idi Amin regime in Uganda in 1979 left a security lapse and a consequent raid of an arms depot in Moroto in the country's Karamoja region whereby the Karamojong helped themselves to large amounts of arms (Mkutu, 2007). A similar case occurred in Kapoeta in Southern Sudan in 2002 (Bevan, 2008). The current civil war in the republic of South Sudan creates a major loophole in security in the region and provides an opportunity for armament.

Porous borders in the areas inhabited by pastoralist communities enhance easy circulation of arms across the borders through cross border arms-trade routes. Mkutu (2003), identified four key small arms trade routes within the IGAD region. There are two routes from South Sudan to the Karamoja region of Uganda; one from Kapoeta and another from Nimule regions. From Karamoja, they are further taken to Kenya. The third route is from South Sudan into Kenya through Lokichoggio and the fourth is from Somalia, through Merile region of Ethiopia and Karamoja region of Uganda and further to Kenya. The figure below illustrates the routes

Cross border Arms flows within the IGAD region
Source: Mkutu, 2003

Disarmament of Pastoralists in the IGAD Region

IGAD member states have on various occasions initiated and carried out voluntary as well as forceful disarmament programmes in order to alleviate the trail of destruction that SALW have been causing in the region (IGAD, 2007). Some of the initiatives are discussed below.

Uganda

Uganda has had decades of disarmament particularly in the Karamoja region which is predominantly inhabited by pastoralists, most of the initial efforts being largely forceful. However, the 21st century seemed to bring a change of trend from forceful disarmament to a more peaceful one. In April 2000, the Ugandan parliament resolved that the time was ripe for the Karamoja region

to be fully disarmed. The first phase of disarmament began in December 2001 with a voluntary disarmament phase that lasted until February 2002 (Mkutu, 2003:29). The voluntary phase involved various measures such as amnesty to those who surrendered their small arms, compensation which signaled the government's appreciation of the economic and security value that the small arms had for the pastoralists. Incentives such as an ox-plough and a bag of maize were also offered. The voluntary phase led to the recovery of approximately 10,000 small arms (KIDDP, 2007:9). This was way below the targeted 40,000 small arms (Mkutu, 2003:31). In a bid to assure security for those who disarmed and also to prevent rearmament, the Ugandan government attempted to seal the porous borders with Kenya and Sudan but this was not effective. The end of the voluntary period gave way for forceful disarmament. This was carried out by the military (Uganda Peoples Defense Forces (UPDF)) and included rounding up of people and taking them to the barracks for questioning. They would only be released once it was established that they had already surrendered their guns. A meagre 854 guns were recovered from this exercise (Sabala, 2007:36). The forceful disarmament attracted resistance from the Karamojong and subsequent clashes between Karamojong fighters and the UPDF leading to the death of 19 soldiers, 13 warriors and recovery of several weapons (Sabala, 2007:36). Another phase of disarmament was re-launched between September 2004 and February 2006. It was dubbed Karamoja Integrated Disarmament and Development Programme (KIDDP) and sought to take a human security dimension by incorporating development in disarmament operations. It was even supported by the UNDP. Nevertheless, it was marred with violence leading to gross loss of human life, livestock and destruction of property. This exercise was also interrupted by presidential elections and resumed later in March 2006 but still with high military interventions. The violence coupled with allegations of corruption among the UPDF led to the withdrawal of the UNDP from the programme.

By and large, the Ugandan government has been very active in disarming its pastoralists over the years particularly the Karamoja. However, incidences of violence and extreme brutality exercised by Ugandan security forces on the Karamoja have on many occasions undermined the disarmament process and strained the state-citizen relationships in Karamoja.

Kenya

Since the 1980s, Kenya has made attempts to disarm her pastoralists. Most of them were forceful and sporadic consequently recovering very few arms. Just like in Uganda, in the year 2001, the government of Kenya began making efforts to pursue pacific means of disarmament. The former president, Daniel Arap Moi gave ultimatums to pastoralists residing in West Pokot, Marakwet and Baringo to surrender their arms in exchange for amnesty (Sabala, 2007). The ultimatum was not heeded since the pastoralists feared remaining vulnerable to their neighbors within the country and the Karamoja in Uganda. This led to forceful disarmament.

In 2005, Kenya launched another disarmament operation dubbed "*Operation Dumisha Amani 1*" (*Operation maintain peace*). The communities in Northern and North Eastern Kenya were given amnesty to surrender all illegal guns. The operation combined socio-economic interventions with calls for voluntary disarmament. It was reported that the operation was relatively successful leading to recovery of a good number of fire arms, construction of three schools, sinking of boreholes for the communities, infrastructural facilities and offering medical assistance (Kimaiyo, 2009:32). This reportedly reduced cattle rustling incidences.

However, it was discovered that the pastoralist communities still maintained a good number of small arms. This led to a forceful disarmament phase known as *Operation Okota* (*Operation Collect*) between April 2006 and August 2009 (Kimaiyo, 2009). It was a large scale military-led operation to disarm communities in North Rift and North Eastern Kenya. It was very forceful and brutal, inviting heavy criticism from local leaders, civil society organizations and members of parliament (Sabala, 2007:38). In 2010, the government of Kenya launched *Operation Dumisha Amani II*. Since then, various disarmament operations have been carried out under the same name.

Kenya/Uganda Joint Disarmament Operation

Kenya and Uganda share a long border which is inhabited by pastoralist communities. The communities launch sporadic cross border cattle rustling attacks on each other. Many small arms are also exchanged through this

border. This enhances immediate rearmament after disarmament. In 2005, Kenya and Uganda planned to carry out a joint disarmament exercise. In fact, KIDDP in Uganda and Operation Dumisha Amani (ODA) in Kenya were purposed to be joint disarmament exercises. However, the two countries ended up carrying out the exercises independently hence failing to realize expected results. They disarmed the communities at different times which resulted in immediate rearmament of the disarmed communities owing to increased attacks by neighbors (Kimaiyo, 2009).

Ethiopia, Sudan and Somalia

Compared to Uganda and Kenya, the efforts that Ethiopia, Sudan and Somalia have undertaken to disarm their pastoralist communities are minimal. Ethiopia does not place a lot priority on the disarmament of her pastoralist communities. The Ethiopian government however went on record for extreme brutality in disarming the Nuak community in the south western region (Kopel, Gallant & Eisen, 2006). In Somalia, coercive disarmament of various militias has been carried out by external parties such as the United Nations through the United Nations Mission in Somalia (UNMIS) in early 1990s while the Transitional Federal government later disarmed more warlords and militias (Sabala, 2007:41). The civil war in Sudan left several illegal weapons in civilian hands. In 2006, the Government of Sudan (GoS) forcefully disarmed the Dinka-Bor community and some Toposa (Kimaiyo, 2009; Sabala, 2007).

South Sudan

South Sudan has experienced years of violent conflict before and after independence. The country is therefore highly militarized with high levels of SALWs. Considering the civil war that ravaged the country since 2013, the government lacks the infrastructural capacity for national disarmament (Gichane, 2015). It is however important to note that as part of national healing immediately after independence, the government granted amnesty to those who voluntarily surrendered their arms continuously for a period of 3-4 years (Gichane, 2015). Efforts have also been done in the country to strengthen cross border small arms control. Nevertheless, compared to IGAD countries such as Kenya and Uganda, South Sudan has performed minimally in disarming her

pastoralists compared to Kenya and Uganda (Small Arms Survey, 2016). South Sudan is yet to establish a national focal point on SALWs.

Legal and Institutional Framework for Disarmament of Pastoralists in the IGAD Region

There are various legal and institutional frameworks that guide IGAD member states in addressing SALW problems. Among them include: The Bamako Declaration on an African Common Position on the illicit proliferation, Circulation and Trafficking of Small Arms and Light Weapons (Bamako Declaration, December 2000) as well as the Nairobi Declaration on the Problem of the Proliferation of illicit small Arms and Light weapons in the Great Lakes Region and the Horn of Africa (Nairobi Declaration, March 2000). Both instruments were established in the year 2000 (Thusi, 2003). Another important instrument is the Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa which was established in 2004 (Nairobi Protocol, 2004). Under this protocol commonly known as the Nairobi Protocol, the Regional Centre for Small Arms and Light Weapons (RECSA) was established. RECSA acts as a forum for cooperation among National Focal Points and other relevant agencies to prevent, combat, and eradicate stockpiling and illicit trafficking in small arms and light weapons in the Great Lakes Region and the Horn of Africa (Leff, 2009). At the global level, the United National Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in all its Aspects (UNPoA, (A/CONF.192/15), 2001) that was adopted by all United Nations member states is an important institution as well. At the national level, the IGAD member states have various national institutions including the National Focal Points (NFPs) for small arms and light weapons. Some examples of such focal points are the Uganda National Foal Point on Small Arms and Light weapons, established in 2002 and the Kenya National Focal Point on Small Arms and Light Weapons (KNFP) established in 2003.

A Critical Analysis of the Problem

The IGAD region is awash with SALWs. Most of them are concentrated among pastoralist communities who inhabit the borderlands in the countries'

peripheries. Owing to harsh climatic conditions, the pastoralists are forced to walk long distances in search of pastures and water. Sometimes they cross borders and find themselves in neighboring territories. This increases their vulnerability. Clashes over dwindling pastures lead to violent confrontations within and across borders. Cattle raids within and across the borders are also common occurrences among the pastoralists. The use of SALWs in the violent conflicts among these pastoralists leaves large trails of destruction. This is exacerbated by an emerging trend whereby criminal gangs carry out cattle rustling for commercial purposes.

Determined to reduce the number of illegal arms among the pastoralists, IGAD member countries have attempted various disarmament operations. Most of these efforts are mainly coercive. In addition, the states do not provide adequate security to the communities after disarmament. This leaves them vulnerable and prompts rearmament (HSBA, 2007). The countries have pursued disarmament independently at different times, intensities and commitment levels. While Uganda and Kenya have made considerable efforts in disarming their pastoralists, other countries such as Ethiopia, Somalia and South Sudan had minimal attempts. It is also important to acknowledge that the countries also possess different capabilities as far as addressing the menace of arms proliferation is concerned. For instance, while Uganda may have the capability to mount a large scale disarmament operation against the Karamoja, South Sudan which is a very young state that has been facing challenges of civil war since 2013, just two years after its attainment of statehood may not have the same capability.

The countries also have different priorities. For instance while Uganda securitizes the Karamoja region and therefore considers disarmament thereof as a priority, Ethiopia considers disarmament as a peripheral problem. The initial priority of Prime Minister Abiy Ahmed who on coming in power in early 2018 was keen on pacifying various ethnic communities and enhancing internal social cohesion as his grand strategy for Ethiopia's economic development, disarmament operations would undermine his efforts. Currently, Ethiopia's top security priority is to deal with the Tigray crisis which poses not only a threat to the Prime Minister's legitimacy but also to state and human

security in Ethiopia and the entire Horn of Africa (De Waal & Boswell, 2021; International Crisis Group (ICG), 2021). For South Sudan, the process of getting out of civil war and putting the government in order takes priority over disarmament of pastoralists in the borderlands.

In order to promote pastoralism within and across their borders, IGAD member states proposed in 2018 a protocol to manage transhumance in the region. The Protocol on Transhumance in the IGAD Region/ IGAD Protocol on Transhumance is a framework that aims at enabling pastoralists to move more safely and easily across borders of other member states in search of water and pasture (IGAD, March 2020; IGAD, November 2020). By late 2018, the protocol had received approval from Kenya, Ethiopia, South Sudan and Uganda (Asiimwe, 2019, IGAD, 2018). Several meetings have been held by IGAD member countries throughout 2019 and 2020 in efforts to endorse the protocol and make plans for its adoption and implementation.

The paradox surrounding this protocol is that even as the above IGAD member states approve it, they express major reservations about its implementation. For instance in September 2019 in a meeting in Entebbe, Uganda, IGAD members were unable to reach an agreement to endorse the protocol after Somalia and Ethiopia refused to sign it due to some articles they felt did not favor them (Daily Monitor, 2019). They requested for more time to consult with their regional governments since the two countries are federal states.

From the onset, serious reservations to the protocol pointed out the impossibility of implementing the protocol owing to the problem of cattle rustling and proliferation of small arms among the pastoralists within the region. South Sudan stated that for the protocol to take effect, the resolution of cattle rustling across borders was necessary (Asiimwe, 2018). On the same note Uganda and South Sudan warned that the free movement of pastoralists may not be possible if Kenya does not disarm the Turkana (Asiimwe, 2018). The violent conflict between the Turkana and Pokot in Kapedo, Turkana county in Kenya which began in January this year (2021) validates the fears expressed regarding the threats posed by illegal arms in the hands of pastoralist communities within the IGAD region (Cherono, 2021; Kangogo, 2021). This

signals an inherent problem of pastoralist disarmament that has to be tackled by IGAD as a region. If the disarmament is not handled carefully, then the Protocol on Transhumance may have dire consequences among the IGAD member states, if at all it gets implemented.

In spite of the SALWs menace in the pastoralist areas within the IGAD region, IGAD as a regional organization has not come up with a common policy that can provide guidelines and direction on how disarmament should be carried out within the region. The protocol on transhumance, although it will go a long way in helping pastoralist communities, its success is highly dependent on how disarmament is going to be coordinated within the region. Although pastoralist communities live in the peripheries of most of the IGAD member states, they can still pose a challenge to the national and regional security. Besides, the human insecurity that is caused by the pastoralists in possession of arms is immense. Disarmament needs to be well coordinated in order to enhance security of the whole region. As such, a policy on common disarmament is indispensable in the IGAD region.

Policy Recommendations for an IGAD Common Policy on Disarmament of Pastoralists.

This article proposes the establishment of an IGAD common policy for disarmament of pastoralist communities within the IGAD region and makes the following recommendations for such a policy.

Strengthen state-citizen relationships

As indicated above, most of the pastoralist communities in the IGAD region live in the peripheries of their countries. The presence of the state and state security apparatuses is minimal in most of the regions inhabited by pastoralists. Consequently these regions have come to be labeled as ungoverned spaces. This forces most pastoralists to find their own ways of providing for themselves services that should be provided by the state such as security, hence the need for armament. State absence coupled with forceful disarmament have deteriorated the state-citizen relationships and diminished state legitimacy. The policy should have provision for activities that restore and strengthen state-citizen relationships and enhance state legitimacy.

Address disarmament from the demand as well as supply side

The policy should make provisions for dealing with the factors that enhance demand for arms. The main problem established in this paper security. IGAD should encourage her member states to ensure maximum security for pastoralist communities and also seek to address the issue of cattle rustling both for traditional and commercial purposes.

This paper has established some of the cross-border arms flow routes within the regions that are likely to be strongly impacted by IGAD's Protocol on Transhumance which has necessitated the writing of this policy paper. The policy should provide for mechanisms to establish with clarity the source of the weapons and find measures of curbing supply. This would entail measures to ensure registration and tracking of illegal weapons. As a region, IGAD could also try to establish the countries and other international actors involved in supplying weapons to the pastoralists. The policy should also provide for mechanisms to effectively monitor the porous borders in order to dismantle the arms flow and trade routes.

Disarmament should target individuals not communities

Disarmament operations from the governments have targeted entire communities such as the Turkana in Kenya or the Karamoja in Uganda. This has led to collective punishment and torture of communities including women and children. In the process, criminal gangs escape and continue to be at large. The IGAD common disarmament policy should enhance mechanisms for identifying the individuals wielding illegal weapons. This could entail establishing a regional intelligence force that helps in gathering crucial and strategic information for effective disarmament.

Increased Community and Civil Society Participation

The policy should provide for active participation of the communities and civil society. Ownership of the disarmament process by the community is of utmost importance. It is the local community which can provide crucial information that can guide disarmament in the region. The local people are also conversant with the topography of the area and the new trends on arms availability. The policy should provide for measures to win the good will of the community

such as joint community activities like sports and ceremonies which sensitize people on the importance of ridding the region of SALWs. The civil society should also be engaged to complement the governments and other regional actors.

Engage Impartial and Independent Observers in the Disarmament Exercises.

In most of the disarmament operations, incidences of violence and brutality in the hands of security forces have been reported. The UPDF of Uganda and Kenyan security forces have been reported to have been brutal. An IGAD common disarmament policy should have provision for a team of impartial and independent observers drawn from the IGAD the different IGAD member states. This team could be engaged in advising, monitoring and providing reports on the conduct of security forces during disarmament operations. The team should however work closely with national authorities.

Pursue Disarmament from a Human Security Perspective

So far, majority of the disarmament efforts have been pursued from a state security perspective. The main concern has been to rid civilians of arms in order for the state to retain its monopoly of violence. There has been little consideration has been on the human security perspective. Even the programmes that intended to introduce a human security aspect in disarmament such as Uganda's KIDDP and Kenya's ODA ended up being violent and brutal. Human security entails freedom from fear and from want. The UNDP's conceptualization of human security encompasses providing several aspects of individual security which include human security, food security, health security, personal security, community security, and political security (Gomez & Des Gasper, 2013). The Policy should entail provisions that call on IGAD as well as the Member States to pursue disarmament form a predominantly human security perspective taking into account all the above dimensions of human security. Also provision of education would be a major step in disarming the minds. These interventions would eventually render arms insignificant to the pastoralists and would therefore be encourage them to peacefully surrender them.

Conclusion

This policy paper is addressed to IGAD and is based on the urgent need for an IGAD common policy for disarmament of pastoralist communities in the IGAD region. It is a response to the proposed IGAD Transhumance Protocol and the challenges foreseen to its implementation owing to the proliferation of small arms in the region. The article has provided background information to the proliferation of SALWs among pastoralists in the IGAD region as well as disarmament efforts pursued so far. Following disparate priorities and efforts from the IGAD member states with regards to disarmament of pastoralist communities, the article identified a gap that needs to be filled by establishing a regional common policy of disarming pastoralist communities in the region. The article has also offered various recommendations for such a policy. This article concludes that based on the above recommendations, disarmament should be viewed as a continuous process and not a one of sporadic event and it should be taken as a key prerequisite to the implementation and success of the IGAD protocol on Transhumance.

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Criminal Liability of Corporate Entities and Public Officers: A Kenyan Perspective

By: ***Prof. Tom Ojienda, SC* and Lydia Mwalimu Adude*****

Abstract

Corporate crime are criminal acts and omissions committed by a corporate entity through individuals acting on its behalf where the said acts and omissions are for the benefit of the corporate entity. Corporate crime gives rise to corporate criminal liability as opposed to individual criminal liability, which occurs whenever a natural person is found culpable of committing a crime(s) on his or her own account. Corporate crime is on the rise, especially in Kenya, and uncovering and prosecuting it is marred with challenges including advancements in technology. In addition, the distinct legal personality of a corporate entity from the natural personality of its owners and directors somehow does provide its owners and directors with cover from the criminal liability of the corporate entity. A candid examination of the issue of corporate criminal liability is therefore imperative, in terms of the trial, conviction and sentencing of a corporate entity for its criminal acts and omissions.

This article interrogates the criminal liability of corporate entities in light of the trial, conviction, and sentencing of a corporate entity and its directors in the case of ***Republic v. Grace Sarapay Wakhungu, John Koyi Waluke and Erad Supplies & General Contractors Limited, Anti-Corruption Case No. 31 of 2018*** *(hereinafter* ***"the Waluke Case"****). The article seeks to shade light on the criminal liability of a corporate entity, especially as concerns the trial, conviction and sentencing for corporate crime. Who is to be tried, convicted, and sentenced for the criminal acts and omissions of the corporate entity—the corporate entity itself, its directors, or both? In addition, John Koyi Waluke, the 2nd accused in the* **Waluke Case***, is the current Member of the National Assembly for Sirisia Constituency, in Bungoma County. Therefore, in the same breath, the article looks at the indifferent, cold, and inconsistent treatment of public officers by the criminal justice system in Kenya, especially as concerns their prosecution for corruption and economic crimes.*

The article thus endeavours to propose possible reforms to the anti-corruption regime in Kenya, with the possibility of ushering in a new anti-corruption dispensation aligned with the Constitution of Kenya, 2010, and which focuses more on restorative justice rather than merely punishing those accused of and convicted on charges of corruption and economic crimes. The article equally calls for clarity in the functions of the Kenyan State agencies involved in the investigation and prosecution of corruption and economic crimes; that is, the Ethics and Anti-Corruption Commission (EACC), the Directorate of Criminal Investigations (DCI), and the Office of the Director of Public Prosecutions (ODPP).

1.Introduction

Corporate crime refers to criminal acts and omissions committed by a corporate entity through individuals acting on its behalf, where the said acts and omissions are for the benefit of the corporate entity.[1] Thus, corporate

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crime gives rise to corporate criminal liability as opposed to individual criminal liability—individual criminal liability occurs whenever a natural person is found culpable of committing a crime(s) on their own account. Now, corporate crime is on the rise. What is more, the advancement of technology has aggravated the complexity of corporate crime, in terms of uncovering it.

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[1] See, e.g., Brian K. Payne and Susannah Tapp 'Corporate Crime' (2015) <https://www.oxfordbibliographies.com/view/document/obo-9780195396607/obo-9780195396607-0185.xml> (Accessed July 13, 2020).

Besides, it seems that the legal personality of a corporate entity being distinct from the natural personality of its owners and directors, does provide its owners and directors with cover from the criminal liability (and civil liability) of the corporate entity. A candid examination of the issue of corporate criminal liability is therefore imperative, in terms of the trial, conviction and sentencing of a corporate entity for its criminal acts and omissions.

This article interrogates the criminal liability of corporate entities in light of the trial, conviction, and sentencing of a corporate entity and its directors in the case of **Republic v. Grace Sarapay Wakhungu, John Koyi Waluke and Erad Supplies & General Contractors Limited**[2] (hereinafter **"the Waluke Case"**). The article seeks to shade light on the criminal liability of a corporate entity, especially as concerns the trial, conviction and sentencing for corporate crimes. Who is to be tried, convicted, and sentenced for the criminal acts and omissions of the corporate entity—the corporate entity itself, its directors, or both? In addition, John Koyi Waluke, the 2nd accused in the **Waluke Case**, is the current Member of the National Assembly for Sirisia Constituency, in Bungoma County. Therefore, in the same breath, the article looks at the indifferent, cold, and inconsistent treatment of public officers by the criminal justice system in Kenya, especially as concerns their prosecution for corruption and economic crimes.

The article thus endeavours to propose possible reforms to the anti-corruption regime in Kenya, with the possibility of ushering in a new anti-corruption dispensation aligned with the Constitution of Kenya, 2010 and which focuses more on restorative justice, rather than merely punishing those accused of and convicted on charges of corruption and economic crimes. The article equally calls for clarity in the functions of the State agencies involved in the investigation and prosecution of corruption and economic crimes; that is, the Ethics and Anti-Corruption Commission (EACC), the Directorate of Criminal Investigations (DCI), and the Office of the Director of Public Prosecutions (ODPP).

[2] Anti-Corruption Case No. 31 of 2018.

2 The Waluke Case; The Trial, Conviction, and Sentencing of a Corporate Entity and its Directors

2.1 Brief Background

The corporate entity or company in question in the case at hand is **Erad Supplies & General Contractors Ltd** (hereinafter **"Erad"**), the 3rd accused. Erad was incorporated in 1998 to buy and sell cement, sand, and cereals. The co-accused, the co-directors of the company, are **Grace Sarapay Wakhungu** (hereinafter **"Wakhungu"**), the 1st accused, and **John Koyi Waluke** (hereinafter **"Waluke"**), the 2nd accused. Wakhungu is the Managing Director, thus in charge of the day-to-day running of the affairs of Erad.

In **August 2004**, Erad bid for and was lawfully awarded a tender to supply 40,000 metric tonnes of white maize to the National Cereals and Produce Board (hereinafter **"NCPB"**). On **August 26, 2004**, a supply contract was therefore executed between Erad and NCPB, for the maize to be supplied within four weeks from the date of the contract. Erad was to be paid USD 229 (approximately KES 19,465 at the time) per metric tonne of white maize supplied (**KES 778,600,000.00** in total). NCPB was bound to issue the tenderers with a letter of credit to guarantee payment, once the supply contracts were signed. However, Erad was never issued with a letter of credit hence could not proceed with the importation of the maize.

Erad was dissatisfied with NCPB's failure to issue it with a letter of credit, hence filed an arbitration case against NCPB pursuant to clause 12.0 of the contract. Erad claimed that NCPB had frustrated its performance of the contract and was therefore in breach of contract. Erad alleged that it had already procured the white maize from Ethiopia and that it was being stored in Djibouti by Chelsea Freight, a South African firm. Erad claimed that Chelsea Freight charged it USD 1,146,000.00 as storage charges for the maize. Erad also claimed that its expected profit from the supply of the maize amounted to USD 1,960,000.00. As a result, Erad demanded from NCPB a total of USD 3,106,000.00 as compensation for loss of profit and storage charges. Ultimately, Erad was awarded a total sum of **USD 3,106,000.00**, together with interest at 12% per annum from **October 27, 2004** (when Erad expected to have performed the contract) until payment in full, and the cost of

the arbitration. NCPB's counterclaim against Erad's alleged storage charges was dismissed.

NCPB's efforts to set aside the arbitration award and the execution of the subsequent decree at the High Court were unsuccessful. As a result, Erad moved to execute the decree. NCPB's bank accounts were frozen, and NCPB's assets, including office equipment and motor vehicles, were attached through auctioneers. In particular, on **March 19, 2013**, NCPB received a letter from its bank, Kenya Commercial Bank, on a garnishee order attaching **KES 297,086,505.00** payable to Erad; which was eventually paid out to Erad's advocates. Similarly, on **June 28, 2013**, NCPB received another letter from its other bank, National Bank of Kenya, on a garnishee order attaching KES 264,864,285.00 in NCPB's account payable to Erad's advocates; only the available balance of **KES 13,363,671.40** was attached and paid out, the amount having been paid out accordingly on **June 24, 2020**. A further garnishee order was issued to Cooperative Bank of Kenya attaching **USD 24,032.50** in NCPB's USD bank account and which was paid out to Erad's advocates accordingly, on **July 2, 2013**.

Nonetheless, as the execution of the decree against NCPB was ongoing, EACC commenced investigations against Erad, to dispel any suspicions of fraud in relation to the arbitration award to Erad. The EACC later forwarded the file to the DPP to consider preferring criminal charges against Erad. This led to the **August 2018** arrest and arraignment in court of the co-directors of Erad, Wakhungu and Waluke.

It is notable that though the tender by Erad was valued at USD 9,000,000, NCPB never issued any monies to Erad under the cancelled contract for the supply of maize—the monies at the centre of the charges preferred against Wakhungu, Waluke, and Erad were those paid out of NCPB's bank accounts to Erad and its advocates through garnishee orders issued pursuant to the arbitration award. The central allegation was that the whole arbitration process was flawed because it was based on a fraudulent invoice in relation to the storage charges claimed by Erad; that the said invoice was a false document

made in support of a false claim for storage charges.[3] Only Wakhungu testified on behalf of Erad during the arbitration proceedings, but both directors benefited from pay-outs made pursuant to the arbitration award.

2.2 The Trial, Conviction, and Sentencing

What transpired in **Republic v. Grace Sarapay Wakhungu, John Koyi Waluke and Erad Supplies & General Contracts Limited**[4] (**"the Waluke Case"**)? This case came before the Chief Magistrate's Court at Milimani Law Courts in **August 2018** where the three accused (Wakhungu, Waluke, and Erad) were charged on five counts of the offences of uttering a false document, perjury, and fraudulent acquisition of public property. The three were charged under both the **Anti-Corruption and Economic Crimes Act, 2003 (ACECA)**[5] (the special statute on corruption and economic crimes) and the **Penal Code**[6] (the general statute on criminal offences), as follows:[7]

> **(i) Count1: Uttering a false document contrary to section 353 as read with Section 349 of the Penal Code.**[8] The particulars of the charge were that Grace Sarapay Wakhungu, the 1st accused, John Koyi Waluke, the 2nd accused, and Erad Supplies & General Contractors Limited, the 3rd accused, on or about **February 24, 2009**, being the directors of Erad Supplies & General Contractors Limited, together with Erad Supplies & General Contractors Limited, within Nairobi City County in Kenya, knowingly and fraudulently uttered a false **invoice No.12215-CF-ERAD for the**

[3] Judgment of June 22, 2020, pp 64-66.
[4] Anti-Corruption Case No. 31 of 2018.
[5] Act No. 3 of 2003, Laws of Kenya.
[6] Chapter 63, Laws of Kenya.
[7] Judgment of June 22, 2020, pp 1-3.
[8] Chapter 63, Laws of Kenya. **Section 353 of the Penal Code** prescribes the offence of uttering false documents and states that*: "Any person who knowingly and fraudulently utters a false document is guilty of an offence of the same kind and is liable to the same punishment as if he had forged the thing in question.*" On the other hand, **Section 349 of the Penal Code** provides for the general punishment for forgery and states that: *"Any person who forges any document or electronic record is guilty of an offence which, unless otherwise stated, is a felony and he is liable, unless owing to the circumstances of the forgery or the nature of the thing forged some other punishment is provided, to* ***imprisonment for three years****."*

sum of USDs 1,146,000 as evidence in the arbitration dispute between Erad Supplies & General Contractors Limited and National Cereals and Produce Board (NCPB), purporting it to be an invoice to support a claim for cost of storage of 40,000 metric tonnes of white maize purportedly incurred by Chelsea Freight;

(ii)Count 2: Perjury contrary to Section 108(1) as read with Section 110 of the Penal Code.[9] The particulars of the charge were that Grace Sarapay Wakhungu, the 1st accused, on or about February 24, 2009, being a director of Erad Supplies & General Contractors Limited, within Nairobi City County in Kenya, while giving testimony in an arbitration dispute between Erad Supplies & General Contractors Limited and NCPB knowingly gave false evidence for decisions for cost of storage of 40,000 metric tonnes of white maize purportedly incurred by Chelsea Freight;

(iii)Count 3: Fraudulent acquisition of public property contrary to section 45(1) as read with section 48(1) of ACECA.[10] The

[9] **Section 108(1) of the Penal Code** prescribes the offences of perjury and subornation of perjury and states that: *"(a) Any person who, in any judicial proceeding, or for the purpose of instituting any judicial proceeding, knowingly gives false testimony touching any matter which is material to any question then pending in that proceeding or intended to be raised in that proceeding, is guilty of the misdemeanour termed perjury. (b) It is immaterial whether the testimony is given on oath or under any other sanction authorized by law. (c) The forms and ceremonies used in administering the oath or in otherwise binding the person giving the testimony to speak the truth are immaterial, if he assent to the forms and ceremonies actually used. (d) It is immaterial whether the false testimony is given orally or in writing. (e) It is immaterial whether the court or tribunal is properly constituted, or is held in the proper place or not, if it actually acts as a court or tribunal in the proceeding in which the testimony is given. (f) It is immaterial whether the person who gives the testimony is a competent witness or not, or whether the testimony is admissible in the proceeding or not."* **Section 110 of the Penal Code** provides the punishment for the offences of perjury and subornation of perjury and states that: *"Any person who commits perjury or suborns perjury is liable to* ***imprisonment for seven years****."*

[10] Act No. 3 of 2003, Laws of Kenya. **Section 45(1) of ACECA** aims to protect *inter alia* public property and revenue and states that: *"(1) A person is guilty of an offence if the person fraudulently or otherwise unlawfully— (a) acquires public property or a public service or benefit;(b) mortgages, charges or disposes of any public property;(c) damages public property, including causing a computer or any other electronic machinery to perform any function that directly or indirectly results in a loss or adversely affects any public revenue or service; or (d) fails to pay any*

particulars of the charge were that Grace Sarapay Wakhungu, the 1st accused, John Koyi Waluke, the 2nd accused, and Erad Supplies & General Contractors Limited, the 3rd accused, on or about **March 19, 2013**, in Nairobi City County in Kenya, being the directors of Erad Supplies & General Contractors Limited together with Erad Supplies and General Contractors Limited, jointly and fraudulently acquired public property to wit **KES 297,086,505.00** purporting it to be the cost of storage of 40,000 metric tonnes of white maize purportedly incurred by Chelsea Freight.

(iv)Count 4: Fraudulent acquisition of public property contrary to section 45(1) as read with Section 48(1) of ACECA.[11] The particulars of the charge were that Grace Sarapay Wakhungu, the 1st accused, John Koyi Waluke, the 2nd accused, and Erad Supplies & General Contractors Limited, the 3rd accused, on or about **June 27, 2013** in Nairobi City County in Kenya, being the directors of Erad Supplies & General Contractors Limited together with Erad Supplies & General Contractors Limited jointly and fraudulently acquired public property to wit **KES 13,364,671.40** purporting it to be cost of storage of 40,000 metric tonnes of white maize purportedly incurred by Chelsea Freight loss of profit and interest.

(v)Count 5: Fraudulent acquisition of public property contrary to section 45(1) as read with section 48(1) of the ACECA, 2003.[12]The particulars of the charge are that Grace Sarapay Wakhungu, the 1st accused, John Koyi Waluke, the 2nd accused, and Erad Supplies & General Contractors Limited, the 3rd accused, on or about **July 27, 2013**, in Nairobi City County in Kenya, being the directors of Erad Supplies & General Contractors Limited, jointly

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taxes or any fees, levies or charges payable to any public body or effects or obtains any exemption, remission, reduction or abatement from payment of any such taxes, fees, levies or charges." **Section 48(1) of ACECA** provides the penalty for the offence and states that: *"(1) A person convicted (...) shall be liable to—(a)* ***a fine not exceeding one million shillings, or to imprisonment for a term not exceeding ten years, or to both****; and (b) an additional mandatory fine if, as a result of the conduct that constituted the offence, the person received a quantifiable benefit or any other person suffered a quantifiable loss."*

[11] Id.

[12] Id.

> and fraudulently acquired public property to wit **USDs 24,032.00** purporting it to be the cost of storage of 40,000 metric tonnes of white maize purportedly incurred by Chelsea Freight and loss of profit and interest.

The whole prosecution and the establishment of the criminal liability of the three accused was hinged on the genuineness of an invoice produced by the 1st accused, Wakhungu, to support the claim for storage charges by Erad during the arbitration proceedings. The Chief Magistrate, Honourable Elizabeth Juma, found the said invoice to be a fraudulent document which was knowingly used to further a fraudulent claim. She addressed the issue as follows:

> *(...) This honourable court is certain and satisfied that PEX43, the invoice in question was a false document made in support of a false claim for storage charges.*
> *The court having determined that PEX 43 was not genuine the next is whether the prosecution has proved beyond reasonable doubt that the 1st accused person knowingly gave false testimony on the matter with regards to PEX 43. The document was tailored in support of the false claim and the 1st accused being the managing director of the 3rd accused and in charge of the day to day running of its affairs and from her evidence o[n] the follow up she made on the matter there is no doubt whatsoever that she produced pex43 to arbitration with full knowledge that it was false and lied on oath on the false of storage claim.*
> *The failure by NCPB to open a letter of credit in favour of the 3rd accused may have infringed the contractual terms, the 3rd accused is probably entitled to some civil remedy, however this is an issue that can at best be addressed [in] a civil court, the accused persons crossed the civil line by adducing a false document in support of their claim and out of the false document NCPB lost a huge amount of money to the accused persons and their advocates.*[13]

[13] Judgment of June 22, 2020, pp 66-67.

On June 22, 2020, Honourable Elizabeth Juma passed judgment on the three accused in respect of the anti-corruption and criminal charges, as follows:[14]

> (i)**Count 1:** Grace Sarapay Wakhungu, the 1st accused, was found guilty and convicted accordingly; John Koyi Waluke, the 2nd accused, and Erad Supplies & General Contractors Limited, the 3rd accused, were both found not guilty and were both acquitted under **Section 215 of the Criminal Procedure Code (CPC);**[15]
> (ii)**Count 2:** Grace Sarapay Wakhungu, the 1st accused was found guilty and was convicted accordingly;
> (iii)**Count 3:** Grace Sarapay Wakhungu, the 1st accused, John Koyi Waluke, the 2nd accused, and Erad Supplies & General Contractors Limited, the 3rdaccused, were all found guilty and were convicted accordingly;
> (iv)**Count 4:** Grace Sarapay Wakhungu, the 1st accused, John Koyi Waluke, the 2nd accused, and Erad Supplies & General Contractors Limited, the 3rd accused, were all found guilty and were convicted accordingly; and
> (v)**Count 5:** Grace Sarapay Wakhungu, the 1st accused, John Koyi Waluke, the 2nd accused, and Erad Supplies & General Contractors Limited, the 3rd accused, were all found guilty and were convicted accordingly.

On June 25, 2020, the Court passed sentenced on the three accused as follows:[16]

The 1st accused, Grace Sarapay Wakhungu;

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[14] Id. at pp 67-68.
[15] Chapter 75, Laws of Kenya. **Section 215 of the CPC** states that: *"The court having heard both the complainant and the accused person and their witnesses and evidence shall either convict the accused and pass sentence upon or make an order against him according to law, or shall acquit him."*
[16] See, e.g., 'Waluke's jail term is 67 years, Judiciary clarifies' (The Star, June 26, 2020) <https://www.the-star.co.ke/news/2020-06-26-walukes-jail-term-is-67-years-judiciary-clarifies/> (Accessed July 15, 2020).

COUNT	**FINE (KES)**	**IMPRISONMENT (IN DEFAULT OF FINE)**
Count 1	100,000.00	1 year
Count 2	100,000.00	1 year
Count 3	500,000.00	3 years
	594,175,000.00	7 years
Count 4	500,000.00	3 years
	26,729,342.80	7 years
Count 5	500,000.00	3 years
	5,121,219.20	7 years
	80,000,000.00	7 years
Total	**707,725,562.00**	

The 2nd accused, John Koyi Waluke;

COUNT	**FINE (KES)**	**IMPRISONMENT (IN DEFAULT OF FINE)**
Count 3	500,000.00	3 years
	594,175,000.00	7 years
Count 4	500,000.00	3 years
	26,729,342.80	7 years
Count 5	500,000.00	3 years
	5,121,219.20	7 years
	100,000,000.00	7 years
Total	**727,525,562.00**	

The 3rd accused, Erad Supplies & General Contractors Limited;

COUNT	**FINE (KES)**	**IMPRISONMENT (IN DEFAULT OF FINE)**
Count 3	500,000.00	3 years
	594,175,000.00	7 years
Count 4	500,000.00	3 years
	26,729,342.80	7 years
Count 5	500,000.00	3 years
	5,121,219.20	7 years
	100,000,000.00	7 years

Total 727,525,562.00

The 1st accused, Wakhungu, was sentenced to pay a cumulative fine of **KES 707,725,562.00** and in case of default serve a cumulative custodial sentence on all the five counts. The 2nd accused, Waluke, was sentenced to pay a cumulative fine of **KES 727,525,562.00** and in case of default serve a cumulative custodial sentence on three counts. The 3rd accused, Erad, which is a corporate entity was similarly sentenced to pay a cumulative fine of **KES 727, 525, 562.00** and in case of default serve a cumulative custodial sentence on three counts.[17]

2.3The Criminal Liability of the Corporate Entity, Erad Supplies & General Contractors Limited, in Relation to the Individual Criminal Liability of its Two Co-Directors

Regarding the criminal liability of the 3rd accused, Erad Supplies & General Contractors Limited, the Chief Magistrate, Honourable Elizabeth Juma, stated that:

> *On the 7th issue of criminal liability of the 3rd accused, since a company is an artificial person, it can only act through an agent. In **Quin and Axtens v Salmon [1909] AC 442**, it was established that the decisions of the directors are deemed to be the decision of the company. This was further cemented in **Shaw Sons Ltd v Shaw [1935] 2 UB 113** that declared that directors are empowered to manage the company's affairs.*
>
> *In this respect, the company is bound by the actions of its agents the directors as seen in **Leonard's Carrying Company Ltd v Asiatic Petroleum Co [1915] A.C 705 HL.** This agency relationship and company liability only ensues in the scope of the director's mandate. Anything aside from that, they will be personally liable.*[18]

[17] See, e.g., Everlyne Judith Kwamboka, 'Sirisia MP Waluke to serve 67 years in prison' (The Standard, June 27, 2020) <https://www.standardmedia.co.ke/western/article/2001376642/sirisia-mp-waluke-to-serve-67-years-in-prison> (Accessed July 15, 2020).

[18] *Judgment of June 22, 2020, p 62.*

Comparing the individual criminal liability of a natural person and the criminal liability of a corporate entity, the Chief Magistrate expressed the view that, a corporate entity is considered to be a legal entity, separate and distinct from its members per **Salomon v. Salomon**,[19] and that a corporate entity has the same criminal liability as a natural person by virtue of **Section 3(1) of the Interpretation and General Provisions Act**[20].[21] Further, relying on **Section 23 of the Penal Code**,[22] the Chief Magistrate went on to explain the extent of the criminal liability of the directors for the criminal acts of the corporate entity and stated that:

> *Where an offence is committed by either a natural or juristic person (a corporation), every person who is in charge of the control of the management of the affairs or activities of the company is guilty of the offence and is liable to be punished for it (Also seen in **R v Ivan Arthur Campus [2002] 1 KLR 461**). This is the rule, which exempts liability from parties who either were not aware of the offence being intended or about to be committed, or that they did their due diligence and took all the necessary steps to avoid its commission.*[23]

However, it is unfortunate that even though the Chief Magistrate relied on the English cases above to elaborate on how criminal liability is ascertained as between the corporate entity and its directors, she failed to apply the same in the case of Erad and its directors. The Court merely used the two cases to impute criminal liability on the corporate entity from the acts of the two co-directors. This the Court did in order to arrive at the conclusion that *"the 3rd accused can be held liable and culpable in counts 3, 4 and 5, it was on account of the nature of count 1 that the 3rd is exenorated."*[24] The Court thus took the view that the 1st and 2nd accused acted both personally and independent of the 3rd accused but that at the same time their actions were those of the 3rd

[19] [1897] AC 22.
[20] Chapter 2, Laws of Kenya.
[21] *Judgment of June 22, 2020, pp 62-63.*
[22] Chapter 63, Laws of Kenya.
[23] *Judgment of June 22, 2020, p 63.*
[24] *Id. p 64.*

accused—thereby finding individual criminal liability for Wakhungu and Waluke and at the same time corporate criminal liability for Erad.

Accordingly, the Court failed to notice that since the corruption and criminal charges arise from the same facts, the two co-directors could either have been found to be personally liable for the corruption and criminal acts in question or that since the two were acting for the 3rd accused, then the 3rd accused was wholly liable (vicariously) for the corruption and criminal acts in question. Alternatively, criminal liability could be shared between the three accused to the extent of their involvement in the corruption and criminal acts in question, but the cumulative liability should not be excessive. It is regrettable that in the **Waluke Case**, the Court simply treated the corporate entity and its two co-directors as three persons acting independently to commit the same crime based on the same facts, and used the corporate entity merely as the common factor linking the three to each other.

The Court used the same analogy when passing sentence on the three accused. The Court imposed fines and default custodial sentences on Wakhungu, Waluke, and Erad as though each had committed the corruption and criminal acts therein solely and independent of each other. The result is that the cumulative punishment meted against the three is clearly excessive in comparison to the alleged losses incurred by NCPB. Moreover, as regards the default custodial sentence imposed on Erad, the Chief Magistrate expressed herself in the manner that, since a company cannot serve a custodial sentence, the two co-directors, Wakhungu and Waluke, would have to serve the custodial sentence imposed on Erad, on behalf of the corporate entity, should the corporate entity fail to pay the fine imposed on it. In essence, the two co-directors would have to serve the corporate entity's custodial sentence in addition to their own individual custodial sentences, if they fail to raise the fines imposed on them.

