PART I: LAW SCIENCE, TECHNOLOGY AND INNOVATION

Carbon Credit Schemes in Foreign Direct Investments in Kenya: Prospects and Challenges

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Abstract

The awareness of changes in the global climate arising out of environmental degradation has brought to issue the need for new technologies to produce clean energy and for measures to allay the problem arising out of the over-utilisation of fossil fuels. An invention in this line is seen in the introduction of carbon credit schemes whereby industrialised countries, which are the greater polluters of the environment, provide funds for projects in countries that undertake measures to reduce pollution. This paper explores the extent to which Kenya has developed the capacity to tap into the carbon credit schemes by, not only encouraging investments, but also in providing facilitative legal and policy framework and creating clear mechanisms for dispute resolution in conflicts affecting investors in the clean energy sector.

1. Introduction

Although the discovery of fossil fuel in Kenya may be seen as a likely spur to economic development, as it will attract foreign investment into the country,[1] the exploitation of these resources causes a particular concern with respect to the environment. The Intergovernmental Panel on Climate Change (IPCC), established by the United Nations Environmental Program (UNEP) and World Meteorological Organization (WMO) attributes the dangerous climate change

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1 The exploitation of fossil fuel already attracts a significant percentage of global foreign direct investment (FDI E.g., in 2013-2014, the United Kingdom, alone provided loans worth over US $ 2.6 billion to foreign fossil fuel projects throughout the world. *See,* "UK Loaned £1.7bn To Foreign Fossil Fuel Projects despite Pledge," *The Guardian*, 6 January 2015 at http://www.theguardian.com/environment/2015/jan/06/uk-loaned-17bn-to-foreign-fossil-fuel-projects-despite-pledge.

to the greenhouse gas emissions from the use of fossil fuels,[2] and the US Supreme Court in *Massachusetts v Environmental Protection Agency*,[3] classified greenhouse gases (GHG) resulting from fossil fuels as air pollutants which needed to be regulated to safeguard against dangerous global climate change.[4]

The danger posed by the emission of the greenhouse gases has attracted international attention. For instance, the ongoing negotiations for a new international legal instrument within the UN Framework Convention on Climate Change (FCCC),[5] is expected to focus on foreign direct investment (FDI) inflows into developing countries' carbon credits, and their significant role in climate change adaptation and mitigation.[6]

The aim of this paper is to examine the role of renewable energy and forest sector schemes in the promotion of FDI inflows in Kenya. It explores the existing structures including the available legal and policy framework for the promotion of clean energy in the country on the premise that, if well

2 IPCC was established with a view "to provide the world with a clear scientific view on the current state of knowledge in climate change and its potential environmental and socio-economic impacts." Greenhouse gases include carbon dioxide or other gaseous carbon compounds released into the atmosphere, associated with climate change.

3 (2007)549 US 497.

4 Article 1(2) of the UN Framework Convention on Climate Change defines "climate change" as 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. The US Environmental Protection Agency (EPA) as well as similar national institutions around the world and the United Nations are taking action to reduce greenhouse gas emissions from both mobile and stationary sources.

5 An International Climate Change agreement(s) may be adopted at the 21st Session of the UN Framework Convention on Climate Change to be held in Paris, France from 30 November to 11 December 2015. For the negotiations timeline, see UNFCCC, *20 Years of Effort and Achievement. Key Milestones in the Evolution of International Climate Policy* at http://unfccc.int/timeline/. FCCC/CP/2013/10/Add.3, Pages 52-53.

6 FDI net inflows are the value of inward direct investment made by non-resident investors in the reporting economy. See The World Bank Group, *What is the Difference between Foreign Direct Investment (FDI), Net Inflows and Net Outflows*? https://datahelpdesk.worldbank.org/knowledgebase/articles/114954-what-is-the-difference-between-foreign-direct-inve. Renewable energy is energy that comes from naturally replenished sources e.g. sunlight, wind, rain, tides, waves and geothermal heat. For information on renewable energy, see http://www.renewableenergyworld.com/rea/home. According to the Food and Agriculture Organization (FAO), forests currently contribute about one-sixth of global carbon emissions when cleared, overused or degraded. However, they also absorb carbon from the atmosphere, store and sink to the ground. See FAO, *Role of Forests in Climate Change* at http://www.fao.org/forestry/climatechange/en/. For an overview of global forest carbon projects, see *Forest Trends: Forest Carbon Portal* at http://www.forestcarbonportal.com/project/. See also UN Secretary General Climate Summit, *Action Areas and Action Statements: Energy, Forests, Financing and Pricing Carbon*, 23 September 2014 at http://www.un.org/climatechange/summit/action-areas/; UNEP, *Climate Change Adaptation*, at http://www.unep.org/climatechange/adaptation/; UNEP, *Climate Change Mitigation* at http://www.unep.org/climatechange/mitigation/.

implemented, these schemes will not only lead to environmental protection, but also bring financial benefits and development to the country.

The analysis in the paper is divided into five substantive parts. Part one provides an overview of FDIs, while part two specifically explores FDI in carbon credit schemes in the renewable energy sector in Kenya. Part three, for its part focuses attention on the legal framework for the protection of carbon credit schemes in the country, while part four explores the issue of investments in the carbon credit schemes in Kenya, and part five looks at the various protections available to foreign investors, including the existing dispute resolution mechanisms for conflicts that may arise in the implementation of the projects attracting carbon credits.

2. Overview of Foreign Direct Investment and Carbon Credit Schemes

2.1 Foreign Direct Investments in Kenya

Kenya is the 9th largest economy in Africa with a gross domestic product (GDP) of US$ 53.3 billion, and a per-capital GDP of US$ 1,246.[7] The *Fortune* Magazine has placed Kenya among the top emerging markets globally after India, Indonesia, Malaysia, Mexico, Columbia and Poland.[8] According to the World Bank, FDI inflows to Kenya stood at US$ 514,387,425 between 2010 and 2014 from US$ 178,064,607 between 1990 and 1998.[9]

Most of the FDIs are market-seeking. In Kenya, they are aimed at taking advantage of the country's position as a leading economy in East Africa to attract international investors into the country. Indeed, the World Bank's Multilateral Investment Guarantee Agency (MIGA), attributes Kenya's growth and favourable investment climate to:

> Its position as an East African business hub for major international corporations, excellent Internet connectivity, a well-developed port system with cold storage facilities, computerized port procedures and a motivated workforce. Kenya's

7 See Farai Gundan, 'Kenya Joins Africa's Top 10 Economies After Rebasing of Its Gross Domestic Product (GDP)' *Forbes* (1 October 2014 at http://www.forbes.com/sites/faraigundan/2014/10/01/kenya-joins-africas-top-10-economies-after-rebasing-of-its-gross-domestic-product/, last visited on 9 November 2015.

8 "The New World of Business", *Fortune Online Edition*, 22 January 2015 at http://fortune.com/2015/01/22/the-new-world-of-business/.

9 "Foreign Direct Investment, Net Inflows (BoP, current US$)", World Bank, at http://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD.

economy is also liberalized without exchange or price controls. It has no restrictions on domestic and foreign borrowing by residents and non-residents, and enjoys a good, extensive infrastructure and membership to regional trading blocs like the Common Market for East and Southern Africa (COMESA) and the East African Community (EAC).[10]

Furthermore, Kenya is seen as a preferential trading country under the African Growth and Opportunity Act (AGOA) – a US law under which products from eligible African countries enjoy duty free access to the US market.[11] AGOA provides reforming African countries with the most liberal access to the US market available to any country or region with which the United States does not have a Free Trade Agreement.[12] The country's potential also arises from its membership in the ACP-EU/Cotonou partnership agreement between the European Union (EU) and African, Caribbean and Pacific (ACP) states.[13] Under the Cotonou agreement, products from ACP countries entering the EU market are "entitled to duty reductions and freedom from all quota restrictions."[14] Moreover, as a member of the World Trade Organization (WTO) since 1 January 1995,[15] under the Generalized System of Preferences (GSP),[16] a wide range of Kenya's manufactured products are entitled to preferential duty treatment in the

10 World Bank Group, *Multilateral Investment Guarantee Agency: Snapshot Africa; Benchmarking FDI Competitiveness in Sub-Saharan African Countries: Kenya*, at 22 at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/03/07/000020953_20070307114626/Rendered/PDF/389050AFR0Snapshot1africa01PUBLIC1.pdf.