3 Corporate Civil Liability Versus Corporate Criminal Liability

The civil and criminal liability of a corporate entity stems from the principle of separate legal personality of a company, a corporation, or a corporate entity, which enables it to sue and be sued and to acquire and dispose of interests in property in its own name. The common law principle of separate legal

personality for the corporate entity was espoused in the landmark case of **Salomon v. Salomon**;[25] that a corporate entity is a legal or juristic person in itself in relation to its owners and directors (the corporate entity's directing mind or controlling mind).[26]

The common law principle of separate legal personality for the corporate entity has been restated by Kenyan courts in various cases. In **Victor Mabachi & Another v. Nurturn Bates Limited**,[27] the Court held that a company as *"a body corporate, is a persona jurisdica, with separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil."*[28] The Court went further to elaborate that the separate legal personality of a corporate entity does not necessarily make it a sham, such that unless the corporate veil is lifted, one cannot go after the owners or agents of the corporate entity in order to impose personal liability on them. In doing so, the Court quoted the case of ***Jones & Another v. Lipman & Another***,[29] *where Russel, J* held that: "*if a company was thought to be a mere cloak or sham, a device or a mask which the defendant held to his face, in an attempt to avoid recognition by the eye of equity, the court could grant summary judgment even against the person behind that company."*[30]

In addition, in ***Kolaba Enterprise Limited v. Shamshudin Hussein Varvani & another***,[31] *the court stated thus;*

> *It should be appreciated that the separate corporate personality is the best legal innovation ever in company law. See the famous case of SALOMON & CO. LTD. v SALOMON [1887] A.C. 22 H. L. that a company is different person altogether from its subscribers and directors. Although it is a fiction of the law, it still is as important for all purposes and intents in any*

[25] [1897] AC 22.
[26] See also Macaura v. Northern Assurance Co. Ltd [1925] AC 619; and Lee v. Lee's Air Farming [1961] UKPC 33.
[27] [2013] eKLR.
[28] Id. at para 23.
[29] *[1962] 1 W.L.R 832, 833.*
[30] Id.
[31] *[2014] eKLR.*

> *proceedings where a company is involved. Needless to say, that separate legal personality of a company can never be departed from except in instances where the statute or the law provides for the lifting or piercing of the corporate veil, say when the directors or members of the company are using the company as a vehicle to commit fraud or other criminal activities.*[32]

The jurisprudence around a corporate entity's civil liability has developed over time, under the vicarious liability principle and principal-agent relationship. The corporate entity remains liable for the torts of its servants committed *intra vires,* that is, within the scope of their employment, on the basis of the vicarious liability principle.[33] The acts of the corporate entity's agents in the course of the business of the corporation, if the acts are *intra vires,* are the acts of the corporation. An incorporated body always acts through its agents.[34]

Conversely, whereas it is common for corporate entities to stand civil trial and shoulder civil liability, criminal liability for corporate entities is shrouded in confusion. This is largely due to the fact that traditionally, the criminal justice system developed with the natural person in mind. The distinction between corporate civil liability and corporate criminal liability is premised on the criminal law principle of attributing not only the act, but also the guilty mind

[32] Id. at para 20.

[33] See e.g., Arthur L. Goodhart, 'Essays in jurisprudence and the common law,' (Cambridge University Press, 1931) pp 91-109. In **Lennard's *Carrying Co Ltd v. Asiatic Petroleum Co* Ltd [1915] AC 705**, the Court expressed the view that: *"a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company."*

[34] George O. Otieno Ochich, 'The Company as a Criminal: Comparative Examination of some Trends and Challenges Relating to Criminal Liability of Corporate Persons' (2008), <http://kenyalaw.org/kl/index.php?id=1919> (Accessed July 1, 2020).

to the perpetrator of the acts and omissions in question. This is not the case for civil criminal liability.

As a result, corporate criminal liability remains a complex area of criminal justice because establishing the criminal liability of a corporate entity is not as straight forward as that of a natural person.[35] Due to the separate legal personality of the corporate entity, it is possible to establish that certain crimes are committed by the directors or such other persons who act as the controlling mind of the company, and that certain other crimes are committed by the corporate entity itself by direct attribution to the directors or the controlling mind of the corporate entity or its authorized agents, while on official duty. Consequently, courts have faced dilemma in finding a corporate entity liable as opposed to its directors or its controlling mind, more so in criminal matters.

4 Statutory Analysis Of Corporate Criminal Liability

Corporate criminal liability in Kenya has since been codified in a number of Statutes. These include: the **Companies Act, 2015**;[36] the **Interpretation and General Provisions Act**;[37] the **Anti-Corruption and Economic Crimes Act, 2003 (ACECA)**;[38] the **Proceeds of Crime and Anti-Money Laundering Act, 2009 (POCAMLA)**;[39] **the Public Procurement and Asset Disposal Act, 2015 (PPADA)**,[40] and the **Penal Code**.[41]

First and foremost, the **Interpretation and General Provisions Act** defines the word *'person'* to include "*a company or association or body of persons, corporate or incorporate*."[42] This definition has allowed criminal charges and

[35] See, e.g., McSyd Hubert Chalunda, 'Corporate Crime and the Criminal Liability of Corporate Entities in Malawi' Resource Material Series No. 76 <https://www.unafei.or.jp/publications/pdf/RS_No76/No76_08PA_Chalunda.pdf> (Accessed June 29, 2020).
[36] Act No. 17 of 2015, Laws of Kenya. Aside from the regulatory offences prescribed in the Companies Act, 2015, statutory provisions have been crafted with a bearing on criminal sanctions for corporate entities.
[37] Chapter 2, Laws of Kenya.
[38] Act No. 3 of 2003, Laws of Kenya.
[39] Act No. 9 of 2009, Laws of Kenya.
[40] Act No. 33 of 2015, Laws of Kenya.
[41] Chapter 63, Laws of Kenya.
[42] Section 3(1) of the Act.

penal sanctions to be imposed on corporate entities. For example, **Section 45 of ACECA** prescribes offences for the protection of *inter alia* public property and revenue. Under the said provision, a person is guilty of an offence if the person fraudulently or otherwise unlawfully: (a) acquires public property or a public service or benefit; (b) mortgages, charges or disposes of any public property; (c) damages public property, including causing a computer or any other electronic machinery to perform any function that directly or indirectly results in a loss or adversely affects any public revenue or service; or (d) fails to pay any taxes or any fees, levies or charges payable to any public body or effects or obtains any exemption, remission, reduction or abatement from payment of any such taxes, fees, levies or charges. This provision has been applied to corporate entities in the same manner as natural persons, where corporate entities are suspected of involvement in the acts outlawed therein.

Republic v. Grace Sarapay Wakhungu and 2 others,[43] above, is a good example of such cases where **Section 45 of ACECA** has been used to impose criminal charges on a corporate entity. In that case, Erad Supplies and General Contractors Limited was charged alongside two natural persons, Wakhungu and Waluke, for fraudulent acquisition of public property contrary to **Section 45(1)** as read with **Section 48(1) of ACECA**. Another example is **Republic v. Muhammed Abdalla Swazuri & 16 others**[44] where three corporate entities (Dasahe Investment Limited, Keibukwo Investment Limited, and Olomotit Estate Limited) were among accused persons charged with various criminal offences under **ACECA.**

On its part, **POCAMLA** creates offences in relation to money laundering. The Act embodies the concept of corporate criminal liability by creating separate penalties for the natural person and the corporate entity. **Section 16 of POCAMLA**, which provides for penalties for contravention of the provisions of the Act, states thus;

> *1.A person who contravenes any of the provisions of sections*
> *3, 4 or 7 is on conviction liable—*

[43] Anti-Corruption Case No. 31 of 2018.
[44] Anti-Corruption Case No. 33 of 2018.

a)in the case of a natural person, to imprisonment for a term not exceeding fourteen years, or a fine not exceeding five million shillings or the amount of the value of the property involved in the offence, whichever is the higher, or to both the fine and imprisonment; and

b)in the case of a body corporate, to a fine not exceeding twenty-five million shillings, or the amount of the value of the property involved in the offence, whichever is the higher.

2.A person who contravenes any of the provisions of sections 5, 8, 11(1) or 13 is on conviction liable—

a)in the case of a natural person, to imprisonment for a term not exceeding seven years, or a fine not exceeding two million, five hundred thousand shillings, or to both and

b)in the case of a body corporate, to a fine not exceeding ten million shillings or the amount of the value of the property involved in the offence, whichever is the higher.

3.A person who contravenes any of the provisions of section 12(3) is on conviction, liable to a fine not exceeding ten per cent of the amount of the monetary instruments involved in the offence.

4.A person who contravenes the provisions of section 9, 10 or 14 is on conviction liable—

a)in the case of a natural person, to imprisonment for a term not exceeding two years, or a fine not exceeding one million shillings, or to both and

b)in the case of a body corporate, to a fine not exceeding five million shillings or the amount of the value of the property involved in the offence, whichever is the higher.

5.(...)

> *6.Where any offence under this Part is committed by a body corporate with the consent or connivance of any director, manager, secretary or any other officer of the body corporate, or any person purporting to act in such capacity, that person, as well as the body corporate, shall be prosecuted in accordance with the provisions of this Act.*

In distinguishing between penalties to be imposed on natural persons and those to be imposed on corporate entities, **POCAMLA** clearly demonstrates the extent to which corporate entities can be held liable for crimes created under the Statute. It is also evident that hefty fines are meted out on corporate entities to discourage engagement in these crimes that can easily go unnoticed. Interestingly, **Section 16(6) of POCAMLA** demonstrates that in offences where both the corporate entity and its controlling mind or directing mind have actively participated in its perpetration, both parties are subject to prosecution.

The provisions in **POCAMLA** were recently a thorn in the flesh of many banking institutions that were investigated for suspicion of crimes in the nature proceeds of crime and money laundering. This was evident in the case of **Family Bank Limited & 2 others v. Director of Public Prosecutions & 2 others**,[45] where Family Bank Limited, which was charged alongside two natural persons, unsuccessfully sought to prevent their prosecution for money laundering offences under **POCAMLA**.

On another front, **Section 176 of PPADA** creates offences in relation to public procurement and asset disposal. In recognizing the uniqueness of corporate criminal liability, **Section 177 of PPADA** provides for penalties specific to corporate bodies aside from natural persons, as follows:

> *A person convicted of an offence under this Act for which no penalty is provided shall be liable upon conviction—*

[45] [2018] eKLR.

> *(a)if the person is a natural person, to a fine not exceeding four million shillings or to imprisonment for a term not exceeding ten years or to both;*
>
> *(b)if the person is a body corporate, to a fine not exceeding ten million shillings.*[46]

In summary, recently enacted Statutes are embracing the present reality that corporate entities ought to be factored in when creating offences and prescribing the attendant penalties, since corporate crime is on a steady rise lately, particularly in the context of corruption and economic crimes. However, in the overall, **Section 23 of the Penal Code** provides in regard to offences by corporate entities *inter alia* that:

> *Where an offence is committed by any company or other body corporate, or by any society, association or body of persons, every person charged with, or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and liable to be punished accordingly, unless it is proved by such person that, through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission.*

5 Corporate Entities And The Criminal Trial Process

Kenyan courts recognize that corporate entities can stand criminal trial as separate legal entities from their owners and directors,[47] but it is the directors

[46] See also PPADA, 2015, Section 176(2).

[47] See, e.g., **Paper House of Kenya Ltd. v Republic [2006] eKLR**, where Paper House of Kenya Ltd., a corporate entity, was charged, tried, and convicted by the Subordinate Court of the First Class Magistrate Court at City Hall, Nairobi, for the offences of failing to comply with a notice (to abate a nuisance) contrary to Section 115 as read with Section 118 and 119 and punishable under Section 120 and 121 of the Public Health Act. Paper House of Kenya Ltd. was then sentenced to serve a fine of KES 886,500/= and in default one year imprisonment (per Section 28 of the Penal Code, which provides for the appropriate default custodial sentence for a fine where none has been provided under a particular Statute). The conviction and sentence

that bear the consequences of the corporate entity's criminal acts and omissions.[48] Moreover, the courts have declared that directors can equally be charged in their personal capacities for offences attributable to the corporate entity, based on their positions and their conduct in relation to the corporate entity.[49] This begs the question, who bears criminal liability in cases where the offence(s) cannot be attributed to the directors of the corporate entity? Further, it is double jeopardy (double punishment) if both the corporate entity and its directors or authorized agents are punished for the same crime based on the same facts.

In this section of the article, we examine the process of charging, plea-taking, trial, conviction and sentencing for corporate crimes (generally, criminal trials involving corporate entities) in Kenya, and some possible reforms in this area.

5.1 Charging a Corporate Entity

Generally, the power to institute or discontinue criminal proceedings against any person, natural or juristic, lies with the DPP.[50] So, how should the DPP charge when faced with corporate crime? Should the corporate entity be charged alongside its directors? Are all the directors to be charged alongside the corporate entity? When should some directors be charged alongside the corporate entity and not others? Are there instances where the directors alone can be charged without preferring charges against the corporate entity itself? These are some questions that arise as concerns the charging of a corporate entity for corporate crimes.

Even so, the law has not left the DPP to run amok as concerns the decision to charge or not to charge. The constitutional threshold for the institution and

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imposed on Paper House of Kenya Ltd was upheld on appeal, by both the High and the Court of Appeal (**Paper House of Kenya Limited v. Republic [2014] eKLR**).

[48] See e.g., **Rebecca Mwikali Nabutola & 2 others v. Republic [2016] eKLR**, where the High Court stated that; *"While Maniago Safaris Limited is a separate legal entity, all the acts in question in this case were executed by its director, the 2nd appellant. In accordance with section 23 of the Penal Code, the directors of the company bear the responsibility of a company's criminal actions."*

[49] See, e.g., Clay City Developers Limited v. Chief Magistrate's Court at Nairobi & 2 others [2014] eKLR.

[50] Article 157(6) of the Constitution of Kenya, 2010.

discontinuation of criminal proceedings by the DPP is twofold: one, the DPP is constitutionally required to exercise independent judgment, devoid of the direction or control of any person or authority, in commencing criminal proceedings and in the exercise of his or her prosecutorial powers or functions;[51] and two, the DPP is constitutionally required to have regard to the public interest, the interests of the administration of justice, and the need to prevent and avoid abuse of legal process in exercising his or her prosecutorial powers.[52]

That being the case, the DPP's decision in charging for corporate crimes can successfully be challenged in court, on the grounds that the alleged criminal proceedings are tantamount to an abuse of legal process, are contrary to public interest or the interests of the administration of justice, or are influenced by ulterior motives and should thus be halted in the interest of justice.[53]

[51] Article 157(10) of the Constitution of Kenya, 2010.
[52] Article 157(11) of the Constitution of Kenya, 2010. See also Office of the Director of Publications, *Guidelines on the Decision to Charge, 2019*, pp 25-35.
[53] See, e.g., Clay City Developers Limited v. Chief Magistrate's Court at Nairobi & 2 others [2014] eKLR, paras 21 and 22, where the High Court stated thus:

> *21. The Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defence is open to the applicant in those proceedings. However,* ***if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.*** *The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore* ***the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case***

Essentially, one must satisfy the Court, through cogent reasons, that the discretion given to the DPP to charge or not to charge for crimes ought to be interfered with.[54]

For instance, in **Rebecca Mwikali Nabutola & 2 others v. Republic**,[55] the High Court was called upon to determine ***the question whether it was proper to charge the director of a corporate entity independently and at the same time as director of the corporate entity, for the same offence and on the basis of the same facts.*** In this case, both the corporate entity, Maniago Safaris Limited, and its director, the 2nd accused, were charged with the offences of conspiracy to defraud the public of monies. It was alleged that the 1st and 2nd appellants together with Maniago Safaris Limited conspired to defraud the Ministry of Tourism over expenses incurred for a trip by the Permanent Secretaries of the Government of Kenya to Maasai Mara in October 2007. As concerns the drafting of charges against both the corporate entity and its director, the court was of the view that:

> *The offences as drafted are against both the 2nd appellant [the director] and the company in the applicable instances. While the charges are also drawn against the company, the implications of Section 23 above are that, upon determination of its liability, the directors shall bear the responsibility. In my view therefore, the*

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the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim. In the exercise of the discretion on whether or not to grant an order of prohibition, the court takes into account the needs of good administration. *See* ***R vs. Monopolies and Mergers Commission Ex Parte Argyll Group Plc [1986] 1 WLR 763*** *and* ***Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK).***
22. It is therefore clear that ***whereas the discretion given to the [DPP] to prosecute criminal offences is not to be lightly interfered with, that discretion must be properly exercised and where the Court finds that the discretion is being abused or is being used to achieve some collateral purposes which are not geared towards the vindication of the commission of a criminal offence such as with a view to forcing a party to submit to a concession of a civil dispute, the Court will not hesitate to bring such proceedings to a halt****.*

[54] Id. at para 24.
[55] [2016] eKLR.

> *charges as drafted were proper, and no question of mis-joinder arises. The question of liability will only be determined upon consideration of evidence, and a further determination on whether the 2nd appellant bears liability as a director of the company.* [56]

However, the court was of the view that ***a company and its sole-director could not conspire to defraud public funds, as the company and its director counted as one person.*** The court stated as follows:

> *(...) having discharged the 1st appellant of the offence of conspiracy under count II, it follows that the 2nd appellant could not have conspired with the company in which he is the director to defraud the public of the monies in question. The offence of conspiracy entails overt acts by two or more persons and cannot therefore be sustained against one person. While Maniago Safaris Limited is a separate legal entity, all the acts in question in this case were executed by its director, the 2nd appellant. In accordance with* ***section 23*** *of the Penal Code, the directors of the company bear the responsibility of a company's criminal actions.*[57]

The 2nd appellant, the director, was thus acquitted on that count.

In **Clay City Developers Limited v. Chief Magistrate's Court at Nairobi & 2 others**,[58] the High Court considered ***the question whether where a criminal offence is alleged to have been committed by a Company with more than one director, it is competent to charge only one or some of the directors.***[59] In this case, the one director accused (to the exclusion of three other co-directors) alongside Clay City Developers Limited, the corporate entity, brought judicial review proceedings challenging the DPP's decision to charge the company and himself only for the offence of conspiracy to defraud

[56] Id. at p 11.
[57] Id. at p 18.
[58] [2014] eKLR.
[59] Id. at para 19.

contrary to **Section 317 of the Penal Code**,[60] stating that the offence charged was against the corporate entity and not himself personally. He alone had been charged alongside the corporate entity and not three other co-directors of the corporate entity, although there was no company resolution to evidence the fact that the corporate entity had resolved to have only one of its directors shoulder criminal liability on its behalf. He alleged that the DPP arrested and charged only him to appear and plead on behalf of the corporate entity without disclosing that there were three other co-directors of the corporate entity. He alleged that he was randomly picked by the DPP without any due regard to any criminal liability of the directors of the corporate entity and their responsibility in as far as the alleged offence was concerned.

On the charging of director(s) for the criminal offences alleged to have been committed by the corporate entity, the High Court was of the view that the state of mind of the director(s) constitutes the state of mind of the corporate entity. The Court expressed itself as follows:

> *25. The law relating to corporations is well known. A company may in many ways be linked to a human body. It has a brain and nerve centre, which control what it does. It also has hands, which hold the tools and act in accordance with the directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work. Others are directors and managers who represent the mind and will of the company and control what it does. The state of mind of these managers is the state of mind of the company and is treated by law as such. However, a corporation is an abstract. It has no mind of its own; its active and directing will must consequently be sought in the persons of somebody who for some purpose may be called an agent and will of the corporate, the very ego and centre of the personality of the corporation in such a case as the present one that the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing respondent superior, but somebody for whom the*

[60] Chapter 63, Laws of Kenya.

> *company is liable because his action is the very action of the company itself. See* ***Lenard's Carrying Co. vs. Astatic Petroleum [1915] AC 705 H.L AT P. 713-714.***[61]

However, on the basis of **Section 23 of the Penal Code**,[62] the High Court was of the view that, where there are more than one directors of the corporate entity in question, each director would be liable to extent of available evidence regarding their culpability. The High Court stated thus: *"It is therefore clear that where a person charged with or concerned or acting in, the control or management of the affairs or activities of a company proves that through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission, he will not be guilty of an offence committed by the company and shall not be liable to be punished thereof."*[63] As such, in considering which director(s) to charge, or not to charge, the DPP is enjoined by **Article 157(11) of the Constitution of Kenya, 2010** (hereinafter **"the Constitution"**)[64] to have regard to the public interest, the interests of the administration of justice, and the need to prevent and avoid abuse of the legal process. Accordingly, the Court stated:

> *28. In conducting the investigations it is upon the Director of Public Prosecution and the police based on the evidence and*

[61] Clay City Developers Limited v. Chief Magistrate's Court at Nairobi & 2 others [2014] eKLR, para 25.
[62] Chapter 63, Laws of Kenya. **Section 23 of the Penal Code** provides that: *"Where an offence is committed by any company or other body corporate, or by any society, association or body of persons, every person charged with, or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and liable to be punished accordingly, unless it is proved by such person that, through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission."*
[63]Clay City Developers Limited v. Chief Magistrate's Court at Nairobi & 2 others [2014] eKLR, para 27.
[64]**Article 157(11) of the Constitution of Kenya, 2010** provides that: *"In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process."*

material presented before them to decide whether the material justifies the charging of all the Directors of a Company or only some of them. To charge all the Directors of a Company with an offence committed by the Company where the DPP and the Police are in possession of the evidence showing that some of the Directors are not liable would in my view amount to abuse of power since the DPP and the Police are entitled to act bona fide. As was held in ***R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No.406 of 2001****:*

"A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable".

29. Under Article 157(11) of the Constitution, the DPP is enjoined in exercising the powers conferred by the said Article to have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. Interest of the administration of justice in my view dictates that only those whom the DPP believes have a prosecutable case against them be arraigned in Court. So unless it is manifestly clear to the Court that the DPP is abusing his powers or exercising them in a discriminatory manner in breach of section 4 of the ***Office of Public Prosecutions Act****, No. 2 of 2013, which require that in exercising his discretion he must take into account the principle of constitutionalism, it is not for this Court in judicial review proceedings to minutely examine the evidence before the DPP in order to determine whether or not all the Directors of a Company ought to have been charged.(..)*[65]

[65] Clay City Developers Limited v. Chief Magistrate's Court at Nairobi & 2 others [2014] eKLR, paras 28 and 29.The Court relied on a number of cases that have dealt

In this case, the High Court held that it could not interfere with the DPP's decision to only charge one of four directors of the corporate entity, Clay City Developers Limited, because no evidential material had been led by the applicant director in that regard:

> *1.*
> *...) there is no material before this Court on the basis of which the Court can find that in making a decision to charge only one Director of the Applicant, the 2nd Respondent did not consider the material before it or that it considered irrelevant matters or that his decision amounts to abuse of his powers or is against the principle of constitutionalism. It was upon the Applicant to place before this Court material on the basis of which this Court could find in its favour. The mere fact that the DPP decides to charge one director while leaving the others is not a ground for interfering with his discretion.*[66]

Further, in **Clay City Developers Limited v. Chief Magistrate's Court at Nairobi & 2 others**,[67] the High Court considered the question ***whether it is competent to call some of the directors to testify for the prosecution where their co-director is charged on behalf of the company, especially with the view of giving evidence against the corporate entity and the charged co-director.***[68] Surprisingly, in this case the other three co-directors, who were not charged, were summoned by the DPP to testify for the prosecution. On that, the accused director alleged that the act of calling the other three co-directors to testify against the company and one of the co-directors was contrary to **Article 50 of the Constitution** as it was tantamount to self-incrimination and prejudiced the defence to the charges. He also claimed that in doing so, the DPP abused the court process.

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with the power of the High Court to interfere the investigative and prosecutorial powers of the DCI and the DPP, respectively, in terms of the exercise of the discretion to investigate or charge for criminal acts and omissions, such as: Meixner & Another v. Attorney General [2005] 2 KLR 189; and Kuria &3 Others v. Attorney General [2002] 2 KLR 69.

[66] Id. at para 31.

[67] [2014] eKLR.

[68] Id. at para 19.

On the contrary, the High Court relied on **Section 128 of the Evidence Act**[69] and found for the prosecution. According to the Court, the Applicant director failed to cite any provision in the law which provides that a director of a company is not competent to be a witness in criminal proceedings against the company. The Court was of the view that: *"(...) taking into account the fact that a Corporation is in law distinct from the its directors where some only of the directors are charged in respect of a criminal offence against the Company, I do not agree that it is illegal to call the directors not charged as witnesses in the same proceedings."*[70]

In aggregate therefore, the High Court in **Clay City Developers Limited v. Chief Magistrate's Court at Nairobi & 2 others**[71] could not interfere with the DPP's decision to charge only one of four directors of a corporate entity, as it was not satisfied that the DPP's decision to charge only one director with an offence committed by the corporate entity in question and the subsequent application for and grant of witness summons against the other three co-directors to testify against the corporate entity and the charged co-director, were tainted with illegality, irrationality or procedural impropriety.[72]

From the above, where there are more than one directors of a corporate entity, the decision on who to (or not to) investigate or charge for the criminal offences of the corporate entity rests with the DPP and the DCI, respectively. The High Court can only interfere with the discretion of the DCI and the DPP where sufficient evidence is placed before the Court to show that the intended or ongoing criminal proceedings constitute abuse of the legal process or are

[69] Chapter 80, Laws of Kenya. **Section 128 of the Evidence Act** provides for the compellability of ordinary witnesses and states that: *"A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will incriminate, or may tend directly or indirectly to incriminate, such witness, or that it will expose, or tend directly or indirectly to expose such witness to a penalty or forfeiture of any kind, but no such answer which a witness is compelled to give shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer."*
[70] Clay City Developers Limited v. Chief Magistrate's Court at Nairobi & 2 others [2014] eKLR, para 33.
[71] [2014] eKLR.
[72] Id. at para 34.

contrary to the public interest, the interests of the administration of justice and constitutionalism, per **Articles 157(11) and 245(4) of the Constitution**.

5.2 Plea taking

It is a fact that corporations cannot appear in court in person. This therefore calls for authorized representatives to take plea on behalf of the company. In **Republic v. Henry Rotich & 2 others**[73] the High Court was faced with the question of the validity of a plea taken by an advocate on behalf of his clients, two corporate entities. The Court relied on George Otieno Ochich's article on *"The Company as a Criminal: Comparative Examination of some Trends and Challenges Relating to Criminal Liability of Corporate Persons"*[74] to suggest that personal appearance by a corporate entity to plead to an offence may not always be necessary:

> *Traditionally, the predominant thinking was that a corporation could not be indicted for a crime at all. This was partly attributable to the fact that it was necessary that the accused person makes a personal appearance in the courts, and a corporation, not being a physical person could not appear. Personal appearance is no longer mandatory in all cases as an accused person, including a corporation, may now appear and plead through a representative.*[75]

The court found that an authorised legal representative could take plea on behalf of the corporate entity. It adopted the United States position as postulated by Hayes Hunt and Michael P. Zabel in their article on *"Corporations in the Unusual Role of Criminal Defendant"*[76] that:

> *Unlike with a natural person, however, the plea process for a corporate defendant may be done entirely through its legal*

[73] [2019] eKLR.
[74] (2008), <http://kenyalaw.org/kl/index.php?id=1919> (Accessed July 1, 2020).
[75] Republic v. Henry Rotich & 2 others [2019] eKLR, para 29.
[76](*Law.Com/ The Legal Intelligencer*, August 28, 2013) https://www.law.com/thelegalintelligencer/almID/1202617256976&Corporations_in_the_Unusual_Role_of_Criminal_Defendant/ (Accessed June 29, 2020).

> *counsel, so long as he or she has the proper authority. Rule 43(b)(1) of the Federal Rules of Criminal Procedure explains a corporate defendant need not be present at a plea so long as it is represented by counsel who is present."*[77]

The Court also relied on **paragraph 66 of the Judicial Criminal Procedure Bench Book, 2018** which provides that a corporate entity can be charged with a criminal offence, however, when taking a plea in the case of the corporate entity, the court must satisfy itself that the person taking the plea is duly authorised to take plea on behalf of the corporate entity.[78]

Even so, the court found that it was problematic for advocates to take plea on behalf of a corporate entity that they are representing, and at the same time defend the corporate entity before the court. In the words of the court:

> *In my view, the person who can properly represent a corporation in our courts is an officer of the corporation, properly authorised. Such person would ordinarily be a Director of the corporation. It cannot be just 'anybody', even a 'mason,' as Mr. Monari suggested in his submissions. To hold otherwise may well result in the rather unedifying spectacle of a parade of legal representatives from the Kenyan Bar engaging in the gymnastics of moving from the Counsel table to the dock while simultaneously standing in for and representing their corporate clients as the accused in the dock and also conducting their defence.*[79]

Moreover, the Court found that whether an authorised legal representative could take plea on behalf of the corporate entity also depended on the nature and seriousness of the offence charged.[80] The court thus insisted that in corruption and economic crimes' cases, it is expedient for the accused corporate entities to plead by their director(s) or parties involved in the crimes

[77] Republic v. Henry Rotich & 2 others [2019] eKLR, para 30.
[78] Id. at paras 31 and 32.
[79] Id. at paras 34 and 35.
[80] Id. at para 33.

charged, due to the high public interest in such matters.[81] According to the court, it would beat logic for such parties to hide under the cloak of legal representatives.

Based on the above, the court went ahead to render the plea taken by the defence counsel in this case to be irregular and improper and ordered the said corporate entity to appear and plead to the charges through their director(s).[82]

5.3 Evidential threshold

Akin to establishing corporate civil liability, a corporate entity's criminal liability must be established through the acts or omissions of its agent(s) as the controlling mind and will of the corporate entity.[83] Generally, the prosecution must prove two things to establish corporate criminal liability: (a) that the acts of the corporate entity's agent(s) were within the scope of his or her duties; and (b) that the acts were intended, at least in part, to benefit the corporate entity. Nonetheless, the standard of proof in criminal cases remains to be beyond reasonable doubt. As such, to convict a corporate entity for a criminal offence, it is necessary to prove beyond reasonable doubt that: (a) the corporate entity committed the act prohibited by the offence (*actus reus*); and (b) the corporate entity had a guilty state of mind, that is, the corporate entity had the required mental intent when committing the act that makes it an offence (*mens rea*).

The challenge sets in when trying to ascribe a guilty mind to a company. This issue has been dealt with by the courts in the United Kingdom (UK) crystallizing into **the identification principle**. The identification principle imputes to the corporate entity the acts and the state of mind of those who represent the "directing mind and will" of the corporate entity.[84] Generally, the

[81] Id. at para 36.
[82] Id. at para 37.
[83] Hayes Hunt and Michael P. Zabel, 'Corporations in the Unusual Role of Criminal Defendant' *(Law.Com/ The Legal Intelligencer,* August 28 2013) https://www.law.com/thelegalintelligencer/almID/1202617256976&Corporations_in_the_Unusual_Role_of_Criminal_Defendant/ (Accessed June 29, 2020).
[84]Joanna Ludlam, 'Corporate Liability in the United Kingdom' <https://globalcompliancenews.com/wcc/corporate-liability-in-the-united-kingdom/> (Accessed June 30, 2020).

application of the identification principle is restricted to the actions of the board of directors, the managing director and other superior officers who carry out functions of management and speak and act as the corporate entity. This means that where the criminal act and criminal state of mind in question can be attributed to such individuals, the company can be prosecuted for the offence as a principal offender.

The case of **Tesco Supermarkets Ltd v. Nattrass**[85] considered the identification principle further and endorsed the case of **Lennard's Carrying Co Ltd v. Asiatic Petroleum Co Ltd,**[86] specifically the notion of the *"directing mind and will"* of the corporate entity. The case defined the directing mind and will of a corporate entity as extending to the *"board of directors, the managing director and perhaps other superior officers of the company who carry out functions of management and speak and act as the company"*. To establish who the directing mind and will of any one company is, prosecutors will review the company's constitutional documents.

This common law principle is applicable in Kenya. A strict reading of **Sections 798 and 810 of the Companies Act, 2015** reveals that in case an investigation on the affairs or ownership of a corporate entity results into some evidence that a person has, in relation to the corporate entity or to any other body corporate whose affairs have been investigated committed an offence for which the person is criminally liable, the Court shall submit a copy of the report to the DPP for prosecution. The Companies Act, 2015 tends to lean towards the culpability of the person responsible for the criminal act as compared to the corporate entity. The Act provides for investigation of a corporate entity *inter alia*, due to public interest reasons, for instance, the onslaught on corruption and economic crimes which has seen many corporate entities being investigated.

5.4 Sentencing a Corporate Entity

Upon conviction of a corporate entity, the question of sentencing sets in and this stretches the bounds of traditional criminal law. This is because of the uniqueness of a corporate entity as a juristic or legal person different in many

[85] [1972] AC 153.
[86] [1915] AC 705.

ways from a natural person. As a result, pragmatism is imperative in sentencing a corporate entity as it is logical that a corporation cannot serve a custodial sentence.

Drawing from the **United States Federal Sentencing Guidelines on the sentencing of organizations**, guidelines on sentencing a corporate entity should achieve the following four principles: (1) a convicted corporate entity should remedy any harm caused by the offence committed; (2) if the corporate entity is operated primarily for a criminal purpose or primarily by criminal means, the fine imposed should be set sufficiently high to divest the organization of all of its assets; (3) for any other corporate entity, the fine imposed should be based on its conduct and culpability; and (4) sentencing a corporate entity to probation is appropriate when needed to ensure that another sanction will be fully implemented, or to ensure that steps will be taken within the corporate entity to reduce the likelihood of future criminal conduct.[87]

[87] United States Sentencing Commission, *Federal Sentencing Guidelines 2015: Introductory Commentary to Chapter 8 – Sentencing of Organizations* <https://www.ussc.gov/guidelines/2015-guidelines-manual/2015-chapter-8> (Accessed July 13, 2020); there are four general principles on sentencing of organizations:

> *"First, the court must, whenever practicable, order the organization to remedy any harm caused by the offense. The resources expended to remedy the harm should not be viewed as punishment, but rather as a means of making victims whole for the harm caused.*
> *Second, if the organization operated primarily for a criminal purpose or primarily by criminal means, the fine should be set sufficiently high to divest the organization of all its assets.*
> *Third, the fine range for any other organization should be based on the seriousness of the offense and the culpability of the organization. The seriousness of the offense generally will be reflected by the greatest of the pecuniary gain, the pecuniary loss, or the amount in a guideline offense level fine table. Culpability generally will be determined by six factors that the sentencing court must consider. The four factors that increase the ultimate punishment of an organization are: (i) the involvement in or tolerance of criminal activity; (ii) the prior history of the organization; (iii) the violation of an order; and (iv) the obstruction of justice. The two factors that mitigate the ultimate punishment of an organization are: (i) the existence of an effective compliance and ethics*

In the **Waluke Case**,[88] the trial magistrate relied on UK cases to allude to the fact that there are limits to criminal offences that can be committed by a corporate entity, in that, even though a corporate entity acts through its directors as its controlling mind, there are certain criminal offences which a corporate entity, unlike a natural person, is incapable of committing.[89] A corporate entity is incapable of committing offences such as perjury and bigamy because by their very nature they cannot be committed by corporate entities. Besides, for offences such as murder, where the only available criminal punishment in most cases is custodial, it is tricky to charge a corporate entity for the same unless an alternate non-custodial punishment exists.

In the event that the corporate veil is lifted and the directors, the controlling mind and will of the corporate entity, are punished, slapping the corporate entity too with a fine amounts to double punishment. On the flip side, finding the corporate entity culpable suggests that the directors breached some of their statutory duties leading to the commission of the crime by the corporate entity. The implication of this is that the separate legal personality of the corporate entity is therefore at its best fictitious when sentencing a corporate entity, because the effect of such sentencing will be felt by the controlling mind and will of the corporate entity, the directors. This position is justified under **Section 23 of the Penal Code**,[90] which provides for offences by corporations and states that:

> *Where an offence is committed by any company or other body corporate, or by any society, association or body of persons,*

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program; and (ii) self-reporting, cooperation, or acceptance of responsibility.
Fourth, probation is an appropriate sentence for an organizational defendant when needed to ensure that another sanction will be fully implemented, or to ensure that steps will be taken within the organization to reduce the likelihood of future criminal conduct."

See also Law Library - American Law and Legal Information, 'Corporate Criminal Responsibility' <https://law.jrank.org/pages/747/Corporate-Criminal-Responsibility-Sentencing.html> (Accessed July 2, 2020).

[88] Judgment of June 22, 2020, p 63.

[89] Majestic Theatre Co. Ltd v. Regina [1952] KLR 157; and R v. Nassa Ginners Ltd [1955] EA 33.

[90] Chapter 63, Laws of Kenya.

> *every person charged with, or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and liable to be punished accordingly, unless it is proved by such person that, through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission.*

The High Court endorsed the application of **Section 23 of the Penal Code** in the case of **Rebecca Mwikali Nabutola & 2 others v. Republic**,[91] as already indicated above, when it stated that: "*The offences as drafted are against both the 2nd appellant and the company in the applicable instances. While the charges are also drawn against the company, the implications of Section 23 above are that, upon determination of its liability, the directors shall bear the responsibility."*

This leaves the criminal justice system in Kenya in a precarious position, since there are no clear cut rules or jurisprudence on the sentencing of a corporate entity. The law has cast its net wide to catch anyone who would have causative link with the offences committed by a corporate entity. It appears that the Kenyan legislature has not intended that corporate entities should bear the criminal burden alone.[92] Although **Section 23 of the Penal Code** recognizes that a corporate entity may commit an offence in its own right, it does not contemplate that the criminal charge may be brought against the corporate entity alone, or that the criminal penalty may be imposed upon the corporate entity alone.[93]

That being the case, **Section 23 of the Penal Code** is retrogressive to the development of corporate criminal liability jurisprudence in Kenya. As such, it is time the Legislature re-evaluates this provision to determine whether it

[91] 2016] eKLR.
[92] George O. Otieno Ochich, 'The Company as a Criminal: Comparative Examination of some Trends and Challenges Relating to Criminal Liability of Corporate Persons' (2008), <http://kenyalaw.org/kl/index.php?id=1919> (Accessed July 1, 2020).
[93] Id.

resonates with the fight against corruption and economic crimes. Without elaborate judicial principles and statutory provisions on corporate criminal liability, the sentencing of corporate entities will remain hinged on a game of chance with low efficiency if any. A ray of hope is glimmering with the recent practice of enacting Statutes with separate penalty provisions for corporate entities and natural persons.

Nonetheless, as concerns corruption and economic crimes, **Section 48 of ACECA** prescribes **an additional mandatory fine** to reflect the severity of the offences prescribed under the Act, in terms of benefits accruing to the convicts or losses incurred by any other person as a result of the offence committed. The Section provides as follows;

> *(1) A person convicted of an offence under this Part shall be liable to—*
>
> *(a) a fine not exceeding one million shillings, or to imprisonment for a term not exceeding ten years, or to both; and*
>
> *(b) an additional mandatory fine if, as a result of the conduct that constituted the offence, the person received a quantifiable benefit or any other person suffered a quantifiable loss.*
>
> *(2) The mandatory fine referred to in subsection (1)(b) shall be determined as follows—*
>
> *(a) the mandatory fine shall be equal to two times the amount of the benefit or loss described in subsection (1)(b);*
>
> *(b) if the conduct that constituted the offence resulted in both a benefit and loss described in subsection (1)(b), the mandatory fine shall be equal to two timesthe sum of the amount of the benefit and the amount of the loss.*

In **Thuita Mwangi & 2 others v. Ethics & Anti-Corruption Commission & 3 others**,[94] Majanja J. considered the issue of discrepancy in penalties under the Penal Code and the ACECA.[95] At issue in the case was the penalty

[94] [2013] eKLR.
[95] Id. paras 57-63.

prescribed under **Section 127 of the Penal Code**,[96] and that under **Section 48(1)(b) of ACECA**. **Section 48(1)(a) of ACECA** imposes a similar penalty to that under **Section 127 (2) of the Penal Code**. However, the 2nd and 3rd Petitioners therein alleged that **Section 48(1)(b) of ACECA,** in prescribing an additional mandatory fine, imposes a penalty more severe than that imposed by **Section 127 of the Penal Code**. In his findings, Majanja J. was of the view that the additional mandatory fine under **Section 48(1)(b) of ACECA** was necessitated by the specific objectives of ACECA in curbing corruption and economic crimes. He expressed himself as follows:

> *59. (…) acceding to the petitioners' submission would entail this court adopting an interpretation that presupposes Parliament was oblivious of the existence of the **Penal Code** when it enacted the **ACECA** in the year 2003. It certainly was aware and saw it fit that in addition to the sentence under the paragraph (a) of the section, a mandatory punishment be specifically provided for in cases where a public officer had received a benefit as a result of the economic crime.*
> *60. These provisions cannot be read in isolation and at all times, the purpose of the legislation ought to be borne in mind. **ACECA** was introduced to serve a specific purpose of thwarting corruption and economic crimes. It is, "An Act of Parliament to provide for the prevention, investigation and punishment of corruption, economic crime and related offences and for matters incidental thereto and connected therewith."*
> *61. On the other hand, the **Penal Code** is not a one stop shop of all the criminal offences, several other Acts create similar offences, depending on the specific objects of the legislation in question and the gravity of the offence. It is notable that even*

[96] **Section 127 of the Penal Code** provides for the offence of fraud or breach of trust by public officers and states that: *"(1) Any person employed in the public service who, in the discharge of the duties of his office, commits any fraud or breach of trust affecting the public, whether the fraud or breach of trust would have been criminal or not if committed against a private person, is guilty of a felony. (2) A person convicted of an offence under this section shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding ten years or to both."*

> *under the **Penal Code** itself, we have varied sentences for similar offences. Take for instance, punishment for stealing under **section 275** which differs depending on the unique circumstances of the crime so that we have varied sentences for what is for all intents and purposes the crime of theft, such as stealing by servant.*
>
> *(…)*
>
> *63. The legislature is (…) entitled to adopt different levels of penalties to satisfy certain policy objectives. The question of severity of punishment cannot of itself render a statute unconstitutional. The substance of legislation including the sentence to be meted out is within the realm of the legislature and the court's role is limited and will not interfere unless it is shown that such sentence violates any of the known Constitutional rights and freedoms. (…)*[97]

6 Twinning Corporate Criminal Liability and Criminal Liability of Public Officers in Anti-Corruption Cases

Recent anti-corruption cases in Kenya have seen a mix of corporate entities and public officers who are together accused of committing offences arising from the same facts. Such cases include: **Republic v. Grace Sarapay Wakhungu, John Koyi Waluke and Erad Supplies & General Contractors Limited**;[98] **Republic v. Muhammed Abdalla Swazuri & 16 Others**;[99] **Republic v. Muhammed Abdalla Swazuri & 23 others**;[100]

[97] Thuita Mwangi & 2 others v. Ethics & Anti-Corruption Commission & 3 others [2013] eKLR, paras 59-63 and 80-84.

[98] Anti-Corruption Case No. 31 of 2018.

[99] Anti-Corruption Case No. 33 of 2018. The corporate entities charged alongside the natural persons were Dasehe Investment Limited (15th accused), Keibukwo Investment Limited (16th accused), and Olomotit Estate Limited (17th accused). See **Muhammed Abdalla Swazuri & 16 others v. Republic [2018] eKLR, High Court of Kenya at Nairobi, Anti-Corruption and Economic Crimes Division, Criminal Revision No. 13 of 2018,** ruling by Ong'udi, J. dated **1st day of November 2018.**

[100] Anti-Corruption and Economic Crimes Case No. 6 of 2019. The corporate entities charged alongside the natural persons were; Sunside Guest House Ltd (11th accused) and Tornado Carriers Limited (19th accused). See **Muhammed Abdalla Swazuri & 23 others v. Republic [2019] eKLR; High Court at Nairobi, Anti-Corruption**

Republic v. Moses Lenolkulal & 13 others;[101] and **Republic v. Ferdinand Ndung'u Waititu Babayao & 12 others**.[102] In this section, the article considers the charging, trial, conviction and sentencing of public officers for corruption and economic crimes; especially because in the **Waluke Case**, Waluke is a public officer, that is, the Member of the National Assembly for Sirisia Constituency, in Bungoma County.

6.1 The Quagmire of Bail and Bond Terms for Public Officers in Cases Involving Corruption and Economic Crimes

In accordance with **Article 49(1)(h) of the Constitution**, every arrested or accused person has the right to be released on bail or bond, on reasonable conditions, pending a criminal charge or trial, unless there are compelling reasons to be denied bail or bond. As such, bail or bond is a constitutional right of an arrested or an accused person.[103] In addition, under **Article 49(2) of the Constitution**, an accused is not to be remanded in custody for an offence, if the offence is punishable by a fine only or by imprisonment for not more than six months.

Crimes Division, Criminal Revision No. 13 of 2019, ruling by Mumbi Ngugi, J. dated 2nd May 2019.

[101] Anti-Corruption Case No. 3 of 2019. See **Moses Kasaine Lenolkulal v. Director of Public Prosecutions [2019] eKLR, High Court at Nairobi, Anti-Corruption and Economic Crimes Division, Criminal Revision No. 25 of 2019**, ruling by Mumbi Ngugi, J. dated 24th July 2019. *See also* **Moses Kasaine Lenolkulal v. Republic [2019] eKLR, Court of Appeal at Nairobi, Criminal Appeal No. 109 of 2019**, ruling by Musinga, Gatembu, and Murgor, JJA. dated 20th December 2019.

[102] Anti-Corruption Case No. 22 of 2019. See **Ferdinand Ndungu Waititu Babayao& 12 others v. Republic [2019] eKLR, High Court at Nairobi, Anti-Corruption and Economic Crimes Division, Anti-Corruption Revision No. 30 of 2019,** ruling by Ngenye, J. dated 8th August, 2019). Bienvenne Delta Hotel alongside its director Susan Wangari Ndung'u, Testimony Enterprises Ltd., and Saika Two Estate Developers Limited are corporate entities which are also charged in the case. See also **Ferdinand Ndung'u Waititu Babayao v. Republic, Court of Appeal at Nairobi, Civil Appeal No. 416 of 2019**, ruling by Musinga, Gatembu, and Murgor, JJA. dated 20th December 2019. The matter has been appealed to the Supreme Court, in Supreme Court Petition No. 2 of 2020.

[103] See, e.g., **Andrew Young Otieno v. Republic [2017] eKLR** (Kimaru J. held that the bail or bond terms set by the trial court should not be such that they amount to a denial of the constitutional right of the accused to be released on bail pending trial.)

Pursuant to **Section 123A(1) of the Criminal Procedure Code (CPC)**,[104] the court is to consider all the relevant circumstances in exercising the discretion to grant or deny bail or bond, including: (a) the nature or seriousness of the offence; (b) the character, antecedents, associations and community ties of the accused person; (c) the defendant's record in respect of the fulfilment of obligations under previous grants of bail; and (d) the strength of the evidence of his having committed the offence.[105] Moreover, a court may deny bail if satisfied that the person: (a) has previously been granted bail and has failed to surrender to custody and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody; and (b) should be kept in custody for his own protection.[106] The prosecution is to satisfy the court on a balance of probabilities as to the existence of compelling reasons to justify the denial of bail.[107]

Even so, the jurisprudence on bail and bond terms for public officers charged with corruption or economic crimes is at best marshy. This article takes a look into the jurisprudence on bail and bond terms in such cases, based on the rulings that have been handed down by the Courts when faced with accused persons charged with corruption and economic crimes. This is imperative, especially for accused persons who are public officers, because of the link between integrity and leadership that arises in such cases.

The cases cited above also dealt with the issue of removal from office of public officers facing charges of corruption and economic crimes. At the core of the issue in these cases was **Section 62(6) of ACECA**, which provides that for constitutional office holders whose process of removal is specified under the Constitution, the constitutional procedure has to be adhered to. **Section 62 of ACECA** provides for the effect of a charge on corruption or economic crime on the holders of public office, that is, suspension from public office, as follows:

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[104] Chapter 75, Laws of Kenya.
[105] See generally, Judiciary of Kenya, *Bail and Bond Policy Guidelines* (National Council on the Administration of Justice, March 2015).
[106] Section 123A(2) of the CPC.
[107] Judiciary of Kenya, *Bail and Bond Policy Guidelines* (National Council on the Administration of Justice, March 2015), p 25.

62. Suspension, if charged with corruption or economic crime

(1) A public officer or state officer who is charged with corruption or economic crime shall be suspended, at half pay, with effect from the date of the charge until the conclusion of the case:

Provided that the case shall be determined within twenty-four months.

(2) A suspended public officer who is on half pay shall continue to receive the full amount of any allowances.

(3) The public officer ceases to be suspended if the proceedings against him are discontinued or if he is acquitted.

(4) This section does not derogate from any power or requirement under any law under which the public officer may be suspended without pay or dismissed.

(5) The following shall apply with respect to a charge in proceedings instituted otherwise than by or under the direction of the [DPP]—

(a) this section does not apply to the charge unless permission is given by the court or the [DPP] to prosecute or the proceedings are taken over by the Attorney-General; and

(b) if permission is given or the proceedings are taken over, the date of the charge shall be deemed, for the purposes of this section, to be the date when the permission is given or the proceedings are taken over.

(6) This section does not apply with respect to an office if the Constitution limits or provides for the grounds upon which a holder of the office may be removed or the circumstances in which the office must be vacated.

(7) This section does not apply with respect to a charge laid before this Act came into operation.

We will now look at how the Courts in the cases mentioned above have interpreted and applied **Section 62(6) of ACECA**, as concerns bail and bond terms for public officers who are constitutional office holders and facing charges of corruption and economic crimes.

6.1.1 Republic v. Muhammed Abdalla Swazuri & 16 Others[108]

Prof. Muhammad Abdalla Swazuri was the Chairperson of the National Land Commission (NLC) between February 2013 and 2019. NLC is a constitutional commission established under **Article 67(1) of the Constitution**, and specified as such under **Article 248(2)(b) of the Constitution**. The appointment and removal from office of the Chairperson of NLC, like any other constitutional commission, is provided for under **Articles 250 and 251 of the Constitution**, respectively. Moreover, while **Section 10 of the National Land Commission Act, 2012 (NLCA)**[109] makes provision for when the office of Chairperson of NLC is deemed to be vacant, **Section 11 of the Act** buttresses **Article 251 of the Constitution** regarding the removal of the Chairperson of NLC from office.

On August 13, 2013, Prof. Muhammad Abdalla Swazuri was arraigned before the Chief Magistrate's Court at Nairobi, to answer to charges of corruption and economic crimes under ACECA. Upon application for bail or bond, he and other accused were granted bail or bond but with conditions, as follows:

> *For 1st and 2nd accused who face more charges, each faces at least seven counts, as well as accused A13, 14, 15 who faces at least six count each; they shall be released with executing a bond (six million) for a surety of like amount or in the alternative each shall deposit cash bail of Kshs. Three million five hundred thousand only (3.5) million.*
>
> > *(i)*
> > *s for accused A3, 4, 5 and 16. Nos. 12, 6, 7, 8, 9, 10 and 11 who face count 1 and XIX only and separate alternative counts, each shall be released on a bond of Kshs 3,000,000 (three million) plus a surety of like amount or an alternative of Kshs One million five hundred thousand (1.5) million each.*

[108] Anti-Corruption Case No. 33 of 2018.
[109] Act No. 5 of 2012, Laws of Kenya.

> *(ii)*
> *hey shall further be required to deposit their passports with the court.*
>
> *(iii)*
> *or public officers who have been in office, they are hereby ordered to keep off their offices unless accompanied by police officers and upon prior arrangement with the new management of those institutions.*
>
> *(iv)*
> *he accused person shall not make contact either by themselves or through proxies with witnesses whom they shall be aware of.*

Orders accordingly.

On August 22, 2013, Prof. Muhammad Abdalla Swazuri requested the trial court to review the bail condition barring him from accessing his office *"unless accompanied by police officers and upon prior arrangement with the new management of those institutions."* On August 28, 2018, the trial magistrate, Honourable L. N. Mugambi, reviewed the bail terms as follows:

> *The condition requiring that accused be accompanied by police officer appears to have been misconceived. However, it is a condition which in my view is still relevant for reasons explained in the foregoing. The court considers that since the essence is to safeguard evidence by reducing the frequency of contact with witnesses or any possible suppression of evidence to ensure credibility of the judicial process, an order modifying the same to make it less onerous is necessary. The order to have police escort every time they make visit to their offices is vacated and replaced with the following:*
>
> *1*
> *or public officers who do not hold Constitution Offices; they are hereby barred from accessing their offices unless there is prior written authorization by the respective Heads of departments who shall be notified to the*

> *Investigative agency in advance of any such visit so that if a need arises for any arrangements to minimize contact with the witnesses who will testify against the accused or secure any other evidence appropriate measures can be taken in that regard.*
> *2*
> *or the Constitution office holders, the 1st accused, who has been at the helm of the NLC and indeed any other Constitutional office holder for that matter, a prior written authorization by the person exercising the duties of the Secretary/CEO of the Commission, who is also not an accused in this case, authorizing access after due consultations with the investigative agency in this case so that any appropriate arrangements can be made to ensure contact with witnesses who are expected to testify against the accused is minimized and/or any other form of evidence secured.*

Prof. Muhammad Abdalla Swazuri claimed that the orders of August 13 and 28, 2018 barring him from accessing his office were tantamount to his suspension or removal from constitutional office, in violation of **Articles 248(2)(b), 250(6), and 251 of the Constitution, Section 10 of NLCA, and Section 62(6) of ACECA**. As a result, he filed an application for the revision and setting aside of the said orders of the trial court at the High Court, **Muhammed Abdalla Swazuri & 16 others v. Republic**;[110] under **Section 123(3) and 362 of the Criminal Procedure Code (CPC)**,[111] **Section 10 of NLCA**, **Section 62(6) of ACECA**, and **Articles 49(1)(h); 67, 165(6) and**

[110] [2018] eKLR, Criminal Revision No. 13 of 2018, ruling by Ong'udi, J. dated **1st November 2018.**

[111] Chapter 75 of the Laws of Kenya. **Section 123(3) of the CPC** provides that: *"The High Court may in any case direct that an accused person be admitted to bail or that bail required by a subordinate court or police officer be reduced."*; and Section 362 of the CPC provides that:*"The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court."*

(7),[112] **248(2) (b), 249(2) 250(b), 251 and 252 of the Constitution**. It is noteworthy that this is the first case where the High Court was called upon to consider the application of **Section 62(6) of ACECA** in relation to a constitutional office holder facing charges of corruption and economic crimes.

Prof. Muhammad Abdalla Swazuri sought to be allowed unrestricted access to his office because as a constitutional office holder, he could only be suspended or removed from office through the procedure laid down pursuant to the Constitution. He could only be removed from office through a petition for his removal as member and Chairperson of NLC, as provided under **Article 251 of the Constitution**. Moreover, he claimed that the said bail and bond terms subjected him to the authority of the Secretary or CEO of EACC who, together with his administrative officers, prevented him from fulfilling his constitutional mandate as Chairperson of NLC—contrary to **Article 249(2) of the Constitution**. Besides, he claimed that he was being restricted from accessing his office although the investigations in the case had already been concluded.

The High Court (Ong'udi J.) delivered its ruling on the application for revision on November 1, 2018. It is notable that both the prosecution and the Court admitted that unlike other public officers, Prof. Muhammad Abdalla Swazuri, being a constitutional office holder, was not subject to **Section 62(1) of ACECA** by virtue of **Section 62(6) of ACECA**.[113] However, the prosecution argued that he was being barred from accessing his office because the same was now a crime scene and most of the witnesses in the case were his subordinates. On this, Ong'udi J. stated that he understood the need to secure the credibility of the judicial process as the charges arose from Prof.

[112] **Article 165(6) and (7) of the Constitution of Kenya, 2010** gives the High Court supervisory jurisdiction over subordinate courts, and provides that: *"(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."*

[113] Muhammed Abdalla Swazuri & 16 others v. Republic [2018] eKLR, paras 12 and 35.

Muhammad Abdalla Swazuri's operations at NLC and the witnesses in the case were also his subordinates. However, Ong'udi J. held that securing the credibility of the judicial process had to be done within the confines of the law and the Constitution.[114] In this case, the problem was that the investigating agency was the EACC and the Secretary or CEO of EACC was to give authorization for Prof. Muhammad Abdalla Swazuri to access his office after consultation with the EACC; that is, EACC was to grant authorization after consultation with itself.[115] In any case, a refusal to grant such authorization by EACC meant that he could not access his constitutional office, an independent constitutional commission.

Ong'udi J. was of the view that **Section 10 of NLCA** on vacancy in the office of chairperson or member of NLC did not apply in this case as Prof. Muhammad Abdalla Swazuri still remained in office because the subject anti-corruption case was yet to be determined by the trial court. He therefore found the trial magistrates order barring Prof. Muhammad Abdalla Swazuri from accessing his office without authorization from EACC to be impracticable because: (1) there was a conflict of interest in that the Secretary or CEO of EACC and the investigating agency (EACC) could be seen to be controlling the affairs at NLC yet both EACC and NLC are independent constitutional commissions;[116] (2) If Prof. Muhammad Abdalla Swazuri wanted to be in his office every day, it would be impracticable for him to obtain authorization from EACC on a daily basis;[117] (3) investigations into the case were complete and what was required was merely to safeguard against witness interference.[118] After considering the legality and practicalities of operationalising the orders of the trial magistrate, Ong'udi J. thus ruled:

> *42. From my analysis above and especially on the issue of the operationalization of the Order in respect of the Applicant, I am satisfied that the trial court did not assess the practical impact of the orders it gave in respect to the Applicant. I therefore find that*

[114] Id. at para 37.
[115] Id. at paras 38-39.
[116] Id. at para 40.
[117] Id. at para 41.
[118] Id.

> *section 362 CPC is applicable in the circumstances of this case. This is for the purposes of making it practical for the Applicant to carry out his official duty and not earn a full salary for doing nothing.*
>
> *43. I therefore set aside the order complained of and substitute it with an order directing the Applicant to make an undertaking not to interact and/or interfere with the witnesses at his work place or any other witness. He will also undertake not to interfere with the records and/or documents relevant to the case at hand. Failure to comply will lead to automatic cancellation of his bond.*
>
> *Orders accordingly.*[119]

In essence, Ong'udi J. held that restricting constitutional office holders from accessing their offices during the pendency of a criminal trial is illegal, unconstitutional and impractical, as the said public officers still remain in office unless removed as provided under the Constitution. Instead, an undertaking that the said public officers will not interfere with witnesses and the records or documents relevant for the criminal trial is sufficient in safeguarding the integrity of the judicial process, without infringing on the law and the Constitution.

6.1.2 Republic v. Muhammad Abdalla Swazuri & 23 others[120]

The accused in the case were charged with offences comprising corruption and economic crimes under ACECA, such as abuse of office, unlawful acquisition of public property, dealing with suspect property, and conspiracy to commit an act of fraud leading to an irregular payment of KES 109,769,363.00. The accused pleaded not guilty to the charges and applied for bail and bond.

On April 23, 2019, the trial magistrate, Honourable L. N. Mugambi, granted the accused bail and bond accordingly. However, conditions of bail were also imposed on the accused, in that, they were to deposit their passports in court, they were not to contact any witnesses, and ***every accused person who was a public officer was barred from accessing his or her office without prior***

[119] Id. at paras 42 and 43.
[120] Anti-Corruption and Economic Crimes Case No. 6 of 2019.

written authorization of the head of the respective organization, and the authorization was to be made after consultation with the investigative agency in the case.

Dissatisfied with the ruling of the trial court, Prof. Muhammad Abdalla Swazuri and the other accused applied for revision of the orders of the trial magistrate at the High Court; in **Muhammed Abdalla Swazuri & 23 others v. Republic**.[121] They claimed that the trial court imposed unjust, unreasonable and exorbitant bail and bond terms that were in contravention of **Article 49 of the Constitution** and urged the court to revise the orders and issue reasonable bail or bond terms.

They argued that the setting of bail and bond terms is a constitutional and legal process guided by precedence and is not an emotional decision on the part of the trial court. In this case, they claimed that in arriving at the bail and bond terms, the trial magistrate had expressed the view that corruption and economic crimes were more grievous compared to murder. In sum, they faulted the ruling of the trial magistrate on four grounds, that: (1) the trial magistrate ignored local precedence and judicial trends on bail and bond terms; (2) the trial magistrate categorised the accused into groups and set bail and bond terms on the basis of those categories; (3) the trial magistrate considered the quantum alleged to have been misappropriated by the accused as a basis for setting the bail and bond terms; and (4) the trial magistrate relied on a decision from India in which the court considered the public interest in setting bail and bond terms against an accused person.[122]

However, Mumbi Ngugi, J. was of the view that the trial magistrate properly applied the principles on bail and bond and took into account the constitutional and statutory provisions and judicial precedents on bail and bond. On May 2, 2019, Mumbi Ngugi, J. ruled as follows:

> *42. We are in familiar, yet uncharted territory, when it comes to corruption and anti-corruption prosecutions. We are familiar*

[121] [2019] eKLR, High Court at Nairobi, Anti-Corruption Crimes Division, Criminal Revision No. 13 of 2019.
[122] *Ibid.* at paragraph 24.

with corruption because, as this court observed in the cases of ***Lenolkulal*** *and* ***Lumenyete****, it wreaks havoc on our society and economy and on the needs and rights of citizens. We are, however, in uncharted territory because the recent past has probably seen the first serious and concerted effort to deal with it and ensure that those who perpetrate it are brought to justice. This is where the public interest consideration and the need not to diminish public confidence in the administration of justice that the Chief Magistrate in this case spoke of come in. Yet, these considerations must be balanced with the constitutional right of an accused person to bail, which is linked to his or her constitutional right to be presumed innocent.*

43. In the circumstances, in order to balance these important yet competing considerations but in the absence of any averments with respect to the personal circumstances of the applicants, I will exercise discretion and revise the terms of bail and bond set by the trial court as follows:

> ***1. The 1st, 2nd, 3rd, 4th 7th, and 8th accused persons namely Mohammad Abdalla Swazuri, Emma Muthoni Njogu, Tom Aziz Chavangi, Salome Ludenyi Munubi, Francis Karimi Mugo and Catherine Wanjiru Chege shall each be released on a bond of Kshs 15 million with one surety of a similar amount or cash bail of Kshs 7 million;***
> ***2. The 12th accused, Samuel Rugongo Muturi shall be released on a bond of Kshs 7.5 million with one surety of a similar amount or cash bail of Kshs 3 million;***
> ***3. The 16th accused, Sostenah Ogero Taracha, shall be released on a bond of Kshs. 5 million with one surety of a similar amount or cash bail of Kshs 1.5 million;***
> ***4. The 6th, 13th, and 14th accused persons, Lilian Savai Keverenge, Evahmary Wachera Gathondu and Michael George Onyango Oloo shall each be released on a bond***

> ***of Kshs 2.5 million with one surety of a similar amount or cash bail of Kshs 750,000.***
>
> *44. The bond approvals in this matter shall be done before the Chief Magistrate's Anti-Corruption Court seized of ACEC No. 6 of 2019, and any applications in respect of the orders made in this ruling shall be made before the same court.*
>
> *45. The other terms set by the Chief Magistrate's Court in the ruling dated 23rd April 2019 shall remain in force.*
>
> *46. Orders accordingly.*

So, Mumbi Ngugi J. did not rule on the conditions of bail, especially as concerns the condition that every accused person who was a public officer was barred from accessing his or her office without prior written authorization of the head of the respective organization nor the fact that the authorization was to be made after consultation with the investigative agency in the case.

6.1.3 Republic v. Moses Lenolkulal & 13 others[123]

The Governor of Samburu County was charged, alongside 13 other accused, with various offences under ACECA: the offence of conspiracy to commit an offence of corruption contrary to Section 47A (3) as read with Section 48(1) of ACECA; the offence of abuse of office contrary to Section 46 as read with Section 48(1) of ACECA; the offence of conflict of interest contrary to Section 42(3) as read with Section 48(1) of ACECA; and the offence of unlawful acquisition of public property contrary to Section 45(1)(a) as read with Section 48(1) of ACECA. He was alleged to have committed these offences between March 27, 2013 and March 25, 2019, while Governor of Samburu County.

Moses Lenolkulal was arraigned before the Chief Magistrate's Court at Nairobi on April 2, 2019. He pleaded not guilty to the charges and applied for bail or bond pending trial. As is the emerging trend, the prosecution did not oppose his application for bail or bond, instead the prosecution requested the trial court to impose stringent bail and bond terms. The prosecution alleged that Moses Lenolkulal committed the offences charged in his capacity as the

[123] Anti-Corruption Case No. 3 of 2019.

Governor of Samburu County and as such only stringent bail and bond terms would suffice in this case. According to the prosecution: *"In the event that the court did not impose terms that would render it impossible for the applicant to continue rendering services as Governor, justice would be compromised. The DPP requested the court to consider the provisions of section 65(1) of ACECA and order that the applicant keeps away from the County offices where the majority of witnesses are working."*[124]

The prosecution also urged the court to consider the provisions of **Chapter 6 of the Constitution**, especially **Article 75 of the Constitution** concerning the conduct of State officers, including conflict of personal interests and public or official duties. The prosecution alleged that Moses Lenolkulal was trading with his own government and prayed for orders that the Director of the Integrated Financial Management Information System (IFMIS) at the National Treasury[125] bars the 13 accused persons from accessing Government of Samburu accounts on the IFMIS platform.[126] The prosecution requested the trial court for leave to file a formal application to lay out its arguments.

In a ruling dated April 2, 2019, the trial magistrate, Honourable Ogoti, granted bail and bond and ordered the release of Moses Lenolkulal and the other accused. **Moses Lenolkulal, was granted bond of KES 150 million with one surety of a similar amount or cash bail of KES 100 million**. Honourable Ogoti also issued interim orders as follows:

> *i.That since the Samburu County offices is where the crime took place, it is a scene of crime. The Governor is hereby*

[124] Moses Kasaine Lenolkulal v. Republic [2019] eKLR, High Court at Nairobi, Anti-Corruption and Economic Crimes Division, Anti-Corruption and Economic Crimes Revision No. 7 of 2019 (the ruling delivered by Mumbi Ngugi J. on 3rd April 2019), at para 4.
[125] Integrated Financial Management Information System (IFMIS) is an automated public finance management platform under the National Treasury; for e-procurement of goods, works, and services by public entities.
[126] Moses Kasaine Lenolkulal v. Republic [2019] eKLR, High Court at Nairobi, Anti-Corruption and Economic Crimes Division, Anti-Corruption and Economic Crimes Revision No. 7 of 2019 (the ruling delivered by Mumbi Ngugi J. on 3rd April 2019), at para 5.

> *prohibited to access those offices till the application to be directed to be filed is heard and determined.*
>
> *ii.Since it is public money that is involved, the Director of IFMIS is directed not to allow the 13 accused persons i.e from 1-13 access to the Government of Samburu accounts till the application to be filed is heard and determined.*
>
> *iii.The DPP to file a formal application and have it served on the accused persons.*

Moses Lenolkulal was dissatisfied with the decision of the trial court. On the same day, 2nd April 2019, he applied for revision of the decision of the trial magistrate by the High Court; **Moses Kasaine Lenolkulal v. Republic**.[127] He claimed that the bail and bond terms were completely outrageous, unprecedented and excessive, contrary to the Bail and Bond Policy Guidelines, 2015 which require that bail and bond terms should not be greater than is necessary to secure the attendance of the accused in court. Basically, bail and bond terms are not a criminal punishment in themselves but rather are a means to secure the attendance of the accused in court, during trial. Moses Lenolkulal also claimed that as Governor he was not a flight risk and would attend court.

Mumbi Ngugi J. noted that the application for revision dated 2nd April 2019 was targeted at the bail and bond terms, and not the interim orders regarding Moses Lenolkulal's access to Samburu County Government offices and accounts. In reviewing the bail and bond terms, Honourable Mumbi Ngugi, J. considered that the penalty for the offences charged is a fine not exceeding KES 1 million or a term of imprisonment for ten years or both per **Section 48(1)(a) of ACECA**, unless the additional mandatory fine under **Section 48(1)(b) and (2) of ACECA** applied in the case. Accordingly, the Honourable judge held that:

> *14. (…) given the nature and circumstances of this case and the penalty provided in law, it is my view that the bond terms imposed*

[127] [2019] eKLR, High Court at Nairobi, Anti-Corruption and Economic Crimes Division, Anti-Corruption and Economic Crimes Revision No. 7 of 2019.

> *on the applicant are excessive, and may well amount to a denial of bail. It has not been demonstrated that he is a flight risk, and I note that the Prosecution did not oppose his application for bail. The applicant has also been barred from accessing County offices, so the apprehension that he may interfere with witnesses is not a consideration.*
>
> *15. I accordingly vary the said terms as follows:*
>
> ***i. The applicant may be released on a bond of Kenya shillings thirty million (Kshs 30,000,000) and one surety of a similar amount.***
>
> ***ii. In the alternative, the applicant may be released on a cash bail of Kenya Shillings Ten Million (Kshs 10,000,000).***[128]

Mumbi Ngugi J. thus reduced Moses Lenolkulal's bond from KES 150 million to KES 30 million, and the cash bail from KES 100 million to KES 10 million. Regarding the interim orders barring the accused from accessing Samburu County Government offices and accounts, Mumbi Ngugi J. ordered that the said interim orders of the trial court would stay in force pending the hearing and determination of the application by the prosecution, as directed by the trial court.[129]

Via an application dated 16th April 2019, the prosecution sought orders to bar Moses Lenolkulal and other accused from accessing any of the Samburu County Government offices pending the hearing and determination of the criminal trial against them. On 15th May 2019, the trial court (Honourable Murigi) thus ordered that; ***"The 1st Respondent who is the Governor of Samburu County is barred from accessing the Samburu County Government Offices without the prior written authorization from the CEO of the Investigative Agency (EACC) who shall put measures if any in place so as to ensure that there is no contact between the 1st Respondent with the***

[128] Id. at paras 14 and 15.
[129] Id. at para 16.

prosecution witnesses and preserve the evidence until further orders of this Court."

Moses Lenolkulal was aggrieved by the said orders of the trial magistrate. As a consequence, on 3rd June 2019, he filed an application for the revision of the trial magistrate's orders of 15th May 2019 by the High Court, under **Article 165(6) and (7) of the Constitution** as read with **Section 362 of the CPC**; **Moses Kasaine Lenolkulal v. Director of Public Prosecutions**.[130] One, Moses Lenolkulal faulted the order barring him from accessing the Samburu County Government offices without the prior written authorization of the CEO of EACC, on the ground that it was illegal and unconstitutional and contrary to **Section 62(6) of ACECA**. He claimed that as the sitting Governor of Samburu County, elected as such under **Article 180 of the Constitution of Kenya, 2010**, he was a constitutional officeholder and could only be removed from office under **Article 181(1) of the Constitution of Kenya, 2010**,[131] and **Section 33 of the County Government Act, 2012 (CGA)**.[132]

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[130] [2019] eKLR, High Court Anti-Corruption and Economic Crimes Division, Criminal Revision No. 25 of 2019.

[131] **Article 181 of the Constitution of Kenya, 2010** makes provision for the removal of a County Governor. It states that: *"(1) A county governor may be removed from office on any of the following grounds—(a) gross violation of this Constitution or any other law; (b) where there are serious reasons for believing that the county governor has committed a crime under national or international law; (c) abuse of office or gross misconduct; or (d) physical or mental incapacity to perform the functions of office of county governor. (2) Parliament shall enact legislation providing for the procedure of removal of a county governor on any of the grounds specified in clause (1)."*

[132] No. 17 of 2012. **Section 33 of CGA** provides the procedure of removal of a County Governor, as follows:

> *"(1) A member of the county assembly may by notice to the speaker, supported by at least a third of all the members, move a motion for the removal of the governor under Article 181 of the Constitution.*
> *(2) If a motion under subsection (1) is supported by at least two-thirds of all the members of the county assembly—*
> *(a) the speaker of the county assembly shall inform the Speaker of the Senate of that resolution within two days; and*
> *(b) the governor shall continue to perform the functions of the office pending the outcome of the proceedings required by this section.*
> *(3) Within seven days after receiving notice of a resolution from the speaker of the county assembly—*

Two, Moses Lenolkulal faulted the legality and practicalities of the operationalizing or implementing the orders of the trial court. He claimed that it would be impractical to obtain authorization from the Secretary or CEO of EACC on a daily basis if he wanted to be in office every day, and that the grant or denial of such authorization would be tantamount to the Secretary or CEO of EACC controlling the affairs of the office of the duly elected Governor of Samburu County. He relied on **Muhammed Abdalla Swazuri & 16 Others v. Republic**,[133] above, where a similar order issued by the trial court directing that Prof. Muhammed Abdalla Swazuri obtains prior written authorization of

(a) the Speaker of the Senate shall convene a meeting of the Senate to
hear charges against the governor; and
(b) the Senate, by resolution, may appoint a special committee comprising eleven of its members to investigate the matter.
(4) A special committee appointed under subsection (3)(b) shall—
(a) investigate the matter; and
(b) report to the Senate within ten days on whether it finds the particulars of the allegations against the governor to have been substantiated.
(5) The governor shall have the right to appear and be represented before the special committee during its investigations.
(6) If the special committee reports that the particulars of any allegation against the governor—
(a) have not been substantiated, further proceedings shall not be taken under this section in respect of that allegation; or
(b) have been substantiated, the Senate shall, after according the governor an opportunity to be heard, vote on the impeachment charges.
(7) If a majority of all the members of the Senate vote to uphold any impeachment charge, the governor shall cease to hold office.
(8) If a vote in the Senate fails to result in the removal of the governor, the Speaker of the Senate shall notify the speaker of the concerned county assembly accordingly and the motion by the assembly for the removal of the governor on the same charges may only be re-introduced to the Senate on the expiry of three months from the date of such vote.
(9) The procedure for the removal of the President on grounds of incapacity under Article 144 of the Constitution shall apply, with necessary modifications, to the removal of a governor.
(10) A vacancy in the office of the governor or deputy governor arising under this section shall be filled in the manner provided for by Article 182 of the Constitution."

[133] [2018] eKLR, Criminal Revision No. 13 of 2018.

the Secretary or CEO of the EACC to access his office, NLC, was set aside by the High Court (Ong'udi J) following an application for revision.

Three, he claimed that any concern that he would interfere with witnesses on the basis of his authority was merely speculative, and in any case investigations in the case were complete. Therefore, he urged the High Court to set aside the orders of the trial court barring him from accessing the Samburu County Government offices without prior authorization of the Secretary or CEO of EACC. The prosecution did not attend the revision hearing on 26th June 2019 despite being served with the application for revision.

In a ruling delivered on 24th July 2019, Mumbi Ngugi J. noted the **similarities between Moses Lenolkulal's case and that of Prof. Muhammed Abdalla Swazuri**, the then NLC Chairman, in **Muhammed Abdalla Swazuri & 16 Others v. Republic**.[134] The Honourable Judge thus stated:

> *27. [Moses Lenolkulal] is the Governor of Samburu County Government and would thus appear to be exempt from the provisions of section 62(1) of ACECA and protected by section 62(6) thereof as the grounds for his removal are set out in the Constitution.*
>
> *28. Further, by requiring that he seeks authorisation from the EACC and its CEO, he is, to some extent, subordinated to the EACC. There may also be, as the court in **Swazuri** found, some practical difficulties in the manner in which the authorisation is to be given. (...)*[135]

However, Mumbi Ngugi J. chose to depart from the Swazuri case on what she termed as **public interest in 'political hygiene', as opposed to the individual**

[134] Id.
[135] Moses Kasaine Lenolkulal v. Director of Public Prosecutions [2019] eKLR, High Court Anti-Corruption and Economic Crimes Division, Criminal Revision No. 25 of 2019, paras 27 and 28.

interests of the accused constitutional office holder. The Honourable Judge stated that:

> *28. (…) It is thus notable that the concern in the **Swazuri** case was with respect to the interests of the applicant, the accused person, who also happened to be the Chairperson of an independent constitutional commission.*
>
> *29. However, there is another perspective from which I believe the question of the applicant's access to his office must be considered, a perspective that looks beyond the interests of the individual holder of the constitutional office and considers the wider public interest. This perspective speaks to the question of what Mr. Nyamodi termed 'political hygiene,' and is a perspective that raises serious concerns that require judicial consideration with respect to section 62(6) of ACECA.*[136]

The Honourable judge was of the view that **Section 62(6) of ACECA** accorded differential treatment of public officers; public officers who are constitutional office holders versus public officers who are not holders of constitutional office. She questioned the rationale behind **Section 62(6) of ACECA** and weighed the said Section against the constitutional provisions on leadership and integrity (**Chapter Six of the Constitution**) and the national values and principles of governance (**Article 10 of the Constitution**), which applied to all public officers, State officers and State organs.[137] The Honourable Judge merged the considerations of 'public interest' and the constitutional provisions on leadership and integrity and the national values and principles of governance as against the rationale behind **Section 62(6) of ACECA**, as follows:

> *47. The question then arises: after promulgating the Constitution with the national values and principles at Article 10 and the clear provisions on leadership and integrity in Chapter Six, could the people of Kenya have intended to then pass legislation that*

[136] Id. at paras 28 and 29.
[137] Id. at para 44.

> *allowed state officers for whom grounds for removal from office are provided in the Constitution, to ride roughshod over the integrity required of leaders, face prosecution in court over their alleged corrupt dealings, and still continue to enjoy the trappings of office as they face corruption charges alleged to have been committed while in office and committed within the said offices"*
> *48. Could the people of Kenya have wished to have their legislative authority, which they have delegated, under Article 1, to the legislature, to be exercised in such a way as to pass legislative provisions such as section 62(6) of ACECA that allow state officers whose removal is provided for in the Constitution to remain in the same offices that they are alleged to have abused and used to their personal enrichment to the detriment of the public they are supposed to serve while undergoing prosecution for such offences"*
>
> *49. An examination of the rationale behind suspending public or state officers who have been charged with corruption may shed some light on the sort of answer that the people of Kenya would expect to the above questions if their governance is to accord with the constitutional principles with respect to leadership and integrity.*[138]

The Honourable Judge could not find local authorities to support her point of view. As result, she relied on a case from India's High Court of Judicature at Madras, that supported her view point; the case of **R. Ravichandran v. The Additional Commissioner of Police, Traffic, Chennai & Another**, the orders of Honourable Mr. Justice S. Manikumar of 5 October 2010.[139] This case birthed the term **'moral turpitude'** and **'moral ill-health'** into the Kenyan legal system, especially as concerns charges of corruption and economic crimes against public officers who are constitutional office holders.[140] Unfortunately, the term **'moral turpitude'** or **'moral ill-health'** has operated as a presumption of guilt until innocence is proven for public

[138] Id. at paras 47-48.
[139] Id. at paras 50 and 51.
[140] Id. at paras 27 and 28.

officers charged with corruption and economic crimes, contrary to the constitutional right of accused persons under **Article 50(2)(a) of the Constitution** to presumed innocent until the contrary is proved.

The Honourable Judge applied the Indian case to Moses Lenolkulal's case, as follows:

> *52. In the matter before me, the Governor of a County, to whom Article 10 and Chapter Six apply is charged with the offence of abuse of office. He is charged with basically enriching himself at the expense of the people of Samburu County who elected him and whom he is expected to serve. Would it serve the public interest for him to go back to office and preside over the finances of the County that he has been charged with embezzling from" What message does it send to the citizen if their leaders are charged with serious corruption offences, and are in office the following day, overseeing the affairs of the institution" How effective will prosecution of such state officers be, when their subordinates, who are likely to be witnesses, are under the direct control of the indicted officer"*
>
> *53. It seems to me that the provisions of section 62(6), apart from obfuscating, indeed helping to obliterate the 'political hygiene' that Mr. Nyamodi spoke of, are contrary to the constitutional requirements of integrity in governance, are against the national values and principles of governance and the principles of leadership and integrity in Chapter Six, and undermine the prosecution of officers in the position of the applicant in this case. In so doing, they entrench corruption and impunity in the land.*
>
> *54. The question then is what should be done in a case such as this in order to protect the public interest and ensure that the applicant does not use his position to undermine his prosecution. (...)*[141]

Mumbi Ngugi J. was of the view that **Section 62(6) of ACECA** violates the letter and spirit of the Constitution, as far as the public interest derived from

[141] Id. at paras 52-54.

the constitutional provisions on leadership and integrity and national values and principles of governance is concerned. Nonetheless, since **Section 62(6) of ACECA** is still the prevailing law, the only way for the Honourable Judge to go around the said Section was to allow access to office for the subject constitutional office holders but at the same time impose restrictions that protect 'public interest'; a kind of clawback of the protection afforded by **Section 62(6) of ACECA** to public officers who are constitutional office holders. Thus, her view was that issuing an order requiring Moses Lenolkulal not to access his office without prior authorisation of the Secretary or CEO of EACC did not amount to a 'removal' from office in contravention of the provisions for removal of a Governor under **Article 181 of the Constitution**. The Honourable Judge thus upheld the ruling of the trial court and in so doing expressed herself as follows:

> *57. First, I consider what the implications of directing that the applicant does not access his office are. Under the provisions of the County Government Act, where the Governor is unable to act, his functions are performed by the Deputy Governor. This is provided for in section 32(2) of the County Governments Act, which states that:*
>
> ***(2) The deputy governor shall deputize for the governor in the execution of the governor's functions.***
>
> *58. The Governor in this case is not being 'removed' from office. He has been charged with an offence under ACECA, and in my view, a proper reading of section 62 of ACECA requires that he does not continue to perform the functions of the office of governor while the criminal charges against him are pending. However, if section 62(6), which in my view violates the letter and spirit of the Constitution, particularly Chapter Six on Leadership and Integrity, is to be given an interpretation that protects the applicant's access to his office, then conditions must be imposed that protect the public interest. This is what, in my view, the trial court did in making the order requiring that the applicant obtains the authorisation of the CEO of EACC before accessing his office. In the circumstances, I am not satisfied that*

> *there has been an error of law that requires that this court revises the said order, and I accordingly decline to do so.*
>
> *59. Should there be difficulty, as the court in the* ***Swazuri*** *case was concerned about, in obtaining the authorisation from the EACC, I believe that there will be no vacuum in the County. I take judicial notice of the fact that there have been circumstances in the past in which county governors have, for reasons of ill health, been out of office, and given the fact that the Constitution provides for the seat of a deputy governor, the counties have continued to function. In this case, the applicant is charged with a criminal offence; he has been accused of being in* ***'moral ill-health'****, if one may term it so. He is alleged to have exhibited* ***moral turpitude*** *that requires that, until his prosecution is complete, his access to the County government offices should be limited as directed by the trial court.*
>
> *60. I accordingly decline to exercise powers of revision over the decision of the trial court in this matter. The terms set for the applicant's access to his office shall remain in force for the duration of his trial. I need not add that it is in the public interest and the interest of the applicant that the case against the applicant in ACC No. 3 of 2019 is proceeded with expeditiously.*
>
> *61. Orders accordingly.*

It is notable that Justice Mumbi Ngugi's take on the constitutionality of **Section 62(6) of ACECA** in Moses Lenolkulal's case was a complete departure from her earlier holding in **Alex Kyalo Mutuku & 7 others v. Ethics and Anti-Corruption Commission & 2 others**,[142] where she had been called upon to consider the constitutionality of **Section 62 of ACECA**.[143] In that case, the Petitioners argued that **Section 62 of ACECA** was unconstitutional because: (1) it violated their right under **Article 50(2)(a) of the Constitution** to be presumed innocent until proved guilty; (2) it was discriminatory to them as some other public officers such as Members of

[142] [2016] eKLR, High Court at Nairobi, Constitutional and Human Rights Division, Petition No. 258 of 2015.
[143] Id. at para 59.

Parliament are not suspended in similar circumstances; and (3) their suspension on half pay violated their socio-economic rights.[144] Mumbi Ngugi J. proceeded to examine the constitutionality of **Section 62 of ACECA** against **Articles 50(2), 27 and 43 of the Constitution** and ultimately held that: "***The provisions of section 62 of the Anti-corruption and Economic Crimes Act are not unconstitutional***."[145]

Moses Lenolkulal was aggrieved by the decision of Mumbi Ngugi J. and therefore he appealed against the same at the Court of Appeal; **Moses Kasaine Lenolkulal v. Republic**.[146] He faulted the decision of Mumbi Ngugi J. delivered on July 24, 2019 on the grounds of:

> *1.Failing to give effect to the provisions of **section 62(6)** of the ACECA contrary to **Article 10** of the Constitution.*
> ***2.**Finding that **section 62(1)** of the ACECA should apply to the appellant notwithstanding clear and unambiguous provisions of **section 62(6)** of the ACECA.*
> ***3.**Finding that **section 62(6)** of the ACECA was contrary to Chapter 6 of the Constitution.*
> ***4.**Finding that a proper reading of **section 62** of the ACECA requires that the appellant, once charged with an offence under ACECA, should not continue to perform the function of the office of the Governor while criminal proceedings are still pending, notwithstanding the clear and unambiguous wording of **section 62(6)** of the ACECA that expressly exempt the application of **section 62(1)** the ACECA to the appellant.*
> ***5.**Applying an unknown doctrine of constitutional interpretation and application in interpreting the constitutionality or otherwise of **section 62(6)** of the ACECA.*
> ***6.**Introducing new issues and arguments not urged before the High Court at the hearing of the application for revision*

[144] Id. at para 59.
[145] Id. at para 83.
[146] [2019] eKLR, Court of Appeal at Nairobi, Criminal Appeal No. 109 of 2019.

> *brought under **section 362** of the **Criminal Procedure Code,** which application was not opposed, thereby denying the appellant the opportunity to respond contrary to **Article 50** of the **Constitution.***
> ***7.**Failing to find that the orders of trial court barring the appellant, a constitutional office holder, from accessing his office without the written authorization of the CEO of the EACC rendered the appellant subject to their authority and control contrary to the express provisions of the Constitution and was unlawful and unconstitutional.*
> ***8.**Failing to assess the practical impact of the orders of trial court barring the Appellant from accessing his office unless authorized in writing by the CEO of EACC.*[147]

The Court of Appeal (Musinga, Gatembu, and Murgor, JJA.) was thus called upon to consider whether Mumbi Ngugi J. rightly exercised her discretion to decline to review the bail and bond terms ordered by the trial court and whether the interpretation of the relevant statutory provisions was in accordance with the requirements of the Constitution.

First, on the issue of whether the High Court declared **Section 62(6) of ACECA** to be unconstitutional, the Court of Appeal was of the view that this was not so. According to the Court of Appeal, the learned Judge of the High Court merely remarked that **Section 62(6) of ACECA** stands against the intent and purport behind the constitutional provisions on leadership and integrity but did not proceed to declare or hold the said provision unconstitutional.[148]

Second, on whether the High Court was wrong in declining to apply **Section 62 (6) of ACECA** to the circumstances of Moses Lenolkulal's case, the Court of Appeal was of the view that the application of the said provision to the case was not necessary, nor was the High Court compelled to apply the said provision. The Court of Appeal expressed itself as follows:

[147] Id. at pp 3 and 4.
[148] Id. at p 8.

*Determining whether or not **section 62 (6)** was applicable, requires that the genesis of the application be considered. The application for review in the High Court arose from a bail application in the trial court, which the respondent did not oppose, but nevertheless requested for the imposition of stringent bail conditions on the appellant. **Article 49 (1) (h)** of the **Constitution,** allows the trial court to impose bail terms.*

(...)

***Section 62 (6)** prohibits application of **section 62 (1)** in the case of a constitutional office holder charged with a corruption offence, where the Constitution already provides a method for removal, which in this case is, **Article 181**. When these provisions are considered against **Article 49 (1) (h)** which allows for imposition of reasonable bail terms, it becomes patently clear that they address two disparate circumstances. One is concerned with removal from office and the other imposition of bail.*

*The complaint is that denying the appellant access to the County offices during the period of the trial was tantamount to his removal from office as contemplated by **Article 181,** and hence contrary to the requirements of **section 62 (6).** But limiting the governor's access to the County offices whilst he is facing trial for corruption offences cannot be construed or equated to a removal from office. The governor has not been ordered to vacate his office. He may access his office, but on the conditions imposed by the court.*

*Though his access is limited, he remains the governor. Given the aforegoing, our view is that the allegation that the imposition of bail terms barring the appellant from the County offices was tantamount to a removal from office is therefore unfounded. As such, we agree with the High Court that application of **section 62 (6)** was unnecessary, and the learned judge was not compelled to apply that provision to the circumstances of this case.*[149]

[149] Id. at p 9.