11 AGOA was signed into law on 18 May 2000 as Title 1 of The Trade and Development Act of 2000.

12 US Department of Commerce, International Trade Administration, Summary of AGOA 1, Background, Para 4 at http://trade.gov/agoa/legislation/index.asp.

13 The ACP-EU Partnership Agreement, signed in Cotonou on 23 June 2000, was concluded for a 20-year period from 2000 to 2020. It is the most comprehensive partnership agreement between developing countries and the EU. Since 2000, it has been the framework for EU's relations with 79 countries from Africa, the Caribbean and the Pacific (ACP). In 2010, ACP-EU cooperation had been adapted to new challenges such as climate change, food security, regional integration, and State fragility and aid effectiveness. See ACP - The Cotonou Agreement at https://ec.europa.eu/europeaid/regions/african-caribbean-and-pacific-acp-region/cotonou-agreement_en.

14 International Business Publications, Kenya Business Law Handbook: Strategic Information and Laws (Int'l Business Publications 2012) 74.

15 World Trade Organization, Kenya and the WTO at https://www.wto.org/english/thewto_e/countries_e/kenya_e.htm.

16 The UN Conference on Trade and Development (UNCTAD), under Resolution 21/1968, the objectives of the generalized, non-reciprocal, non-discriminatory system of preferences in favour of the developing countries, including special measures in favour of least advanced among the developing countries, should be: (a) to increase their export earnings; (b) to promote their industrialization; and (c) to accelerate their rates of economic growth. See UNCTAD), About GSP at http://unctad.org/en/Pages/DITC/GSP/About-GSP.aspx.

United States of America, Japan, Canada, New Zealand, Australia, Switzerland, Norway, Sweden, Finland, Austria, and other European countries.

Kenya has also entered into bilateral trade agreements with 27 countries and is negotiating such agreements with 9 other countries.[17] Notably, while the UK, Netherlands and Germany have traditionally been the lead FDI sources in Kenya, China and India have now replaced them as top FDI sources after the government deliberately turned East to source for investments.[18]

Hence, riding on a relatively stable political environment, natural resource discoveries, rising consumerism and the ongoing integration of the East African Community, FDI inflows to Kenya have significantly increased over the last couple of years.[19] This has enabled Kenya to surge into second place, after Ghana, in FDI rankings in Africa.[20] Furthermore, oil discoveries in Northern and Eastern parts of Kenya will also inevitably lead to increased FDI inflows to Kenya, something which is already being felt.[21]

The exploitation of the fossil fuel discovered in Kenya is, however, bound to raise questions in respect of the impact that this will have on the environment and on the responsibility that the state and other actors in the field have towards environmental protection. It is in this respect that the carbon credit schemes emerge; not only as a remedy to the production of greenhouse gases, but also as an important source of alternative energy as well as a source of FDI to the country.

2.2 FDI's in Carbon Credit Schemes

Universally, the FDI carbon credit schemes have been employed as a mechanism for the protection of the environment. These schemes are anchored on the UN

17 See Kenya's Export Promotion Council webpage at http://epckenya.org/index.php?option=com_content&task=view&id=50&Itemid=70.

18 "China, India Replace Britain As Country's Top Sources Of FDI", *Business Daily* (Nairobi, 7 September 2011) available at http://www.businessdailyafrica.com/China--India-replace-Britain-as-Kenya-s-top-sources-of-FDI-/-/539552/1232240/-/121fmsbz/-/index.html.

19 "Kenya FDI Inflows Pick Up, Hit $382.3m in Quarter Two of 2013," *The EastAfrican* (21 September 2013) available at http://www.theeastafrican.co.ke/business/Kenya-FDI-inflows-pick-up-hit--382m-in-Q2-of-2013-/-/2560/2001694/-/u7c3lr/-/index.html.

20 "Kenya Surges to Second Place in Africa FDI Ranking", *Business Daily* 18 May 2014) available at http://www.businessdailyafrica.com/Kenya-surges-to-second-place-in-Africa-FDI-ranking/-/539552/2319332/-/9csnqnz/-/index.html.

21 "Oil Sector Raises Kenya's FDI Inflows 98 Per Cent", *Business Daily* (18 July 2014) available at http://www.businessdailyafrica.com/Oil-sector-raises-Kenya-s-FDI-inflows-98-per-cent/-/539552/2393694/-/m7owucz/-/index.html.

Framework Convention on Climate Change,[22] and the Kyoto Protocol to the Convention.[23] They are also firmly rooted in the post-Kyoto climate change negotiations. For instance, the Copenhagen Accord states that:

> Developed countries commit to a goal of mobilizing jointly USD 100 billion dollars a year by 2020 to address the needs of developing countries. This funding will come from a wider variety of sources, public and private, bilateral and multilateral, including alternative sources of finance. [24]

At the UN Secretary General's Climate Summit held in September, 2014 three major pension funds from North America and Europe accelerated their investments in low-carbon investments across asset classes up to more than $31 billion by 2020. Commercial banks also committed to provide US$ 30 billion in new climate finance by the end of 2015 by issuing green bonds and other innovative financing initiatives.[25]

Kenya hopes to tap into this climate financing opportunities to implement local climate change adaptation and mitigation actions. For example, to finance its National Climate Change Response Strategy of 2010,[26] Kenya adopted a National Climate Change Action Plan in March 2013 which prioritizes scaling up access to international carbon markets; establishment of a conducive investment climate; and enhancement of foreign direct investment, international trade, and international cooperation to support the transfer of environmentally sound technologies.[27]

3. Tapping into the Carbon Credit Scheme Through the Renewable Energy Sector in Kenya

By the year 2012, Kenya had attracted more than $600 million of international private sector investment in renewable energy.[28] These investments targeted hydropower, geothermal, wind and bioenergy power projects. Foreign investors

22 Art 4.

23 Art 12.

24 Copenhagen Accord, at http://unfccc.int/meetings/copenhagen_dec_2009/items/5262.php.

25 Press Release, "Governments, Investors and Financial Institutions to Mobilize US$200 Billion by End of 2015 to Support Climate Action", *Climate Summit 2014*, available at http://www.un.org/climatechange/summit/wp-content/uploads/sites/2/2014/05/FINANCING-PR-REVISED.pdf.

26 Government of Kenya, *National Climate Change Response Strategy* (April, 2010) at http://cdkn.org/wp-content/uploads/2012/04/National-Climate-Change-Response-Strategy_April-2010.pdf.

27 Republic of Kenya, *National Climate Change Action Plan 2013-2017*, Pages 91-92 available at http://cdkn.org/wp-content/uploads/2012/04/National-Climate-Change-Response-Strategy_April-2010.pdf.

28 Republic of Kenya, *National Climate Change Action Plan : Finance*, August 2012, at 7.

in the country have been active in the power sector since 1906 when Mombasa Electric Light and Power Company was established.[29] The Company had its roots in Zanzibar, but was dissolved in 1922 and a London-based board established.[30] It was reconstituted as the East Africa Power and Lighting Company, which operated under the management of Balfour Beatty & Co, and the technical assistance of Power Securities Ltd.[31] The Company was later renamed Kenya Power and Lighting Company Ltd (KPLC) in 1983 after a merger with Kenya Power Company (KPC).[32]

It was, however, not until 1996 that the power sector was officially liberalized and foreign investment in the energy sector increased. The KPLC was split to form Kenya Power and KenGen, and even though the Kengen has remained a power generation monopoly (with the government owning 51% shares and the remainder traded at the Nairobi Securities Exchange), four independent power producers (IPPs) entered into a build-own-operate (BOO) contracts with the Ministry of Energy to generate power through diesel, kerosene and gas.[33] One of the four independent power producers, the Nevada-based Ormat Technologies, through its wholly owned subsidiary, Orpower4 Technologies incorporated in Cayman Islands and registered in Kenya as a foreign company was allowed to invest in the $310 million 110 Mw geothermal power generation plant.[34] Orpower4 sells the power generated to Kenya Power and Lighting Company under a 20-year power purchase agreement.