Third, the Court of Appeal considered the issue whether the bail terms issued by the trial court were reasonable in so far as they barred Moses Lenolkulal from accessing Samburu County Government offices without prior authorization of the Secretary or CEO of EACC, and therefore subjected the Samburu County Government to the control of EACC. The Court of Appeal found that the impugned bail terms were constitutional and lawful, as both the trial court and the High Court properly applied their discretion under **Article 49(1)(h) of the Constitution** and **Section 123 of the CPC** in arriving at their decisions on the said bail terms. According to the Court of Appeal, the trial court took into account the nature of the corruption charges preferred in the case, and considering the possibility of witness interference or suppression or tampering with evidence imposed the said bail terms.[150] As concerns the public interest considerations drawn from the constitutional provisions on leadership and integrity and the national values and principles of governance, the Court of Appeal stated that:

> *(...) contrary to the appellant's assertion that the learned judge introduced new arguments, both courts below acceded to the dictates of **Article 10 (1) (b)** of the Constitution, and took into account the imperatives of Chapter 6 of the Constitution on leadership and integrity and, other public interest elements of the Constitution, and arrived at bail terms that were reasonable and constitutional. In observing that the safeguarding of public interest was an essential requirement in such cases, the High Court found that the bail terms imposed were sufficient and concluded that no error or misdirection had been made on the trial court's part.*
>
> *Likewise, we too are satisfied that both courts below properly exercised their discretion when they took into account the appropriate principles or guidelines on bail. Further we can find no wrong in the two courts application of the national values and constitutional imperatives set out in Chapter 6 of the Constitution to arrive at bail terms imposed. After all, under both **Articles 10 (1) (b)** and **259 (1)** of the Constitution courts are duty bound to take into account the national values, principles of governance,*

[150] Id. at p 11.

> *and the Chapter 6 principles on leadership and integrity when applying provisions of the Constitution.*[151]

On the fact that the bail terms subordinated the Offices of the County Government to the CEO of the EACC, the Court of Appeal was of the view that despite the inconvenience imposed on Moses Lenolkulal in accessing Samburu County Government offices, the bail terms were necessary to eliminate the possibility of witness interference and tampering with evidence. The Court of Appeal also found that the High Court had assessed the impact of the ruling on Samburu County Government in holding that there would be no vacuum in the County Offices with the Deputy Governor deputizing for the Governor in the execution of the Governor's function.

In its ruling delivered on December 20, 2019, the Court of Appeal thus upheld the High Court's decision, as follows:

> *We would agree. Having found as we have that the bail terms did not remove the appellant from office, but merely required compliance with constitutionally sanctioned terms that of necessity limited his access to the County offices until determination of the trial, we find that the learned judge sufficiently addressed the issue by pointing out the relevant constitutionally crafted remedy.*
> *All issues considered, we are satisfied that the learned judge determined and analysed only matters that were placed before her, and as we have found no misdirection in the exercise of discretion, we have no basis upon which to interfere with the High Court's decision.*[152]

[151] Id.
[152] Id. at p 12.

Accordingly, the Court of Appeal in **Moses Kasaine Lenolkulal v. Republic**,[153] overturned the considerations of the High Court in **Muhammed Abdalla Swazuri & 16 others v. Republic**.[154]

6.1.4 Republic v. Ferdinand Ndung'u Waititu Babayao & 12 others[155]

Ferdinand Ndung'u Waititu Babayao (hereinafter **"Waititu"**) is the immediate former Governor of Kiambu County. On July 29, 2019, Waititu (the 1st accused) and twelve other accused were arraigned before the Chief Magistrate's Court at Nairobi, Honourable L. N. Mugambi (the Anti-Corruption Court), to answer to charges of corruption and economic crimes under ACECA. The offences charged relate to the period when Waititu was Governor of Kiambu County. Waititu was charged under Counts I, II and III as follows:

> Count 1: The offence of conflict of interest contrary to Section 42(3) as read with Section 48 of ACECA. The particulars of the charge were that between 2nd July 2018 and 13th March 2019 at Kiambu County, Waititu knowingly acquired an indirect private interest through the receipt of KES 25,624,500.00, which are payments to Testimony Enterprises Limited (the 11th accused) for contracts awarded to the corporate entity by Kiambu County Government.
> Count 2: The offence of dealing with suspect property contrary to Section 47(1) as read with Sections 47(2)(a) and 48 of ACECA. The particulars of the charge were that between 2nd July 2018 and 13th March 2019 in Nairobi, Waititu and Saika Two Estate Developers Limited (the 12th accused), a corporate entity associated with Waititu, received KES 18,410,500.00 from Testimony Enterprises Limited (the 11th accused), having reason to believe that the said amount was acquired from Kiambu County Government through corrupt conduct.
> Count 3: The Offence of dealing with suspect property contrary to Section 47(1) as read with Section 47(2)(a) and 48 of ACECA,

[153] [2019] eKLR, Court of Appeal at Nairobi, Criminal Appeal No. 109 of 2019.
[154] [2018] eKLR, Criminal Revision No. 13 of 2018, ruling by Ong'udi, J. dated **1st November 2018.**
[155] Anti-Corruption Case No. 22 of 2019.

> against Waititu and his wife, Susan Wangari Ndung'u (the 2nd accused) trading as Bienvenue Delta Hotel, a corporate entity (the 13th accused), for receiving KES 7,214,000 from Testimony Enterprises Limited (the 11th accused), while having reason to believe that the said amount was acquired from Kiambu County Government through corrupt conduct.

The other charges, Counts IV to XI, related to the other accused: Count IV - abuse of office contrary to Section 46 as read with Section 48 of ACECA; Count V - wilful failure to comply with the law relating to procurement contrary to Section 45(2)(b) as read with Section 48 of ACECA; Count VI and VII - engaging in a fraudulent practice in procurement contrary to Section 66(1) as read with section 177 of PPADA; Count VIII - fraudulent acquisition of public property contrary to Section 45(1)(a) as read with Section 48 of ACECA; and Count X to XI - money laundering contrary to Section 3(b)(i) as read with Section 16 of POCAMLA.

Waititu and the other accused denied the charges and applied to be released on bail or bond pending trial. As usual the prosecution did not oppose the application for bail or bond, rather it requested the trial court to impose the following bail terms: **Waititu be barred from going back to the Kiambu County Government office pending the determination of the criminal case;** (b) all the accused deposit their travel documents with the court; (c) all the accused persons not to contact witnesses, either directly or indirectly or in any way tamper with the exhibits; (d) all the accused persons not to access their offices pending the determination of the criminal case. Waititu opposed the bail terms proposed by the prosecution. He claimed that the condition barring him from accessing Kiambu County Government offices violated **Article 49(1)(h) of the Constitution** and **Section 62(6) of ACECA** and was tantamount to him being unlawfully removed from office.

In his ruling dated July 30, 2019, Honourable L. N. Mugambi granted bail or bond to the accused as follows: the 1st accused, Waititu, the 3rd accused and the 4th accused were to be released on **a cash bail of KES 15 million or bond of KES 30 million with a surety of a similar amount**; the 2nd and 5th accused were to be released on a cash bail of KES 4 million or bond of KES 10 million

with a surety of a similar amount; and the 6th to 10th accused were to be released on a cash bail of KES 1 million or bond of KES 3 million with a surety of a similar amount. **No bail or bond was imposed on the accused corporate entities, the 11th to 13th accused.** However, the trial magistrate also imposed the following conditions of bail:

1. *The 1st accused shall not access his office until this criminal case is heard and determined.*
2. *Equally accused persons who are employees of the county will not access their offices during the pendency of this criminal Case.*
3. *The rest of the accused are also barred from setting foot in Kiambu County Offices pending full trial.*
4. *All accused will deposit their travelling documents with the court to minimize the risk of the accused travelling out of this court's jurisdiction without leave of court. For those without passports a confirmation of the fact must be given by the department of immigration.*
5. *They must not contact witnesses or in any way interfere with exhibit or any evidence.*

In a departure from the previous cases, the trial magistrate completely denied the accused public officers, including Waititu, access to the Kiambu County Government offices until the criminal case had been determined. Waititu and the other accused were dissatisfied with the trial court's ruling hence applied for revision of the said ruling by the High Court, under **Article 165(6) of the Constitution** and **Section 362 of the Criminal Procedure Code**; **Ferdinand Ndungu Waititu Babayao & 12 others v. Republic**.[156] The accused were dissatisfied with the amounts of bail and bond imposed by the trial court. Waititu was also aggrieved by the bail term that limited his access to Kiambu County Government offices. The accused claimed that the bail and bond terms imposed by the trial court were excessive and illegal, and amounted to constructive denial of bail without compelling reasons.

[156] [2019] eKLR, High Court Anti-Corruption and Economic Crimes Division, Anti-Corruption Revision No. 30 of 2019.

The prosecution opposed the application for the revision of the bail and bond terms on the ground that the application offended **Section 364(5) of CPC**, and alleged that an appeal should have been filed instead.[157] According to the prosecution, the applicants/ accused sought the interpretation of various constitutional questions which the High Court could only deal with when sitting as a constitutional court and not as an anti-corruption court. The prosecution also claimed that since the bail and bond terms imposed by the trial court met the threshold set out under **Article 49(1)(h) of the Constitution**, there was no need for the High Court's intervention in this particular instance.

Honourable Ngenye-Macharia J thus had to determine three issues: a) whether the High Court had jurisdiction to entertain the application for revision; b) whether the trial magistrate erred in imposing a condition to the bail terms that the 1st Applicant/accused, Waititu, does not set foot in his office pending the hearing and determination of the trial; and c) whether the bail terms imposed on the Applicants/accused were harsh and excessive. On the question of jurisdiction, the Honourable judge held that the High Court has supervisory jurisdiction over the decisions of subordinate courts pursuant to **Section 362 and 364 of the CPC** and **Article 165(6) and (7) of the Constitution**.[158]

On the issue of the bail term requiring Waititu to keep off his office during the pendency of the criminal case, it was argued for Waititu that the said bail condition was set in contravention of **Section 62(6) of ACECA**, **Section 33 of CGA,** and **Articles 181 and 182 of the Constitution** as it amounted to the removal of Waititu from his position as Governor of Kiambu County. It was stated that from a literal interpretation, **Section 62(6) of ACECA** did not apply to Waititu as the Governor of Kiambu County and that it was erroneous for the trial magistrate to purport to rely on the decision of Mumbi Ngugi J. in

[157] **Section 364(5) of the CPC** provides that: *"When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed."*
[158] Ferdinand Ndungu Waititu Babayao & 12 others v. Republic [2019] eKLR, High Court Anti-Corruption and Economic Crimes Division, Anti-Corruption Revision No. 30 of 2019, at paras 14-17.

Moses Kasaine Lenolkulal v. Director of Public Prosecutions[159] to bar Waititu from setting foot in his office until the criminal case is determined.[160] The applicant also relied on Justice Mumbi Ngugi's earlier decision in **Alex Kyalo Mutuku & 7 others v. Ethics and Anti-Corruption Commission & 2 others**,[161] where she had held that: ***"The provisions of section 62 of the Anti-corruption and Economic Crimes Act are not unconstitutional."***[162] The Applicant also urged the High Court to rely on the case of **Muhammed Abdalla Swazuri & 16 others v. Republic**,[163] where Ong'udi J. found that **Section 62(1) of ACECA** was not applicable to constitutional officer holders like Waititu, the then Governor of Kiambu County.

However, Honourable Ngenye-Macharia distinguished **Alex Kyalo Mutuku & 7 others v. Ethics and Anti-Corruption Commission & 2 others**,[164] from the case of Waititu by stating that in that case Mumbi Ngugi J. only considered the constitutionality of **Section 62(1-4) of ACECA** and not the constitutionality of **Section 62(6) of ACECA** despite her sweeping holding on the constitutionality of **Section 62 of ACECA**.[165] On the other hand, the Honourable Judge distinguished the case of **Muhammed Abdalla Swazuri & 16 others v. Republic**,[166] from the Waititu case by stating that the finding by Ong'udi J. therein that **Section 62(6) of ACECA** did not apply to constitutional office holders and that their removal or suspension from office would only occur as provided under the constitution was merely an *obiter*

[159] [2019] eKLR, High Court Anti-Corruption and Economic Crimes Division, Criminal Revision No. 25 of 2019.
[160] Ferdinand Ndungu Waititu Babayao & 12 others v. Republic [2019] eKLR, High Court Anti-Corruption and Economic Crimes Division, Anti-Corruption Revision No. 30 of 2019, at para 21.
[161] [2016] eKLR, High Court at Nairobi, Constitutional and Human Rights Division, Petition No. 258 of 2015.
[162] Id. at para 83.
[163] [2018] eKLR.
[164] 2016] eKLR, High Court at Nairobi, Constitutional and Human Rights Division, Petition No. 258 of 2015.
[165] Ferdinand Ndungu Waititu Babayao & 12 others v. Republic [2019] eKLR, High Court Anti-Corruption and Economic Crimes Division, Anti-Corruption Revision No. 30 of 2019, paras 23-27.
[166] [2018] eKLR.

dictum remark and not the *ratio decidendi* in the case.[167] According to Ngenye-Macharia J., Ong'udi J. did not consider the constitutionality of the order barring Prof. Muhammad Abdalla Swazuri from accessing his office at NLC but rather the practicality of implementing the said order.[168] Regarding Justice Mumbi Ngugi's decision in **Moses Kasaine Lenolkulal v. Director of Public Prosecutions,**[169] Ngenye-Macharia J. stated that her understanding of the decision was that Mumbi Ngungi J. was simply stating that *"(…) in as much as State Officers are exempt from suspension from office because the Constitution provides for a mechanism for their removal, that statement in the legislation is against the spirit and letter of Chapter Six of the Constitution."*[170] In her case, Ngenye-Macharia J. took what she considered to be **a holistic approach in the interpretation of Section 62(6) of ACECA** in relation to the removal from office of constitutional office holders and stated thus:

> ***(…) I understand Section 62(6) of ACECA to be restating the supremacy of the Constitution. Similar sentiments are restated under Sections 63(4) and 64(2) of ACECA. To that extent, I agree that since the Constitution provides for mechanisms of removal or vacating of such state offices no other law would supersede it.***[171]

The Honourable Judge then considered the provisions of **Article 181 of the Constitution** and **Section 33 of CGA** on the procedure for the removal of a Governor from office. Therefore, arguing from the point of the supremacy of the Constitution, she held that ***attaching conditions to the grant of bail is not tantamount to a removal of the Governor from office***.[172]

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[167] Id. at para 28.
[168] Id.
[169] [2019] eKLR, High Court Anti-Corruption and Economic Crimes Division, Criminal Revision No. 25 of 2019.
[170] Ferdinand Ndungu Waititu Babayao & 12 others v. Republic [2019] eKLR, High Court Anti-Corruption and Economic Crimes Division, Anti-Corruption Revision No. 30 of 2019, at para 30.
[171] Id. at para 31.
[172] Id. at para 33.

That notwithstanding, Justice Ngenye-Macharia decided to uphold the trial court's order barring Waititu from setting foot at the Kiambu County Government offices, except once to pick his personal belongings, on grounds of the constitutional provisions on leadership and integrity.[173] The Honourable Judge also emphasized on the discretionary powers of the trial court under **Article 49(1)(h) of the Constitution** and the guidance offered by the **Bail and Bond Policy Guidelines, 2015** in attaching suitable bail or bond conditions to ensure that the relationship between the accused and the witnesses does not undermine the interests of justice.[174] The Honourable Judge expressed herself in the manner that:

> *47. After considering the nature of the charges, the whereabouts of potential witnesses, the source of evidence and the position of influence held by the 1st Applicant, it was reasonable for the trial court to attach the condition that the 1st Applicant will not access the Kiambu County Government offices.*
>
> *48. In the respect of the 1st Applicant he is placed on such a high pedestal that his office requires him to execute his duties while beyond reproach. The charges facing him are so grave that owing to his position, the weight of the offence and the public interest there is demand that stringent terms of bail be attached. I find no fault in the decision of the learned magistrate in barring the 1st Applicant, alongside the other accused persons from setting foot into the offices of the County Government of Kiambu.*
>
> *49. I am alive to the fact that the 1st Applicant may have been arrested unexpectedly and may have left behind personal belongings he may require for his personal use. For this purpose only, this court shall accommodate him on a single date he elects to be accompanied by the investigating officer with the authority of the Secretary/CEO EACC to go back to the office. Thereafter, he must keep off the office until the conclusion of the trial.*

[173] Id. at paras 36-40 (Ngenye-Macharia J. stated that, *"it is clear that the charges currently facing the 1st Applicant are antithetical to the letter and spirit of the Constitution"*).
[174] Id. at paras 41-46.

> *50. I have borne in mind what impact the absence of the 1st Applicant will have in the running of the County Government of Kiambu. Whereas, this is not a question I was asked to determine I would concur with the observation of my senior sister Mumbi, J. in the Lenolkulal case that* ***the 1st Applicant ought to be considered in "moral ill health". I am also alive to the fact that other counties have suffered similar impacts when their governors have fallen ill and have been absent from office. The course taken by those Counties in such instances should apply to the County of Kiambu.***
> *51. Additionally, I take solace in the fact that there are mechanisms and officers in place, namely; the County Executive Committee and Deputy Governor who can ably carry out the management and coordination of the functions of the County administration and its departments. They are required to be accountable to the people of Kiambu through the provision of full and regular reports to the County assembly. This mandate is provided under Article 179 of the Constitution. He best that both the 1st Applicant and the prosecution can do is to mobilize all resources and ensure that the trial is expedited.*
> *52. In the premises, I find no irregularity, impropriety, illegality or incorrectness in the order of the learned trial magistrate in directing the 1st Applicant to not set foot in the offices of the County Government of Kiambu whilst the trial is ongoing save for the window accorded by this court to go and collect any personal belongings.*[175]

In essence, despite the terms of **Section 62(6) of ACECA**, a constitutional office holder who is charged with corruption and economic crimes is to be presumed to be of **'moral-ill health'** until proven otherwise. This is despite the presumption of innocence under **Article 50(2)(a) of the Constitution**.

On whether the bail terms imposed on the applicants/ accused were harsh and excessive, the Honourable judge of the High Court only varied the cash bail

[175] Id. at paras 47-52.

and bond imposed on the 3rd and 4th accused. She ruled that a cash bail of KES 15 million or bond of KES 30 million imposed on the 1st accused /applicant and bail and bond amounts imposed on the other accused were appropriate keeping in mind the offences charged and their respective circumstances.[176]

Being dissatisfied with the ruling of Ngenye-Macharia J. dated 8th August 2019, Waititu appealed against the decision at the Court of Appeal; **Ferdinand Ndung'u Waititu Babayao v. Republic**.[177] He sought for the High Court ruling to be set aside, he be allowed to access his office and discharge his constitutional functions as Governor of Kiambu County, and for the reduction of the cash bail from KES 15 million to KES 2 million and the bond from KES 30 million to KES 5 million.

Accordingly, the Court of Appeal considered the question whether denial of access to office in Waititu's case did amount to his removal from office. Through a ruling dated 20th July 2019, the Court of Appeal (Musinga, Gatembu, and Murgor JJA.) concurred with the trial court and the High Court that since the bail terms were not meant to remove Waititu from Office of Governor Kiambu County, **Section 62(6) of ACECA** did not apply in this case. The Court of Appeal was also of the view that the constitutionality of **Section 62(6) of ACECA** was not up for determination before it. The court expressed itself thus:

> *In our view, to the extent that neither the trial magistrate nor the learned judge's holding purported to remove or suspend the appellant from office of Governor, Kiambu County, **section 62 (6)** of **ACECA** had no application in the matter that was before her. The appellant has not been suspended from his office, he is still the Governor of Kiambu County; he is still entitled to his full pay, not half. In the circumstances, the learned judge cannot be accused of having failed to apply the **"omitted case"** cannon of statutory interpretation in affirming the terms of the appellant's grant of bail. The issue of constitutionality or otherwise of **section 62 (6)** of **ACECA** is not before us for determination in*

[176] Id. at paras 57-62.
[177] Court of Appeal at Nairobi, Civil Appeal No. 416 of 2019.

> *this appeal and therefore we cannot express any opinion on the same.*[178]

The Court of Appeal did not fault the fact that Waititu was barred from accessing his office pending the determination of the criminal case owing to the nature of the charges he was facing, the circumstances under which the offences are alleged to be committed, and the fact some of the prosecution witnesses were County staff subordinate to him.[179] In doing so, the Court alluded to instances in other cases where vital documents had been lost from offices where the subject public or State officers facing charges of corruption and economic crimes had been allowed unrestricted access to their offices.[180] In addition, the Court of Appeal was of the view that because of the structure of governance and legislative and administrative institutions of a county, the bail terms denying Waititu access to his office would not paralyse the operations of Kiambu County Government.[181] Further, the Court of Appeal concurred with the High Court that there was no reason to interfere with the trial court's discretion under **Article 49(1)(h) of the Constitution** and **Section 123 and 123A of the CPC** to set impose on Waititu a cash bail of KES 15 million or bond of KES 30 million with a surety of similar amount.[182]
Consequently, the Court of Appeal dismissed the entire appeal. The matter has further been appealed to the Supreme Court and is yet to be determined; in **Ferdinard Ndungu Waititu Babayao v. Republic**.[183]

6.2 The Conviction and Sentencing of Public Officers and its Effects

For public officers in particular, **Sections 63** and **64 of ACECA** provide for the effect of a conviction on corruption or economic crimes on the holders of public office, that is, their suspension or disqualification from public office. **Section 63 of ACECA** provides *inter alia* for suspension from public office if convicted of corruption or economic crime as follows:

[178] Id. at para 44.
[179] Id. at para 48.
[180] Id.
[181] Id. at para 49.
[182] Id. at paras 50-52.
[183] Supreme Court Petition No. 2 of 2020.

(1) A public officer who is convicted of corruption or economic crime shall be suspended without pay with effect from the date of the conviction pending the outcome of any appeals.

(2) The public officer ceases to be suspended if the conviction is overturned on appeal.

(3) The public officer shall be dismissed if— (a) the time period for appealing against the conviction expires without the conviction being appealed; or (b) the conviction is upheld on appeal.

(4) This section does not apply with respect to an office if the Constitution limits or provides for the grounds upon which a holder of the office may be removed or the circumstances in which the office must be vacated.

(5) This section does not apply with respect to a conviction that occurred before this Act came into operation.

Section 64 of ACECA provides for disqualification from public office if one is convicted of corruption or economic crime and states that:

(1) A person who is convicted of corruption or economic crime shall be disqualified from being elected or appointed as a public officer for ten years after the conviction.
(2) This section does not apply with respect to an elected office if the Constitution sets out the qualifications for the office.
(3) This section does not apply with respect to a conviction that occurred before this Act came into operation.
(4) At least once a year the Commission shall cause the names of all persons disqualified under this section to be published in the Gazette.

In **Republic v. Grace Sarapay Wakhungu, John Koyi Waluke and Erad Supplies & General Contractors Limited**,[184] the 2nd accused, Waluke, is the incumbent Member of the National Assembly for Sirisia Constituency in Bungoma County. As such, the Chief Magistrate, Hon. Elizabeth Juma indicated during the delivery of the sentence that the court would write to the Speaker of the National Assembly to declare Sirisia Constituency National Assembly seat vacant, in case MP Waluke failed to post the fine imposed upon him.

7 Comparative Study Of Corporate Criminal Liability In Other Jurisdictions

7.1 United Kingdom (UK)

For a long time in the UK, corporate entities have been held liable to commit crimes. The courts in England have emphatically rejected the notion that a body corporate could not commit a criminal offence which was an outcome of an act of will needing a particular state of mind. In **Director of Public Prosecutors v. Kent and Sussex Contractors Ltd,**[185] the court stated that: *"a body corporate is a person to whom there should be imputed the attribute of a mind capable of knowing and forming an intention. A body corporate can have the intent but not criminal intent"*. A corporate entity can only know or form an intention through its human agents, but circumstances may be such that the knowledge of the agent must be imputed to the body corporate. This decision has seen development of various statutes providing for corporate criminal liability.

In order to simplify the question of imputing criminal liability on corporate entities, the UK came up with the **Corporate Manslaughter and Corporate Homicide Act, 2007** and the **Bribery Act, 2010**. Under the **Corporate Manslaughter and Corporate Homicide Act, 2007** prosecution is brought against the corporate entity itself and not any official of the corporate entity. A corporate entity is guilty of the offence under the Act if the way in which it manages or organizes its activities causes a death and amounts to a gross breach of a relevant duty of care to the deceased.

[184] Anti-Corruption Case No. 31 of 2018.
[185] [1944] KB 146.

A corporate entity can be held liable under both vicarious and non-vicarious liability. The offence of bribery under the **Bribery Act, 2010** falls under vicarious liability. The corporate entity commits an offence if a person associated with the corporate entity bribes another person, intending to either obtain or retain business for the corporate entity or obtain or retain an advantage in the conduct of business for the corporate entity.

The **Tesco Case's** ratio is still the prevailing law of corporate criminal liability in the UK. However, the UK has gone a step ahead in enacting legislation that can see a corporate entity being arraigned in court and standing trial on its own account.

The sanctions imposed on a corporate entity include imprisonment (up to a certain number of years) and an unlimited fine.[186] Even though, a corporate entity cannot be imprisoned, if individuals are separately convicted in relation to the same activity, they may be. In the event of a corporate conviction, the court will most likely impose a fine, while taking into consideration the corporate entity's plea. A corporate entity that has pleaded guilty to the offence charged or to some lesser offence can expect to receive a lower fine than if it had fought the case unsuccessfully. The degree of discount depends on the stage at which the guilty plea is entered.[187]

7.2 United States of America (US)

US law, both at the State and Federal levels, provide for criminal liability for corporate entities, for crimes committed by individual directors, managers, or low-level employees.[188] The Model Penal Code, 1962, introduced an added

[186] Kingsley O. Mrabure and Alfred Abhulimhen-Iyoha, 'A Comparative Analysis of Corporate Criminal Liability in Nigeria and Other Jurisdictions' (2020) 11 Beijing Law Review, 429-443 <https://www.scirp.org/pdf/blr_2020042114144981.pdf>.
[187] Linklaters (2016), 'Corporate Criminal Liability: A Review of Law and Practice across the Globe' (2016)<https://knowledgeportal.linklaters.com/llpublisher/knowledge_1/corporate-criminal-liability-a-review-of-law-and-practice-across-the-globe_1> (Accessed July 20, 2020).
[188] Sara Sun Beale, 'A Response to the Critics of Corporate Criminal Liability' (2009) 46 American Criminal Law Review 1481-1505 <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2735&context=faculty_scholarship> (Accessed July 20, 2020).

prerequisite in proving corporate crimes. It provides that the execution of the offence should be approved, demanded, directed, carried out or accepted in a reckless manner by the board of directors or a senior manager working on behalf of the corporate entity within the limits of his office.[189] Thus, the code distinguishes between the ability of the managerial employees and the lower level employees to prevent a corporate crime.

Sentencing in the United States is left to the general statutory sentencing provisions. The sentencing court however, has the discretion in applying fines and may take into account a variety of factors, including the presence of an effective ethics and compliance program. This is good practice that should be emulated in our jurisdiction. A corporate entity may be punished by fine or their property can be confiscated which can be levied by the orders of the court. Corporate entities are also to be placed on probation or ordered to pay restitution for crimes committed under the statutory regime. Depending on the specific statute, other sanctions can be instituted, such as suspension or debarment from entering into contracts with the Federal government.[190] This practice should be adopted in Kenya to bar corporate entities caught up in corrupt dealings from doing business with the Government, in order to enhance strict compliance with corporate criminal liability principles.
The jurisdictions above, and others, have also adopted deferred prosecution agreements in modifying the regime for corporate criminal liability. We discuss this model below.

7.3 Deferred Prosecution Agreements

A Deferred Prosecution Agreement (DPA) is an agreement reached between a prosecutor and a corporate entity which could be prosecuted, under the

[189] Kingsley O. Mrabure and Alfred Abhulimhen-Iyoha, 'A Comparative Analysis of Corporate Criminal Liability in Nigeria and Other Jurisdictions' (2020) 11 Beijing Law Review, 429-443 <https://www.scirp.org/pdf/blr_2020042114144981.pdf>.
[190] Linklaters (2016), 'Corporate Criminal Liability: A Review of Law and Practice across the Globe' (2016)<https://knowledgeportal.linklaters.com/llpublisher/knowledge_1/corporate-criminal-liability-a-review-of-law-and-practice-across-the-globe_1> (Accessed July 20, 2020).

supervision of a judge.[191] The agreement allows a prosecution to be suspended for a defined period, provided the corporate entity meets certain specified conditions.[192] DPAs can be used for fraud, bribery and other economic crimes. They apply to corporate entities (organizations) and not individuals.

DPA is deemed to be the probable answer to the conundrum of corporate criminal liability. DPA has been used in the UK, US, France, Singapore, and Australia. This model allows the corporate entities to remedy the crimes committed within a set period of time. Through this, time and cost for litigation is saved thus, shouldering the taxpayer from such expenses. It also protects the corporate entities from negative publicity that would potentially damage a corporate entity's brand.

Positively, the ODPP has, pursuant to **Article 157 and 159 of the Constitution**, the **National Prosecution Policy, 2015** and the **Diversion Policy, 2019**, introduced 'Differed Prosecution' as an alternative to Prosecution in Kenya.[193] This will be a definitive moment in the prosecution of corporate entities as the weaknesses of the identification principle will be cured. Corporate entities will therefore serve criminal sanctions on their own personality. This is set to revolutionize corporate criminal liability and cushion the traditional criminal justice system which was stretched to its elastic limit in trying to deal with corporate crimes. This is the way to go in Kenya if we are deal with corporate crimes effectively.

8. Possible Reforms

8.1 A New Anti-Corruption Dispensation

This entails putting side by side the purposes of the criminal justice system against the anti-corruption and economic crimes regime for Kenya. This article vouches for a new anti-corruption dispensation, in terms of the charging,

[191]Serious Fraud Office, 'Deferred Prosecution Agreements' <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/> (Accessed July 1, 2020).
[192] Id.
[193] See, e.g., Stephen Adier, Evans Monari and Cecil Kuyo. (2020). 'Deferred Prosecution Agreements as an Alternative to the Prosecution of Corporate Organizations in Kenya: Fresh Jurisprudence' (2000) <https://www.bowmanslaw.com/insights/dispute-resolution/deferred-prosecution-agreements-as-an-alternative-to-the-prosecution-of-corporate-organizations-in-kenya-fresh-jurisprudence/> (Accessed on July 1, 2020).

conviction, and sentencing for anti-corruption and economic crimes. The purposes of the criminal justice system entail; punishment, retribution, restoration, and rehabilitation or reform of the offender. As opposed to merely punishing for punishment's sake, the criminal justice system is first and foremost an instrument for the reform and reintegration of the offender back to society.

However, the current anti-corruption and economic crimes regime is geared more towards the restoration of the State and society while being against the offender who is intended to be punished merely for punishment's sake. But, the new anti-corruption dispensation should aim for both the restoration of the State and Society and the reform of the offender, rather than focusing on merely punishing the offender, if it is to be beneficial in the long run. Otherwise, society loses.

The new anti-corruption and economic crimes regime should focus more on asset recovery, to recover the lost public assets from suspected persons rather than merely aiming to punish the offender for punishment's sake. This is because a pure focus on criminal punishment neither benefits the State nor society, nor the offender. The first port of call should be the recovery of the stolen property and if and only this fails should criminal punishment be pursued as the last port of call.

8.2 Need for Court Decisions in Anti-Corruption Cases to Align with the Constitution

The jurisprudence on the grant or denial of bail and bond and the revision of bail terms as concerns charges of corruption and economic crimes against public officers has been considered above; in the cases of **Republic v. Muhammed Abdalla Swazuri & 16 Others**;[194] **Republic v. Muhammed Abdalla Swazuri & 23 others**;[195] **Republic v. Moses Lenolkulal & 13 others**;[196] and **Republic v. Ferdinand Ndung'u Waititu Babayao & 12 others**.[197] The inconsistency in the decisions is glaring, in a manner that

[194] Anti-Corruption Case No. 33 of 2018.
[195] Anti-Corruption and Economic Crimes Case No. 6 of 2019.
[196] Anti-Corruption Case No. 3 of 2019.
[197] Anti-Corruption Case No. 22 of 2019.

portrays judicial reasoning as fluid and prone to change based on the temperament and mood swings of the Judge or Magistrate concerned.

Courts have equally brought in **Article 10 of the Constitution**,[198] on national values and principles of governance, and **Chapter 10 of the Constitution,** on leadership and integrity, to override **Section 62(6) of ACECA**, which provides that holders of constitutional office can only be removed from office as provided Constitution. In so doing, the courts have constructively determined **Section 62(6) of ACECA** to be null and void in supposed 'public interest'. Consider the ruling of Justice Mumbi Ngugi in **Moses Kasaine Lenolkulal v. Director of Public Prosecutions,**[199] which is nothing short of presuming public officers charged with corruption and economic crimes guilty until proven otherwise. This is contrary to the presumption of innocence under **Article 50(2)(a) of the Constitution**. A new term, **'moral turpitude'** or **'moral ill-health'** is being used to remove public officers charged with corruption and economic crimes from office. In the words of Justice Mumbi Ngugi, in **Moses Kasaine Lenolkulal v. Director of Public Prosecutions:**[200] "*In this case, the applicant is charged with a criminal offence; he has been accused of being in 'moral ill-health', if one may term it so. He is alleged to have exhibited moral turpitude that requires that, until his prosecution is*

[198] Article 10 of the Constitution of Kenya, 2010 provides as follows:

> **10. National values and principles of governance**
> *(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—*
> *(a) applies or interprets this Constitution;*
> *(b) enacts, applies or interprets any law; or*
> *(c) makes or implements public policy decisions.*
> *(2) The national values and principles of governance include—*
> *(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;*
> *(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;*
> *(c) good governance, integrity, transparency and accountability; and*
> *(d) sustainable development.*

[199] [2019] eKLR.
[200] [2019] eKLR.

complete, his access to the County government offices should be limited as directed by the trial court."[201]

8.3 A New Way of Sentencing for Corporate Crimes

Sentencing for corporate crimes should avoid double criminal punishment, in that, the net sum of the punishment imposed upon the accused (the corporate entity and its directors) should not exceed the gravity of the offence charged. The common law rule against double punishment targets double jeopardy, which occurs at the punishment or sentencing stage of the trial process, once the accused has been found guilty and convicted accordingly.[202] Double criminal punishment can thus be termed as double jeopardy in a single trial or multiple punishments based on the same set of facts.[203]

Double criminal punishment in the context of corruption and economic crimes and corporate crimes can occur in various forms. First, double criminal punishment occurs when the accused is punished severally on several counts drawn from various provisions of the law (within the same Statute or several Statutes) but based on the same set of facts; it is like punishing an accused person for both murder and robbery with violence based on the same facts. Second, double criminal punishment in the context of corporate crimes occurs when punishment is meted against the corporate entity itself alongside the individual director(s), and in excess of the punishment prescribed in law. Since the criminal penalty meted on the corporate entity will be borne by the directors, as the corporate entity's controlling minds, sentencing for corporate crimes should clearly show that it is the corporate entity that is being punished

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[201] Id. at para 59. The term "moral turpitude" has become analogous with the removal from office of public officers facing prosecution for corruption and economic crimes, the same having been drawn by Justice Mumbi Ngugi (at paragraphs 50 and 51 of the judgment in the Lenolkulal case) from the Indian case, **R. Ravichandran v. The Additional Commissioner of Police, Traffic, Chennai & Another [2010], In the High Court of Judicature at Madras** <https://indiankanoon.org/doc/83803/> (Accessed July 21, 2020).

[202]See, e.g., National Judicial College of Australia, 'Double Punishment',<https://csd.njca.com.au/principles-practice/general_sentencing_principles/double_punishment/> (Accessed on July 14, 2020).

[203]See, e.g., 'Double Jeopardy: Multiple Punishment', <https://law.jrank.org/pages/1011/Double-Jeopardy-Multiple-punishment.html> (Accessed on July 14, 2020).

for criminal acts and omissions committed by the directors on behalf of the corporate entity. Imposing a penalty against the corporate entity itself and a separate penalty for the directors individually is nothing short of double criminal punishment and even the law does not smile on this.

8.4 Streamlining the Roles of State Agencies as Concerns the Investigation and Prosecution of Corruption and Economic Crimes

Generally, the powers to prosecute crime in Kenya are vested in the DPP. On the other hand, the powers to investigate crime are vested in various investigative State agencies in Kenya. By virtue of **Section 2 of the Office of the Director of Public Prosecutions Act, 2013 (the ODPP Act, 2013)**,[204] the investigative State agencies in relation to public prosecutions are: *"the National Police Service, Ethics and Anti-Corruption Commission, Kenya National Commission on Human Rights, Commission on Administration of Justice, Kenya Revenue Authority, Anti-Counterfeit Agency or any other Government entity mandated with criminal investigation role under any written law."*[205]

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[204] Act No. 2 of 2013, Laws of Kenya.

[205] See, e.g., **Africa Spirits Limited v. Director of Public Prosecutions & another (Interested Parties) Wow Beverages Limited & 6 others [2019] eKLR, at p 9,** where Kimaru J. was of the view that the DCI could not digress into the mandates of other authorities and stated that:

> *[T]here are various legal regimes that govern the administration of certain Acts of Parliament. For instance, under our tax laws, the body that is recognized as authorized to administer our tax laws are the officers of Kenya Revenue Authority. Under* ***Section 7*** *of the* ***Tax Procedures Act 2015*** *and* ***Section 7*** *of the* ***East African Community Customs Management Act 2004****, Kenya Revenue Authority officers have been given* ***"all powers, rights, privileges and protection of a police officer"*** *in the performance of their duty. Indeed, the two* ***Acts*** *envisage that the Kenya Revenue Authority officers, as authorized officers have the power to investigate and in appropriate cases, seize and forfeit goods (See* ***Section 43*** *and* ***44*** *of the* ***Tax Procedures Act*** *and* ***Section 210*** *of the* ***East Africa Community Customs Management Act****). Under the* ***Proceeds of Crime and Anti-money Laundering Act*** *and* ***Section 2*** *thereof, an authorized officer include the Asset Recovery Agency director, Commissioner of Customs and any other person designated by the Minister as an authorized person to perform any function under the* ***Act****. In the instance case, the application that is the subject of the application for revision was filed by the Directorate of*

In particular, the EACC, the DCI and the DPP have had a hand in the investigation and prosecution of corruption and economic crimes in the country. As already indicated, he DPP has an overall and general prosecutorial mandate over crimes under the criminal justice system in Kenya.[206] On the one hand, the DCI has a general investigative mandate over crimes under the criminal justice system in Kenya;[207] but upon concluding its criminal investigations, the DCI must forward the files to the DPP to consider whether or not to charge the suspects. The DCI is under the direction, command and control of the Inspector-General of the National Police Service.[208]

On the other hand, the EACC has a specific investigative mandate in respect of corruption and economic crimes in Kenya.[209] Thus, when the EACC concludes its investigations, the files are forwarded to the DPP to consider preferring charges against persons that are the subject of those investigations.[210] In a recent decision, **Ethics and Anti-Corruption**

> *Criminal Investigations. In performance of his duties, the Directorate of Criminal Investigations must exercise jurisdictional deference to other authorities that have been established by statute to fulfill their mandates (see **Section 64** of the **National Police Service Act**). In this case, it is evident that there was an element of jurisdictional overreach by the Directorate of Criminal Investigations on matters which are statutorily under the jurisdiction of the Asset Recovery Authority and the Kenya Revenue Authority.*

[206] Article 157 of the Constitution of Kenya, 2010 and Section 5 of the ODPP Act, 2013.

[207] See Articles 157(4), 245(4) and (5), and 247 of the Constitution of Kenya, 2010, and Section 35 of the National Police Service Act, No. 11A of 2011. Under Article 157(4) of the Constitution of Kenya, 2010, the DPP has power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General is bound to comply with any such direction.

[208]Sections 28, 29(8) and (9), and 35(h) of the National Police Service Act, No. 11A of 2011.

[209]*See* Article 79 of the Constitution of Kenya, 2010 and Sections 3, 11, 12, 13 and 15 of the Ethics and Anti-Corruption Commission Act, No. 22 of 2011 (the EACC Act, 2011).

[210] Section 11(1)(d) of the EACC Act, 2011 and Section 35 of ACECA, 20O3. See also Thuita Mwangi & 2 others v. Ethics & Anti-Corruption Commission & 3 others [2013] eKLR, at para 49 ("*Under **section 35** of the **ACECA**, a prosecution can only be brought to the court with the authority of the DPP. The EACC's duty is to investigate and make recommendations for prosecution to the DPP. The DPP applies his mind independently and makes the decision to prosecute."*).

Commission v. James Makura M'abira,[211] the Court of Appeal at Nyeri, considered whether under **Section 35 of ACECA** it is mandatory for EACC (then KACC) to obtain consent from the DPP (then under AG) before charging a suspect for corruption and economic crimes under ACECA. In this case, initially criminal charges were preferred against the Respondent before KACC's investigative report was laid before the AG (the charges were later withdrawn after the AG received the investigative report and the Respondent re-charged with the same offences). The Court of Appeal reiterated that EACC is vested with investigative powers, but once the investigations are completed, EACC is obligated under **Section 35 of ACECA** to submit the investigation report to the DPP with recommendation that the person who is the subject of the said investigations may be charged with the corruption and economic crimes therein.[212] In any case, the decision whether to charge or not resides with the DPP, as an investigator cannot also be the prosecutor.[213] So, no written consent to prosecute is required from the DPP to prosecute any person, as all criminal cases are instituted by the DPP per **Article 157(6) of the Constitution**.[214] According to the Court of Appeal, if the procedure under **Sections 35, 36 and 37 of ACECA** is not followed, then the suspect can be re-charged upon the set procedure being followed: *"a procedural misstep during pretrial in criminal cases has no bearing on the culpability of the suspect and cannot be taken to vitiate a charge which is predicated on a valid or lawful complaint before the case is tried and concluded in court".* [215]

There have been instances where the three State agencies have been at loggerheads and that has proven to be destructive in the anti-corruption quest. It is a matter of public knowledge that there has been friction between the DCI and the DPP concerning the investigation and prosecution of persons suspected of corruption and economic crimes. However, the DCI cannot bypass the DPP to prefer criminal charges against any person before any court, as the decision to charge or not to charge rests with the DPP.

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[211] [2020] eKLR, Court of Appeal at Nyeri, Civil Appeal No. 27 of 2013 (Ouko, Koome, Makhandia, Murgor, and Mohammed, JJ.A)).
[212] Id. at paras 23 and 24.
[213] Id.
[214] Id. at paras 28, 29, and 31.
[215] Id. at para 25 and 32.