Moreover, the FDI into the renewable energy sector is rapidly increasing after adoption of a Feed-In-Tariff (FiT) policy on wind, biomass, small hydro,

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29 Nicola Swainson, *The Development of Corporate Capitalism in Kenya, 1918-77* (University of California Press, 1980) at 66.

30 Somerset Playne and F. Holderness Gale, *East Africa: Its History, People, Commerce, Industries and Resources* (The Colonial Compiling and Publishing Company, 1908-1909) at 420; Kenya Gazette, *General Notice No. 527* of 1 June 1922, 7 July 1922.

31 Both were British companies.

32 The KPC had been established in 1954 to transmit power from the Owen Falls dam in Uganda. See Kenya Power and Lighting Company, 'History and Milestones', available at http://www.kplc.co.ke/content/item/61/History-and-Milestones.

33 See, Anton Eberhard and Katharine Gratwick, *The Kenyan IPP Experience* (Working Paper 49, University of Cape Town, August 2005, revised November 2005), available at http://fsi.stanford.edu/sites/default/files/Kenya_IPP_Experience_.pdf; Ormat, "Olkaria III Geothermal Complex In Kenya Reaches 110 Mw With Commercial Operation Of Plant 3", available at http://www.ormat.com/news/latest-items/olkaria-iii-geothermal-complex-kenya-reaches-110-mw-commercial-operation-plant-3.

34 Multilateral Investment Guarantee Agency, *Project Brief*, at http://www.miga.org/projects/index.cfm?pid=504.

geothermal, biogas and solar resource generated electricity.[35] Since the adoption of the FiT policy, foreign investment in wind power has soared.

3.1 Wind Power

Examples of renewable energy projects that have taken advantage of the FiT include the Lake Turkana Wind Power Project; the Nyandarua Wind Power Project; and the Kipeto Wind Power Project. The Lake Turkana Wind Power Project is comprised of a consortium of companies that include KP&P BV Africa of Netherlands; Aldwych International Limited of England; Vestas Wind Systems A/S of Denmark; Norwegian Investment Fund for Developing Countries (Norfund); the Industrial Fund for Developing Countries (IFU) of Denmark; and the Finnish Fund for Industrial Cooperation Ltd (Finnfund). Taking advantage have also been the Overseas Private Investment Corporation (OPIC), the US Government's development finance institution, which has approved an investment guaranty of up to $US 250 million to support construction of the Lake Turkana Wind Power Project.[36] Other investors include South Africa's Standard Chartered Bank, the Nedbank, and the African Development Bank.[37] The LTWP project is expected to generate 310 Mw and reduce the equivalent of 736,615 metric tons of carbon equivalent per annum.[38]

For its part, the Kipeto Wind Power Project comprises of 100 Mw installed capacity aimed at reducing 254,125 metric tons of CO_2 equivalent per annum.[39] The project is being implemented through Kipeto Energy Limited, a special purpose vehicle incorporated in Kenya for developing the proposed wind

35 The FiT policy allows power producers to sell renewable energy generated electricity to an Off-taker at a pre-determined tariff for a given period of time as a way of promoting generation of electricity from renewable energy sources. See Ministry of Energy, *Feed-in-Tariffs Policy on Wind, Biomass, Small Hydro, Geothermal, Biogas and Solar Resource Generated Electricity* (March 2008, Revised January 2010 and December 2012) at 6. Available at http://www.renewableenergy.go.ke/downloads/policy-docs/Feed_in_Tariff_Policy_2012.pdf

36 "OPIC Board of Directors Commits to Lake Turkana Wind Power Project, Affirms Power Africa Pledge", *Overseas Private Investment Corporation*, June 2014 at https://www.opic.gov/press-releases/2014/opic-board-directors-commits-lake-turkana-wind-power-project-affirms-power-africa-pledge.

37 "Banks Team up to Arrange Wind Power Funds, *Business Daily* (April 2015) at http://www.businessdailyafrica.com/Banks-team-up-to-arrange-wind-power-funds/-/539552/2561698/-/yaxxvvz/-/index.html.

38 "Project 4513: Lake Turkana 310 Mw Wind Power Project, *CDM Registry*, at http://cdm.unfccc.int/Projects/DB/SGS-UKL1298369167.94/view.

39 "Project 8775: Kipeto Wind Energy Project", CDM Registry, at http://cdm.unfccc.int/Projects/DB/JCI1355475722.72/view.

energy facility, by General Electric Company of the USA, and Craftskills Wind Energy International Limited, a Kenyan renewable energy company.[40]

Furthermore, the Nyandarua Wind Power Project, that is projected to have an installed capacity of 60 Mw to reduce 123,577 metric tons CO_2 equivalent per annum, is in the offing. The Nyandarua Wind Power Project investors include JP Morgan Ventures Energy Corporation and EcoSecurities International Limited; both of the United Kingdom, through Aeolus Kenya Limited, a company registered in Kenya.[41]

3.2 Geothermal Power

The establishment of the Geothermal Development Corporation (GDC) in 2008 had the objective of fast-tracking the development of geothermal resources in the country, and has factored in the increase of FDI into the Kenyan energy sector. Indeed, part of GDC mandate is: "to avail steam to power plant developers for electricity generation as a way of attracting foreign investments by reducing investment risks associated with exploration and site development".[42]

The Ormat Technologies, in partnerships with Symbion Power LLC, and Civicon Ltd have signed a 25-year built-operate-own (BOO) agreement with the GDC, to develop a 35 Mw geothermal power generation plant in Menengai.[43] The Nevada-based Geothermal Development Associates has also invested in a 2.5 Mw geothermal generating power plant in Eburu, Kenya.[44] The GDC is developing other geothermal sites, and regularly invites foreign investors to invest in power generation.

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40 Kipeto Energy Limited, *Kipeto Wind Farm and 220 KV Transmission Line: Executive Summary*, September 2013 at page 4. Available at https://www3.opic.gov/environment/eia/kipeto/Kipeto%20Wind%20Farm%20and%20220kV%20Line%20Executive%20Summary%20Report%20Final.pdf.

41 CDM Executive Board, *Project Design Document: 60 Mw Kinangop Wind Power Project*, available at http://cdm.unfccc.int/filestorage/9/W/Y/9WYXVDU4MO6GKZL2JCBFT0851SIEQ3/Kinangop_Wind_PDD.pdf?t=TGl8bm5ldHUzfDBxKiGPuNHMF9u_sZnynAnc.

42 Geothermal Development Corporation, *Who We Are*, at http://www.gdc.co.ke/index.php?option=com_content&view=article&id=139&Itemid=203.

43 Ormat, *Ormat Signs 25-Year PPA and Steam Supply Agreement for the 35 Mw Menengai Geothermal Project in Kenya*, available at http://www.ormat.com/news/latest-items/ormat-signs-25-year-ppa-and-steam-supply-agreement-35-mw-menengai-geothermal-proje.

44 Geothermal Development Associates, *Commissioned: Eburu Geothermal Power Plant*, (Feb. 2012) available at http://www.gdareno.com/news/commissioned-eburru-geothermal-power-plant/.