Recently, in **Geoffrey K. Sang v. Director of Public Prosecutions & 4 others**,[216] Odunga J. considered the issue of the powers of the DPP in relation to those of the DCI and found that neither the DCI nor the Inspector-General of the National Police Service has any prosecutorial powers.[217] Odunga J. thus held that:

> *126. (…) in terms of prosecutorial powers, the Director of Public Prosecutions may pursuant to Article 157(4) of the Constitution, direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction. Upon receipt of such directions, pursuant to Section 35(h) of the National Police Service Act, the Inspector General of Police may direct the Directorate of Criminal Investigations to execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157 (4) of the Constitution. Clearly therefore there is a clear chain of command set out hereinabove. When it comes to the exercise of prosecutorial powers, as between the three entities, the Director of the Public Prosecutions has the last word. In other words, no public prosecution may be undertaken by or under the authority of either the Inspector General of Police or the Director of Criminal Investigations without the consent of the Director of Public Prosecutions.*
> *127. What the foregoing provides is that each of the three entities must of necessity stay on their respective lanes. Any attempt by any of them to trespass onto the other's lane can only end up disastrously. In simple terms an attempt by the Directorate of Criminal Investigations to charge a person with a criminal offence without the consent of the Director of Public Prosecutions is ultra vires the power and authority of the Director of Criminal Investigations and amounts to abuse of his powers. It is therefore null and void ab initio.*[218]

[216] [2020] eKLR.
[217] Id. at paras 115, 120, 143-144 and 205.See also Africa Spirits Limited v. Director of Public Prosecutions & another (Interested Parties) Wow Beverages Limited & 6 others [2019] eKLR, p 9, on the powers of the DCI to investigate crime vis-à-vis other authorities.
[218] Geoffrey K. Sang v. Director of Public Prosecutions & 4 others [2020] eKLR, paras 126 and 127. See also para 128 *("(…) the Director of Criminal Investigations, must*

In essence, for either the DCI or the EACC to levy charges against any person for corruption and economic crimes without the consent of the DPP would be unconstitutional, unlawful, illegal and null and avoid ab initio. That notwithstanding, the DPP is not bound by the recommendations of the DCI nor the EACC—the DPP is required to exercise independent judgment,[219] and to exercise prosecutorial discretion in a manner that upholds the public interest and the interests of the administration of justice and which does not result in the abuse of the legal process.[220] On the other hand, as concerns investigations

keep to its lawful lane and must desist from the temptation to overlap even where he believes that those who are constitutionally empowered to take action are dragging their feet. Once he is done with its mandate he must hand over the button to the next "athlete" and must not continue with the race simply because he believes that the next athlete is "a slow footed runner".").

[219] Article 157(10) of the Constitution of Kenya, 2010 and Section 6 of the ODPP Act, 2013.

[220] Article 157(11) of the Constitution of Kenya, 2010 and Section 4 of the ODPP Act, 2013. See, e.g., Geoffrey K. Sang v. Director of Public Prosecutions & 4 others [2020] eKLR, para 129 (*"(...)the DPP is not bound by the actions undertaken by the police in preventing crime or bringing criminals to book. He is, however, under Article 157(11) of the Constitution, enjoined to have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. In other words, the DPP ought not to exercise his/her constitutional mandate arbitrarily.*"); and para 132 *(''(...) the mere fact that those entrusted with the powers of investigation have conducted their own independent investigations, and based thereon, arrived at a decision does not necessarily preclude the DPP from undertaking its mandate under the foregoing provisions. Conversely, the DPP is not bound to prosecute simply because the investigating agencies have formed an opinion that a prosecution ought to be undertaken. The ultimate decision of what steps ought to be taken to enforce the criminal law is placed on the officer in charge of prosecution and it is not the rule, and hopefully it will never be, that suspected criminal offences must automatically be the subject of prosecution since public interest must, under our Constitution, be considered in deciding whether or not to institute prosecution."*). *See also* Geoffrey K. Sang v. Director of Public Prosecutions & 4 others [2020] eKLR, at paragraphs 133-140; Charles Okello Mwanda v. Ethics and Anti-Corruption Commission & 3 Others (2014) eKLR, at paras 47 and 48 *(''(...So long as there is sufficient evidence on the basis of which a criminal prosecution can proceed against a person, the final word with regard to the prosecution lies with the [DPP], the only proviso being that the [DPP] must act in accordance with his constitutional mandate.)"*); and Thuita Mwangi & 2 others v. Ethics & Anti-Corruption Commission & 3 others [2013] eKLR, at paras 40-43 (*"The decision to institute criminal proceedings by the DPP is discretionary. Such exercise of power is not subject to the*

on corruption and economic crimes, the DCI should give way to the EACC because of its special mandate in that regard, unless of course the EACC opts to collaborate with the DCI in the investigation of corruption and economic crimes.[221]

9. Conclusion

This article calls for a new anti-corruption dispensation, which focuses on the recovery of stolen public assets rather than merely punishing the offender for the sake of punishment. The article also calls for a new way of charging and sentencing for corporate crimes that does not further double criminal punishment by punishing the accused severally based on the same facts and by punishing a corporate entity alongside its directors for the criminal acts of the corporate entity. The article also calls for the alignment of court decisions on bail and bond terms with the applicable constitutional and statutory provisions, particularly the application of **Section 62(6) of ACECA** in cases involving constitutional office holders charged with corruption and economic crimes. Constitutional office holders should be removed from office only pursuant to the procedures set out in accordance with the Constitution, and not by preferring criminal charges against them and labelling them of 'moral ill-health' in order to remove them from office. In conclusion, it is hoped that newly enacted Statutes will specifically address the unique nature of corporate crimes when creating offences and prescribing criminal penalties for the same—amending old Statutes may equally be imperative.

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direction or control by any authority (…). The discretionary power vested in the DPP is not an open cheque and such discretion must be exercised within the four corners of the Constitution. It must be exercised reasonably, within the law and to promote the policies and objects of the law which are set out in ***section 4*** *of the* ***Office of the Director of Public Prosecutions Act.*** *These objects are as follows; the diversity of the people of Kenya, impartiality and gender equity, the rules of natural justice, promotion of public confidence in the integrity of the Office, the need to discharge the functions of the Office on behalf of the people of Kenya, the need to serve the cause of justice, prevent abuse of the legal process and public interest, protection of the sovereignty of the people, secure the observance of democratic values and principles and promotion of constitutionalism. The court may intervene where it is shown that the impugned criminal proceedings are instituted for other means other than the honest enforcement of criminal law, or are otherwise an abuse of the court process."*

[221] See Africa Spirits Limited v. Director of Public Prosecutions & another (Interested Parties) Wow Beverages Limited & 6 others [2019] eKLR, at p 9.

The Impacts of Emerging Technologies in the Future of Law and Legal Practice: A Case of Kenya

By: ***Benjamin Arunda****

Abstract

The internet was a game changer in every industry. It gave everyone access to everything and to everyone else. It redefined privacy and transformed communication, transaction and information. It is the reason this decade is often referred to as "the information age". The legal industry too has felt the influence of the internet. Law is widely seen as a tool for social engineering. Law does not and cannot exist in a vacuum; it exists and advances the relationships or transactions between states, intra-state agencies, states and their citizens, and among citizens. Contemporary technologies have affected these various aspects of relationships, and emerging technologies such as Artificial Intelligence (AI), Blockchain and Data Analytics are poised to deepen the impacts. As such, law has to metamorphose to meet the changing nature of transactions or relationships.

This paper discusses how these technologies will impact the future of law and the practice of it, with a particular focus on Kenya. Spanning across decades and jurisdictions, many lawyers, judges and other legal officers will experience disharmonies in written and unwritten laws in solving unique technology-related disputes. The available systems for dispensation of justice may also have to be recalibrated to exploit the strengths of the new technological infrastructures and innovations. Kenya's deliberate efforts to technological advancement is demonstrated by the pursuit of the Konza Technopolis Project, the establishment of a Blockchain and Artificial Intelligence Taskforce and the partial digitization of service delivery such as eCitizen and virtual courts. Adoption of more emerging and revolutionary technologies will likely have entrenched legal implications.

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Introduction

In February 2017, President Uhuru Kenyatta announced the establishment of a Blockchain and Artificial Intelligence Taskforce under the Ministry of ICT to champion the exploration of opportunities presented by emerging technologies. The taskforce released its report with recommendations in July 2019 after two years of exploration, and in summary stated, "The Fourth Industrial Revolution will result in massive transformations in the labour force, economy and productivity of our society."[1] Although none of the recommendations have been implemented, the fact that they have been communicated in the report means there is high likelihood of implementation in the future. The industry-specific recommendations will be discussed later in this paper. In underscoring Kenya's forward-leaning approach in leveraging emerging technologies for social and economic development, The Taskforce Report states that "emerging technologies have already allowed governments to leapfrog legacy infrastructure systems, generate economic growth and promote social inclusion for citizens."[2] The increasing use of robotics such as drones in photography and factory-floor and warehouse robots, NLP in language translation, cryptocurrencies in financial inclusion, and AI in customer service in Kenya is a sign of gradual penetration of these technologies in core industries. The role of emerging technologies in transforming legal transactions across industries is significant and its impacts in shaping the future of law are enormous. However, it is still a concern whether lawyers and law firms are ready to adopt these technologies as tools for achieving efficiency and mitigating costs.[3]

Kenya's increasing receptiveness in mobile money, smart phone literacy and internet penetration is key in its adoption of new technologies. At 87.2% internet penetration, Kenyans have the highest access to internet in Africa.[4] As

[1] Ministry of Information, Communication and Technology, *Emerging Digital Technologies for Kenya: Exploration and Analysis*, (Kenya, July 2019) 9 [1] (The Taskforce Report).

[2] *Ibid* [1]

[3] Kariuki Muigua, 'Legal Practice and New Frontiers: Embracing Technology for Enhanced Efficiency and Access to Justice', June 2020, 6.

[4] J. Clement, 'Share of internet users in Africa as of March 2020, by country' (Statistica, 18 November 2020)

at 30 September 2019, the mobile SIM card penetration level was at 112% with the number of active mobile subscriptions growing from 52.2 million in June to 53.2 million.[5] The growth in mobile subscriptions is attributable to the increasing accessibility of mobile network signals with up to 93% of the Kenyan population having access to 3G networks.[6] During the Covid -19 pandemic, Kenya's Judiciary turned to technology to minimize disruption of court processes and ensure efficient delivery of justice while also adhering to guidelines from World Health Organization that limit public gatherings.[7] Multiple courts held virtual hearings with parties allowed to file their petitions via a judiciary e-filing system. According to Kariuki Muigua, "Arguably, this has disrupted the profession in a way not experienced before."[8] The provisions and directions for e-filing are contained in the Gazette Notice No. 2357.[9] The increased internet coverage and access to communication gadgets such as smart phones by Kenyans made it possible for most people including advocates, students of law and parties to the trials to attend proceedings virtually.

Since the inception of the internet, there has been evolutionary and revolutionary innovation of new technologies hinged on the inherent capabilities of the internet. As at 2020, the top emerging technologies sparking conversations around key industries included: 5G, AI, Internet of Things (IoT), Serverless Computing, Virtual and Augmented Reality (AR/VR), Advanced Biometrics, Blockchain and Cryptocurrencies, Natural Language Processing (NLP), 3D Printing, Holograms, Robotics, and Quantum

<https://www.statista.com/statistics/1124283/internet-penetration-in-africa-by-country/> accessed 19 January 2020.

[5] Communications Authority of Kenya, 'First Quarter Sector Statistics Report for the Financial Year 2019/2020' (CAK, July – September 2019), 7.

[6] *Ibid* 7 [1].

[7] Beatrice Hongo and Julie Marks, 'Pandemic prompts innovation by Kenya's justice system' (United Nations Office on Drugs and Crime (UNODC)) <https://www.unodc.org/easternafrica/Stories/pandemic-prompts-innovation-by-kenyas-justice-sector.html> accessed 19 January 2021 [1].

[8] N 3, 2.

[9] Gazette Notice No. 2357, 'Practice Directions on Electronic Case Management', Cap. 21 of the Civil Procedure Act.

Computing.[10] Most of these technologies will have significant impacts on key industries such as Finance and Banking, Agriculture, Ecommerce and Logistics, Manufacturing and others. In every industry there is a legal implication accompanying every transaction, thus a change in the nature of those transactions will subsequently affect the relevant law and the practice of it. As Willem Gravett opines,

> *"The legal profession is at a crossroads. Just as the other professions are undergoing tremendous upheaval, so it must be with the law. The legal world of tomorrow will bear little resemblance to that of the present. It will change more in the next twenty years than it has during the past two centuries."*[11]

The modern lawyer has to learn to cope with technological changes and use them in attaining effectiveness in the legal practice. For instance, using Wi-Fi, advanced online search tools, web conferencing, and Voice over Internet Protocol (VoIP) in communicating with clients, in legal research, in operations management at the law firms, in collaboration with global partners and in collecting, processing, managing and securing data.[12] Further, T du Plessis asserts that in litigation practice, lawyers may be required to have skills for using support tools and technologies for automated litigation and lack of such skills may hinder their client representation.[13]

Legal practice, especially commercial law, has over the years become industry specific with some lawyers or law firms specializing on particular industries. Industry-specific regulatory bodies have also been created across different jurisdictions to regulate activities in those particular industries. For instance, in Kenya the regulators include the Insurance Regulatory Authority (IRA), the Capital Markets Authority (CMA), the Central Bank of Kenya (CBK), the

[10] 'Ranking Influential Emerging Technologies for 2020' (Connected World, 15 July 2020) <https://connectedworld.com/ranking-influential-emerging-technologies-for-2020/> accessed 19 January 2020, [2].
[11] Willem Gravett, 'Is the Dawn of Robot Lawyer upon us? The Fourth Industrial Revolution and the Future of Lawyers.' PER/PELJ 2020, 23, 6.
[12] T du Plessis, 'Competitive Legal Professional's Use of Technology in Legal Practice and Legal Research' (2008) PER 21, 38 [2].
[13] *Ibid* 38 [3].

Kenya Revenue Authority (KRA), Law Society of Kenya (LSK), the Pharmacy and Poisons Board, and the Engineers Board of Kenya among many others.[14] These regulatory bodies are established by Acts of Parliament such as the Central Bank of Kenya Act Cap. 491 established the CBK as the banking industry regulator. The impacts of technology on these industries, especially those that affect transactions and professional practice, will have to be factored in by legislators in future amendments to the regulatory acts. Various aspects of law will be disrupted by the adoption of these technologies. For instance, massive adoption of robotics in factory floor roles that would otherwise be done by humans may deny many Kenyans their economic rights highlighted in Article 43 of the Constitution.[15] In future, employment laws may have to be reviewed and harmonized with the changing nature of workplace globally. Discussed below are how the various emerging technologies are impacting law and legal practice in different industries:

Finance and Banking Laws

In Kenya, and in most countries, the financial services industry is highly regulated and has a lot of barriers to entry. From taxation to insurance to banking, this industry operates under the watch of multiple regulators. Furthermore, this industry is poised to be significantly disrupted by most of the emerging technologies. Up to 66% of Africans remain unbanked despite traditional banking services finding their way into rural areas. In Kenya, mobile banking has increased access to banking with most people who cannot access traditional banking services using Mpesa or Airtel Money services. It

[14] The Central Bank of Kenya Act (Cap. 491), The Insurance Act (Cap. 470), The Capital Markets Act (Cap. 485a), The Kenya Revenue Authority Act (Cap. 469), Law Society of Kenya Act (Cap. 18), The Pharmacy and Poisons Act (Cap. 244), Engineers Act 43 of 2011, Engineers Registration Act (Cap. 530) and others.

[15] The provision of Article 43 of the Constitution of Kenya on social and economic rights is also buttressed by other provisions such as Article 55 (c) that states that "The state shall take measures, including affirmative action programmes, to ensure that the youth access employment". The creation of employment is key in granting economic liberation to the youth. The provisions of law on employment should, however, envision the negative impacts of increased technological adoption by key industries that ought to employ the youths, on roles that require semi-skilled labour such as factory floor and warehouse jobs. The conversation of the impacts of technology should be factored in when discussing the creation of jobs for the youth, because the global workplace is fast metamorphosing.

is important to note that the establishment of Mpesa was only possible because the CBK granted a regulatory compromise allowing a telecommunication company to provide banking services. The CBK Act did not have any express provisions that would prompt it to license a telecommunication company to offer financial services. At the juvenile start of Mpesa, Kenya's banking industry was performing fairly well although about 19 percent of Kenyans of the overall 35 million people in 2006 had access to banking services.[16] More Kenyans had access to mobile phones than to banking services. Statistic from Financial Access Survey in 2006 found out that for every Kenyan who could access a bank account, two others could access a mobile phone.[17] It was during that period that Mpesa applied for a license to operate in the financial service industry.

The CBK, after months of engagements, allowed Safaricom to launch its mobile money transfer service, Mpesa, into the market without the requisite regulatory license.[18] The banking industry players argued that it was unfair to allow a telecommunication company to operate in the same market without having the banking license.[19] The advancement of mobile phone technology and its subsequent penetration into the Kenyan populace impacted the banking industry outside the scope of regulatory provisions of the CBK Act. This kind of regulatory compromise or adjustments may be necessary in the wake of leapfrogging technological advancements.

There could be similar impacts on the banking industry by emerging technologies such as Blockchain, cryptocurrencies, big data and AI. For instance, the disruptive impact of Blockchain-based cryptocurrencies such as Bitcoin and Ethereum in the banking industry is already being felt globally.[20]With approximately $1 trillion market capitalization of the over

[16] Alliance for Financial Inclusion, 'Enabling mobile money transfer: The Central Bank of Kenya's treatment of M-pesa.' 2010, 2.
[17] *Ibid* 2.
[18] *Ibid* 2.
[19] *Ibid* 2.
[20] Benjamin Arunda, *Understanding the Blockchain: An In-Depth Overview of Blockchain and its Use Cases in Government, Banking, Insurance, Healthcare, Law, Manyfacturing, Education and Other Industries*. (GMN, 2018), p.19.

8000 cryptocurrencies listed on the coin rating site Coin Market Cap[21], the financial services regulators can no longer ignore these cryptography-based currencies. Although Blockchain technology has been associated with several benefits such as transparency in transactions, the uncertainties associated with cryptocurrencies are immense and require robust and up-to-date regulatory provisions to mitigate the risks. Adoption of cryptocurrencies pose a threat to the centralization of banking services that allows regulators to play the watch-dog role; and further such currencies may foster money-laundering and financing of terrorism activities.[22] Most countries do not have express regulatory provisions to regulate crypto-related activities thus most central banks have only managed to issue cautionary statements to that effect.[23] In the Banking Circular No. 14 of 2015, the CBK cautioned financial institutions against dealing in virtual currencies stating that they unregulated, untraceable and anonymous.[24] In the United States of America, the Security Exchange Commission (SEC) has not issued any industry-specific regulations to guide the crypto industry. In a recent spurt by SEC Commissioner Hester Peirce, she blamed the bureaucracy at the SEC for its slowness in responding to financial innovation. She stated:

> *"While we've been very slow in giving guidance, there is more and more interest from a wide spectrum of people, both inside the crypto space as*

[**Blockchain Technology:** This is a distributed ledger technology that uses independent nodes to validate transactions other than relying on a central institution such as a bank. The technology was created in 2008 by a pseudonym called Satoshi Nakamoto, and subsequently launched a cryptocurrency (a currency secured by cryptography) called Bitcoin that has grown in value to over $500 billion market cap within 10 years.]

[21] 'Today's Cryptocurrency Prices by Market Cap' <https://www.coinmarketcap.com> accessed 23 January 2021.

[22] Library of Congress (LOC), 'Regulation of Cryptocurrencies Around the World' (LoC, 30 December 2020) <https://www.loc.gov/law/help/cryptocurrency/world-survey.php> accessed 23 January 2021, [4].

[23] *Ibid* [3].

[24] Banking Circular No. 14 of 2015 from CBK to all Chief Executives of Commercial Banks, Mortgage Finance Companies and Microfinance Banks (18 December 2015).

Also see: CBK, 'Public Notice: Caution to the Public on Virtual Currencies Such as Bitcoin' (December 2015).

> *well as inside the traditional financial institutions who are asking us for guidance. The landscape is changing so quickly."*[25]

The SEC has in the recent past instigated legal suits against companies in the crypto industry that fundraised in the US such as Telegram which raised over $1 billion in the ICO of Gram token which ended up halting its token issuance[26], and Ripple in Civil Suit No. 10832 in the United States.[27] What makes cryptocurrencies difficult to sufficiently regulate is the confusion as to whether to treat them as assets or securities. In Civil Suit No. 08 of 2019 at the Milimani Commercial and Tax Division, where the issue of contention was whether or not a cryptocurrency called Kenicoin was a security and falls within the regulatory scope of the Capital Markets Authority (CMA). The applicant was involved in fundraising through ICO of Kenicoin. In disposition, Judge M.W. Muigai ruled that:

> **"The balance of convenience tilts in favour of Investor/Consumer protection through, inquiry, investigation and regulation of crypto currency/Kenicoin as security under Capital Market Authority, the defendant whose mandate is to regulate Capital markets and securities."**[28]

By that ruling, the honourable judge set a precedent that identifies cryptocurrencies as securities and are within the regulatory scope of the CMA. The buildup of discussions on the potential of Blockchain and cryptocurrencies in deepening financial inclusion in Kenya broke through into the Blockchain and Artificial Intelligence Taskforce Report released in 2018. The taskforce, in its recommendations, highlighted that Blockchain could be

[25] Kevin Reynolds, 'SEC Will be Forced to Give Crypto Guidance Despite Bureaucracy, Risk Avoidance: Peirce.' (Coindesk, 10 October 2020) <https://www.coindesk.com/sec-will-be-forced-to-give-more-guidance-about-crypto-peirce> accessed 23 January 2021, [1].

[26] Securities Exchange Commission (SEC), 'SEC Halts Alleged $1.7 Billion Unregistered Digital Token Offering' (SEC, For Immediate Release, 2019-212) <https://www.sec.gov/news/press-release/2019-212> accessed 27 January 2021.

[27] Securities and Exchange Commission v Ripple Labs Inc., Bradley Garlinghouse, and Christian A. Larsen, Civ. 10832 at the United States District Court, Southern District of New York (Filed on 22 December 2020).

[28] Wiseman Talent Ventures v Capital Markets Authority [2019] eKLR.

used to reduce cost of transactions.[29] Among the actionable steps that the Taskforce recommended is the full implementation of the Financial Technology Legal and Regulatory Sandbox.[30] This informs the argument posited in this paper that the legal frameworks reforms is necessary in the implementation of emerging technologies.

The conversations around the establishment of Central Bank Digital Currencies (CBDCs)[31] by central banks across the world has sparked a discussion on the shifts in the global financial regulatory environment. The widespread adoption of the CBDCs and the consequent obsolescence of fiat paper money would be ideal in mitigating the risks of tax evasion, financing of terrorism, money laundering and other illegal activities.[32] China's central bank is currently testing a digital currency in Shenzen in its issuance of 10 million yuan in form of the currency to 50,000 locals.[33] Most countries are currently considering the use of CBDCs or actually in the early stages of creating one. In Kenya, the CBK held discussions with international banks in the last quarter of 2020 to explore the possibility of creating and issuing a CBDC.[34]

The increasing growth of financial technologies (popularly known as Fintechs) in Kenya and globally will require an adjustments or provisions of law to advance innovation and to regulate their use. In Kenya, there has been a rising number of digital lending platforms such as Tala, Branch and 110 others, most of which charge too high interest rates compared to those standard bank

[29] N 1, p 17.
[30] N 1, p 17.
[31] CBDC is a digital form of a national fiat currency issued by the central bank instead of printing physical cash.
[32] Michael Bordo and Andrew Levin, 'Central Bank Digital Currency and the Future of Monetary Policy.' Working Paper No. 23711, National Bureau of Economic Research, August 2017, p. 4.
[33]'Shenzen residents test digital currency' (BBC News, 13 October 2020) <https://www.bbc.com/news/business-54519326> accessed 23 January 2021, [1].
[34] Bitange Ndemo, 'Dawn of Central Bank Digital Currency' (Business Daily, 5 November 2020) <https://www.businessdailyafrica.com/bd/opinion-analysis/columnists/dawn-of-central-bank-digital-currency-2731070> accessed 27 January 2021, [13].

interest rates and also use crude means in debt recovery.[35] According to study by the Digital Lenders Association of Kenya (DLAK), at least 71% of Kenyans have taken a digital loan in the last half of 2020.[36] The industry uses illegal means not sanctioned by CBK Act or other enabling legislations in collecting data in the digital lending industry and the unsecure way of managing and processing that data.[37] Early in 2020, the CBK clamped down of the digital lenders and prevented them from listing credit defaulters for loans below $9 (Ksh.1000) on the Credit Reference Bureaus (CRB).[38] The CBK Amendment Act Bill No. 21 of 2020 was introduced in Parliament of Kenya in July 2020 seeking to provide a long-term solution to the problem by putting the digital lenders under the regulatory scope of the CBK.

In the insurance industry, Blockchain can be used in transactions of catastrophe swaps and bonds; in detection of fraud and prevention of risks; in financial audit and reporting; and in prevention and management of claims.[39] The scope of impacts of technological advancements in the finance and banking industry is wide and it's inevitable that these impacts will require regulatory adjustments and introduction of new laws to regulate affected transactions.

Tax and Customs Laws

Tax laws have transmuted over the last few decades as human activities, cultural assimilation, political acculturation, governance structures, and nature of business metamorphosed. Globalization, industrialization and digitization

[35] Paul Gubbins, 'Digital Credit in Kenya: Facts and Figures from FinAccess 2019,' FSD Kenya, December 2019.

[36] 'Case Study: Digital Lending Grows in Popularity in Kenya' (GeoPoll) <https://www.geopoll.com/resources/digital-lending-kenya-dlak/> accessed 27 January 2021.

[37] Sarah Ombija and Patrick Chege, 'Time to Take Data Privacy Concerns Seriously in Digital Lending' (CGAP, 24 October 2016) <https://www.cgap.org/blog/time-take-data-privacy-concerns-seriously-digital-lending> accessed 27 January 2021, [5].

Also see: Joy Makena, 'The Regulation of Digital Credit in Kenya: The Case for Consumer Protection', March 2018, Strathmore University Law School.

[38] Alex Hamilton 'Kenyan Central Bank Plans Digital Lender Clampdown' (Fintech Futures, 28 July 2020) <https://www.fintechfutures.com/2020/07/kenyan-central-bank-plans-digital-lender-clampdown/> accessed 27 January 2021 [3].

[39] N 20, p.74-80.

have dramatically changed the nature of tax laws globally.[40] Governments across the world have responded to the economic transmutations by formulating and implementing tax reforms; for instance, to reduce tax rates to promote trade and development, increase particular tax rates to discourage certain societal pleasures such as alcoholism and sports betting or gambling, and expand tax base and holistically standardize other taxes to enhance government operations. According to Jeffrey Owens,

> *"Tax Policy issues have moved up the global political agenda…At the same time many governments around the world are looking for higher tax revenues as part of their efforts to reduce budget deficits, but to do this in ways which reduce the complexity of tax systems and reduce the growing inequalities in income and wealth"*[41]

The conversation about tax policies is at the center of any effective government. Ensuring that tax policies are harmonized with the social and economic development of a country and its populace is instrumental in establishing a perception that individual taxpayers, corporate entities, and governments are interacting in a legally and equitably sound administrative framework.[42] This segment of the paper focuses on both the impact of technology in tax administration of existing tax avenues and on the role of emerging technologies in creation of new tax avenues.

Firstly, it discusses how technology has helped tax agencies to collect and administer tax efficiently thus increase tax revenues significantly. In Kenya, in particular, the Kenya Revenue Authority has shared on its website the various forms of tax fraud which include: use of forged books of accounts and cooked statements; failure to register as a tax entity, furnish tax returns, pay taxes, keep taxes, and withhold taxes; obstruction, bribing and impersonating as tax officials; and aiding and abetting tax crimes.[43] The KRA has also shared

[40] Jeffrey Owens, 'Tax Policy in the 21st Century: New Concepts for Old Problems'. Robert Schuman Center for Advanced Studies, Issue 2013/5, September 2013, [Highlights [2]].
[41] *Ibid* 1.
[42] *Ibid* 4.
[43] Kenya Revenue Authority, 'Reporting Tax Fraud' < https://www.kra.go.ke/en/tax-fraud> accessed 3 February 2021.

on its website the various actions that lead to commission of tax evasion or tax fraud. Some of them include: Manifest fraud – this is where the shipping agents creates a loophole for false declaration by illegally altering manifests before uploading them to the Customs Manifest Management System (MMS); importers and port clearing agents using fake customs security bonds to clear transit goods; Customs Mis-declaration – Some importers and customs clearing agents may fraudulently declare wrong goods to evade payment of duties; Smuggling – import or export of goods secretly in violation of the law; Use of fake export entries to fraudulently claim VAT refund; Use of fake bank payment receipts to fraudulently validate entries for import taxes; and under-declaration of taxable income by taxpayers, among others.[44] Majority of these fraudulent activities, as is observable and adducible, are as a result of system vulnerabilities, lack of transparent systems or opaqueness in systems, dishonesty of taxpayers and tax administrators, and poor management of various data points. Although KRA has increasingly reduced instances of fraud and increased tax revenue collection by digitization of services,[45] there are still several loopholes and vulnerabilities that can be exploited by fraudsters.

A good way to demonstrate the impact of technology on tax compliance and tax administration is by comparing the period before digitization and after digitization. In 2016/2017 financial year after the full digitization of tax procedures, the KRA collected total tax Ksh.1.366 trillion ($12.418 billion) which is Ksh.115 billion ($1.045million) more than the amount collected in 2015/2016 financial year before digitization of the processes.[46] A report by Tax Justice Network – Africa (TJN-A) in 2015 estimated that total tax lost by Kenya through evasion by multinational organizations hit Ksh.639 million ($5.814million) annually.[47]

[44] *Ibid*.
[45] George Maina, 'Kenya: Impact of Technology on Tax Administration' (Rodl & Partner, 23 May 2018) < https://www.roedl.com/insights/impact-technology-tax-administration#> accessed 3 February 2021, [4].
[46] *Ibid* [4].
[47] *Ibid* [8].

Despite the full digitization of tax procedures, there are still uncharted waters of potential technological advancements in improving tax administration and curbing tax fraud. Some of the key emerging technologies that can be used to increase efficiency and curb evasion include: AI, Data Analytics and Blockchain. AI is a broad term that includes cognitive and machine learning such as intelligent assistants like Cortana and Siri, or simple AI like grammar and spell checkers.[48] AI can be used to introduce interlinked digital sensors that monitor, track and detect transactions processes and malpractice on the customs or taxpayers chain of relevant activities. A properly intertwined use of quality data and AI algorithms can be essential, not only in combating tax fraud, but also in increasing efficiency in tax procedures thus increase tax compliance by taxpayers.[49]

Blockchain technology can also be used in advancing tax administration procedures and enhancing transparency to reduce tax fraud. In a joint study conducted by tax specialists and technology experts drawn from public and private sectors convened by PwC, the technology experts emphasized the suitability of Blockchain in tax-based transactions, while the tax specialists agreed that Blockchain could be applied in areas such as transaction taxes like VAT, stamp duties, withholding tax, and insurance premium taxes.[50]

> *"Blockchain could allow us to capture information from many perspectives. The result is more detail, more visibility, more useful information and more certainty"*[51]

Big data refers to the immense amount of data available in this information age, and data analytics is the use of technology to extract value out of that

[48] Deloitte, 'Artificial Intelligence – Entering the world of tax', October 2019, 2.
[49] Cristina Garcia-Herrera Blanco, 'The use of artificial intelligence by tax administrators, a matter of principle' (Inter-American Center of Tax Administrations (C.I.A.T), 2017) < https://www.ciat.org/the-use-of-artificial-intelligence-by-tax-administrations-a-matter-of-principles/?lang=en> accessed 3 February 2021, [4].
[50] PwC, 'How Blockchain technology could improve the tax system', February 2017, 2.
[51] *Ibid.*

data.[52] The increasing demand for tax revenues and tax transparency by governments brings the need for tax authorities to collect quality taxpayer data, link relevant data points, and extract tax-valuable information from that data.[53] Secondly, on the role of emerging technologies in creating new tax avenues, there are several new tech-based revenue generating activities or rather tech-based jobs that create tax opportunities for governments. A food example is the Digital Service Tax (DST) recently introduced by Kenya targeting income from digital economy. According to information provided by KRA, a "Digital Service Tax (DST) is payable on income derived or accrued in Kenya from services offered through a digital marketplace," and "A digital marketplace is a platform that enables direct interaction between buyers and sellers of goods and services through electronic means."[54] The Kenya's tax authority also stipulated that the DST will be paid as follows:

> *"1.5% of the gross transaction value:*
>
> ***1.*** *a) In the case of the provision of digital services, the payment received as consideration for the services; and*
>
> ***2.*** *b) In the case of a digital marketplace, the commission or fee paid to the digital marketplace provider for the use of the platform."*[55]

This is a new tax avenue created in order to respond to the increasing growth of the digital marketplaces globally and in the Kenyan tax jurisdiction. The new DST is an example of how tax authorities can create new tax regimes from emerging technologies and industries to increase the tax revenue base.[56]

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[52] EY Global, 'How data analytics is transforming tax administration' (EY Global, 27 May 2019) < https://www.ey.com/en_gl/tax/how-data-analytics-is-transforming-tax-administration> accessed 3 February 2021, [2].

[53] *Ibid.*

[54]Kenya Revenue Authority (KRA), 'Digital Service Tax' < https://www.kra.go.ke/en/helping-tax-payers/faqs/digital-service-tax-dst> accessed on 3 February 2021.

[55] *Ibid.*

[56] George Maina, 'Taxation of Kenya's digital marketplace' (Rodl & Partner, 24 November 2020) < https://www.roedl.com/insights/kenya-digital-service-tax-marketplace> accessed 3 February 2021, [1].

Employment and Labour Laws

The transmutation of technology in production across industries has always shaped the nature of employment engagements and the vital issues in employment and labour laws.[57] Technology, particularly information technology, have boosted job search through online job listings such as LindedIn or Indeed Jobs, job screening through online tests, and job-resume matching through online resume databases. These advantageous progresses have, however, reduced the need for certain traditional hiring mechanisms and practices such as job halls and submission of physical resumes.[58] These changes in ICT largely impact the employment or job search or hiring process rather than the availability of the jobs. However, most emerging technologies are poised to have a disruptive effect on the job market by reducing available employment opportunities by replacing workers with automation, AI and robotics, and alternatively increase more tech-based job opportunities.[59]

> "*The impact of technology on work and workers is multifaceted and complex. Technology is not homogenous and at least should be thought of in terms of enabling and replacement technologies: the former complementing the productivity of workers and the latter taking away the need for workers"*[60]

The transformation of work and workforce will not happen at once, rather it is a gradual change that will be experienced over decades. Recently in Kenya, for instance, the United Nations Development Programme (UNDP) donated three robots meant to boost the fight against Covid-19 by mass temperature scanning.[61] This is a typical example of how robotics will outdo humans in

[57] Kenneth G. Dau-Schmidit, 'The Impact of the Emerging Information Technology on Employment Relationship: New Gigs for Labour and Employment Law', University of Chicago Legal Forum, Vol. 2017, 2018, 63, 63.
[58] *Ibid.*
[59] Paul Schulte and John Howard, 'The Impact of Technology on Work and the Workforce', International Labour Organization (ILO), 1.
[60] *Ibid.*
[61] Brian Ambani, 'UNDP donates robots to help Kenya's Covid-19 fight', (Business Daily, 22 January 2021)
< https://www.businessdailyafrica.com/bd/corporate/health/undp-donates-robots-to-help-kenya-s-covid-19-fight-3265800> accessed 3 February 2021, [1-3].

efficiency and speed of most job roles. For example, a health officer scanning potential Covid-19 patients can only scan one person at a time, which extremely low compared to the capacity of the scanner robots that can scan 10 to 100 people every minute from a distance of 3.5 metres.[62] In plain terms, these robots, if deployed in masses, can lead to displacement of certain health workers. Development and automation of surgery through deployment of surgical robots, such as Da Vinci robots used in bariatric, urological and gynaecological surgical procedures, may reduce work for some doctors.[63] Some of the companies in the surgical robotics industry include Johnson & Johnson, Stryker, Da Vinci, and Medtronicare.[64]

Study by Overseas Development Institute (ODI) and Association of Kenya Manufacturers (AKM) found that although empirical evidence show that rapid automation and digitization in manufacturing could reduce the number of jobs, new findings indicate that adoption of these emerging technologies could actually create more jobs by boosting production and increasing exports.[65] The KAM has stated that emerging technologies are fast changing operations in the global market.[66] The Chief Executive of KAM, Phyllis Wakiaga, in encouraging manufacturers and government to adopt automation, further stated:

> *"Technological developments have changed the operations of the global market, which means that Kenya has to keep up with these trends in order to realize the Big 4 Agenda and Vision 2030. It is important that the collaboration between the National and County Governments, Industry and Academia is strengthened to fully unlock our potential in*

[62] *Ibid*.
[63] Global Data, 'What are the main types of robots used in healthcare' (Medical Device Network, 2 January 2020) <https://www.medicaldevice-network.com/comment/what-are-the-main-types-of-robots-used-in-healthcare/> accessed 3, January 2021 [4].
[64] *Ibid* [3-4].
[65] Kawira Mutisya, 'Kenya's manuafacturers urged to embrace robotics, artificial intelligence' (The Exchange, 30 November 2018) <https://theexchange.africa/countries/kenya/kenyas-manufacturers-urged-to-embrace-robotics-artificial-intelligence/> accessed 3 February 2018 [2].
[66] *Ibid*.

> *the digitalization age. Additionally, fostering research, development and innovation will boost the competitiveness of Industry."*[67]

All these emerging instances and practices have legal implications that may need legislators to adjust existing laws or make new laws to accommodate the changes. Adoption of robotics in manufacturing, healthcare and other industries will have to be regulated. These regulations will impact the legal practice by introducing a new set of laws and unique jurisprudence.

Environmental Laws

Environmental conservation has become the crux of many discussions that revolve around sustainability and climate change. Human activities are making the earth age so fast that it may be unbearable in a few decades if not checked. Emissions from transportation vessels, fuel consumption by stationary equipment, industrial processes, solid waste disposal and other human activities continue to pollute the environment.[68] The emissions mostly comprise of carbon-monoxide, nitrogen oxides, Sulphur oxides, particulate matter and volatile organic compounds.[69] The level of emissions vary from developed and developed countries due to differing levels of industrialization and population.[70]

In March 2019, at the Second Global Session of the United Nations Policy Business Forum and the United Nations Environmental Assembly, a number of initiatives were launched aimed at uniting the global efforts to leverage the frontier technologies in monitoring the state of the global environment.[71] Some of the initiatives launched include a resolution to develop an environmental data strategy of global scale by 2025; the Working Group of the United Nations Science Policy Business Forum adopted a report titled 'The case for a digital ecosystem for the environment: bringing together data, algorithms and insights for sustainable development' that highlighted clear calls to action; and

[67] *Ibid* 6.
[68] Halit Heren, 'Impact of Technology on Environment', Curtin University, 29 October 2016, 1.
[69] *Ibid.*
[70] *Ibid.*
[71] The International Telecommunication Union (ITU), 'Frontier Technologies to Protect the Environment and Tackle Climate Change', 2020, p 8.

the launch for a vision for the World Environmental Situation Room which will promote transparency in access and sharing of data on statistical and geospatial environmental fronts that support policy and action for sustainable development.[72] These establishments provide for the use of frontier technologies such as Blockchain for transparency and security in data sharing, data analytics in extracting value from big data, and AI in ensuring collection of data by smart devices and communication of data points.

According to Patricia Espinosa, United Nations Climate Change Executive Secretary, "Climate change is an existential crisis and represents the greatest challenge facing this generation… Technology, if harnessed correctly, offers enormous potential in our efforts to address climate change."[73] The role of technological innovation in tackling climate change is crucial. Although technology is largely seen as having a positive impact on environmental sustainability, there are some technological innovations that actually pose a threat to the environment.

First, on the positive impact of technology on the environment, key technologies that feature include transport vessels that use clean energy such as electric cars, AI and robotics. Research has shown that electric cars are more environmentally friendly compared to petrol or diesel cars.[74] Electric cars emit less air pollutants and greenhouse gases compare to the petrol or diesel cars thus are better placed to boost efforts to tackle climate change.[75] The use of robotics, AI and Blockchain have a potential of reducing human activities at the workplace by replacing them with automation. Reduced human activity will have a consequent effect of lowering pollution; for instance, as a result of reduced commutation of masses of people, pollution from transportation may decline.

[72] *Ibid*.
[73] *Ibid* 10.
[74] Marta Moses, 'Benefits of Electric Cars on the Environment' (eDF, 15 February 2020) <https://www.edfenergy.com/for-home/energywise/electric-cars-and-environment> accessed 5 February 2021, [1-3].
[75] *Ibid*.

Second, on the negative impact of emerging technologies on environment, increased industrialization to produce electric vehicles, smart phones and other smart devices may be counterproductive.[76] Increased industrialization will be commensurate to high energy consumption, and with limited production of clean energy into the national grid, for instance in Kenya, it may further pollute environment. Another imminent avenue for massive environmental pollution is 5G internet. The increasing over-dependency on wireless technologies in the telecommunications industry to expand reach of connected devices is to blame for the growing exposure to electromagnetic waves.[77] The proponents of Internet of Things (IoT) are now developing even shorter high frequency 5G electromagnetic wavelengths, with 5G masts mounted at closer ranges to power super-fast internet connectivity.[78] It is argued that the widespread adoption of 5G may have profound environmental pollution and pose public health risks. Radiofrequency radiation (RF) has been recognized as a new form of pollution to the environment despite being aggressively pursued by internet bigwigs.[79]

The position of this paper is that, legislators ought to put into consideration these emerging potential environmental pollutants when making new environmental laws, or appropriately reform the existing laws to adequately bridle use of such technologies in order to prevent pollution and protect public health from degradation. Article 69 (1) (g) of the Constitution of Kenya states that "The State shall eliminate the processes and activities that are likely to endanger the environment." Parliament is responsible for enacting legislation that shall give full effect to this provision.[80] An independent inquiry may be necessary to establish the facts of the possible endangerment of RF from 5G masts on the environment. Article 42 of the Constitution of Kenya; Article 24 of the African Charter on Humans and People's Rights (ACHPR); and Article 12 (2) (b) of the International Covenant on Economic, Social and Cultural Rights (ICESR) guarantee the right to a clean and a healthy environment. It is

[76] *Ibid.*
[77]Cindy Russell, '5G wireless telecommunication expansion: Public health and environmental implications.' SD-ER, Vol., 484, 484.
[78] *Ibid.*
[79] *Ibid.*
[80] Article 72, Constitution of Kenya (2010).

possible to envision that an infringement of this fundamental right by emission of RF pollutants into the environment may be challenged at the Environment and Land Court.[81] An applicant seeking redress for such pollution may not have "to demonstrate that a person has incurred loss or suffered injury"[82] as a result of the RF from 5G masts. In KM & 9 others v Attorney General & 7 others (the Owino-Uhuru Case), where the petitioner was seeking redress under Article 70, the court's determination on whether the rights of the petitioners guaranteed by Article 42 were violated, stated:

> *"The Constitution gives Kenyans access to court even where there are only threats of violation. In the instant petition, I am satisfied that the Petitioners did not just demonstrate that their rights under the stated articles were likely to or were threatened to be violated. They proved the actual violation which was to their personal life, the environment (soil and dust) where they stayed and the water (sanitation) which they consumed…"* [83]

Landed Property and Intellectual Property Laws

Chapter 5, from Article 60 to 68 of the Constitution of Kenya, 2010, provides for classification of land, land policy principles, regulation of land use and property and legislation on land. The level of corruption and nauseating rot in the lands registries across Africa, particularly in Kenya, has been the cause of irregular and illicit land transactions that has bedeviled many Africans and Kenyans. Counterfeit land titles and shady land transactions are rampant in Kenya. According to Transparency International, "corruption in the lands sector can generally be characterized as pervasive and without effective means of control".[84] For instance, in Ghana, an estimated 80% of land has no appropriate ownership documentation.[85] This is land that could easily be grabbed or illicitly transacted. In 2018, in a case where two men were charged

[81] Article 70 (1), Constitution of Kenya (2010).
[82] Article 70 (3), Constitution of Kenya (2010).
[83] KM & 9 others v Attorney General & 7 others (2020) eKLR, Petition No. 1 of 2016, [134].
[84] Working Paper No. 4 of 2011, 'Corruption in the Land Sector', Transparency International, p. 2.
[85] Georg Eder, Digital Transformation: Blockchain and Land Titles. 2019 OECD Global Anti-corruption & Integrity Forum, 21 March 2019, p 4 [1].

in Kenya for corruption in lands, an investigation conducted by the Ethics and Anti-Corruption Commission (EACC) found that Kenya's Ministry of Lands and Physical Planning had irregularly allocated and registered land in the names of the accused persons, and further colluded with agents at the National Land Commission (NLC) to allegedly siphon taxpayer money to entities and individuals to whom the land was allocated.[86]

Emerging technologies such as Blockchain could be used to bring an end to corruption in the lands sector. Blockchain is known as a distributed ledger that is essential in achieving transparency and immutability in transactions. The three key aspects of Blockchain in land rights include:

> *"1. Public Registries, facilitating the recordkeeping of relevant transactions.*
> 2. *Tokenized trading: Property is tokenized and traded.*
> 3. *Specific development project ICOs, financing projects through cryptocurrencies."*[87]

By implementing these Blockchain-in-land-rights elements, governments can curb illegal land transactions by ensuring that there is a single source of truth, that is, a Blockchain-based digital lands registry of titles. Ghana's Ministry of Lands and Natural Resources partnered with IBM to establish a Blockchain-based registry of land titles.[88] Systemic issues in the lands sector such as accountability, opaqueness of transactions, incoherence of data sets pertaining to any single of land, and delays or proliferation of deceit in management of land records can be solved by use of an appropriate Blockchain architecture.[89] In order to use of Blockchain in creating an immutable land title registry, first, the title deeds have to be digitized and land allocation and registration harmonized to correctly reflect public, private and community land ownership. This may require the endorsement of a legislation in order to take effect. In

[86] Jesse Chase-Lubitz, 'Kenya Arrests 17 for Corruption Over US$3 Billion Railway' (OCCRP, 13 August 2018) < https://www.occrp.org/en/daily/8448-kenya-arrests-17-for-corruption-over-3-billion-railway> accessed 5 February 2021, [2].
[87] N 84.
[88] N 84, p. 4 [2].
[89] Vinay Thakur, M.N. Doja and Yogesh Dwivedi and others, 'Land Records in Blockchain for Implementation of Land Titling in India', IJIM Vol. 52, 8 June 2019.