3.3 Biogas

Besides the wind and geothermal power investment, biogas has also been viewed as an alternative source of clear energy that may attract FDI into Kenya. It is in this regard that Tropical Resources, a British owned company registered in Kenya has developed a 2.2 Mw biomass energy plant called the Gorge Farm Energy Park Biogas Plant at a cost of US$ 6.5 million.[45]

The plant is located in Naivasha and generates power from organic crop waste which is sourced from a neighbouring farm owned by VP Group, one of East Africa's biggest exporters of fresh vegetables. The vegetable farm produces thousands of tonnes of organic waste annually where 50,000 tonnes is being supplied to the Gorge Farm Energy Park every year.

3.4 The Forestry Sector

Foreign investments in the forest carbon are relatively new in Kenya. They are being developed and implemented either through the clean development mechanism (CDM) or through the voluntary carbon market. There are currently about fourteen forest carbon projects in the country. Of these, five are registered with the CDM and nine operate under the voluntary carbon market.[46]

The CDM compliance based carbon projects include the Aberdare Range/ Mt. Kenya Small Scale Reforestation encompassing the Kamae-Kipipiri project;[47] the Kirimara-Kithithina project;[48] and the Kibaranyeki project.[49] Other projects are the restoration of degraded lands through reforestation in

45 Reuters, *Africa's First Grid-Connected Biogas Plant To Launch In Kenya* (4 February 2015) available at http://www.reuters.com/article/2015/02/04/us-kenya-power-biofuels-idUSKBN0L81IP20150204.

46 See KenGen CDM Project, at http://www.kengen.co.ke/index.php?page=business&subpage=cdm, last visited on 10 November 2015.

47 "Project 3206: Aberdare Range/Mt. Kenya Small Scale Reforestation Initiative Kamae-Kipipiri Small Scale A/R Project", CDM Registry, available at http://cdm.unfccc.int/Projects/DB/JACO1260322827.04/view.

48 "Project 3207: Aberdare Range /Mt. Kenya Small Scale Reforestation Initiative Kirimara-Kithithina Small Scale A/R Project", *CDM Registry*, available at http://cdm.unfccc.int/Projects/DB/JACO1260322919.16/view.

49 "Project 5585: Aberdare Range/Mt. Kenya Small Scale Reforestation Initiative Kibaranyeki Small Scale A/R Project", *CDM Registry*, available at http://cdm.unfccc.int/Projects/DB/JACO1324448535.95/view.

Mau forest complex,[50] and restoration of degraded lands through reforestation in Aberdare forest complex and national park area.[51]

Foreign investments in the voluntary forest carbon market include the Kasigau corridor (Phase I & II) by Wildlife Works, based in California;[52] the International Small Group & Tree Planting Programme (TIST) by Clean Air Action Corporation (CAAC), based in Delaware;[53] the Forest Again Project by Eco2librium Inc., based in Idaho;[54] the Mikoko Pamoja Mangrove Restoration Project by Earth Watch Institute, based in Boston;[55] the Community and Biodiversity Project by the Africa Wildlife Foundation;[56] and the Aberdare Range/Mt. Kenya Small Scale Reforestation (which receive most of their support from the United States).[57]

Other projects include the Treeflights Kenya Planting Project by Treeflights based in the United Kingdom;[58] and the Western Kenya Smallholder Agriculture Carbon Finance Project by VI Agroforestry, a Swedish development cooperation organization.[59]

4. Foreign Investment Law And Carbon Credit Schemes In Kenya

For Kenya's National Climate Change Action Plan (NCCAP) to be fully and effectively implemented, a sound and enabling policy, legislative, and institutional framework is necessary. This will provide legitimacy and set goals for environmental conservation and protection. It will also regulate conduct, provide incentives for action, promote investment, and establish sanctions that can ensure compliance.

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50 "Project 9785: Restoration Of Degraded Lands through Reforestation in Mau Forest Complex, Kenya," *CDM Registry*, available at http://cdm.unfccc.int/Projects/DB/DNV-CUK1384521146.87/view.

51 "Project 9789: Restoration Of Degraded Lands through Reforestation in Aberdare Forest Complex & National Park Area, CDM Registry, available at http://cdm.unfccc.int/Projects/DB/DNV-CUK1384937677.31/view.

52 Wildlife Works Inc., at http://www.wildlifeworks.com.

53 Clean Air Action, at http://www.cleanairaction.com/offices.htm.

54 ECO2LIBRIUM at http://www.eco2librium.net/forestagain.html.

55 Plan Vivo, at http://www.planvivo.org/wp-content/uploads/gazi_pin_PlanVivo_Kenya.pdf.

56 Africa Wildlife Foundation at http://www.awf.org/old_files/documents/climatechange/Mbirikani_Brochure_web_version.pdf.

57 GreenBelt Movement at http://www.greenbeltmovement.org.

58 Treeflights at https://sites.google.com/site/treeflightskenya/home.

59 Vi Agroforestry at http://www.viagroforestry.org/projects/kenya/ .

In this regard, a legal preparedness assessment report (LPAR) was developed in 2012 to "review international, regional and national legal instruments relating to climate change with a view to developing a policy and regulatory framework that promotes coherence, coordination and cooperative governance of climate change issues at the national and county levels".[60]

The law and policy frameworks for FDI's in carbon credit schemes in Kenya is governed by the terms of the contract between the parties, by the various bilateral investment treaties (BITs) between Kenya and country of the investor, and by national and international law, which we shall now turn to.

4.1 Contracts

Under the Investment Promotion Act, "a foreign investor who intends to invest in Kenya may apply to the Kenya National Investment Authority for an investment certificate."[61] Such a foreign investor is required to have at least US $100,000 or the equivalent in any currency.[62] It is also required that the proposed investment and the activities related to the investment must be lawful and beneficial to Kenya.[63]

In practice, the prospective foreign investors and the Government of Kenya, through the respective ministries, do negotiate investment agreements within which they determine the applicable law under the contracts that they enter into.[64] Usually, the Ministry of Finance, which is tasked with the responsibility of formulating financial and economic policies, will coordinate with the Ministry of Energy and Petroleum, the Energy Regulatory Commission and the Geothermal Development Corporation in case of renewable energy projects. It also coordinates with the Ministry of Environment and Natural Resources in the case of forest carbon projects while negotiating the relevant contracts with the prospective investors.

60 Republic of Kenya, *National Climate Change Action Plan: Legal Preparedness Assessment Report* (2012) at 2.

61 Section 3(2).

62 Section 4(1)(a).

63 Section 4(1)(d).

64 For renewable energy projects, the Ministry of Energy and Petroleum.

4.2 The International Legal Framework

The idea that international law should protect a foreign investor and his investment was first mooted in 1796 by John Adams.[65] Since then, arbitral decisions, state practice in diplomatic intercourse, and uniform practice of civilized states have concretised into International Minimum Standards Rules Applicable to Investors against Arbitrary Actions of Host States.[66] Generally, therefore, FDI's are protected by general international law, applicable rules of international law, standards specific to international economic law and distinct rules that concern protection of investments.

It is notable that in Kenya, the Constitution now provides that, "The general rules of international law shall form part of the laws of Kenya."[67] Similarly, "Any treaty or convention ratified by Kenya shall form part of the laws of Kenya."[68]

Kenya is a party to the World Trade Organization, the International Convention on the Settlement of Investment Disputes (ICSID) and various International Human Rights Conventions which are thus part of Kenyan law as per the Constitution.

4.3 The Bilateral Investment Agreements

Kenya has signed bilateral trade agreements with 27 countries and is negotiating such agreements with nine other countries. The countries with which Kenya has signed agreements include Argentina, Bangladesh, Bulgaria, China, Comoros, and the Democratic Republic of Congo. Other countries with which Kenya has bilateral trade agreements are Djibouti, Egypt, Hungary, India, Iraq, Lesotho, Liberia, Netherlands, Nigeria, Pakistan, Poland, Romania, Russia, Rwanda, Somalia, South Korea, Swaziland, Tanzania, Thailand, Zambia, and Zimbabwe. The BIAs under negotiations include agreements with Belarus, Czech Republic, Ethiopia, Eritrea, Iran, Kazakhstan, Mozambique, and South Africa.[69]

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65 Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (2nd edn, 2012) at 1.

66 Edwin Borchard, *Minimum Standard of the Treatment of Aliens (1940)* (Faculty Scholarship Series, Paper 3469) at 448-9 available at http://digitalcommons.law.yale.edu/fss_papers/3469.

67 Constitution 2010, Art 2(5).

68 Constitution 2010, Art 2(6).

69 Export Promotion Council, *Bilateral Investment Agreements* available at http://epckenya.org/index.php?option=com_content&task=view&id=50&Itemid=70.

With regard to investments in carbon credit schemes, however, the bilateral agreements by Kenya are mainly with developed western countries including the US, United Kingdom, Netherlands, Norway and Denmark.

4.4 The National Legal Framework

Kenya has no specific carbon law or policy. However, there are several existing and upcoming legislations and policies that govern the development of carbon credit schemes and carbon trade in Kenya. The most relevant of these include the Constitution of Kenya, 2010; the Environment (Management and Coordination) Act of 1999; the Water Act of 2002; the Forest Act of 2005; and the Energy Act of 2006. In terms of policy regulations, carbon credit schemes may also fall under the regulations within the Energy Policy; the Feed-in-Tariff Policy, and the Vision 2030 Development Programme (covering the period 2008 to 2030).

Indeed, the National Climate Change Action Plan recognises the importance of FDI in financing climate change activities in Kenya, but acknowledges that "Kenya's financial legislation do not provide for climate finance as a distinct governmental priority". It is in this respect that a draft National Policy on Carbon Finance and Emission Trading is being developed. The policy contemplates three sources of finance for carbon trading. These are the clean development mechanism (CDM), the voluntary emission reductions (VER), and the Green Climate Fund.

What then are the protections available to FDI in carbon credit schemes in Kenya? According to UNCTAD, the objective of FDI law is to promote and protect a foreign investor and his investment in a host country.[70] Under article 25(1) of the ICSID, international investment law addresses disputes arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State.[71]

70 UN Conference on Trade and Development, *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries,* at 15.

71 Art 25(1) of the International Convention for Settlement of Investment Disputes.

5. Investments and Carbon Credit Schemes in Kenya

5.1 Definition of 'Investments'

Are carbon credit schemes investments capable of protections under FDI laws? Kenya's Investment Promotion Act, 2004 defines 'investment' as "the contribution of local or foreign capital by an investor, including the creation or acquisition of business assets by or for a business enterprise and includes the expansion, restructuring, improvement or rehabilitation of a business enterprise".

It is notable that the Investment Promotion Act provides an overall investment environment in Kenya. The objective of the Act is the promotion and facilitation of investment by assisting investors in obtaining necessary licenses and other incentives.

What constitutes an 'investment' under FDI regulation is generally determined by the terms of a treaty between Parties, and the rules of interpreting such determination must follow article 31 of the Vienna Convention on the Law of Treaties and, increasingly also, the practice of States.

In that respect, the case of *Fedax v Venezuela* provides a good basis for determining what an investment is.[72] Under the criteria set in that case, important factors include certainty of duration; regularity of profit and return; assumption of risk; a substantial commitment; and the significance for the host State's development. Four of the Fedax criteria, are affirmed in the case of *Salini v Morocco*, [73] which, despite some misgivings, has now become the widely accepted criteria for determining 'investment'.[74]

In the context of Kenya, the Investment Protection Act provides that a project should be beneficial for it to be considered as an investment.[75] For it to be considered as such, it must create employment for Kenyans, contribute to acquisition of new skills or technology for Kenyans, or result in a transfer of technology to the country. A project will be considered as an investment if it also contributes to tax or other Government revenues; contributes to increase in foreign exchange; and utilises domestic raw materials, supplies and services. If a

72 *Fedax v Venezuela*, ICSID Case No. ARB/96/3, Decision on Jurisdiction, 11 July 1997, paras 21-23.

73 ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001 para 51. The *Salini* case excludes the element of profit as being a salient feature that determines whether a project should be considered as an investment.

74 See e.g. in *Malaysian Historical Salvors v Malaysia*, ICSID Case No. ARB/05/10, Award, 17 May 2007; and in *Biwater Gauff v Tanzania*, ICSID Case No. ARB/05/22, Award July 28, 2004.

75 Section 4(2) (A-F).

project result in adoption of value addition in the processing of local, natural and agricultural resources, or contribute to the utilization, promotion, development and implementation of information and communication technology, it will also be considered to be an investment capable of protection under the Investment Promotion Act.

Applying the *Salini* test to carbon credit schemes in Kenya, it is reasonable to classify them as 'investments' within the meaning of foreign direct investment law. Thus, for instance, in terms of duration, renewable energy projects like geothermal power run for 20-30 years, while forest carbon projects are expected to run for 30-60 years. Both renewable energy and forest carbon projects require significant investments. For example, OrPower 4 Inc. invested over US $300 million to develop a 100 Mw geothermal power generating plant in Kenya.[76] Geothermal power and wind energy project development also involve considerable risk to the investor. Moreover, in terms of risk, the forest carbon investment have not picked up globally (with international carbon markets even crashing).[77]

It is worth noting that renewable energy projects are now being developed in the context of Kenya's Vision 2030, a development blueprint aimed at making Kenya a middle-income country by 2030. The forest carbon projects are being developed in the context of Kenya's National Climate Change Action Plan, which envisions Kenya pursuing a low-carbon development path.

5.2 'Investor' or 'National of another Contracting State'?

There are five categories of interests in carbon credit schemes in Kenya. These are:

(a) Private companies;

(b) Government linked lending organizations;

(c) Non-governmental Organizations (NGOs);

(d) Multilateral Development Banks; and

(e) Individuals who voluntarily buy carbon credits from the voluntary carbon markets.

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76 Ventures, *Orpower 4 Receives $265m For Kenyan Geothermal Plant*, November, 2012 available at http://www.ventures-africa.com/archives/15998.

77 "Global carbon trading system has 'essentially collapsed", *The Guardian* (10 September, 2012) at http://www.theguardian.com/environment/2012/sep/10/global-carbon-trading-system.

It therefore becomes important to first understand the concept of 'foreign investor or a national of another contracting state' in relation to these different interests in carbon credit schemes in Kenya.

According to Lin, an investor is a person who allocates capital with the expectation of a future financial return.[78] The interpretation clause of Kenya's Investment Promotion Act, 2004, defines 'foreign investor' to mean "(a) A natural person who is not a citizen of Kenya; (b) A partnership in which the controlling interest is owned by a person or persons who are not citizens of Kenya; and (c) A company or other body corporate incorporated under the laws of a country other than Kenya."

The 'foreignness' of the investors in carbon credit schemes in Kenya is important to determine the protections that each may benefit from.[79] The investor's nationality is critical because substantive standards guaranteed in a treaty between Kenya and the investor's state of origin will only be applicable to nationals of that other state and Kenya. Further, the nationality of an investor will also determine the jurisdiction of an arbitral tribunal in case of a dispute.

Under the ICSID, a 'national of another contracting state' is both a natural or juridical person of the contracting state other than the state party to the dispute.[80] However, the natural person must not have the nationality of the contracting state to the dispute. In the case of a juristic person, the person can have the nationality of the contracting state to the dispute but with foreign control. Thus, the parties may agree that such a person should be treated as a national of another Contracting State.[81]

While the nationality of a natural person is determined by citizenship, corporate nationality is determined either by place of 'incorporation' or the 'seat of business.' Citizenship by registration, dual nationality and the ability to regain Kenyan nationality are important to consider as they may trigger questions of dominant or effective nationality in situations where foreign investors in carbon credit schemes acquire dual nationality or Kenya citizenship. The ICSID is clear and specific that any person who also has the nationality of the host state is excluded from bringing a claim under the Convention". [82] But a foreign investor who has no citizenship of the host state will have access to international

78 Lin, Tom C.W. "Reasonable Investor(s)" *Boston University Law Review* (2015) 95 (461): 466.

79 A. Sinclair, 'The Substance of Nationality Requirements in Investment Treaty Arbitration' (2005) 20 *ICSID Review*-FILJ 357.