2018, The Law Society of Kenya (LSK) filed a lawsuit and won to bar The Ministry of Lands and Physical Planning from digitizing land title register indicating that the process risked being corrupted.[90] The initiative was meant to make it easy for people to access land titles especially for community land. According to Patricia Kameri-Mbote, Intellectual Property (IP) is fast becoming a vital aspect of international trade.[91] The Constitution of Kenya guarantees protection for the intellectual property rights of Kenyans.[92] Entrenching this right in the constitution demonstrates the progressive reforms that Kenya have gone through to recognize new developments in the economy, for instance, where musicians can earn from their talent.

As emerging technologies gain momentum, and as telecommunication industry grows with more people owning mobile phones in Kenya than those that do not, data is becoming invaluable in daily business operations. NKOR, an Ethereum-based innovation designed for safe recording, tracing and sharing of data, is seeking to revolutionize the commercial aspect of protection rights and IP.[93]

According to World Intellectual Property Organization (WIPO), Blockchain can be used in IP registration and protection especially in IP-heavy industries such as in digital content, technology and medical research, innovation and development.[94] Government agencies in charge of IP may need to streamline the relevant laws in order to boost adoption of Blockchain in IP registration

[90] Thomson Reuters Foundation, 'Land registry digitization could invalidate thousands of cases - LSK' (The Star, 8 May 2018) < https://www.the-star.co.ke/news/2018-05-08-land-registry-digitisation-could-invalidate-thousands-of-cases-lsk/> accessed 5 February 2021, [1-2].

[91] Patricia Kameri-Mbote, Intellectual Property Protection in Africa: An Assessment of the Status of Laws, Research and Policy Analysis on Intellectual Property Rights in Kenya. International Environmental Law Research Center (IELRC), IELRC Working Paper 2005 - 2, p 1 [3].

[92] Article 11 (1) (c), Constitution of Kenya (2010).

[93] N 21, p. 109-110.

[94] Birgit Clark, 'Blockchain and IP Law: A Match Made in Crypto Heaven?' (WIPO, February 2018) < https://www.wipo.int/wipo_magazine/en/2018/01/article_0005.html> accessed 5 February 2021, [5].

and protection. WIPO further acknowledged the challenge of a non-supportive regulatory environment, stating thus:

> *"There are various potential hurdles to large-scale legal application (including questions of governing laws and jurisdictions, data security and privacy concerns)."*[95]

ICT and Data Privacy Laws

The ICT industry has gone through some of the most disruptive transformations by new innovations. In this fourth industrial revolution, ICT is at the center of almost every commercial engagement whether directly or indirectly. The expanding mobile and digital financial services have driven the massive growth in Africa's ICT sector.[96] Statistics show that about half of the global mobile money accounts were in Africa as at 2018 and is poised to experience the fastest growth through to 2025.[97] Advancing Kenya's ICT infrastructure is instrumental in modernizing business process, increasing production, and positioning Kenya on the global arena. The Konza Technology City[98], among other projects overseen by the Ministry of ICT, are advancing Kenya's ICT landscape. Goal 9 of the Sustainable Development Goals (SDGs) states "Build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation".[99] This goal, also vitally supported by the United Nations Industrial Development Organization (UNIDO), emphasizes the importance of building a supportive ICT infrastructure which is also key in promoting innovation and sustainable industrialization.

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[95] *Ibid.*

[96] Njuguna Ndun'gu and Landry Signe, 'The Fourth Industrial Revolution and digitization will transform Africa into a global powerhouse.' Foresight Africa, 61.

[97] *Ibid.*

[98] "Konza (Konza Technopolis) is a key flagship project of Kenya's Vision 2030 economic development portfolio. Konza will be a world-class city, powered by a thriving information, communications and technology (ICT) sector, superior reliable infrastructure and business friendly governance systems." –Konza.go.ke

[99] Li Yong, 'How infrastructure is crucial in achieving the SDGs in the era of the Fourth Industrial Revolution' (ITU News, Emerging Trends, 14, June 2017) < https://news.itu.int/ict-infrastructure-crucial-achieving-sdgs-era-fourth-industrial-revolution/> accessed 6 January 2021, [5].

At the center of a fully, efficiently operational ICT infrastructure is a robust data infrastructure that ensures that data is handled and interpreted appropriately. The more people own mobile phones and or other smart devices, and the more they can access internet connection, data will continue to be grow in value. Africa boasts of the largest number of mobile money accounts,[100] thus most business operations are increasingly becoming data centric.

Data is the new oil in a technology world, thus it is an asset. Foreign companies such as Facebook have often exploited or misused data from Africa. Enforcement of data protection laws will help protect data as an asset.[101] The enactment of the Data Protection Act 2019 which establishes the Office of a Data Commissioner[102] is good progress for Kenya in implementing the

[100] N 96.

[101] Abdi Dahir, 'Africa isn't ready to protect its citizens personal data even as EU champions digital privacy' (Quartz Africa, 8 May 2018) <https://qz.com/africa/1271756/africa-isnt-ready-to-protect-its-citizens-personal-data-even-as-eu-champions-digital-privacy/> accessed 2 January 2021, [1, 2, & 3].

[102] The roles of the Office of the Data Commissioner as highlighted in Section 9 of the Data Protection Act 2019 include:

> (a) oversee the implementation of and be responsible for the enforcement of this Act;
>
> (b) establish and maintain a register of data controllers and data processors;
>
> (c) exercise oversight on data processing operations, either of own motion or at the re
> verify whether the processing of data is done in accordance with this Act;
>
> (d) promote self-regulation among data controllers and data processors;
>
> (e) conduct an assessment, on its own initiative of a public or private body, or at the re
> body for the purpose of ascertaining whether information is processed according to
> or any other relevant law;
>
> (f) receive and investigate any complaint by any person on infringements of the rights u
>
> (g) take such measures as may be necessary to bring the provisions of this Act to the
> public;
>
> (h) carry out inspections of public and private entities with a view to evaluating the pro
>
> (i) promote international cooperation in matters relating to data protection and ensure co
> protection obligations under international conventions and agreements;

guarantees of Article 31 of the Constitution of Kenya that provides that "Every person has the right to privacy, which includes the right not to have –

> *(c) information relating to their family or private affairs unnecessarily required or revealed, or*
> *(d) the privacy of their communication infringed."*

In the Consolidated Petitions No. 56, 58 and 59 of 2019, where the legality of the establishment of the National Integrated Identity Management System (NIIMS) was being contested, an in its determination to the issue of whether there was violation of threatened violation of the right to privacy, the judge of the High Court stated:

> *"We considered in this regard the scope and content of the right to privacy including information, and found that biometric data and GPS coordinates required by the impugned amendments are personal, sensitive and intrusive data that requires protection. Even though there was no evidence brought by the Petitioners of any violations of rights to privacy in this respect, we also found that the impugned amendments impose an obligations on the relevant Respondents to put in place measures to protect the personal data."*[103]

The emerging technologies, including Blockchain, AI, Machine Learning, Big Data and others, all rely on the availability of quality data. The increasing reliance on data by economies through adoption of the frontier technologies will further make data a valuable asset and raw material in Kenya and globally. Legislators must consistently make new laws or reform existing laws to ensure

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(j) undertake research on developments in data processing of personal data and ensure risk or adverse effect of any developments on the privacy of individuals; and

(k) perform such other functions as may be prescribed by any other law or as necessary of this Act.

[103] Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties) [2020] eKLR, Consolidated Petition No. 56, 58 and 59 of 2019, [1029].

that social, political and economic growth is not bridled, innovation is not dwarfed and data theft is curbed.

Conclusion

It is difficult to conclude such as a discussion that extends so widely into every single industry. However, this paper is inclined to give empirical evidence on the possible impacts of the emerging technologies on the development of law and legal practice. This paper has sufficiently established that social, economic and political development is dependent on the availability of appropriate legal infrastructures to enhance such developments. The future of law and legal practice is largely hinged on the level and speed of adoption and development of the various emerging technologies. Further research is needed to establish the extent of impact, the timelines of impact and the nature of impact of these technologies in the development of law and legal practice.

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Combating Climate Change in Kenya for Sustainable Development

By: ***Kariuki Muigua****

Abstract

Climate change is considered one of the major global challenges that countries have to contend with in their efforts towards achievement of the sustainable development agenda. Climate change affects not only national and global economy but also has a direct effect on the livelihoods of communities. It is for this reason that there have been global calls on governments and all other stakeholders to put in place climate change mitigation measures and ensure that their economies become resilient. Indeed, climate change is one of the main environmental goals under the United Nation's 2030 Agenda for Sustainable Development Goals as captured under Sustainable Development Goal 13 meant to help countries achieve resilience and build adaptive capacity. However, due to their development activities and approaches, both developed and developing countries have not managed to curb climate change. It is also acknowledged that due to their differing economies and unique challenges, developing countries have far much been affected by climate change compared to the developed countries. Kenya is no exception especially considering that its economy is considered to be agricultural based and much of its rural population is still highly dependent on agriculture and environment to meet their livelihood needs. This has resulted in environmental degradation due to pollution and indiscriminate use of available environmental and natural resources. This paper adds to the existing literature in this area on how the country can successfully combat climate change in its bid to achieve sustainable development. The major argument is that for the country to combat climate change, there is a need for an integrated approach that meaningfully involves all the stakeholders. The Government alone cannot possibly achieve this task. Climate change mitigation is an

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important step towards achieving sustainability in the country, without which the realisation of both the country's Vision 2030 and the United Nation's 2030 Agenda for Sustainable Development will remain a mirage.

1. Introduction

Climate change remains one of the main global challenges that has affected both developed and developing countries in their efforts towards achievement of the sustainable development agenda although it is arguable that the developing countries have been affected in greater ways.[1] This is because, since the environment remains the main source of raw materials for national development and a source of livelihoods for many communities especially those living within the rural settings, and climate change affects the ability of the environment to supply these needs, climate change has a direct effect on the livelihoods of communities as well as countries' ability to achieve growth and development. The year 2020 indeed proved how harsh climate change can be and Corona Virus pandemic (COVID-19) did not make things any better. It has been observed that from wildfires in California and locust attacks in Ethiopia and Kenya to job losses caused by pandemic lockdowns across the world, climate change and COVID-19 disrupted food production and tipped millions more people into hunger in 2020.[2] In addition, Oxfam has estimated that more than 50 million people in East and Central Africa require emergency food aid – and those numbers are set to rise as the region braces for a harsh

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[1] 'Unprecedented Impacts of Climate Change Disproportionately Burdening Developing Countries, Delegate Stresses, as Second Committee Concludes General Debate | Meetings Coverage and Press Releases' <https://www.un.org/press/en/2019/gaef3516.doc.htm> accessed 23 January 2021; 'Untitled' <https://unfccc.int/news/impacts-of-climate-change-on-sustainable-development-goals-highlighted-at-high-level-political-forum> accessed 23 January 2021.

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drought linked to the La Nina climate pattern, as well as more locust swarms.[3] Indeed, commentators have expressed their fears that the situation could worsen from the current year 2021 as both the coronavirus crisis and wild weather exacerbate fragile conditions linked to conflicts and poverty in many parts of the globe, with the head of the U.N. World Food Program (WFP) warning that "even before COVID-19 hit, 135 million people were marching towards the brink of starvation; this could double to 270 million within a few short months".[4]

Climate change thus remains a challenge to many because, as the United Nations Environment Programme observes, climate change is increasing the frequency and intensity of extreme weather events such as heat waves, droughts, floods and tropical cyclones, aggravating water management problems, reducing agricultural production and food security, increasing health risks, damaging critical infrastructure and interrupting the provision of basic services such water and sanitation, education, energy and transport.[5]
It is for this reason that there have been global calls on governments and all other stakeholders to put in place climate change mitigation measures and ensure that their economies become resilient. Climate change is one of the main environmental goals under the United Nation's *2030 Agenda for Sustainable Development Goals*[6] (SDGs) as captured under Sustainable Development Goal 13 meant to help countries achieve resilience and build adaptive capacity. SDG Goal 13 calls on countries to take urgent action to combat climate change and its impacts.[7] SDG Goal 13 targets require countries to: strengthen resilience and adaptive capacity to climate-related hazards and natural disasters in all countries;[8] integrate climate change measures into

[3] *Ibid*.
[4] *Ibid*; 'WFP Chief Warns of Hunger Pandemic as COVID-19 Spreads (Statement to UN Security Council) | World Food Programme' <https://www.wfp.org/news/wfp-chief-warns-hunger-pandemic-covid-19-spreads-statement-un-security-council> accessed 17 January 2021.
[5]Environment UN, 'GOAL 13: Climate Action' (*UNEP - UN Environment Programme*, 2 October 2017) <http://www.unenvironment.org/explore-topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-13> accessed 17 January 2021.
[6] UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.
[7] Sustainable Development Goal 13.
[8] Target 13.1, SDG Goal 13.

national policies, strategies and planning;[9] improve education, awareness-raising and human and institutional capacity on climate change mitigation, adaptation, impact reduction and early warning;[10] implement the commitment undertaken by developed-country parties to the United Nations Framework Convention on Climate Change to a goal of mobilizing jointly $100 billion annually by 2020 from all sources to address the needs of developing countries in the context of meaningful mitigation actions and transparency on implementation and fully operationalize the Green Climate Fund through its capitalization as soon as possible;[11] and promote mechanisms for raising capacity for effective climate change-related planning and management in least developed countries and small island developing States, including focusing on women, youth and local and marginalized communities[12]. Notably, the 2030 Agenda acknowledges that the United Nations Framework Convention on Climate Change is the primary international intergovernmental forum for negotiating the global response to climate change.[13]

The above goals and targets are commendable and are meant to help countries come up with climate change mitigation and adaptation mechanisms to combat the challenge of climate change. However, due to their development activities and approaches, both developed and developing countries have not managed to combat climate change. Indeed, it has been observed that despite the growing amount of climate change concern, mitigation efforts, legislation, and international agreements that have reduced emissions in some places, the continued economic growth of the less developed world has increased global greenhouse gases emission, with the time between 2000 and 2010 experiencing the largest increases since 1970.[14] According to scientific reports, the Earth's mean surface temperature in 2020 was 1.25°C above the

[9] Target 13.2, SDG Goal 13.
[10] Target 13.3, SDG Goal 13.
[11] Target 13.a, SDG Goal 13.
[12] Target 13.b, SDG Goal 13.
[13] See DGS Goal 13 (asterisk).
[14] '15.5: Anthropogenic Causes of Climate Change' (*Geosciences LibreTexts*, 4 November 2019) <https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_(Johnson_Affolter_Inkenbrandt_and_Mosher)/15%3A_Global_Climate_Change/15.05%3A_Anthropogenic_Causes_of_Climate_Change> accessed 17 January 2021.

global average between 1850 and 1900, largely attributable to greenhouse gases from human activities.[15] It has also been reported that human activities are estimated to have caused approximately 1.0°C of global warming above pre-industrial levels, with a likely range of 0.8°C to 1.2°C and global warming is likely to reach 1.5°C between 2030 and 2052 if it continues to increase at the current rate.[16]

It must also acknowledged that due to their differing economies and unique challenges, developing countries have far much been affected by climate change compared to the developed countries.[17] Kenya is no exception especially considering that its economy is considered to be agricultural based and much of its rural population is still highly dependent on agriculture and environment to meet their livelihood needs.[18] This has resulted in environmental degradation due to pollution and indiscriminate use of available environmental and natural resources.[19] This paper adds to the existing literature in this area on how the country can successfully combat climate change in its bid to achieve sustainable development. It is imperative that countries combat climate change urgently considering that it is estimated that

[15]Wilby R, 'Climate Change: What Would 4°C of Global Warming Feel Like?' (*The Conversation*) <http://theconversation.com/climate-change-what-would-4-c-of-global-warming-feel-like-152625> accessed 17 January 2021.

[16]'Summary for Policymakers — Global Warming of 1.5 ºC' <https://www.ipcc.ch/sr15/chapter/spm/> accessed 17 January 2021.

[17]'Unprecedented Impacts of Climate Change Disproportionately Burdening Developing Countries, Delegate Stresses, as Second Committee Concludes General Debate | Meetings Coverage and Press Releases' <https://www.un.org/press/en/2019/gaef3516.doc.htm> accessed 23 January 2021.

[18] Alila, Patrick O., and Rosemary Atieno. "Agricultural policy in Kenya: Issues and processes." *Nairobi: Institute of Development Studies* (2006); Faling, Marijn. "Framing agriculture and climate in Kenyan policies: A longitudinal perspective." *Environmental Science & Policy* 106 (2020): 228-239; Faling, Marijn, and Robbert Biesbroek. "Cross-boundary policy entrepreneurship for climate-smart agriculture in Kenya." *Policy Sciences* 52, no. 4 (2019): 525-547; Haradhan Kumar Mohajan, 'Food and Nutrition Scenario of Kenya' (2014) 2 American Journal of Food and Nutrition 28.

[19] Abioye O Fayiga, Mabel O Ipinmoroti and Tait Chirenje, 'Environmental Pollution in Africa' (2018) 20 Environment, Development and Sustainability 41.; '(PDF) Environmental Degradation: Causes, Impacts and Mitigation' (*ResearchGate*) <https://www.researchgate.net/publication/279201881_Environmental_Degradation_Causes_Impacts_and_Mitigation> accessed 23 January 2021.

without action, by 2050, 68% of humanity may live in urban areas and populations in the tropics will be most exposed to extreme humid heat.[20] The World has been struggling with COVID-19 pandemic since March 2020 and the negative effect on economies and livelihoods has been enormous. Despite this, some commentators have argued that climate change could be more devastating than Covid-19.[21]

2. Climate Change: Definition and Causes

Climate is defined as the temperature and precipitation patterns and range of variability averaged over the long-term for a particular region.[22] On the other hand, climate change has been defined as 'a long-term shift in the average weather conditions of a region, such as its typical temperature, rainfall, and windiness'.[23] The *United Nations Framework Convention on Climate Change*[24](UNFCCC) defines "climate change" to mean a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.[25]

It has been pointed out that while prehistoric changes in climate have been very slow since climate changes typically occur slowly over many millions of

[20]Wilby R, 'Climate Change: What Would 4°C of Global Warming Feel Like?' (*The Conversation*) <http://theconversation.com/climate-change-what-would-4-c-of-global-warming-feel-like-152625> accessed 17 January 2021.

[21]Clifford C, 'Bill Gates: Climate Change Could Be More Devastating than Covid-19 Pandemic—This Is What the US Must Do to Prepare' (*CNBC*, 8 January 2021) <https://www.cnbc.com/2021/01/08/bill-gates-climate-change-could-be-worse-than-covid-19.html> accessed 17 January 2021.

[22] '15.1: Global Climate Change' (*Geosciences LibreTexts*, 26 December 2019) <https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_(Johnson_Affolter_Inkenbrandt_and_Mosher)/15%3A_Global_Climate_Change/15.01%3A_Global_Climate_Change> accessed 17 January 2021.

[23] Canada E and CC, 'Climate Change Concepts' (*aem*, 26 September 2018) <https://www.canada.ca/en/environment-climate-change/services/climate-change/canadian-centre-climate-services/basics/concepts.html> accessed 17 January 2021.

[24] UN General Assembly, *United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly*, 20 January 1994, A/RES/48/189.

[25] *Ibid*, Article 1(2).

years, the climate changes observed today are rapid and largely human-caused.[26]

According to the available scientific data, anthropogenicclimate change, or, human-caused climate change is believed to be causing rapid changes to the climate, which will cause severe environmental damage.[27] This is mainly attributed to anthropogenic greenhouse gases emissions, mostly carbon dioxide (CO_2), from fossil fuel combustion and industrial processes and the following economic sectors: electricity and heat production; agriculture, forestry, and land use; industry; transportation including automobiles; other energy production; and buildings.[28]

3. The Legal Framework on Climate Change Mitigation and Adaptation

Climate change mitigation has been defined as a human-mediated reduction of the anthropogenic forcing of the climate system that includes strategies to reduce GHG sources and emissions and enhancing GHG sinks.[29] At the global scene, there exist a number of related environmental legal instruments, plans and programmes aimed at combating climate change.

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[26] '15.5: Anthropogenic Causes of Climate Change' (*Geosciences LibreTexts*, 4 November 2019) <https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_(Johnson_Affolter_Inkenbrandt_and_Mosher)/15%3A_Global_Climate_Change/15.05%3A_Anthropogenic_Causes_of_Climate_Change> accessed 17 January 2021.

[27] *Ibid*.

[28] '15.5: Anthropogenic Causes of Climate Change' (*Geosciences LibreTexts*, 4 November 2019) <https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_(Johnson_Affolter_Inkenbrandt_and_Mosher)/15%3A_Global_Climate_Change/15.05%3A_Anthropogenic_Causes_of_Climate_Change> accessed 17 January 2021; 'How We Know Today's Climate Change Is Not Natural' (*State of the Planet*, 4 April 2017) <https://blogs.ei.columbia.edu/2017/04/04/how-we-know-climate-change-is-not-natural/> accessed 17 January 2021; 'The Science of Carbon Dioxide and Climate' (*State of the Planet*, 10 March 2017) <https://blogs.ei.columbia.edu/2017/03/10/the-science-of-carbon-dioxide-and-climate/> accessed 17 January 2021.

[29] Rinku Singh and GS Singh, 'Traditional Agriculture: A Climate-Smart Approach for Sustainable Food Production' (2017) 2 Energy, Ecology and Environment 296.

4. International Legal Framework on Climate Change Mitigation and Adaptation

4.1 Montreal Protocol on Substances the Deplete the Ozone Layer

The *Montreal Protocol on Substances the Deplete the Ozone Layer* was signed in 1987 and entered into force in 1989 as a global agreement to protect the Earth's ozone layer by phasing out the chemicals that deplete it, a plan that includes both the production and consumption of ozone-depleting substances.[30] The Protocol is believed to have successfully met its objectives thus far as it continues to safeguard the ozone layer today.[31]

4.2 Vienna Convention for the Protection of the Ozone Layer

The Vienna Convention for the Protection of the Ozone Layer was the first convention of any kind to be signed by every country involved, taking effect in 1988 and reaching universal ratification in 2009.[32] The Vienna Convention obligates the Parties to take appropriate measures in accordance with theprovisions of this Convention and of those protocols in force towhich they are party to protect human health and the environmentagainst adverse effects resulting or likely to result from humanactivities which modify or are likely to modify the ozone layer.[33]

4.3 The Kyoto Protocol

The *Kyoto Protocol*was adopted on 11 December 1997 and entered into force on 16 February 2005, currently with 192 Parties.[34]The Kyoto protocol was the first agreement between nations to mandate country-by-country reductions in greenhouse-gas emissions. Kyoto emerged from the UN Framework Convention on Climate Change (UNFCCC), which was signed by nearly all nations at the 1992 Earth Summit.[35] The Kyoto Protocol operationalizes the

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[30] 'The Montreal Protocol on Substances That Deplete the Ozone Layer | Ozone Secretariat' <https://ozone.unep.org/treaties/montreal-protocol/montreal-protocol-substances-deplete-ozone-layer> accessed 21 January 2021.

[31] *Ibid.*

[32] 'The Vienna Convention for the Protection of the Ozone Layer | Ozone Secretariat' <https://ozone.unep.org/treaties/vienna-convention> accessed 21 January 2021.

[33]Vienna Convention for the Protection of the Ozone Layer , Article 2(1).

[34] 'Untitled' <https://unfccc.int/kyoto_protocol> accessed 21 January 2021.

[35] Extract from The Rough Guide to Climate Change, 'What Is the Kyoto Protocol and Has It Made Any Difference?' (*the Guardian,* 11 March 2011)

United Nations Framework Convention on Climate Change by committing industrialized countries and economies in transition to limit and reduce greenhouse gases (GHG) emissions in accordance with agreed individual targets,[36] whereas the Convention itself only asks those countries to adopt policies and measures on mitigation and to report periodically.[37] Notably, the Kyoto Protocol only binds developed countries, and places a heavier burden on them under the principle of "common but differentiated responsibility and respective capabilities", because it recognizes that they are largely responsible for the current high levels of GHG emissions in the atmosphere.[38] While industrialized nations pledged to cut their yearly emissions of carbon, as measured in six greenhouse gases, by varying amounts, averaging 5.2%, by 2012 as compared to 1990, some almost achieved these targets while others like China and United States exceeded the targets by producing more carbon to the point of cancelling the progress made by all other states.[39] In addition, some countries such as India and China were never in the list of the original 37 developed countries bound by the Protocol yet China and India together account for approximately 35% of total carbon emissions, as of 2020, while the developed nations of the UK, France, and Germany combined, only account for 4% of the world's carbon emissions.[40] The Kyoto Protocol was essentially replaced by the Paris Climate Accord in 2015.[41]

4.4 Doha Amendment to the Kyoto Protocol

Parties to the Kyoto Protocol adopted an amendment to the Kyoto Protocol by decision 1/CMP.8 in accordance with Articles 20 and 21 of the Kyoto Protocol, at the eighth session of the Conference of the Parties serving as the

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<http://www.theguardian.com/environment/2011/mar/11/kyoto-protocol> accessed 21 January 2021.

[36] 'Untitled' <https://unfccc.int/kyoto_protocol> accessed 21 January 2021.

[37] *Ibid.*

[38] *Ibid.*

[39] Extract from The Rough Guide to Climate Change, 'What Is the Kyoto Protocol and Has It Made Any Difference?' (*the Guardian*, 11 March 2011) <http://www.theguardian.com/environment/2011/mar/11/kyoto-protocol> accessed 21 January 2021.

[40] 'Kyoto Protocol - Overview, Components, Current State' (*Corporate Finance Institute*) <https://corporatefinanceinstitute.com/resources/knowledge/other/kyoto-protocol/> accessed 21 January 2021.

[41] *Ibid.*

meeting of the Parties to the Kyoto Protocol (CMP) held in Doha, Qatar, on 8 December 2012.[42]As of 28 October 2020**,** 147 Parties had deposited their instrument of acceptance, therefore, the threshold for entry into force of the Doha Amendment had been met.[43]

The Doha Amendment refers to the changes made to the Kyoto Protocol in 2012, after the First Commitment Period of the Kyoto Protocol concluded. The Amendment adds new emission reduction targets for Second Commitment Period (2012-2020) for participating countries.[44]

4.5 Paris Climate Accord, 2015

The Paris Agreement is a legally binding international treaty on climate change, adopted by 196 Parties at COP 21 in Paris, on 12 December 2015 and entered into force on 4 November 2016.[45] Its goal is to limit global warming to well below 2, preferably to 1.5 degrees Celsius**,** compared to pre-industrial levels.[46] Unlike the Kyoto Protocol, the Paris Agreement is in the multilateral climate change process because, for the first time, a binding agreement brings all nations into a common cause to undertake ambitious efforts to combat climate change and adapt to its effects.[47]

The 26th UN Climate Change Conference of the Parties (COP26) will be held in Glasgow from 1st to 12thNovember 2021.[48] The COP26 summit is expected to bring parties together to accelerate action towards the goals of the Paris Agreement and the UN Framework Convention on Climate Change.[49]

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[42]'Untitled'<https://unfccc.int/process/the-kyoto-protocol/the-doha-amendment> accessed 21 January 2021.

[43] *Ibid.*

[44]'Doha Amendment to the Kyoto Protocol (2012)' (*Cop23*) <https://cop23.com.fj/knowledge/doha-amendment-kyoto-protocol-2012/> accessed 21 January 2021.

[45] 'Untitled' <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement> accessed 21 January 2021.

[46] *Ibid.*

[47] *Ibid.*

[48] 'UN Climate Change Conference (COP26) at the SEC – Glasgow 2021' (*UN Climate Change Conference (COP26) at the SEC – Glasgow 2021*) <https://ukcop26.org/> accessed 17 January 2021.

[49] *Ibid.*

4.6 United Nations Convention to Combat Desertification

The objective of the *United Nations Convention to Combat Desertification*[50] is to combat desertification and mitigate the effects of drought in countries experiencing serious drought and/or desertification, particularly in Africa, through effective action at all levels, supported by international cooperation and partnership arrangements, in the framework of an integrated approach which is consistent with Agenda 21, with a view to contributing to the achievement of sustainable development in affected areas.[51] This is to be achieved through long-term integrated strategies that focus simultaneously, in affected areas, on improved productivity of land, and the rehabilitation, conservation and sustainable management of land and water resources, leading to improved living conditions, in particular at the community level.[52]

4.7 Agenda 21

Agenda 21 s a comprehensive plan of action to be taken globally, nationally and locally by organizations of the United Nations System, Governments, and Major Groups in every area in which human impacts on the environment.[53]

4.8 United Nations Framework Convention on Climate Change (UNFCC

The *United Nations Framework Convention on Climate Change*[54] was passed to achieve, in accordance with the relevant provisions of the Convention,stabilization of greenhouse gas concentrations in the atmosphere, at alevel that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-framesufficient to allow ecosystems to adapt naturally to climate change, toensure that food production is not threatened and to enable economicdevelopment to proceed in a sustainable manner.[55]

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[50]United Nations Convention to Combat Desertification (1994).
[51] Article 2(1).
[52] Article 2(2).
[53]'Agenda 21 .:. Sustainable Development Knowledge Platform' <https://sustainabledevelopment.un.org/outcomedocuments/agenda21> accessed 21 January 2021.
[54] UN General Assembly, *United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly*, 20 January 1994, A/RES/48/189.
[55] *Ibid*, Article 2.

In their actions to achieve the objective of the Convention and to implement its provisions, the Parties are to be guided, *inter alia*, by the following principles: the Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof;[56] the specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration;[57] the Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors. Efforts to address climate change may be carried out cooperatively by interested Parties;[58] the Parties have a right to, and should, promote sustainable development. Policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change;[59] the Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change. Measures taken to combat climate change, including

[56] *United Nations Framework Convention on Climate Change,* Article 3(1).
[57] *United Nations Framework Convention on Climate Change,* Article 3(2).
[58] *United Nations Framework Convention on Climate Change,* Article 3(3).
[59] *Ibid,* Article 3(4).

unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.[60]

4.9 Intergovernmental Panel on Climate Change (IPCC)

The Intergovernmental Panel on Climate Change (IPCC) is the United Nations body established in 1988 for assessing the science related to climate change.[61]The Intergovernmental Panel on Climate Change (IPCC) collects, reviews, and summarizes the best information on climate change and its impacts, and puts forward possible solutions.[62] IPCC often discharges its work through scientific reports, summarizing current and relevant findings in the field and written for policymakers and scientists, but they are available to everyone.[63]

5. Kenya's Legal Framework on Climate Change Mitigation

5.1 Environmental Management and Co-ordination Act, 1999

The *Environmental Management and Co-ordination Act, 1999*[64](EMCA) mandates the Cabinet Secretary in charge of environmental matters in consultation with the National Environment Management Authority, to undertake or commission other persons to undertake national studies and give due recognition to developments in scientific knowledge relating to substances, activities and practices that deplete the ozone layer to the detriment of public health and the environment.[65] The Cabinet Secretary in consultation with the Authority, is then required to issue guidelines and institute programmes concerning the: elimination of substances that deplete the stratospheric ozone layer; controlling of activities and practices likely to lead to the degradation of the ozone layer and the stratosphere; reduction and minimisation of risks to human health created by the degradation of the ozone

[60] *Ibid*, Article 3(5).
[61] 'IPCC — Intergovernmental Panel on Climate Change' <https://www.ipcc.ch/> accessed 21 January 2021.
[62] 'The Intergovernmental Panel on Climate Change' (*MIT Climate Portal*) <https://climate.mit.edu/explainers/intergovernmental-panel-climate-change> accessed 21 January 2021.
[63] *Ibid*.
[64] Environmental Management and Co-ordination Act, No. 8 of 1999, Laws of Kenya.
[65] *Ibid*, sec. 56(1).

layer and the stratosphere; andformulate strategies, prepare and evaluate programmes for phasing out ozone depleting substances.[66]

The Act also mandates the Cabinet Secretary, in consultation with relevant lead agencies, to issue guidelines and prescribe measures on climate change.[67] EMCA also provides for fiscal incentives that are designed to promote climate change mitigation. It empowers the Cabinet Secretary responsible for Finance, on the recommendation of the National Council of Public benefit organizations, to propose to Government tax and other fiscal incentives, disincentives or fees to induce or promote the proper management of the environment and natural resources or the prevention or abatement of environmental degradation.[68] The tax and fiscal incentives, disincentives or fees may include: customs and excise waiver in respect of imported capital goods which prevent or substantially reduce environmental degradation caused by an undertaking; tax rebates to industries or other establishments that invest in plants, equipment and machinery for pollution control, re-cycling of wastes, water harvesting and conservation, prevention of floods and for using other energy resources as substitutes for hydrocarbons; tax disincentives to deter bad environmental behaviour that leads to depletion of environmental resources or that cause pollution; or user fees to ensure that those who use environmental resources pay proper value for the utilization of such resources.[69]

EMCA also provides for Strategic Environmental Assessments[70]; Environmental Impact Assessment[71]; Environmental Audit[72]; and Environmental Monitoring[73], all of which are meant to protect the environment from environmentally degrading human activities.

[66] *Ibid*, sec. 56(2).
[67] *Ibid*, sec. 56A.
[68]Environmental Management and Co-ordination Act, sec. 57(1).
[69] *Ibid*, sec. 57(2).
[70] *Ibid*, sec. 57A.
[71] *Ibid*, sec. 58.
[72] *Ibid*, sec. 68.
[73] *Ibid*, sec. 69.

5.2 Climate Change Action Plan 2018–2022

The Climate Change Action Plan 2018–2022[74] aims to further Kenya's development goals by providing mechanisms and measures that achieve low carbon climate resilient development. NCCAP 2018-2022 builds on the first action plan (2013-2017), sets out actions to implement the Climate Change Act (2016), and provides a framework for Kenya to deliver on its Nationally Determined Contribution (NDC) to the Paris Agreement.[75]

5.2 Climate Change Act, 2016

The Climate Change Act 2016[76] was enacted to provide for a regulatory framework for enhanced response to climate change; to provide for mechanism and measures to achieve low carbon climate development, and for connected purposes.[77] The Act is to be applied for the development, management, implementationand regulation of mechanisms to enhance climate change resilience and lowcarbon development for the sustainable development of Kenya.[78]

5.3 Climate Change Mitigation in Kenya: Challenges and Prospects

Africa is classified as one of the continents highly vulnerable to climate change due to several reasons: high poverty level, high dependence on rain-fed agriculture, poor management of natural resources, capacity/technology limitations, weak infrastructure, and less efficient governance/institutional setup.[79] Arguably, Kenya's challenges as far as combating climate change is concerned are not any different from the ones identified above.

Climate change impacts and the associated socio-economic losses on Kenya have been exacerbated by the country's high dependence on climate sensitive

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[74] Government of the Republic of Kenya (2018). *National Climate Change Action Plan 2018-2022*. Ministry of Environment and Forestry, Nairobi.

[75] National Climate Change Action Plan: 2018-2022, p.4.

[76] Climate Change Act, No. 11 of 2016, Laws of Kenya.

[77] *Ibid*, Preamble.

[78] *Ibid*, sec. 3(1).

[79]Kimaro, Didas N., Alfred N. Gichu, HezronMogaka, Brian E. Isabirye, and KifleWoldearegay. "Climate Change Mitigation and Adaptation in ECA/SADC/COMESA region: Opportunities and Challenges."<https://www.researchgate.net/publication/346628199_Climate_Change_Mitigation_and_Adaptation_in_ECASADCCOMESA_region_Opportunities_and_Challenges> accessed 17 January 2021.

natural resources.[80] The main climate hazards include droughts and floods which cause economic losses estimated at 3% of the country's Gross Domestic Product (GDP) while Kenya's total greenhouse gas (GHG) emissions are relatively low, out of which 75% are from the land use, land-use change and forestry and agriculture sectors.[81] Kenya's Vision 2030 which seeks to convert the country into a newly industrialized middle income country by 2030 is expected to increase emissions from the energy sector.[82]

Kenya's agricultural sector has been greatly affected by climate change and has also seen growth in use of farming chemicals. The growing population in Kenya coupled with dwindling rainfall and shrinking land parcels have all led to the adoption of modern commercial approaches to agricultural production to achieve food security which has coincidentallygreatly contributed to environmental degradation and climate change.[83]

As opposed to the highly commercialized agricultural practices, indigenous agriculture systems are believed to be diverse, adaptable, nature friendly and productive through such approaches as mixed cropping which not only decreases the risk of crop failure, pest and disease but also diversifies the food supply and the higher vegetation diversity in the form of crops and trees escalates the conversion of CO_2 to organic form, thus reducing global warming.[84]

Kenya submitted its Intended Nationally Determined Contribution (INDC) in 2015 as part of its obligations as a signatory and party to the United Nations Framework Convention on Climate Change (UNFCCC).[85] Their

[80]GoK, I. N. D. C. "Kenya's Intended Nationally Determined Contribution." (2015).
[81] *Ibid*.
[82] *Ibid*.
[83] Kioko, John, and Moses M. Okello. "Land use cover and environmental changes in a semi-arid rangeland, Southern Kenya." *Journal of Geography and Regional Planning* 3, no. 11 (2010): 322-326.
[84] Rinku Singh and GS Singh, 'Traditional Agriculture: A Climate-Smart Approach for Sustainable Food Production' (2017) 2 Energy, Ecology and Environment 296.
[85]SusWatch Kenya, 'Nationally Determined Contributions (NDCs)Implementation: The Kenyan Scenario,' *Policy Brief*, December 2019, 1 <https://www.inforse.org/africa/pdfs/PolicyBrief_Kenya_CSO_view_on_NDCs_Dec_2019.pdf> accessed 17 January 2021.

implementation is to begin in this year 2021. Some of the challenges identified are related to technical capacity and financial resource gaps.[86]

Kenya's updated Nationally Determined Contribution (NDC) to the United Nations Framework Convention on Climate Change (UNFCCC) submitted on 28th December 2020 sets out two important developments from its first NDC, which was submitted in December 2016. As compared to the first NDC target of 30% GHG emission reduction, the updated NDC commits to lower GHG emissions by 32% by 2030 relative to the business as usual (BAU) scenario.[87] In addition, while the first NDC was fully conditional to international support, the updated NDC intends to mobilize domestic resources to meet 13% of the estimated USD 62 Billion NDC implementation costs.[88]

6. Combating Climate Change for Sustainable Development: Way Forward

6.1 International Cooperation on Climate Change Mitigation

The World Food Programme has in the recent past observed that the coronavirus crisis has shown how faster international action and better cooperation in areas like science and technology could help tackle the problem (food shortage and climate change).[89]

There is a need for Kenya to work closely with other countries and stakeholders at the global level to combat climate change.

The Paris Agreement provides a framework for financial, technical and capacity building support to those countries that need it.[90] The Paris Agreement reaffirms that developed countries should take the lead in providing financial assistance to countries that are less endowed and more

[86] *Ibid.*

[87] 'NDC Update Kenya: Enhanced Reduction Target' (*Changing Transport*, 13 January 2021) <https://www.changing-transport.org/ndc-update-kenya-enhanced-reduction-target/> accessed 21 January 2021.

[88] *Ibid.*

[89] 'COVID-19 Caused Food Insecurity to Soar, But Climate Change Will Be Much Worse – Homeland Security Today' <https://www.hstoday.us/subject-matter-areas/emergency-preparedness/covid-19-caused-food-insecurity-to-soar-but-climate-change-will-be-much-worse/> accessed 17 January 2021.

[90] 'Untitled' <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement> accessed 21 January 2021.

vulnerable, while for the first time also encouraging voluntary contributions by other Parties, as climate finance is needed for mitigation and adaptation.[91]The Paris Agreement also encourages technology development and transfer for both improving resilience to climate change and reducing GHG emissions, by establishing a technology framework to provide overarching guidance to the well-functioning Technology Mechanism.[92] Also, in recognition of the fact that not all developing countries have sufficient capacities to deal with many of the challenges brought by climate change, the Paris Agreement places great emphasis on climate-related capacity-building for developing countries and requests all developed countries to enhance support for capacity-building actions in developing countries.[93]

Kenya's Government should also continually work closely with the UNEP in design and execution of climate change mitigation plans. UNEP assists countries all over the world in their efforts to create National Adaptation Plans (NAPs), which process seeks to identify medium- and long-term adaptation needs, informed by the latest climate science.[94] NAPs are meant to: reduce vulnerability to the impacts of climate change by building adaptive capacity and resilience; and integrate adaptation into new and existing policies and programmes, especially development strategies.[95]

6.2 Integrated Approach to Reduction of Greenhouse Gases Emission

It has been argued that the Paris Agreement's goal of staying under 2° Celsius and aiming for 1.5°C global warming, as compared to pre-industrial average global temperature, scientifically translates to limiting emissions of greenhouse gases within a finite global carbon budget.[96]

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[91] *Ibid*; see also UN General Assembly, *United Nations Framework Convention on Climate Change,* Article 11.

[92] *Ibid.*

[93] *Ibid*; 'Untitled' <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement/key-aspects-of-the-paris-agreement> accessed 21 January 2021.

[94] UN Environment, 'National Adaptation Plans' (*UNEP - UN Environment Programme*, 14 September 2017) <http://www.unenvironment.org/explore-topics/climate-change/what-we-do/climate-adaptation/national-adaptation-plans> accessed 21 January 2021.

[95] *Ibid.*

[96] 'Nature-Based Solutions for Better Climate Resilience: The Need to Scale up Ambition and Action | NDC Partnership' <https://ndcpartnership.org/nature-based-

As already pointed out, greenhouse gas emissions account for the largest causes of anthropogenic climate change. It has been reported that globally, the economic slowdown during the coronavirus pandemic was expected to slash emissions by 4-7% in 2020, bringing them close to where global emissions were in 2010.[97] However, concentrations of greenhouse gases are still rising rapidly in the atmosphere.[98]Cutting down greenhouse gas emissions can potentially reduce the impacts and costs associated with climate change.[99]

With the outbreak of COVID-19 pandemic, major cities around the world have reported an increase in the numbers of people cycling and walking in public spaces.[100] Cities such as Bogota, Berlin, Vancouver, New York, Paris and Berlin are reported to have expanded bike lanes and public paths to accommodate the extra cycling traffic, with Australia's New South Wales government also encouraging councils to follow suit.[101] The result has been a decline in global daily emissions, with the fall in road traffic being the main driver of the global emissions decline.[102] It is estimated that daily global CO_2 emissions decreased by –17% by early April 2020 compared with the mean 2019 levels, just under half from changes in surface transport.[103]

solutions-better-climate-resilience-need-scale-ambition-and-action> accessed 21 January 2021.