80 Art 25 (2).

81 ICSID art 25(2)(a) & (b).

82 Art (2)(a).

protection even if permanently resident in the host state.[83] Similarly, in *Siag v Egypt*,[84] it was held that the test of dominant or effective nationality could not be triggered where the investor had lost citizenship of the host state even if the investor has historic and continuing residence in the host state.

In the Kenyan context, except for the Greenbelt Movement, all the other major investors in carbon credit schemes are entities registered abroad. Renewable energy companies OrPower4 Inc, Ormat Technologies, in partnerships with Symbion Power LLC and forest carbon companies Wildlife Works Inc., Clean Air Action Corp, Eco2librium Inc. fall within the definition of "nationals of another Contracting State" as they are registered in the United States and Cayman Islands in the case of OrPower4 Inc.

By virtue of their registration, they are juridical persons capable of having separate existence, rights and liabilities. In *Salomon v Salomon & Co Ltd*, the House of Lords in England affirmed the principle of corporate personality establishing that an incorporated body has a separate legal persona from its members.[85] In the US, the doctrine of corporate legal personality was established earlier in *Louisville, C. & C.R. Co. v. Letson*,[86] where the U.S. Supreme Court held that a corporation is "capable of being treated as a citizen of the State which created it, as much as a natural person". This was again affirmed in *Marshall v Baltimore & Ohio R. Co,*[87] where the Supreme Court held that "those who use the corporate name, and exercise the faculties conferred by it, should be presumed conclusively to be citizens of the corporation's State of incorporation."

But are State-linked institutions, like KFW Development Bank of Germany, the French Agency for Development, the Norwegian Investment Fund for Developing Countries (Norfund), etc., part of the state or separate from it so as to be able to qualify as "nationals of another contracting state"? Investment law protections only apply to disputes between the host State and nationals of another contracting state and between states.[88]

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83 Decision on Jurisdiction, 6 December 2000.

84 ICSID Case No. ARB/05/15, Decision on Jurisdiction, 11 April 2007.

85 [1896] UKHL 1.

86 (1844)2 How. 497, 558, 11 L.Ed. 353 (1844).

87 (1854)16 How. 314, 329, 14 L.Ed. 953 (1854).

88 Under Art 25(1) of the International Convention for the Settlement of Investment Disputes, Jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State.

In determining this issue, it was held in the case of *CSOB v Slovakia* that, "the accepted practice in interpreting "juridical persons" as employed in article 25 is not to limit it to privately-owned companies, but to embrace, wholly or partially, government-owned companies provided such were not acting in governmental capacity."[89]

6. Potential Risks and Protection Available for FDI in Carbon Credit Schemes in Kenya

6.1 The Potential Investments Risks

Under the *Salini* test a degree of risks is involved in a foreign investment. An investment risk is "the probability or likelihood of occurrence of losses relative to the expected return on any particular investment".[90]UNCTAD has cited potential risks for investments to include expropriation, revocation of license and political risks.[91]

Expropriation is the taking away of private property by a government for use for a public purpose. In line with international law, the Constitution of Kenya provides protection against expropriation of private property except in cases of public interest and where due process is followed that include adequate, prompt and fair compensation and access to a court of law.[92]

In the case of foreign investment in Kenya, the Risk of reversal or abandonment of current Fit tariffs might also be experienced in the future.[93]

Furthermore, under the Investment Promotion Act, cancellation of a foreign investment license can occur if it was issued on the basis of incorrect information given by the investor; if the certificate was obtained by fraud; or if a condition of the certificate was breached. However, the investor must be given

89 ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999, at http://www.italaw.com/documents/CSOB-Jurisdiction1999_000.pdf. paras 16-27.

90 "Definition of Investment Risk", *The Economic Times*, available at http://economictimes.indiatimes.com/definition/investment-risk.

91 UNCTAD, *An Investment Guide to Kenya Opportunities and Conditions 2012: Investment Protection and Dispute Resolution*, page 29 available at http://unctad.org/en/PublicationsLibrary/diaepcb2012d2_en.pdf.

92 Art 40(3).

93 Examples can be drawn from ongoing events in Spain, the Czech Republic, Italy, Greece, Romania and Bulgaria etc. *see* Baiju Vasani & Jones, "Day Renewable Energy World, International Remedies for Foreign Investors in Europe's Renewable Energy Sector" *Renewable Energy World.Com*, (April 30, 2015) available at http://www.renewableenergyworld.com/rea/news/article/2015/04/international-remedies-for-foreign-investors-in-europes-renewable-energy-sector.

reasonable notice and a chance to address the anomaly before any cancellation is made effective.[94]

Political risks remain the greatest challenge to foreign investment in Kenya. According to KPMG, Kenyan politics are dominated by the challenges of implementing the Constitution enacted in August 2010. It is also aggravated by civil unrest every election time, especially due to previous bloody and violent elections in 2007 and in 1992.[95]

Over the last few years terrorism related risk has also increased tremendously with regular attacks in Nairobi and other towns.[96] Consequently, the US and United Kingdom, the two largest sources of FDI inflows to Kenya carbon credit schemes, have been issuing regular travel advisories against Kenya.[97] Fortunately, Kenya is a member of the Multilateral Investment Guarantee Agency (MIGA),[98] which is also currently supporting Kenya's renewable energy sector by insuring a non-shareholder loan to independent power producers.[99]

6.2 Standards of Protection Available for FDI in Carbon Credit Schemes

The standards of protection available to investors generally include:

(a) Fair and equitable treatment;

(b) Full protection and security;

(c) The umbrella clause;

(d) National treatment; and

(e) Most favoured nation treatment.

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94 Section 10 of the Investment Promotion Act, 2004.

95 "Political Risk For Investors in Kenya Exists Despite Peaceful Elections, *CNBC-Africa* (12 February, 2015) available at http://www.cnbcafrica.com/news/east-africa/2013/08/22/political-risk-for-investors-in-kenya-exists-despite-peaceful-elections/

96 The latest attack was on April 2, 2015 when terrorist attacked and killed 148 students of Garisaa University College. See CNN News clip on the same at http://www.cnn.com/2015/04/02/africa/kenya-attack-shabaab-5-things/

97 See, for example, "British Government Tightens Travel Warning On Kenya," *Reuters* (25 March 2015) at http://uk.reuters.com/article/2015/03/27/uk-kenya-security-britain-idUKKBN0MN1XI20150327.

98 Kenya joined MIGA on 28th November, 1988 http://www.worldbank.org/en/about/leadership/members#4

99 See, for example, MIGA's support to Orpower4 http://www.miga.org/projects/index.cfm?pid=504

6.2.1 The Fair and Equitable Treatment (FET) Principle

It has been noted that:

> The concept of fair and equitable treatment is not precisely defined. It offers a general point of departure in formulating an argument that the foreign investor has not been well treated by reason of discriminatory or other unfair measures being taken against its interests. It is, therefore, a concept that depends on the interpretation of specific facts for its content. At most, it can be said that the concept connotes the principle of non-discrimination and proportionality in the treatment of foreign investors.[100]

In *MTD v Chile*,[101] it was said that, FET should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment. It encompasses good faith, due process, non-discrimination and proportionality. Case law indicates that the application of the FET standard is governed by the principles of stability,[102] transparency,[103] and the protection of investor's legitimate expectation.[104]

The FET standard is a rule of international law and is not solely determined by the laws of Kenya. Indeed, in *Sempra v Argentina*,[105] it was explained that the purpose of FET was to fill the gaps which may have been left by more specific standards in a treaty.[106] However, it is notable that most of the BITs that Kenya has entered into contain FET provisions.[107]

6.2.2 The Full Protection and Security Principle

The full protection and security principle encompasses standard that features prominently in almost all Kenyan BITs. For example, provisions that "investments of nationals or companies of each contracting party shall at all times enjoy full protection and security in the territory of the other Contracting Party," are common in Kenya's BITs.[108]

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100 Peter Muchlinski, *Multinational Enterprises and the Law* (1995) 625.

101 ICSID Case No. ARB/01/7.

102 *CMS v Argentina*, ICSID Award, 12 May 2005.

103 *Metalclad v Mexico*, ICSID Award, 30 August 2000.

104 *Gami v Mexico*, ICSID Award, 15 November 2004 para 93.

105 *Sempra v Argentina*, ICSID Award, 28 September 2007 paras 271-8.

106 See also *Tècmed v Mexico*, ICSID Award, 29 May 2003.

107 See article 2(1) Germany-Kenya (BIT) at http://investmentpolicyhub.unctad.org/Download/TreatyFile/1350 and article 2(2) United Kingdom – Kenya BIT available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/1795

108 See e.g. The Kenya-United Kingdom BIT.

Full protection and security extends to protection against physical violence and harassment by state security forces,[109] or inaction by State security to unlawful acts by host state citizens.[110] It extends even to actions by third parties.[111] Moreover, in *Siemens v Argentina*, it was held that full protection and security principle covers the legal protection of the investor and his investment. And case law indicates that it may even require the restoration of damaged investments and punishment for the author of the injury.[112]

However, the full protection and security standard does not provide absolute protection against physical or legal infringement. The host state is not placed under a position of strict liability and the State is only required to exercise due diligence and take measures to protect the foreign investor under reasonable circumstances.

Kenyan law strongly protects foreign investors and their investments. The Constitution expressly prohibits arbitrary denial of the right to property and prohibits Parliament from enacting legislation that allow the State or any person to arbitrarily deny, limit, or restrict the enjoyment of property of any description.[113]

6.2.3 The National Treatment Principle

Umbrella clauses guarantee observance of obligations assumed by host States in relation to foreign investors. On the other hand, national treatment ensures that foreign investors and their investments are accorded treatment no less favourable than that which the host State accords to its own investors. The Kenya-United Kingdom BIT, for example, provides that "neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State."

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109 *AAPL v Sri Lanka*, ICSID Award, 27 June 1990 paras 148-50; and *AMT v Zaire*, ICSID Award, 21 February, 1997, para 84.

110 *Wena Hotels v Egypt*, ICSID Award, 8 December 2000 para 84; *Tecmed v Mexico*, ICSID Award 29 May 2003; *Noble Ventures v Romania*; ICSID Case No. ARB/05/2, Award, 12 October 2005.

111 *BiWater Gauff v Tanzania*, Award, 24 July 2008

112 *Parkering v Lithuania*, ICSID Arbitration Case No. ARB/05/8, Award, 11 September 2007 para 354.

113 Art 40.

6.2.4 The Most Favoured Nation Treatment Principle

In international agreements, countries are usually prohibited from discriminating between their trading partners. If such treatment is provided, then it is usually expected that the same shall be extended to all other members under that arrangement. Under the 'Most Favoured Nation Treatment' clauses, however, a state will undertake an obligation towards another state to accord that other state the most favoured nation' treatment in an agreed sphere of relations.[114]

Similar to the BITs that Kenya has entered into or is negotiating, provisions for most favoured nation' treatment are usually made. For example, in the Kenya-United Kingdom BIT, it is provided that:

> Neither contracting party shall in its territory subject investments or returns of nationals or companies of the other contracting party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.[115]

6.3 Investment Dispute Resolution

An important element of foreign investment relates to the modes of dispute resolutions available. Though Kenya's Investment Promotion Act does not provide for a dispute resolution mechanism, the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States was domesticated through the Investment Disputes Convention Act of 1966.

Foreign investors thus have access to international arbitral tribunals under national law even in the absence of express reference to such tribunals in their respective investment agreements or in BITs between Kenya and their respective Countries of origin. Prior to 20 August 2010 Kenya was a dualist State that required the domestication of an international law before it was applicable in Kenya. But after the adoption of a new Constitution on 27 August 2010, Kenya became a monist state.[116] Under article 2(5) and (6), general rules of international

114 Matthias Herdegen, *Principles of International Economic Law* (OUP, Oxford 2013) 393.

115 Kenya-British BIT art 3(1).

116 There has been a debate, however, whether the provisions of the Constitution of 2010 makes Kenya monist. See e.g. Omiti, Herman, The Monist Dualist Dilemma and the Place of International Law in the Hierarchy of Valid Norms under the Constitution of Kenya, 2010 (3 July 2012). Available at SSRN: http://ssrn.com/abstract=2099043 or http://dx.doi.org/10.2139/ssrn.2099043.

law and any treaty or convention ratified by Kenya shall form part of the law of Kenya.[117] Kenya ratified the ICSID convention in May 1966.

Kenya also has an Arbitration Act which, "except as otherwise provided in a particular case, shall apply to domestic arbitration and international arbitration".[118] Under section 3(3) of the Act, "an arbitration is international if, at the time of conclusion of an arbitration agreement, the parties have their places of business in different States."This opens up opportunities for arbitration in Kenya, in the event of a dispute between either of the foreign investors partnering in the development of renewable energy and forest carbon projects in Kenya.

Arbitral awards are seriously enforced. Section 4 of the Investment Disputes Convention Act, 1966 is emphatic that "an award rendered pursuant to the Convention, and not stayed pursuant to the relative provisions of the Convention, shall be binding in Kenya, and the pecuniary obligations imposed by the award may be enforced in Kenya as if it were a final decree of the High Court."

In *Overseas Private Investment Corporation v Attorney-General*,[119] the High Court held that foreign investors also have *locus standi* and unfettered access to Kenya courts. This accrues from dispute resolution clauses in the contract, BITs, and the Constitution. Under the Constitution, *locus standi* arises from the fact that foreign investors (i) have property interest in the country, which they are entitled to protect under the Constitution, and (ii) the Bill of Rights in the Constitution applies to all persons and not "citizens".

7. Conclusion

In conclusion, even as the country prepares to exploit its natural gas discoveries, the clean energy sector investments will still have to play a central role in the country's development. Besides addressing the country's responsibilities towards environmental conservation and protection, a well-structured approach to the carbon credit system will also ensure that there is constant supply of FDI to the country leading to further economic growth.

Although the discussion in this paper has highlighted that, by and large, the Kenyan legal and policy framework actually has inbuilt safeguards that may be

117 Constitution of Kenya, 2010 art 2(5) & (6).

118 Section 2 of Arbitration Act, 1996.

119 *Overseas Private Investment Corporation & 2 others v Attorney General* [2013] eKLR.

deemed sufficient to incorporate the carbon credit schemes in the country's FDI investments, it is important that, as the country undertakes reforms in energy, forest and other laws, care should be taken to ensure that the safeguards presently available are not diluted. It may even suffice that a *sui generis* legal regime is developed to focus particular attention on clean energy and ensure that it is not overshadowed by the potential promises of the fossil fuel discoveries in the region.

The Implications of the Legal Framework Governing Agricultural Subsidies in the East African Community

E. Oluoch Asher's*

Abstract

This article examines the implications of the legal framework governing agricultural subsidies within the East African Community (EAC). It argues that the practice employed by countries within the EAC under which the subsidies that promote exports or imports between the Partner States, and those that are granted by the countries on the basis of the nationality or residence of persons or country of origin of goods or services, actually distort competition in the EAC and are thus prohibited by the Treaty and its protocols.

1. Introduction

Agriculture is the mainstay of majority of the population within the East African Community ('EAC') who are mainly small holder farmers living in the rural areas. Several reasons justify an examination of the implications of subsidies provided by the Partner States of the EAC to support the agricultural sector in the Community. Among the reasons are the persistence by the governments of the Partner States of the Community in granting support measures such as agricultural inputs and price guarantee schemes to the agricultural sector for strategic reasons including food security, and concerns that agricultural subsidies by the developed countries have increased since the conclusion of the Uruguay Round of multilateral trade negotiations. So also is the fact that the legal framework governing such subsidies in East Africa is rarely interrogated.