[97] Raymond C and Matthews T, 'Global Warming Now Pushing Heat into Territory Humans Cannot Tolerate' (*The Conversation*) <http://theconversation.com/global-warming-now-pushing-heat-into-territory-humans-cannot-tolerate-138343> accessed 17 January 2021.

[98] *Ibid.*

[99] UN Environment, 'Adaptation Gap Report 2020' (*UNEP - UN Environment Programme*, 9 January 2021) <http://www.unenvironment.org/resources/adaptation-gap-report-2020> accessed 20 January 2021; 'How to Boost Resilience to Climate Change - Adaptation Gap Report 2020 - YouTube' <https://www.youtube.com/watch?v=-KhZ16QPv2c&feature=youtu.be> accessed 20 January 2021.

[100]Quéré CL and others, 'Coronavirus Is a "sliding Doors" Moment. What We Do Now Could Change Earth's Trajectory' (*The Conversation*) <http://theconversation.com/coronavirus-is-a-sliding-doors-moment-what-we-do-now-could-change-earths-trajectory-137838> accessed 17 January 2021.

[101] *Ibid*.

[102] *Ibid*.

[103] Le Quéré C and others, 'Temporary Reduction in Daily Global CO 2 Emissions during the COVID-19 Forced Confinement' (2020) 10 Nature Climate Change 647.

The National and County Governments in Kenya could learn from these global trends and encourage more people to embrace cycling to and from work especially around major towns and the cities in Kenya by creating room for bike lanes and public paths as well as improving security in public places and enhancing road safety. This can potentially improve the country's chances of achieving climate mitigation due to the reduced daily emissions from traffic. It has been suggested that encouraging cycling and working from home to continue beyond the current pandemic is likely to help countries in meeting their climate goals.[104]

There is also a need for the country to embrace vehicle technology that emits less greenhouse gases such as electric vehicles and trains. While this will certainly require massive amount of investments and time, the investment will be worth it in the long run as far as reduction of greenhouse gas emissions is concerned.

The country has however shown some intended positive steps towards this. Notably, the transport sector makes up the biggest share of petroleum consumption in Kenya; as such about 67% of Kenya's energy-related CO_2 emissions and 11.3% of Kenya's total GHG emissions in 2015 came from transport-related activities (GHG inventory report, 2019).[105] Kenya thus seeks to implement low carbon and efficient transportation systems in its December 2020 updated NDC. These are:Upscaling the construction of roads to systematically harvest water and reduce flooding; Enhancing institutional capacities on climate proofing vulnerable road infrastructure through vulnerability assessments; and Promoting use of appropriate designs and building materials to enhance resilience of at least 4500 km of roads to climate risks.[106] Key actions for the transport sector include: Developing an affordable, safe and efficient public transport system, including a Bus Rapid Transit System in Nairobi and non-motorised transport facilities; Reducing fuel consumption and fuel overhead costs, including electrification of the Standard

[104]Quéré CL and others, 'Coronavirus Is a "sliding Doors" Moment. What We Do Now Could Change Earth's Trajectory' (*The Conversation*).
[105] 'NDC Update Kenya: Enhanced Reduction Target' (*Changing Transport*, 13 January 2021) <https://www.changing-transport.org/ndc-update-kenya-enhanced-reduction-target/> accessed 21 January 2021.
[106] *Ibid*.

Gauge Railway; Encouraging low-carbon technologies in the aviation and maritime sectors; Climate proofing transport infrastructure; Encouraging technologies such as development of electric modes of transport and research on renewable energy for powering different modes of transport; Creating awareness on issues such as fuel economy and electric mobility options; Putting enabling policies and regulations in place to facilitate implementation of the mitigation and adaptation actions.[107] There is also a need for the country to continually invest in renewable sources of energy such as solar, wind power, biogas, among others.[108]

The reduction of GHG emissions can also be done through, inter alia, involving the communities in nature-based solutions to reduce the emissions gap such as improved land use and management which may include low-emissions agriculture, agro-forestry, and ecosystem conservation and restoration all of which could achieve this task if properly implemented.[109] Nature-based solutions combine climate change mitigation, adaptation, disaster risk reduction, biodiversity conservation, and sustainable resource management.[110]

Reducing Emissions from Deforestation and Forest Degradation (REDD) is a mechanism that has been under negotiation by the United Nations Framework Convention on Climate Change (UNFCCC) since 2005, with the objective of mitigating climate change through reducing net emissions of greenhouse gases

[107] *Ibid*.
[108] Muigua, K., Exploring Alternative Sources of Energy in Kenya, *Journal of Conflict Management and Sustainable Development*, Volume 5, No 2, (October, 2020); Muigua, K., Towards Energy Justice in Kenya, February 2020, available at http://kmco.co.ke/wp-content/uploads/2020/01/Towards-Energy-Justice-in-Kenya.pdf; Muigua, K., Access to Energy as a Constitutional Right in Kenya, available at http://www.kmco.co.ke/attachments/article/118/Access%20to%20Energy%20as%20a%20Constitutional%20Right%20in%20Kenya-%20NOVEMBER%202013.pdf.
[109] 'Nature-Based Solutions for Better Climate Resilience: The Need to Scale up Ambition and Action | NDC Partnership' <https://ndcpartnership.org/nature-based-solutions-better-climate-resilience-need-scale-ambition-and-action> accessed 21 January 2021.
[110] *Ibid*.

through enhanced forest management, mostly in the developing countries.[111] Forests play an important role in reducing GHG emissions. The Constitution of Kenya 2010 obligates the State to ensure that the country achieves a land surface tree cover of at least 10 per cent.[112] It has been observed that past attempts to increase forest cover and address the problem of deforestation and forest degradation in the country have not been very successful due to a number of reasons: increasing demand for land for agriculture, settlement and other developments, high energy demand and inadequate funding to support investments in the forestry sector.[113]In order to overcome these challenges, Kenya's participation in REDD+ is premised on the conviction that the process holds great potential in supporting: realization of vision 2030 objectives of increasing forest cover to a minimum of 10%; access to international climate finance to support investments in the forestry sector; Government efforts in designing policies and measures to protect and improve its remaining forest resources in ways that improve local livelihoods and conserve biodiversity; realization of the National Climate Change Response Strategy (NCCRS) goals; and contribution to global climate change mitigation and adaptation efforts.[114]

These efforts coupled with lifestyle changes and investments in cleaner technologies can potentially reduce greenhouse gases emission in Kenya thus enabling the country to meet and even exceed its global country targets.

6.3 Inclusion of Communities in Climate Change Impact Reduction and Early Warning Systems

The United Nations describes early warning system as an adaptive measure for climate change, using integrated communication systems to help

[111]Kimaro, Didas N., Alfred N. Gichu, HezronMogaka, Brian E. Isabirye, and KifleWoldearegay. "Climate Change Mitigation and Adaptation in ECA/SADC/COMESA region: Opportunities and Challenges," 4.
[112] Article 69 (1), Constitution of Kenya 2010.
[113]Kimaro, Didas N., Alfred N. Gichu, HezronMogaka, Brian E. Isabirye, and KifleWoldearegay. "Climate Change Mitigation and Adaptation in ECA/SADC/COMESA region: Opportunities and Challenges," 16.
[114] *Ibid*.

communities prepare for hazardous climate-related events.[115] Such systems are meant to saves lives and jobs, land and infrastructures and supports long-term sustainability, as well as assisting public officials and administrators in their planning, saving money in the long run and protecting economies.[116]

The United Nation, working in diverse partnerships, has been putting in place a number of innovative early warning systems initiatives in vulnerable areas around the world, such as the Strengthening Climate Information and Early Warning Systems (SCIEWS) project, which is a comprehensive programme operating across Africa, Asia and the Pacific, meant to ensure preparedness and rapid response to natural disasters, using a model that integrates the components of risk knowledge, monitoring and predicting, dissemination of information and response to warnings.[117]

Such systems should actively and meaningfully involve local communities, because as it has been observed, indigenous people are good observers of changes in weather and climate and acclimatize through several adaptive and mitigation strategies.[118]

6.4 Environmental Education and Creating Awareness on Climate Change Mitigation and Resilience

It has been argued that it is critically important to be aware of the geologic context of climate change processes if we are to understand the anthropogenic (human-caused) climate change because, firstly, this awareness increases the understanding of how and why our activities are causing present-day climate change, and secondly, it allows us to distinguish between natural and anthropogenic processes in the climate record in the past.[119]

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[115]United Nations, 'Early Warning Systems' (*United Nations*) <https://www.un.org/en/climatechange/climate-solutions/early-warning-systems> accessed 20 January 2021.

[116] *Ibid*.

[117] *Ibid*.

[118] Rinku Singh and GS Singh, 'Traditional Agriculture: A Climate-Smart Approach for Sustainable Food Production' (2017) 2 Energy, Ecology and Environment 296.

[119] '15.1: Global Climate Change' (*Geosciences LibreTexts*, 26 December 2019) <https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_(Johnson_Affolter_Inkenbrandt_and_Mosher)/15%3A_Global_Climate_Change/15.01%3A_Global_Climate_Change> accessed 17 January 2021.

Resilience has been defined as the ability to deal with shocks and stress without crossing tipping points and applies to human and environmental systems, from individual households to financial systems, ecosystems, and the biosphere as a whole. Resilience also includes the capacity to adapt to the change, that is, to deal with change without crossing a threshold, and the ability to transform in situations of crises – essentially, the capacity to rebuild livelihoods or functioning ecosystems after crossing a tipping point.[120]
For mitigation planning, the primary goal is to reduce current and future direct and indirect GHG emissions, particularly from energy production, land use, waste, industry, the built environment infrastructure, and transportation.[121] The primary goal of adaptation is to adjust the built, social, and eco-logical environment to minimize the negative impacts of both slow-onset and extreme events caused by climate change, such as sea-level rise, floods, droughts, storms, and heat waves.[122]

Arguably, conservation, restoration, and the management of ecosystems play a crucial role in climate change mitigation (for instance, through land use forms that maintain carbon stocks, carbon sequestration and the reduction of greenhouse gas emissions), which practices can be important for climate change adaptation, buffering societies from the impacts of climate change and reducing disaster risk.[123]

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[120] 'Nature-Based Solutions for Better Climate Resilience: The Need to Scale up Ambition and Action | NDC Partnership' <https://ndcpartnership.org/nature-based-solutions-better-climate-resilience-need-scale-ambition-and-action> accessed 21 January 2021.
[121]Grafakos, S., Pacteau, C., Delgado, M., Landauer, M., Lucon, O., and Driscoll, P. (2018). Integrating mitigation and adaptation: Opportunities and challenges. In Rosenzweig, C., W. Solecki, P. Romero-Lankao, S. Mehrotra, S. Dhakal, and S. Ali Ibrahim (eds.), Climate Change and Cities: Second Assessment Report of the Urban Climate Change Research Network. Cambridge University Press. New York. 101–138, 103 < https://uccrn.ei.columbia.edu/sites/default/files/content/pubs/ARC3.2-PDF-Chapter-4-Mitigation-and-Adaptation-wecompress.com_.pdf> accessed 17 January 2021.
[122] *Ibid*.
[123] 'Nature-Based Solutions for Better Climate Resilience: The Need to Scale up Ambition and Action | NDC Partnership' <https://ndcpartnership.org/nature-based-solutions-better-climate-resilience-need-scale-ambition-and-action> accessed 21 January 2021.

There is a need for government bodies in charge of various but relevant sectors to work closely with communities as a way of creating awareness on how their day to day activities are likely to affect the environment and the climatic conditions in general. Dissemination of environmental knowledge as well as creating opportunities for collaborative approaches to combating climate change can go a long way in not only mitigation and adaptation measures but also creating resilient economies and livelihoods. Arguably, in many decision-making processes, perceptions matter more than facts because how we feel about a risk (subjective perceptions of risk) influences what we pay attention to in complicated situations and how we approach and solve problems. Failure to acknowledge this may create and widen the gap between what experts perceive as risk and what the public perceives as risk.[124]

Climate change knowledge should also be incorporated into the primary, secondary and all tertiary level curricula in order to inculcate a sense of environmental ethics in all people from an early age and to ensure that the knowledge acquired will go a long way in combating climate change.

These efforts should be guided by, inter alia, Article 6 of UNFCCC which states that: in carrying out their commitments under Article 4, paragraph 1 (i),the Parties shall: Promote and facilitate at the national and, as appropriate,subregional and regional levels, and in accordance with national laws and regulations, and within their respective capacities:(i) the development and implementation of educational and public awareness programmes on climate change and its effects;(ii) public access to information on climate change and its effects;(iii) public participation in addressing climate change and its effects and developing adequate responses; and (iv) training of scientific, technical and managerial personnel; Cooperate in and promote, at the international level, and, where appropriate, using existing bodies:(i) the development and exchange of educational and public awareness material on climate change and its effects; and(ii) the development and

[124]Grafakos, S., Pacteau, C., Delgado, M., Landauer, M., Lucon, O., and Driscoll, P. (2018). Integrating mitigation and adaptation: Opportunities and challenges. In Rosenzweig, C., W. Solecki, P. Romero-Lankao, S. Mehrotra, S. Dhakal, and S. Ali Ibrahim (eds.), Climate Change and Cities: Second Assessment Report of the Urban Climate Change Research Network. Cambridge University Press. New York. 101–138, 133.

implementation of education and trainingprogrammes, including the strengthening of nationalinstitutions and the exchange or secondment of-personnel to train experts in this field, in particular for developing countries.[125]

6.5 Integrating Traditional Knowledge with Mainstream Scientific Knowledgefor Climate Mitigation and Adaptation

The Organisation for Economic Co-operation and Development (OECD), countries can use technological change to address climate change without compromising economic growth through ensuring that their climateand innovationpolicies provide the right incentives for the development and diffusion of "climate-friendly" technologies.[126] OECD recommends that this can be achieved through, inter alia: providing predictableand long-termpolicy signalsin order to givepotential innovators and adopters of climate-friendly technologies the confidence toundertake the necessary investments; using flexible policy measures to give potentialinnovators incentivesto identify the best way to meet climateobjectives, and to avoid locking-in technologies that may become inefficient in future; putting a price on Green House Gas (GHG) emissions, for examplethrough taxes or tradable permits,in order to provide incentives across all stages of the innovation cycle; providing anappropriate mix and sequencing of complementary policy measures in order to overcome barriers to development and diffusion of breakthrough technologies; balancing the benefits of technology-neutral policies with the need to direct technological changetoward climate-saving trajectories, by diversifying the portfolio of technologies for which support is provided and identifying general purpose technologies with environmental benefits; since the sources of innovation are widely-dispersed, supporting research and developmentin a broad portfolio of complementary fields, and not just energy, "climate-friendly‟ or 'environmental' Research and development (R&D); ensuring that international policy efforts maximise the potential for sharing of knowledge and technologies of mutual benefit, for example through international research-sharing agreements; and supporting international technology-orientedagreementsas an

[125] UN General Assembly, *United Nations Framework Convention on Climate Change*, Article 6.

[126] OECD, 'Promoting Technological Innovation to Address Climate Change,' (November 2011), 1 <http://www.oecd.org/env/cc/49076220.pdf>accessed 17 January 2021.

importantcomplement to other international efforts (e.g. emissions-based agreements).[127]

Kenya should review and align her science and technological innovation policies to the above recommendations from the OECD in order to ensure their maximum effectiveness in promoting innovation as a tool for combating climate change in the country. Indeed, the starting point should be the Constitution of Kenya. The Constitution of Kenya 2010 obligates the State to, *inter alia*: promote science and 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.[128]

The *Environmental Management and Co-ordination Act, 1999*[129] calls for integration of traditional knowledge for the conservation of biological diversity with mainstream scientific knowledge in conservation of conservation of biological resources *in situ.*[130] Investments in incentivized mitigation programmes, especially in agriculture and forestry, can offer mitigation benefits, increased productivity, improved livelihoods, biodiversity conservation and increased resilience to climate change.[131]

The *Science, Technology and Innovation Act, 2013*[132] 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.[133] The Act acknowledges that reference to **"**innovation" under the Act includes 'indigenous or traditional knowledge by community of beneficial properties of land, natural resources, including plant and animal resources and the environment', where **"**traditional knowledge" means the

[127] *Ibid*, 1.
[128] Article 11(2), Constitution of Kenya, 2010.
[129] Environmental Management and Co-ordination Act, No. 8 of 1999, Laws of Kenya.
[130] *Ibid*, sec. 51(f).
[131]Kimaro, Didas N., Alfred N. Gichu, HezronMogaka, Brian E. Isabirye, and KifleWoldearegay. "Climate Change Mitigation and Adaptation in ECA/SADC/COMESA region: Opportunities and Challenges," 4.
[132] Science, Technology and Innovation Act, No. 28 of 2013, Laws of Kenya.
[133] *Ibid*, Preamble.

wisdom developed over generations of holistic traditional scientific utilization of the lands, natural resources, and environment.[134]

The Act establishes the National Commission for Science, Technology and Innovation (NACOSTI)[135] whose objective is to regulate and assure quality in the science, technology and innovation sector and advise the Government in matters related thereto.[136] The Government, through NACOSTI should work closely with all learning institutions as well as stakeholders in the informal sector to not only tap into the innovations but to also identify the challenges that are affecting the growth and development of this sector. Science and

[134] *Ibid*, sec. 2; see also *Protection of Traditional Knowledge and Cultural Expressions Act*, No. 33 of 2016, Laws of Kenya.
[135] *Ibid*, sec. 3.
[136] *Ibid*. sec. 4. The functions of the Commission as set out under section 6 thereof are to: develop, in consultation with stakeholders, the priorities in scientific, technological and innovation activities in Kenya in relation to the economic and social policies of the Government, and the country's international commitments; lead inter-agency efforts to implement sound policies and budgets, working in collaboration with the county governments, and organisations involved in science and technology and innovation within Kenya and outside Kenya; advise the national and county governments on the science, technology and innovation policy, including general planning and assessment of the necessary financial resources; liaise with the National Innovation Agency and the National Research Fund to ensure funding and implementation of prioritized research programmes; ensure co-ordination and co-operation between the various agencies involved in science, technology and innovation; accredit research institutes and approve all Scientific research in Kenya; assure relevance and quality of science, technology and innovation programmes in research institutes; advise on science education and innovation at both basic and advanced levels; in consultation with the National Research Fund Trustees, sponsor national scientific and academic conferences it considers appropriate; advise the Government on policies and any issue relating to scientific research systems; promote increased awareness, knowledge and information of research system; co-ordinate, monitor and evaluate, as appropriate, activities relating to scientific research and technology development; promote and encourage private sector involvement in scientific research and innovation and development; annually, review the progress in scientific research systems and submit a report of its findings and recommendations to the Cabinet Secretary; promote the adoption and application of scientific and technological knowledge and information necessary in attaining national development goals; develop and enforce codes, guidelines and regulations in accordance with the policy determined under this Act for the governance, management and maintenance of standards and quality in research systems; and undertake, or cause to be undertaken, regular inspections, monitoring and evaluation of research institutions to ensure compliance with set standards and guidelines.

technological innovation should be encouraged through adequate funding as well as fiscal incentives and ensuring that there is a ready market for the same. If the Government can work with the locals, they will not only promote the development of science but will also create an opportunity to utilize the local innovations and ideas especially in environmental areas to combat climate change. NACOSTI should also closely work with the Kenya Institute for Public Policy Research and Analysis whose main functions include: identifying and undertaking independent and objective programmes of research and analysis, including macroeconomic, inter-disciplinary and sectoral studies on topics affecting public policy in areas such as human resource development, social welfare, environment and natural resources, agriculture and rural development, trade and industry, public finance, money and finance, macroeconomic and microeconomic modelling.[137] While coming up with approaches for reducing the country's climate risk and exposure to the main types of climate hazard, their design, implementation and management may and should indeed draw on local and traditional, as well as expert knowledge. Arguably, nature-based solutions – locally appropriate actions that address societal challenges, such as climate change, and provide human well-being and biodiversity benefits by protecting, sustainably managing and restoring natural or modified ecosystems – must become a priority when the government is coming up with solutions to the climate change challenges, with youth, women, indigenous peoples and local communities being key stakeholders.[138] It has rightly been pointed out that traditional knowledge is holistic in nature due to its multitude applications in diverse fields such as agriculture, climate, soils, hydrology, plants, animals, forests and human health.[139]

The above listed recommendations by the OECD should provide cue when it comes to creating a conducive policy and legal environment for science and innovation.

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[137] Kenya Institute for Public Policy Research and Analysis Act, No. 15 of 2006, Laws of Kenya, sec. 6(b).

[138] UN Environment, 'Adaptation Gap Report 2020' (*UNEP - UN Environment Programme*, 9 January 2021) <http://www.unenvironment.org/resources/adaptation-gap-report-2020> accessed 20 January 2021.

[139] Rinku Singh and GS Singh, 'Traditional Agriculture: A Climate-Smart Approach for Sustainable Food Production' (2017) 2 Energy, Ecology and Environment 296.

6.6 Diversification of Economic Activities for Poverty Eradication and Climate Change Mitigation and Adaptation

The World Bank observed in December 2020 that, considering that "the pandemic and global recession may cause over 1.4% of the world's population to fall into extreme poverty, in order to reverse this serious setback to development progress and poverty reduction, countries will need to prepare for a different economy post-COVID, by allowing capital, labour, skills, and innovation to move into new businesses and sectors."[140]

A chief scientist at the U.N. Food and Agriculture Organization (FAO) was recorded in 2020 affirming that farmers and poor urban residents have so far borne the brunt of the COVID-19 pandemic, meaning inequality between and within countries could deepen further in 2021.[141] This was mainly attributed to the fact that cut off from markets and with a plunge in customer demand, farmers struggled to sell their produce while informal workers in urban areas, living hand to mouth, found themselves jobless as lockdowns were imposed.[142] While the United Nations Sustainable Development Goals set to end hunger by 2030, the World Bank has observed that the COVID-19 pandemic is estimated to have pushed an additional 88 million to 115 million people into extreme poverty in the year 2020, with the total rising to as many as 150 million by 2021, depending on the severity of the economic contraction.[143]
There is a need for countries, including Kenya, to create a conducive environment that will allow their citizens to invest and explore new and emerging sectors such as information technology, science and technology, among others. This should target both urban and rural dwellers. This is because the World Bank has estimated that with the effects of COVID-19 expected to

[140] 'COVID-19 to Add as Many as 150 Million Extreme Poor by 2021' (*World Bank*) <https://www.worldbank.org/en/news/press-release/2020/10/07/covid-19-to-add-as-many-as-150-million-extreme-poor-by-2021> accessed 17 January 2021.
[141] 'COVID-19 Caused Food Insecurity to Soar, But Climate Change Will Be Much Worse – Homeland Security Today' <https://www.hstoday.us/subject-matter-areas/emergency-preparedness/covid-19-caused-food-insecurity-to-soar-but-climate-change-will-be-much-worse/> accessed 17 January 2021.
[142] *Ibid* .
[143] 'COVID-19 to Add as Many as 150 Million Extreme Poor by 2021' (*World Bank*) <https://www.worldbank.org/en/news/press-release/2020/10/07/covid-19-to-add-as-many-as-150-million-extreme-poor-by-2021> accessed 17 January 2021.

continue, increasing numbers of urban dwellers are expected to fall into extreme poverty, which has traditionally affected people in rural areas.[144]

6.7 Embracing Climate Resilient Agricultural Production Methods for Climate Change Mitigation and Poverty Reduction

It has rightly been pointed out that sustainable food production poses one of the major challenges of the twenty-first century in the era of global environmental problems such as climate change, increasing population and natural resource degradation including soil degradation and biodiversity loss, with climate change being among the greatest threats to agricultural systems.[145]

The adverse effect of agriculture on the environment and climate change (contributors of global warming through a share of about 10–12% increase in total anthropogenic GHG emission) has largely been attributed to the Green Revolution which though multiplied agricultural production several folds jeopardized the ecological integrity of agro ecosystems by intensive use of fossil fuels, natural resources, agrochemicals and machinery and subsequently threatened the age-old traditional agricultural practices.[146]

Arguably, achieving the goals of eradicating hunger and poverty by 2030 while addressing the climate change impacts need a climate-smart approach in agriculture, an approach based on the objectives of sustainably enhancing food production, climate adaptation and resilience and reduction in GHGs emission.[147]

Arguably, the negative impacts of climate change on production, incomes and well-being can be avoided or ameliorated through adaptation, which includes changes in agricultural practices as well as broader measures such as improved weather and early warning systems and risk management approaches.[148]

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[144] *Ibid*.
[145] Rinku Singh and GS Singh, 'Traditional Agriculture: A Climate-Smart Approach for Sustainable Food Production' (2017) 2 Energy, Ecology and Environment 296.
[146] *Ibid*.
[147] *Ibid*.
[148] McCarthy, N., Brubaker, J. 2014, Climate-Smart Agriculture and resource tenure in Sub-
Saharan Africa: a conceptual framework, Rome, FAO, 6.

Climate smart agriculture is described as an approach that provides a conceptual basis for assessing the effectiveness of agricultural practice change to support food security under climate change, with particular attention to sustainable land management.[149]

It has also been suggested that traditional practices like agro forestry, intercropping, crop rotation, cover cropping, traditional organic composting and integrated crop-animal farming all have potentials for enhancing crop productivity and mitigating climate change considering that indigenous farmers and local people perceive climate change in their own ways and prepare for it through various adaptation practices.[150]

The Government and other stakeholders should work closely with farmers to identify and explore the available opportunities for farmers to engage in sustainable farming practices, informed by both science and indigenous knowledge.

7. Conclusion

It has been observed that responding to climate change, reducing rural poverty and achieving global food and nutrition security are three urgent and interlinked problems facing the global community today.[151] The biggest threat to the 2030 Agenda is climate change, where the Sustainable Development Goals, from poverty eradication and ending hunger to conserving biodiversity and peace, will be unattainable if climate change is not urgently addressed.[152] Before the outbreak of Corona Virus pandemic, SDG Goal 13 aimed to mobilize US$100 billion annually by 2020 to address the needs of developing countries to both adapt to climate change and invest in low-carbon

[149] *Ibid*, 6.

[150] Rinku Singh and GS Singh, 'Traditional Agriculture: A Climate-Smart Approach for Sustainable Food Production' (2017) 2 Energy, Ecology and Environment 296.

[151] McCarthy, N., Brubaker, J. 2014, Climate-Smart Agriculture and resource tenure in Sub-Saharan Africa: a conceptual framework, Rome, FAO, 6 <https://www.researchgate.net/publication/279912013_Climate_Smart_Agriculture_and_Resource_Tenure_in_sub-Saharan_Africa_A_Conceptual_Framework>accessed 17 January 2021.

[152] 'Aligning SDG and Climate Action' (*Sustainable Goals*, 18 June 2019) <https://www.sustainablegoals.org.uk/aligning-sdg-and-climate-action/> accessed 21 January 2021.

development.[153] However, as things stand currently, countries also have to contend with the Covid-19 pandemic, further complicating the situation.

This paper has put across the argument is that for the country to combat climate change, there is a need for an integrated approach that meaningfully involves all the stakeholders. While it has been acknowledged that efforts to mitigate climate change require political action[154], Governments alone cannot possibly achieve this task. Climate change mitigation is an important step towards achieving sustainability in the country, without which the realisation of both the country's Vision 2030 and the United Nation's 2030 Agenda for Sustainable Development will remain a mirage. There is a need to adopt mitigation and adaptation approaches to address climate change. While mitigation and adaptation policies have different goals and opportunities for implementation, many drivers of mitigation and adaptation are common, and solutions can be interrelated.[155]

According to the***IPCC Fifth Assessment Report:***[156]

> *"[T]he more human activities disrupt the climate, the greater the risks of severe, pervasive and irreversible impacts for people and*

[153] 'Goal 13: Climate Action' (*UNDP*) <https://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-13-climate-action.html> accessed 21 January 2021.

[154] '15.5: Anthropogenic Causes of Climate Change' (*Geosciences LibreTexts*, 4 November 2019) <https://geo.libretexts.org/Bookshelves/Geology/Book%3A_An_Introduction_to_Geology_(Johnson_Affolter_Inkenbrandt_and_Mosher)/15%3A_Global_Climate_Change/15.05%3A_Anthropogenic_Causes_of_Climate_Change> accessed 17 January 2021.

[155]Grafakos, S., Pacteau, C., Delgado, M., Landauer, M., Lucon, O., and Driscoll, P. (2018). Integrating mitigation and adaptation: Opportunities and challenges. In Rosenzweig, C., W. Solecki, P. Romero-Lankao, S. Mehrotra, S. Dhakal, and S. Ali Ibrahim (eds.), Climate Change and Cities: Second Assessment Report of the Urban Climate Change Research Network. Cambridge University Press. New York. 101–138, 102 < https://uccrn.ei.columbia.edu/sites/default/files/content/pubs/ARC3.2-PDF-Chapter-4-Mitigation-and-Adaptation-wecompress.com_.pdf> accessed 17 January 2021.

[156] 'The Intergovernmental Panel on Climate Change' (*MIT Climate Portal*) <https://climate.mit.edu/explainers/intergovernmental-panel-climate-change> accessed 21 January 2021.

> *ecosystems... [W]e have the means to limit climate change and its risks, with many solutions that allow for continued economic and human development. However, stabilizing temperature increase to below 2°C relative to pre-industrial levels will require an urgent and fundamental departure from business as usual*."

Combating climate for Sustainable Development in Kenya is indeed a goal that is achievable.

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Evaluating The Kenya-United Kingdom Economic Partnership Agreement, 2020 and its Dispute Resolution Provisions

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This paper considers the Economic Partnership Agreement (EPA) between the United Kingdom and Kenya signed on 8th December 2020 and which was ratified by the Kenyan Parliament on 9th March 2021. The theory underlying the concept of the EPA is that they seek to create greater market access to both countries and are a source of much needed development for the developing such as Kenya. The research considers the nature, importance and historical foundation of EPAs and will address a number of issues particularly as they impact dispute avoidance and settlement which is the focus of this study.

1. Introduction

On 8th December 2020 the governments of the United Kingdom and the Republic of Kenya signed and established an economic partnership agreement (EPA)[1] designated as a treaty with investment provisions (TIP)[2] by the United

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[1] UK Department of International Trade, *UK and Kenya sign trade agreement* (2020) Available at https://www.gov.uk/government/news/uk-and-kenya-sign-trade-agreement Last accessed on 9 March 2021

[2] Investment Policy Hub, *Economic Partnership Agreement between the Republic of Kenya and the United Kingdom of Great Britain and Northern Ireland* (2021) UNCTAD. Available at https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/4940/kenya---united-kingdom-epa-2020- Last accessed on 15 March 2021

Nations Conference on Trade and Development (UNCTAD). The EPA[3] provisionally came into force on 1st January 2021 pending full ratification procedures per the Explanatory Memorandum[4] and it has since been passed by both the UK and Kenyan Parliaments and now awaits the exchange of ratification documents.[5]

Both Trade Secretaries in the UK and Kenya have variously billed this EPA to be an outcome of the strategic partnership agreed between the Heads of Government of the two countries[6] and as an opportunity to reposition their economies onto a sustainable growth trajectory and otherwise expand their trading, investment, tourism and historical relationships.[7] The EPA covers trade in goods,[8] fisheries,[9] agriculture,[10] economic and development

[3] UK Parliament, *Economic Partnership Agreement between the United Kingdom of Great Britain and Northern Ireland, of the one part, and the Republic of Kenya, a Member of the East African Community, of the other part* Miscellaneous Series No.9 (2020) CP339 Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/945516/MS_9.2020_Economic_Partnership_Agreement_UK_Kenya_Member_of_East_Africa_Community.pdf Last accessed on 19 March 2021

[4] UK Foreign, Commonwealth & Development Office, *Explanatory Memorandum on the Economic Partnership Agreement between the Republic of Kenya, a Member of the East African Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part* (MS No.9/2020) Parliamentary Undersecretary of State, Department of International Trade. Available at https://www.gov.uk/government/publications/economic-partnership-agreement-between-the-united-kingdom-of-great-britain-and-northern-ireland-of-the-one-part-and-the-republic-of-kenya-a-member Last accessed 15 March 2021

[5] Kenya High Commission, *Kenya-UK Economic Partnership Agreement* (10 March 2021) Available at https://www.kenyahighcom.org.uk/news/kenya-uk-economic-partnership-agreement Last accessed on 15 March 2021

[6] Ministry of Industrialization, Trade and Enterprise Development, *Press Release by Hon. Betty Maina, CBS, Cabinet Secretary for Industrialization, Trade and Enterprise Development on Kenya-United Kingdom Trade Negotiations* (1 September 2020) Available at https://www.industrialization.go.ke/index.php/kenya-uk-trade-and-economic-partnership-agreement Last accessed on 16 March 2021

[7] Ministry of Industrialization, Trade and Enterprise Development Ibid Supra Note No.6

[8] Kenya-UK EPA Supra Ibid Note No.4 – Article 1(b)

[9] Kenya-UK EPA Supra Ibid Note No.4 – Article 1(c)

[10]Kenya-UK EPA Supra Ibid Note No.4 – Article 1(d)

cooperation,[11] institutional provisions[12] and further sets out the dispute avoidance and settlement process.[13] It also features its general exceptions,[14] general and final provisions[15] as we all annexes and protocols[16] to the foregoing. In addition to this the EPA contains has a *rendezvous* clause making provision for further negotiations to be concluded within the next 5 years in respect of trade in services,[17] competition policy,[18] investment and private sector development,[19] trade environment and sustainable development,[20] intellectual property rights[21] and transparency in public procurement[22] as well as any other areas[23] that may emerge. The parties to the EPA are the United Kingdom of Great Britain and Northern Ireland and the Republic of Kenya.[24]

1.1 Understanding the Concept of the Economic Partnership Agreement: *What is an EPA*?

An EPA can be defined to be a development-oriented asymmetric agreement providing important advantages and safeguards to African, Caribbean and Pacific (ACP) countries and the European Union in order to foster their sustainable economic development, regional integration and integration into and within the world markets.[25] EPAs establish free-trade areas and/or preferential trade relationships with regional groupings and are touted to be an attempt to liberalise trade between economies with disparate levels of

[11]Kenya-UK EPA Supra Ibid Note No.4 – Article 1(e)
[12]Kenya-UK EPA Supra Ibid Note No.4 – Article 1(f)
[13]Kenya-UK EPA Supra Ibid Note No.4 – Article 1(g)
[14]Kenya-UK EPA Supra Ibid Note No.4 – Article 1(h)
[15]Kenya-UK EPA Supra Ibid Note No.4 – Article 1(i)
[16]Kenya-UK EPA Supra Ibid Note No.4 – Article 1(j)
[17] Kenya-UK EPA Supra Ibid Note No.4 – Article 3(a)
[18] Kenya-UK EPA Supra Ibid Note No.4 – Article 3(b)(i)
[19] Kenya-UK EPA Supra Ibid Note No.4 – Article 3(b)(ii)
[20] Kenya-UK EPA Supra Ibid Note No.4 – Article 3(b)(iii)
[21] Kenya-UK EPA Supra Ibid Note No.4 – Article 3(b)(iv)
[22] Kenya-UK EPA Supra Ibid Note No.4 – Article 3(b)(v)
[23] Kenya-UK EPA Supra Ibid Note No.4 – Article 3(c)
[24] Kenya-UK EPA Supra Ibid Note No.4 – Preamble
[25] European Parliament, *An overview of the EU-ACP countries' economic partnership agreements Building a new trade relationship* (July 2018) European Parliamentary Research Service. Available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625102/EPRS_BRI(2018)625102_EN.pdf Last accessed on 17 March 2021

development. Under an EPA the EU or one regional block and now the United Kingdom, provides full duty free and quota free market access to EPA countries and/or regions and ACP countries/regions for their part commit to open at least 75% of their markets to their European counterparts.[26]

They are negotiated within the ambit of the Cotonou Partnership Agreement of 2000 made between ACP countries and the EU[27] and are subject to the Marrakesh Agreement that established the World Trade Organization (WTO).[28] An interesting feature of EPAs is that though they are negotiated by ACP countries within regional blocks the state parties execute and ratify them bilaterally and the signatories are bound bilaterally.[29]

Conceptually EPAs are based on 4 basic principles, to wit (1) Partnership meaning that they involve rights and obligations of both sides; (2) Regional integration to the extent that they are intended to stimulate integration of ACP countries into the global economy; (3) Development for contracting states; and (4) they link ACP countries with WTO.[30]

[26]European Centre for Development Policy Management, *Economic Partnership Agreements: Frequently Asked Questions* (2014) Available at https://ecdpm.org/wp-content/uploads/ECDPM-17-10-14-EPA-QA.pdf Last accessed on 19 March 2021

[27] EU-ACP Ibid Supra Note No.26

[28] WTO Publications, *The WTO Agreements Series 1-Agreement Establishing the WTO* (May 1998) Available at https://www.wto.org/english/res_e/booksp_e/agrmntseries1_wto_e.pdf Last accessed on 15 March 2021

[29] James Thuo Gathii, *The Cotonou Agreement and Economic Partnership Agreements – Chapter 19 of Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (2013) United Nations Office of the High Commissioner for Human Rights Pg.262 Available at https://www.ohchr.org/Documents/Issues/Development/RTDBook/PartIIIChapter19.pdf Last accessed on 17 March 2021

[30] Salif KONÉ, Economic Partnership Agreement between West Africa and the European Union in the Context of the World Trade Organization(WTO) and the Regional Integration Process (2010) Journal of Economic Integration, Vol. 25, No. 1 (March 2010), pp. 104-128 at pg.108 Available at http://www.jstor.org/stable/23000967?origin=JSTOR-pdf Last accessed on 17 March 2021

1.2 Context of Kenya-UK Trade Negotiations:

The EPA was necessitated by the UK's departure from the European Union and it has its roots in the European Union Economic Partnership Agreement with the East African Community[31] (the 'EU-EAC EPA').[32] It is therefore important to note that the UK government has indicated that it considers this EPA as a first step towards a regional agreement with the East African Community.[33] As Kenya is classified as lower middle-income contrary[34] she does not enjoy preferential treatment other than as previously set out in the EU ACP EPA which she has signed[35] and particularly in the face of Britain's exit from the EU which has meant that the UK requires to negotiate new trade agreements.[36]

Per data for 2018, at least 6.6% of Kenya's total exports are destined for the UK making it its fifth largest export market after Uganda (10.1%), Pakistan

[31] European Union, *Economic Partnership Agreement between the East African Partner States and the European Union and its Partner States* (2014) Available at https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153845.pdf Last accessed on 19 March 2021

[32] International Agreements Committee, *Scrutiny of international agreements: Economic Partnership Agreement with Kenya, Trade in Goods Agreement with Norway and Iceland, and Free Trade Agreement with Vietnam* (3 February 2021) House of Lords. Available at https://www.publicinformationonline.com/shop/217994 Last accessed on 15 March 2021

[33] House of Lords Library, *UK-Kenya Economic Partnership Agreement* (26 February 2021) UK Parliament. Available at https://lordslibrary.parliament.uk/uk-kenya-economic-partnership-agreement/ Last accessed on 15 March 2021

[34] United Nations, *World Economic Situation and Prospects* (2020) Available at https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/WESP2020_Annex.pdf Last accessed on 17 March 2021

[35] UK Parliament, *Scrutiny of International Agreements: Economic Partnership Agreement with Kenya, Trade in Goods Agreement with Norway and Iceland, and Free Trade Agreement with Vietnam* (2021) Available at https://publications.parliament.uk/pa/ld5801/ldselect/ldintagr/221/22104.htm Last accessed on 19 March 2021

[36] Kimberly Amadeo and Janet Berry-Johnson, *What Was Brexit, and How Did It Impact the UK, EU, and the US?* (12 March 2021) The Balance. Available at https://www.thebalance.com/brexit-consequences-4062999 Last accessed on 19 March 2021

(9.7%), United States of America (7.7%) and Netherlands (7.6%).[37] The Observatory of Economic Complexity for its part captured the country's top 5 export data for 2019 in monetary terms as follows maintaining the same export destination countries to be (1) Uganda [$619m]; (2) Pakistan [$440m]; (3) USA[$546m]; (4) Netherlands [$487m]; and (5) UK [$387m].[38] From the British perspective, Kenya is her 73rd largest trading partner and its total trade and services in 2019 amounted to £1.4billion.[39] The top goods imported by UK from Kenya comprising coffee, tea and spices (£121 million, mostly black tea), edible vegetables (£79 million, mostly green beans) and live trees and plants (£54 million, mostly cut flowers).[40] The exports to Kenya were vehicles other than railway or tramway stock (£67 million), machinery and mechanical appliances (£63 million) and pharmaceutical products (£27 million)[41]

2. The Metanarrative of Development and an Idealized Historical Background of EPAS:

At the heart of the metanarrative of the development paradigm is that the third world, less developed countries, developing nations and other emerging

[37] Daniel Workman, *Kenya's Top 10 Exports* (2021) World's Top Exports – WorldPress. Available at http://www.worldstopexports.com/kenyas-top-10-exports/ Last accessed on 16 March 2021

[38] OEC, *Kenya* (2021) Datawheel. Available at https://oec.world/en/profile/country/ken Last accessed on 17 March 2021.
Per its website the Observatory of Economic Complexity (OEC) is an online data visualization and distribution platform focused on the geography and dynamics of economic activities which integrates and distributes data from a variety of sources to empower analysts in the private sector, public sector, and academia.The OEC is currently designed and developed by Datawheel, but it began as a research project at MIT's Collective Learning group (former Macro Connections Group). The OEC was the Master Thesis of Alex Simoes (2012), directed by Professor Cesar A. Hidalgo. In 2012 the OEC was spun out of MIT as an open source project. The OEC was refined throughout the years, expanding its technical and analytical capacities.

[39] UK Department of International Trade, *Continuing the United Kingdom's Trade Relationship with Kenya: Economic Partnership Agreement between the Republic of Kenya, a Member of the East African Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part* (2020) Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/946086/ccs1220728208-kenya-trade-parl-report-accessible.pdf Last accessed on 17 March 2021

[40] UK Department of International Trade Supra Ibid Note No.40

[41] UK Department of International Trade Supra Ibid Note No.40

markets should follow in the footsteps of the West the ultimate solution being economic growth and development .[42] Rostow's blueprint for its part prescribing the 5 phases of (1) traditional society; (2) modern science leading to increased production in agriculture and industry; (3) take-off where new development trumps obstacles and creates self-generating growth; (4) refined and complex processing; and (5) high mass consumption being the overriding objective of a somewhat linear conception of growth.[43] The development paradigm has in some instances created challenges in the past such as those that arose from policies such as the Bretton Woods structural adjustment policies leading to a new international world order and eventually culminating in the United Nations Declaration of the Right to Development (UNDRD).[44] The UNDRD had the effect of expanding the definition of development to include technology, human rights, participation, equal opportunity, accountability and differential treatment for developing countries.[45]

In 1973 the United Kingdom joined the then European Economic Community (precursor to the European Community and then the European Union) and mid-1973 the EC began negotiations with the Commonwealth countries of Africa, Caribbean and Pacific (ACP) and the Yaoundé Association comprising 18 former French, Belgian and Italian colonies for the treaty that would be signed in 1975 and which came to be popularly known as the Lomé Convention.[46] The Lomé Convention is touted to be one of the exceptional

[42] Ruth E. Gordon, *Deconstructing Development* (2004) 22 Wis. Int'l. L. J. 1 - Jon H. Sylvester Golden Gate University School of Law. Available at https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1192&context=pubs Last accessed on 16 March 2021

[43] W. W. Rostow, *The Stages of Economic Growth*, The Economic History Review, New Series, Vol. 12, No. 1 (1959), pp. 1-16 Published by: Wiley on behalf of the Economic History Society. Available at https://www.jstor.org/stable/2591077 Last accessed on 16 March 2021

[44] UN General Assembly, *Declaration on the Right to Development: resolution / adopted by the General Assembly*, 4 December 1986, A/RES/41/128. Available at: https://www.refworld.org/docid/3b00f22544.html Last accessed 16 March 2021]

[45] Ruth E. Gordon Supra Ibid Note No.14 pg.43

[46] Vincent A. Mahler, *Britain, the European Community, and the Developing Commonwealth: Dependence, Interdependence, and the Political Economy of Sugar*

circumstances in which the ACP states negotiated from something approaching a position of equality the key example being that of the inclusion of the System for the Stabilisation of Export Earnings (STABEX) which provided a guarantee of finance from the European Development Fund (EDF) to protect the fluctuating revenues that resulted from the export of a number of agricultural products that were not covered by the Common Agricultural Policy.[47] However, during the late 1990s, the World Trade Organization (WTO) ruled that the Lomé convention was in conflict with global trade rules, because it discriminated against other developing countries in Asia and Latin America creating the necessity and basis for the Cotonou Agreement of 2000 which had the effect of stipulating that the EU shall establish full-fledged trade agreements with groups of African countries.[48]

Article 2 of the Cotonou Agreement laid out the four fundamental principles of the new EU-ACP relationship to be (1) the emphasis of equality between the two parties and the responsibility and ownership by each ACP state of its own development.; (2) the inclusion of non-state actors within the process; (3) the importance of political dialogue within the overall framework of relations between the EU and ACP states; and (4) the need for differentiation of the relationship between the EU and ACP group arising from the evolving diversity of levels of development among these states. It is also important to note the special emphasis placed on fostering the growth of regional development strategies.[49]

International Organization, vol. 35, no. 3, 1981, pp. 467–492. JSTOR. Available at https://www.jstor.org/stable/2706432 Last accessed on 16 March 2021

[47] Stephen R. Hurt, *Co-operation and Coercion? The Cotonou Agreement between the European Union and ACP States and the End of the Lomé Convention* (2003) Third World Quarterly , Feb., 2003, Vol. 24, No. 1 (Feb., 2003), pp. 161-176 Published by: Taylor & Francis, Ltd. Available at https://www.jstor.org/stable/3993636 Last accessed on 16 March 2021

[48] Sebastian Krapohl & Sophie Van Huut *A missed opportunity for regionalism: the disparate behaviour of African countries in the EPA-negotiations with the EU* (2020) Journal of European Integration, 42:4, 565-582, Available at https://doi.org/10.1080/07036337.2019.1666117 Last accessed on 16 March 2021

[49] Stephen R. Hurt Supra Ibid Note No.48

An interesting feature that has emerged following the Cotonou Agreements is that the EU's external trade policy differentiates between trade partners with different economic potentials and different trade patterns. This means that African countries face very different trade regimes when exporting to the EU (1) such that least developed countries (LDCs) enjoy free access to the European market under the Everything-but-Arms (EBA) initiative; (2) oil exports from some ACP-countries do not face any barriers when entering the European market; and (3) the Trade Development and Cooperation Agreement (TDCA) granted South Africa access to the European market until recently.
The respective regimes in terms of increasing preferential access are (1) the EU Generalized System of Preferences (GSP); (2) the GSP plus sub-regime; and (3) Everything But Arms (EBA) sub-regime where LDCs are granted duty-free quota-free (DFQF) access to the EU.[50] These different trade regimes constitute extra-regional economic privileges for the respective African countries.[51] Accordingly, the size of the economy, the value of intra- and extra-regional trade, together with the privileged status in extra-regional markets determine the interest of African states in negotiating EPAs.[52] Further, a large number of LDCs (26 out of 50) that enjoy DFQF market access under the EBA initiative since 2002, have opted not to enter into any EPAs reflecting their desire to keep the status quo thereby avoiding the bilateral liberalization of their domestic trade.[53]

3. The Pre-Brexit Bilateral Relationship Between The UK and Kenya

It is impossible to consider any historical linkages between Kenya and the United Kingdom without recalling that Kenya was a colony of the Britain upto the time she attained independence in 1963. At the onset of independence Kenya adopted a policy of foreign investment attraction[54] and this was

[50] Jaime de Melo and Julie Regolo, *The African Economic Partnership Agreements with the EU: Reflections inspired by the case of the East African Community*, Science Direct Journal of African Trade 1(2014) 15 - 24
[51] Sebastian Krapohl & Sophie Van Huut Supra Ibid Note No.49
[52] Sebastian Krapohl & Sophie Van Huut Supra Ibid Note No.49
[53] Jaime de Melo and Julie Regolo Supra Ibid Note No.51
[54] Phyllis W. Waruhiu, *Kenya's Bilateral Investment Treaties: Rethinking the Vaguely Drafted Substantive Provisions* (2019) University of Nairobi School of Law pg.17 Available at http://erepository.uonbi.ac.ke/bitstream/handle/11295/106711/Waruhiu_Kenya%E2

enshrined in the Foreign Investment Protection Act, 1964[55] which to-date outlines the basic foreign investment protections that the country gives.[56] Officially the country pursued a foreign policy of non-alignment but practically engaged in quiet diplomacy all aimed at enabling the then fledgling country participate in international politics without losing its identity.[57]

British foreign policy for its part can be glenned from Winston Churchills categorization to comprise 3 interlinked circles, the empire-Commonwealth, the American special relationship and Europe which according to him "the two beyond the empire being more significant"[58] Be that as it may and notwithstanding the fact that the balance of trade remains in Britain's favour, Kenya's successive regimes since independence have maintained strong political and economic ties with the UK and UK remains a leading destination for Kenyan exports.[59] It is worth noting though that the *Kibaki regime* adopted a dramatic departure from the established norm by pursuing an economic diplomacy approach which expanded economic ties with the Far East. Nevertheless, in real terms Kenya still maintains robust economic ties with UK[60] and Kenya and UK did enter a bilateral agreement in 1999[61] which is currently in force.

%80%99s%20Bilateral%20Investment%20Treaties%20Rethinking%20the%20Vaguely%20Drafted%20Substantive%20Provisions.pdf?sequence=1&isAllowed=y Last Accessed on 15 March 2021

[55] Act No.35 of 1964

[56] The Act was last amended as Act No.8 of 2009

[57] Kiganka Sheila Mwende, *Critical Analysis of Bilateral Relations Between Kenya and Britain from 1963 to 2017* (2018) University of Nairobi Institute of Diplomacy and International Studies pg.33 Available at http://erepository.uonbi.ac.ke/bitstream/handle/11295/105076/Kiganka_Critical%20Analysis%20Of%20Bilateral%20Relations%20Between%20Kenya%20And%20Britain%20From%201963%20To%202017.pdf?sequence=1 Last accessed on 15 March 2021

[58] Kiganka Sheila Mwende, Supra Ibid Note No.58. pg.57

[59] Kiganka Sheila Mwende Supra Ibid Note No.58. pg.35

[60] Kiganka Sheila Mwende Supra Ibid Note No.58.pg.35

[61] UNCTAD, *UK - K*enya *Agreement for the Promotion and Protection of Investments* (1999) Available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1795/download Last accessed on 15 March 2021

4. Regional Economic Communities and Groupings Currently Affecting Kenya

Regional Economic Communities (RECs) in Africa include the East African Community (EAC), the Economic Community of West African States (ECOWAS) and the South African Development Community (SADC).[62] Kenya belongs to the EAC alongside Uganda, Tanzania, Burundi and Rwanda.[63] In addition to this Kenya is a member of at least 3 other regional economic integration groupings such as the Common Market for Eastern and Southern Africa (COMESA), the Inter-Governmental Authority on Development (IGAD) and the Indian Ocean Commission (IOC). More recently together with 54 African nations she also ascended to the membership of the African Continental Free Trade Area (AfCFTA)[64] which came into force on 1st January 2021.[65] The multiplicity of RECs and regional integration groupings creates a complex dynamic when it comes to negotiating EPAs with the EU and post Brexit with the United Kingdom.[66]

[62] European Centre for Development Policy Management, *Overview of the regional EPA negotiations ESA-EU Economic Partnership Agreement* (November 2006) In Brief No.14E

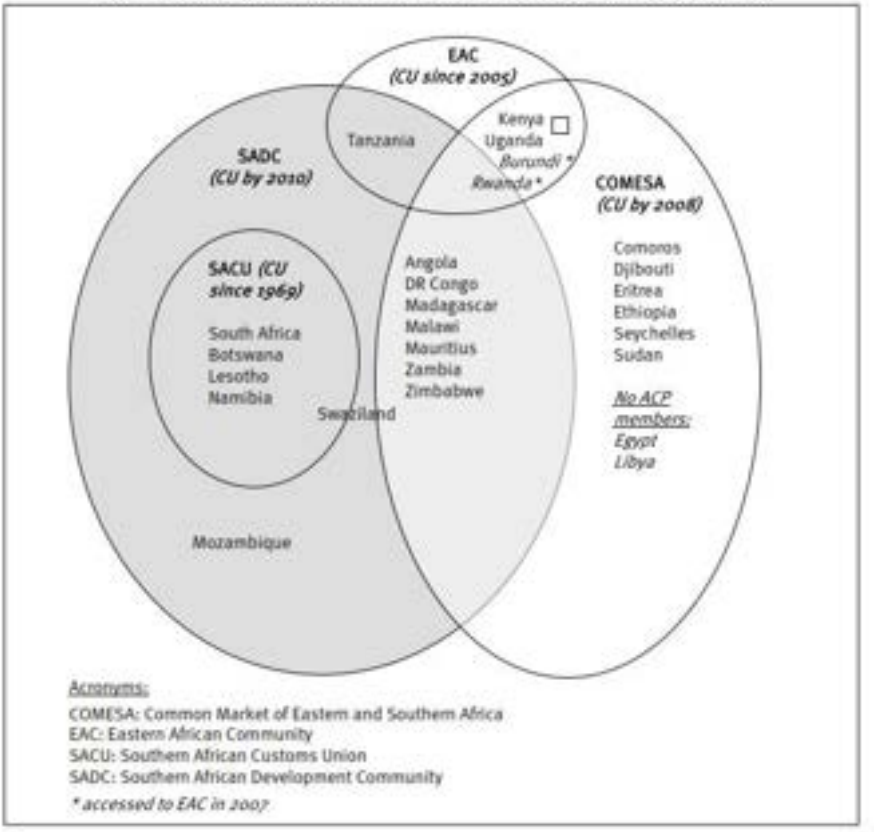
[63] East African Community, *Treaty for the Establishment of the East African Community* (2006) Available at https://www.eacj.org//wp-content/uploads/2012/08/EACJ-Treaty.pdf Last accessed on 16 March 2021

[64] African Union, *Agreement Establishing the African Continental Free Trade Area* (2018) Available at https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf Last accessed on 16 March 2021

[65] Franck Kuwonu, *Africa's free trade area opens for business* (Jan 2021) Africa Renewal. Available at https://www.un.org/africarenewal/magazine/january-2021/afcfta-africa-now-open-business Last accessed on 16 March 2021

[66] In Brief Ibid Supra Note No.63

Figure 1: Overlapping Regional Membership in Southern and Eastern Africa



**adapted from Overseas Development Institute* [67]

5. UK-Kenya EPAS′ Dispute Avoidance & Settlement Provisions:

Dispute resolution provisions in trade agreements function as a safety valve mechanism with the purpose of easing conflict between state parties and further provide legal clarity and provide for procedures guaranteeing finality of their disputes.[68] Such dispute settlement mechanism should therefore be

[67] Marieke Meyn, *Economic Partnership Agreements: A 'historic step' towards a 'partnership of equals'?* (2008) Overseas Development Institute – Working Paper 288 pg.5. Available at https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/1714.pdf Last accessed on 17 March 2021

[68] Joel Davidow and Joseph Whitlock,*'General Dispute Resolution Provisions of the Japan-Singapore Economic Partnership Agreement and the North American Free*

comprehensive and reassuring to Parties that the mechanisms provide legal certainty, clarity through interpretation of provisions, and security in protecting rights and enforcing obligations.[69]

The UK-Kenya EPA is a framework agreement modelled substantially along the lines of the EU EAC EPA[70] and this model in turn is almost a replica of other EU ACP EPAs and free trade agreements. Similar to other economic partnership agreements around the world this EPA is framed as a stand-alone, self-contained agreement that is neither above nor below in the order of precedence among international economic and development cooperation laws or regulations.[71] Article 128(1)(d)[72] accordingly provides that nothing in the Agreement shall be construed to prevent the adoption or application by either Party of measures necessary to secure compliance with laws or regulations that are not inconsistent with the provisions of this Agreement.

5.1 Dispute Avoidance and Settlement Provisions:

The EPA's dispute avoidance and settlement provisions relating to interpretation and application of the EPA are found at Part VII which comprises Articles 109 to 127 and the main mechanisms provided for are a continuum ranging from negotiations to formal adjudication. It follows the generic procedural and institutional which are in a three-stage framework that maximizes Party autonomy, by attempting dispute resolution first through consultations (Party-Party negotiation), then through mediation (Parties discuss dispute with mediators) and, finally, through binding arbitration (Parties agree to abide by a panel's final resolution).[73] The key aspects to

Trade Agreement (2002) 3 J World Investment 739 Pg.750 Available at Heinonline. Last accessed on 19 March 2021

[69] Doris Folasade Akinyooye, *Africa - EU Trade Relations: Legal Analysis of the Dispute Settlement Mechanisms under the West Africa - EU Economic Partnership Agreement* (2020) 2020 ELTE LJ 125. pg.137. Available at Heinonline. Last accessed on 19 March 2021

[70] UK Parliament Supra Ibid Note No.17

[71] Doris Folasade Aknyooye Supra Ibid Note No.70 pg.139

[72] Kenya-UK EPA Supra Ibid Note No.4

[73] Joel Davidow and Joseph Whitlock, *General Dispute Resolution Provisions of the Japan-Singapore Economic Partnership Agreement and the North American Free Trade Agreement* (2002) 3 J World Investment 739 pg.752 Available on Heinoline Last accessed on 19 March 2021

consider include the bases of standing and jurisdiction, standards of pleading, selection and qualification of mediators or arbitrators, availability of review of initial determinations and remedial procedures to enforce binding decisions. A striking feature is the increased institutionalization as the mechanisms veer into arbitration.[74]

5.1.1 Dispute Avoidance:

The Committee of Senior Officials is required to assist the EPA Council and in the area of trade it shall be responsible for undertaking action to avoid disputes and resolve disputes that may arise regarding the interpretation or application of the Agreement[75] in accordance with the provisions of Title I of Part VII. Part VII for its part applies to any dispute concerning the interpretation and application of the provisions of this Agreement, unless otherwise emphasizing the objective to avoid and settle disputes in good faith.[76]

5.2 Consultations:

There are various provisions for consultation throughout the EPA but the general provisions for Consultations are found at Article 110 which requires the parties to enter into consultations and endeavour to resolve any dispute in good faith and with the aim of reaching a mutually agreed solution. Consultations within the WTO dispute settlement framework serves 2 conflicting roles, the first being a mechanism for bilateral settlement process and the second being a mandatory pre-litigation procedure.[77]

Under the EPA Consultations are initiated via a written request copied to the Committee of Senior Officials[78] setting out the issue and the provisions of the EPA that have not been complied with and the Consultations shall be held in the jurisdiction of the party complained against.[79] This Consultation meeting

[74] Joel Davidow and Joseph Whitlock Supra Ibid No.75 pg.753
[75] Article 106(5)(d)(ii)
[76] Article 109 Kenya UK EPA
[77] Dukgeun Ahn, Jihong Lee & Jee-Hyeong Park, *Understanding Non-Litigated Disputes in the WTO Dispute Settlement System* (2013) 47 J World Trade 985 pg.989 Available on Heinoline. Last accessed on 19 March 2021
[78] Kenya-UK EPA Supra Ibid Note No.4 – Article No.110(2)
[79] Kenya-UK EPA Supra Ibid Note No.4 – Article No.110(3)

shall be held within 20 days of the date of receipt of the request and they require to be completed within 60 days also of the date of receipt of the written request. The parties are however at liberty to continue with the consultations and all information disclosed during the consultations remains confidential.[80]

5.2.1 Urgent Consultations:

Urgent consultations are defined to include those related to perishable or seasonal goods are to be held as soon as practicable and in any event within 15 days of the date of receipt of the written request and require to be concluded within 30 days.[81]

5.2.2 Special Consultations:

Provisions are further made for consultations in special circumstances such as (1) where there has been a failure of administrative cooperation to establish proof of origin based on objective evidence and/or proof of fraud;[82] and (2) where balance of payments difficulties arise in which case the dispute is referred to the EPA Council.[83]

5.2.3 Collapse of Consultations:

Where the consultations are not fruitful with a mutually agreed solution being arrived at in general and/or urgent consultations either party may invoke settlement of the dispute by way of arbitration[84] or in the case of special consultations during an impasse in establishing proof of origin of a certain category of product a temporary suspension of not more than 6 months (renewable) may be imposed.[85] The parties may however refer the subject of consultation to Mediation by mutual agreement.[86]

5.2.4 Critique of the Consultations Provisions in the EPA:

The WTO framework which has been replicated in the EPA has been critiqued on the grounds that there is no provision for withdrawal of a consultation once

[80] Kenya-UK EPA Supra Ibid Note No.4 – Article Nos.110(3)
[81] Kenya-UK EPA Supra Ibid Note No.4 – Article No.110(4)
[82] Kenya-UK EPA Supra Ibid Note No.4 – Article No.16
[83] Kenya-UK EPA Supra Ibid Note No.4 – Article No.131
[84] Kenya-UK EPA Supra Ibid Note No.4 – Article No.110(5)
[85] Kenya-UK EPA Supra Ibid Note No.4 – Article No.16(5)(d)
[86] Kenya-UK EPA Supra Ibid Note No.4 – Article No.111(1)

the same has been opened. Thus, unless the Consultation is settled or otherwise referred to mediation or arbitration the same remains technically open even where the state party abandons it midway.[87] In addition to this another legal challenge to settlement through Consultation is the lack of an enforcement procedure.[88]

5.3 Mediation:

Mediation is provided for under Article 111[89] and it is a non-mandatory step therefore either party made proceed directly to arbitration without taking recourse in mediation.[90] The pleadings outlined as terms of reference for mediation shall be the matter referred to in the request for consultations.[91]

5.3.1 Appointment of Mediator:

The parties are required to agree upon a mediator within 15 days of the date of the agreement to request mediation in default of which the Chairperson of the Committee of Senior Officials or their delegate shall select a mediator within 25 days of the date of submission of agreement to request for mediation[92] from the pool of Arbitrators maintained pursuant to Article 125[93] provided that the mediator selected is not nationals of either of the disputing parties.[94]

5.3.2 Mediation Process:

The mediator is required to convene the parties within 30 days of being appointed[95] and s/he should receive the submissions from each Party at least 15 days before the meeting.[96] The mediator is required to notify a non-binding opinion not later than 45 days from the date of appointment which may include a recommendation on how to resolve the dispute consistent with the EPA.[97]

[87] Dukgeun Ahn, Jihong Lee & Jee-Hyeong Park Ibid Supra Note No.77 pg.992
[88] Dukgeun Ahn, Jihong Lee & Jee-Hyeong Park Ibid Supra Note No.77 pg.993
[89] Kenya-UK EPA Supra Ibid Note No.4
[90] Kenya-UK EPA Supra Ibid Note No.4 – Article 111(2)
[91] Kenya-UK EPA Supra Ibid Note No.4 – Article 111(1)
[92] Kenya-UK EPA Supra Ibid Note No.4 – Article 111(3)
[93] Kenya-UK EPA Supra Ibid Note No.4
[94] Kenya-UK EPA Supra Ibid Note No.4 – Article 111(3)
[95] Kenya-UK EPA Supra Ibid Note No.4 – Article 111(3)
[96] Kenya-UK EPA Supra Ibid Note No.4 – Article 111(3)
[97] Kenya-UK EPA Supra Ibid Note No.4 – Article 111(4)

The parties and the mediator are at liberty to adjust the time limits outlined in Article 111 given any complexities that may arise and/or difficulties that may be experienced.[98] All mediation proceedings shall remain confidential.[99]

It has been said that mediation occurs in a situation of a mutually hurting stalemate and generally where both parties have equal bargaining power.[100] A mutually hurting stalemate is present when both parties perceive of unilateral victory as unattainable and the cost of further loss or damage is greater than the expected gains from such a strategy. Both parties then wish to see a settlement as they, although they are in conflict, nevertheless share a few common interests.[101]

5.3.4 Critique of the Mediation Provisions in the EPA:

The EPA provides for mediation to be carried out from the List of Arbitrators and not mediators and it is not clear what, if any qualifications as mediators will be required of them. In addition to this, the colonial heritage as well as the current trade imbalance and disparity in the economic classification of the parties to the EPA seem indicative that changes of mediation being taken up herein may be significantly diminished.

5.4 Arbitration:

Where consultation fails the complaining party is at liberty to invoke arbitration proceedings[102] which must be initiated by way of a notice in writing addressed to the Committee of Senior Officials and which notice requires to outline the specific measures at issue and how such measures constitute a breach of the provisions of the EPA.[103] Within 10 days of submission of the

[98] Kenya-UK EPA Supra Ibid Note No.4 – Article 111(5)
[99] Kenya-UK EPA Supra Ibid Note No.4 – Article 111(6)
[100] Johan Hellman, *The Occurrence of Mediation: A Critical Evaluation of the Current Debate* (December 2012) International Studies Review , Vol. 14, No. 4, Published by: Wiley on behalf of The International Studies Association
Pg.593 Available at https://www.jstor.org/stable/41804156 Last accessed on 19 March 2021
[101] Johan Hellman Supra Ibid Note No.100
[102] Kenya-UK EPA Supra Ibid Note No.4 – Article 112(1)
[103] Kenya-UK EPA Supra Ibid Note No.4 – Article 112(2)

notice to the Committee the parties may consult and agree on the arbitration panel[104] of 3 arbitrators.[105]

5.4.1 Appointment of Arbitration Panel:

In the absence of consensus on the composition within the provided timeframe each party will select one arbitrator from the list of arbitrators established per Article 125 within 5 days and in the event of any party defaulting the Chairperson of the Committee of Senior Officials (or his/her delegate) will appoint a maximum of 2 arbitrators.[106] The 2 arbitrators will then appoint a third arbitrator form the EPA List of Arbitrators who will serve as Chairperson of the panel.[107] Where the 2 arbitrators default then either party may ask the Chairperson of the Committee of Senior Officials to select a chairperson by lot within 5 days.[108] The panel of arbitrators will be established when all 3 have been selected and they have accepted their appointment.[109]

5.4.2 Powers of the Arbitration Panel:

The panel may obtain information and technical advice they deem necessary from the parties, expert witnesses or of its own initiative and this may even include admitting amicus curiae provided that all sources of information are disclosed to the parties and that they have had an opportunity to submit comments on the same.[110] Though the parties are encouraged to agree upon a common working language the written and oral submissions of the parties shall be in any official language of the parties provided that any translation costs will be met by the party that insists on a language that is not shared.[111]

5.4.3 Rules of Interpretation:

The arbitration panel shall interpret the terms of the EPA in accordance with customary rules of interpretation of public international law, including those

[104] Kenya-UK EPA Supra Ibid Note No.4 – Article 113(2)
[105] Kenya-UK EPA Supra Ibid Note No.4 – Article 111(1)
[106] Kenya-UK EPA Supra Ibid Note No.4 – Article 113(3)
[107] Kenya-UK EPA Supra Ibid Note No.4 – Article 113(4)
[108] Kenya-UK EPA Supra Ibid Note No.4 – Article 113(4)
[109] Kenya-UK EPA Supra Ibid Note No.4 – Article 113(5)
[110] Kenya-UK EPA Supra Ibid Note No.4 – Article 121
[111] Kenya-UK EPA Supra Ibid Note No.4 – Article 122

codified by the Vienna Convention on the Law of Treaties[112] provided that the interpretations and rulings of the panel shall not add to or diminish the rights and obligations provided for in the EPA.[113]

5.4.4 Interim Report & Final Arbitration Ruling:

The arbitration panel shall make every effort to render decisions by consensus and where this is not possible a majority vote shall be taken.[114] All decisions require to set out the findings of fact, the applicability of the relevant provisions of the EPA and the reasoning behind any findings, recommendations and conclusions.[115] The Committee of Senior Officials shall make all rulings publicly available and the arbitration panel ruling shall be final and binding on the parties.[116]

The panel is required to issue an interim report summarising the descriptive section and its findings and conclusions within 90 days[117] unless otherwise required by circumstances and where there is some urgency within 45 days.[118] Either party may submit written comments to the arbitration panel on specific aspect of the interim report within 7[119] or 15 days[120] of notification of the said report for urgent or general cases respectively. The panel will consider the submissions and render a final arbitration panel ruling setting out a discussion of the arguments made at the interim review stage and address the questions and observations of the parties.[121] Such ruling shall outline recommendations on how the party complained against can remedy the situation and bring itself into compliance[122] immediately or otherwise within a reasonable period of time[123] and the same will be notified to the Committee of Senior Officials

[112] Kenya-UK EPA Supra Ibid Note No.4 – Article 123(1)
[113] Kenya-UK EPA Supra Ibid Note No.4 – Article 123(2)
[114] Kenya-UK EPA Supra Ibid Note No.4 – Article 124(1)
[115] Kenya-UK EPA Supra Ibid Note No.4 – Article 124(2)
[116] Kenya-UK EPA Supra Ibid Note No.4 – Article 124(4)
[117] Kenya-UK EPA Supra Ibid Note No.4 – Article 114(1)
[118] Kenya-UK EPA Supra Ibid Note No.4 – Article 114(2)
[119] Kenya-UK EPA Supra Ibid Note No.4 – Article 114(2)
[120] Kenya-UK EPA Supra Ibid Note No.4 – Article 114(1)
[121] Kenya-UK EPA Supra Ibid Note No.4 – Article 114(3)
[122] Kenya-UK EPA Supra Ibid Note No.4 – Article 115(3)
[123] Kenya-UK EPA Supra Ibid Note No.4 – Article 115(4)

within 120 days[124] of the date of the panel's establishment unless advised otherwise advised in writing.[125] Once the party complained against complies then they are required to inform their counterparty and the Committee of Senior Officials.[126] In default the complaining party may require temporary compensation to be effected and/or otherwise take temporary retaliatory measures.[127] The parties are nevertheless at liberty to negotiate a mutually agreed solution.[128]

5.4.5 Critique of the Arbitration Provisions in the EPA:

The dispute settlement procedures shall be governed by Rules of Procedure which as yet are not in place. The EPA Council has 6 months within which to provide these.[129]

5.5 Third Party Neutrals in the EPA:

The third-party neutrals in the EPA comprise of arbitrators form whom the mediators and arbitrators will be selected.

5.5.1 List of Arbitrators:

The Committee of Senior Officials shall establish a list of not less than 15 individuals who are willing and able to serve as arbitrators and it shall comprise of 3 sub-lists with 5 individuals each. The fist category of sub-lists will contain individuals from each party who shall serve as arbitrators and the second category comprising arbitrators who are not nationals of either party and who shall serve as Chairperson of the arbitration panel. It will be the responsibility of the Committee of Senior Officials to ensure that the list is always maintained at this bare minimum.[130]

[124] Kenya-UK EPA Supra Ibid Note No.4 – Article 115(1)(a)
[125] Kenya-UK EPA Supra Ibid Note No.4 – Article 11b(1)(b)
[126] Kenya-UK EPA Supra Ibid Note No.4 – Article 116
[127] Kenya-UK EPA Supra Ibid Note No.4 – Article 117 and 118
[128] Kenya-UK EPA Supra Ibid Note No.4 – Article 119
[129] Kenya-UK EPA Supra Ibid Note No.4 – Article 120
[130] Kenya-UK EPA Supra Ibid Note No.4 – Article 125(1)

5.5.2 Appointing Authority:

In the absence of a list of arbitrators being established then the appointing authority shall be the Secretary General of the Permanent Court of Arbitration.[131]

5.5.3 Competence, Knowledge & Experience of the Arbitrators:

The arbitrators shall have specialized knowledge of and experience in law and international trade. The shall be independent and shall serve in their individual capacities and shall not take instructions and or be affiliated with the government of any of the parties. They shall comply with a Code of Conduct to be developed by the EPA Council together with the Riles of Procedure and shall be finalized within 6 months of the entry into force of the EPA.

5.6 EPA Dispute Settlement VIS-À-VIS WTO Dispute Settlement and The EPA

The EPA has reserved application of the WTO dispute settlement mechanism as follows:-

5.6.1 Sector Based Mechanisms:

5.6.2 According to Article 48(7)[132] of the EPA WTO rules on dispute settlement shall apply to any disputes related to antidumping or countervailing measures. Article 49(4)[133] for its part outlines that the provisions of paragraph 1 shall be subject to the WTO Agreement on the Understanding on Rules and Procedures Governing the Settlement of Disputes.

5.6.3 Partys Rights and Obligations under the WTO Agreement:

Arbitration panels shall not adjudicate disputes on the parties' rights and obligations under the WTO Agreement.[134] It is critical to outline that WTO can only address a dispute which deals with countries' WTO obligations and

[131] Kenya-UK EPA Supra Ibid Note No.4 – Article 125(3)
[132] Kenya-UK EPA Supra Ibid Note No.4
[133] Kenya-UK EPA Supra Ibid Note No.4
[134] Kenya-UK EPA Supra Ibid Note No.4 – Article 126(1)

not those obligations that are solely addressed in a Free Trade Agreement[135] and vice versa. Thus, any potential claim before the WTO Dispute Settlement Body must deal with the WTO compatibility of such measures and not their EPA compatibility.[136] Likewise the claims arising from this EPA will only be considered within the dispute settlement mechanism provided in the EPA.

6.0 Conclusion:

It will be interesting to observe as the Kenya-UK EPA is operationalized particularly with the distinct dynamics that it will be effected in and the high developmental expectations that have been pegged on it. Of keen interest will be the establishment of the List of Arbitrators and whether or not given the dispute resolution thrust of the agreement any disputes will make it along the continuum all the way to the more formal arbitration mechanism.

The writer did not however consider the interplay with the other international investment instruments to which both the United Kingdom and Kenya are signatories including the International Centre for Settlement of Investment Disputes as well as the Bilateral Treaty between the 2 countries executed in 1999 and which continues to be in force. This presents a further area for research and study.

[135]Thomas Cottier & Marina Foltea, *Constitutional Functions of the WTO and Regional Trade Agreements.* In: Bartels, Lorand; Ortino, Federico (eds.) Regional Trade Agreements and the WTO Legal System (2006) (pp. 43-76). Oxford: Oxford University Press. Available at 10.1093/acprof:oso/9780199206995.003.0004 Last accessed on 19 March 2021

[136]Amin Alavi, Peter Gibbon and Niels Jon Mortensen, *EU-ACP Economic Partnership Agreements (EPAs) Institutional and Substantive Issues* (2007) Danish Institute for International Studies pg.51 Available at https://pure.diis.dk/ws/files/61466/EU_ACP_Economic_Partnership_Agreements_EPAs_.pdf Last accessed on 19 March 2021

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East African Community, *Treaty for the Establishment of the East African Community* (2006) Available at https://www.eacj.org//wp-content/uploads/2012/08/EACJ-Treaty.pdf Last accessed on 16 March 2021

1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards

UN General Assembly, *Declaration on the Right to Development: resolution / adopted by the General Assembly*, 4 December 1986, A/RES/41/128. Available at: https://www.refworld.org/docid/3b00f22544.html Last accessed 16 March 2021

2019 the Singapore Convention on Recognition and Enforcement of International Mediated Settlement Agreements

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European Centre for Development Policy Management, *Overview of the regional EPA negotiations ESA-EU Economic Partnership Agreement* (November 2006) In Brief No.14E

European Union, *Economic Partnership Agreement between the East African Partner States and the European Union and its Partner States* (2014) Available at https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153845.pdf Last accessed on 19 March 2021

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Book Review: Achieving Sustainable Development, Peace and Environmental Security

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Generations come and go, that is life, and we need to embrace that fact. It is on this basis that we the present generation are the custodians of the future generation especially with regard to environment and development. The forms of development that we undertake currently should be thoroughly informed so as to meet both our needs as the present generation, without compromising the ability of the future generations to meet their own needs. This is what is commonly referred to as Sustainable Development.

The concept of Sustainable Development reaffirms the need for both development and environmental protection, and that neither can be neglected at the expense of the other.

It is in the wake of this that leaders across the globe met in 2015 and formed the Sustainable Development Goals that were to be achieved by the signatory nations by the year 2030. The goals were aimed to create a better and fairer world by 2030.

The Sustainable Development Agenda was informed by the global community's desire to combat the ever increasing environmental degradation which not only endangers the ability of the earth to replenish for the sake of future generations but also causes untold suffering to the present generation as evidenced by abject poverty in some parts of the world especially where there

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is reliance on the natural resources to support livelihoods, as well as the health concerns occasioned by massive pollution.
For the world nations to achieve the 17 Global goals, formulated in 2015, countries ae encouraged to have a plan towards achieving them despite there being challenges and hurdles the latest one being the Covid-19 pandemic.

Countries all over the world are encouraged to adopt progressive laws and policies that will foster the achievement of sustainable development. Written in an articulate and precise language, *Achieving Sustainable Development, Peace and Environmental Security* presents a much needed blueprint not only for the concerns affecting Kenya but also the African Continent and the world at large. The book presents a call for the management of the environment in an effective manner that enhances sustainable development. The book is largely informed by the emerging issues since the year 2015 when the United Nations agenda of Sustainable Development Goals (SDGs) was adopted by states around the world. The book highlights the challenges that countries have faced in implementing the 2030 Agenda on SDGs and also offers numerous recommendations on how the same can be addressed.

The book is divided into thirteen chapters which advocate for sustainable development, peace and environmental security for all and sundry. The main running themes in the book include Sustainable Development; The need to embrace new frontiers in the access to justice especially Environmental Justice; Public Participation, Diversity and Inclusivity; Environmental Democracy; Environmental Justice; Indigenous Ecological Knowledge; Social Justice; Environmental Rights; Role of Law in Environmental Management and Governance; Peacebuilding and Entrenching Environmental Rule of Law in Kenya; Evaluating Africa's Regional Development Plans against the Sustainable Development Goals Agenda among others. The book links these themes with environmental conservation and management and argues a case for sustainable development through an integrated approach and realistic progressive laws.

In the introductory chapter, the author analyses the link between Sustainable Development, Peace and Environmental Security. The chapter defines the concept of Sustainable Development, Peace and Environmental security. It

delves into the role peace plays in the achievement of environmental security and Sustainable Development. The chapter calls for the promotion of Just, peaceful and inclusive societies for sustainable development.

Chapter Two analyses the concept of giving Natural Resources a Legal Personality, the current approach envisaged in natural resources management in both the international and national laws. It examines the idea of giving natural resources a legal personality and relates the same to the Kenyan Context. The Chapter advocates for an approach that strikes a balance between ecocentrism/biocentrism and anthropocentrism approaches in environmental & natural resources management and conservation in Kenya. It further challenges the current approaches (both nationally and internationally) to environmental and natural resources management which are largely based on an anthropocentric approach.

Chapter Three interrogates the need of combating Climate change for the realization of Sustainable Development. It further provides for climate change mitigation whereby it encourages the exploring of alternative sources of energy in Kenya with the aim of realizing and achieving the Right to a Clean and sustainable Energy for all.

Chapter Four examines the concept of reconceptualising the Sustainable Development Agenda for Poverty Eradication. The Chapter discusses how the SDG goal 1 can be achieved in Kenya. The chapter offers recommendations that may be considered for the sake of ensuring poverty in all its form is eradicated, consequently allowing all sections of the society to feel that they belong. This chapter interrogates both the National and International Legal frameworks on poverty eradication. The chapter further discusses, the right to health, the state of health sector in Kenya and also provides a way forward towards addressing the socio-economic factors that affect the right to health in Kenya.

Chapter Five entails a discussion on the human rights approach to Environmental and Natural Resource Conflicts Management in Kenya for Sustainable Development. It critically analyses the concepts of conflict management mechanisms in relation to environmental and Natural Resources

conflicts; and securing Human Rights in Environmental and Natural Resources Conflict Management.

Chapter Six provides a discussion on Environmental Democracy, Peace and Sustainable Development. It interrogates the challenges and prospects encountered by Kenya in a bid to foster peace; the promotion of sustainable peace and inclusive societies for Sustainable Development in Kenya; streamlining Environmental and Natural Resources Governance and Climate change mitigation; Building Accountable and inclusive Institutions for peaceful and inclusive society. The chapter goes ahead and interrogates the linkage between peacemaking and environmental management and the role women play in peacemaking and environmental management in Kenya. The chapter also provides for ways in which women involvement in the peacemaking and effective environmental management in Kenya can be fostered.

Chapter Seven delves into the lessons learnt from the Coronavirus Disease (COVID-19) Pandemic and the need for Kenya as a country to redefine Development. It proposes the adoption of a customized global south perspective on development.

Chapter Eight interrogates the need to consider a new path for Environmental Management and sustainable development. It provides some practical recommendations on how Kenya can actualize the current progressive constitutional and statutory provisions that are meant to drive the country towards achieving the sustainable development agenda. The chapter draws from the best practices internationally and while it acknowledges the uniqueness of Kenya's socio-economic context, the recommendations are broad enough and can be tailored to take care of the needs of all stakeholders. Chapter Nine discusses how Kenya and the world in general can achieve Sustainable Development Goals, also known as Global Goals. It identifies the challenges that still make it difficult to achieve sustainable development and offers some viable solutions ranging from social, economic, political and also ones that require the participation of all stakeholders. It interrogates the challenges that are being faced and the prospects thereof.

Chapter Ten evaluates the Africa's Regional Development plan against the sustainable development goals agenda. It assesses the resource curse phenomenon and Natural Resource-Based conflicts in the African continent. It provides proposals and ways that the African countries can overcome the resource curse in Africa for Economic and Human Development. This chapter goes further to interrogate the emerging jurisprudence emerging from the African Court of Justice and Human Rights (the African Court). It also interrogates the Investment-Related Dispute settlement under the African Continental Free Trade Agreement (AfCFTA) and the African Union Commission's, Agenda 2063.

Chapter Eleven offers a discourse on the need to integrate community practices and cultural voices into the Sustainable Development discourse. The process of Sustainable Development binds a relationship of interdependence, protection and enhancement of natural resources to meet the needs of the present generation, without compromising the ability of future generations to meet their own needs.

Chapter Twelve discusses the link between Sustainable Development and Access to justice. Access to justice is a very important aspect of sustainable development. Access to justice has been described as a situation where people in need of legal redress find effective solutions from justice systems that are accessible, affordable, comprehensible to ordinary people, and which dispense justice fairly, speedily and without discrimination, fear or favour and offer a greater role for alternative dispute resolution. Access to justice is also one of the pillars of the Agenda 2030 on Sustainable Development Goals (SDGs). The chapter also analyses the use of legal technology and the need to embrace technology in the legal practice to enhance efficiency and access to justice. This chapter also interrogates the role that the National Environment Tribunal (NET) plays in sustainable development and access to justice in Kenya.
Chapter Thirteen wraps up the discussion in the preceding chapters of the book. It calls for a participatory and collaborative approach in the realization of the Sustainable Development Goals.

The book offers useful insights towards the realisation of the Sustainable Development Goals. It presents a call for the realisation of Sustainable Development Goals for the coming generations

The book advocates for a just and peaceful society for the realization of Sustainable Development Goals. Sustainable Development Goals can only be achieved in a peaceful and viable environment. The ideas in the book have been presented in a cogent manner and language making the book easy to comprehend.

The book is expertly written by a renowned author and scholar who has vast environmental knowledge and experience. The book is undoubtedly rich in content and will immensely contribute to the realization of the Sustainable Development Goals. *Achieving Sustainable Development, Peace and Environmental Security* is definitely a must read for students, teaching fraternity, members of the bar and the bench, legislators, policy makers, environmentalists and the public in general.

Achieving Sustainable Development, Peace and Environmental Security is an imperative whose time is now.

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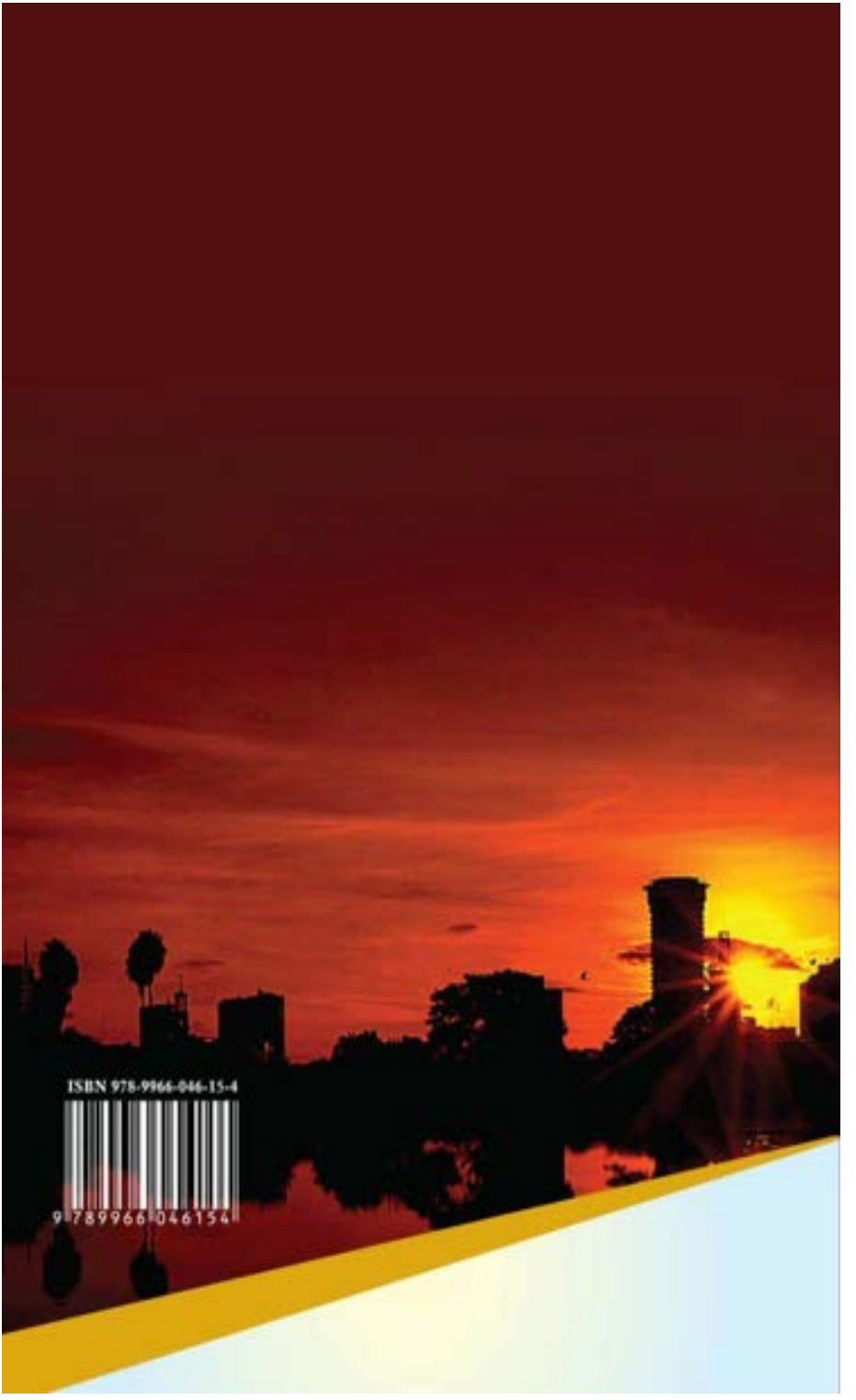
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