This paper examines the implications of the legal framework governing agricultural subsidies in the EAC for agricultural support measures by the Partner States of the EAC. It is organized into four parts. Part 1 examines the concept of subsidy in EAC law and compares it with that in WTO law. It is

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contended that the EAC Treaty conception of subsidy excludes the critical element of benefit, and is therefore inconsistent with that in WTO subsidy law. Part 2 assesses the legal framework governing subsidies in the EAC. It is asserts that the general legal framework governing subsidies in the EAC also applies to agricultural subsidies. Part 3 provides an overview of the regulatory framework for agricultural subsidies in the WTO Agreement on Agriculture (hereinafter 'AoA') and analyses its significance for EAC Partner States. The critical output in this part is that the AoA contains adequate mechanisms to accommodate the non-trade concerns of EAC Partner States such as food security and rural development in the current state of their trade in agricultural commodities, but is likely to constrain them with respect to future expansion of agricultural output for trade purposes. The paper concludes by making recommendations.

2. Subsidy In The East African Community Treaty

The Treaty for the Establishment of the East African Community ('EAC Treaty') defines subsidy as a financial contribution by government or any public body within the territory of a Partner State or where there is any form of income or price support in the sense of article XVI of GATT, 1994.[1] The East African Community Customs Union Protocol ('EACCUP') amplifies the notion of subsidy by describing it as assistance by a government of a Partner State or a public body to the production, manufacture, or export of specific goods, taking the form of either direct payments such as grants or loans, or of measures with equivalent effect, such as guarantees, operational or support services or facilities, and fiscal incentives.[2]

The word "where" in the EAC Treaty definition serves to distinguish the notions of financial contribution and forms of income or price support in the sense of article XVI of GATT, 1994. The distinction is drawn from article 1.1(a) (1) and (2) respectively of the Agreement on Subsidies and Countervailing Measures ('SCM Agreement'). Article 1.1(a)(1) of the SCM provides in part that a subsidy shall be deemed to exist if there is a financial contribution by a government or public body within the territory of a Member State, and then proceeds to set out a list of various forms of financial contribution in paragraphs 1.1(a)(1)(i) to (iv). In US-DRAMS[3] the Appellate Body recognized

1 EAC Treaty, Art. 1

2 EACCU Protocol, Art. 1. See also the East African Community Competition Act, which provides at section 2 that a subsidy has the meaning assigned to it in the EACCUP.

3 *US-Countervailing Duty Investigations on Dynamic Random Access Memory Semi-Conductors (DRAMS) from Korea*, WT/DS 296/AB/R, 20 July 2005.

that "paragraphs (i) through (iv) of article 1.1(a)(1) set forth the situations where there is a financial contribution by a government or public body".[4] Consequently "not all government measures capable of conferring benefits would necessarily fall within article 1.1(a)" as, otherwise there would be no need for the financial contribution "because all government measures conferring benefits *per se* would be subsidies".[5] In US-Export Restraints,[6] the Panel noted that all forms of financial contribution involve a clear transfer of economic resources in the form of a transfer of something of value, either money, goods or services, from the government or an intermediary to a private entity. Thus not all transfers of economic resources constitute a financial contribution under the SCM. The enumerative list in Article 1.1(a)(1)(i) through (iv) is therefore an exhaustive list intended to limit the nature of government measures that may be considered as subsidies on account of financial contribution.[7]

An alternative element to the financial contribution requirement in subsidies expressed in article 1.1(a)(2) of the SCM, is any form of income or price support in the sense of article XVI of GATT, 1994. Income and price supports are forms of government intervention aimed at sustaining the income of a certain category or maintaining the price of a certain commodity at a desired level.[8] As regards the phrase "in the sense of article XVI of GATT, 1994" used in article 1.1(a)(2) of the SCM, it is to be noted that paragraphs 1 and 3 of article XVI of GATT, 1994 refer to subsidies, "including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory". Thus the importance of article XVI of the GATT, 1994 is to regulate subsidies that cause distortion in the market by artificially increasing exports of the product benefiting from the subsidy or reducing imports of competing products.[9]

The second element of subsidy expressed in article 1.1(b) of the SCM is that the financial contribution by the government, or income or price support must confer on the recipient a benefit. While benefit has not been defined in the SCM, article 14 sets out guidelines for calculating the benefit to the

4 *Id*, para. 108.

5 Para. 114.

6 See Report of the Panel in *Brazil-Export Financing Programme for Aircraft ('Brazil-Aircraft')*, WT/DS46/R, 14 April 1999).

7 *Id*, para. 8.69.

8 Rubini, *The Definition of Subsidy and State Aid, WTO and EC Law in Comparative Perspective*, Oxford U.P., Oxford, 2009, 123.

9 Gustavo E. Luengo Hernandez de Madrid, *Regulation of Subsidies and State Aids in WTO and EC Law*, Kluwer Law International, Aiphen aan den Rijn, 2007, 122. See also Rubini, *ibid*.

recipient conferred pursuant to article 1.1. In Canada-Aircraft[10] the Panel stated that benefit entails some form of advantage. In order to determine whether a financial contribution confers a benefit, that is, an advantage, it is necessary to determine whether the financial contribution places the recipient in a more advantageous position than would have been the case but for the financial contribution.[11] With reference to the context outlined by article 14, therefore, "a financial contribution shall not be considered as conferring a benefit unless that financial contribution is made on terms that are more advantageous than would have been available to the recipient on the commercial market".[12] The Appellate Body confirmed this interpretation.[13]

The element of benefit as provided in article 1.1(b) appears to have been excluded from the EAC Treaty definition of subsidy. This raises the prospect that all financial contributions by a Partner State or public body, and all forms of income or price support which have the effect contemplated in article XVI of GATT, 1994, could be construed to be subsidies in the terms of the EAC Treaty. Perhaps this anomaly was the mischief intended to be cured by the enumeration of forms of subsidy in the definition of subsidy in the EACCUP.

In the next part, the legal framework governing agricultural subsidization in the EAC will be examined. As will be shown, the rules governing agricultural support in trade amongst the Partner States of the EAC are different from those that regulate trade between the Partner States and other countries outside the EAC.

3. Agricultural Subsidies in the East African Community

There is neither a specific legal instrument in the EAC, nor provisions in the EAC Treaty specifically addressing agricultural subsidies. Accordingly, the general rules governing subsidies in the EAC also apply to agricultural subsidies. Agricultural subsidies in the EAC are thus governed by the liberalization framework in Chapter 11 of the EAC Treaty, the EACCUP, and the East African Community Competition Act ('EACCA').

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10 *Canada-Measures Affecting the Export of Civilian Aircraft (Canada-Aircraft)*, WT/DS70/R, 14 April 1999.

11 *Id*, para. 9.112.

12 *Id*, para. 9.113.

13 *Id*, paras. 157-158.

3.1 The Treaty for the Establishment of the East African Community

The EAC Treaty addresses co-operation among the Partner States in the agricultural sector in Chapter Eighteen, which does not specifically provide for agricultural subsidies. Instead the Treaty provides that the overall objectives of co-operation in the agricultural sector within the framework set out in the Chapter are the achievement of food security and rational agricultural production within the EAC, with a view to promoting complementarity and specialization in, and sustainability of, national agricultural programmes.[14]

The co-operation among the Partner States in the agricultural sector is thus intended to address non-trade concerns of the Partner States, in particular food security and rational agricultural production. At individual Partner State level, the concern of food security is expressed in several legal and policy instruments. Thus food security is one of the social and economic objectives set out in the National Objectives and Directive Principles of State Policy in the Constitution of Uganda.[15] It is similarly important in Tanzania, thus the enactment of the Food Security Act, No. 10 of 1991, which provides for the establishment and management of the strategic grain reserve. In Kenya it is encapsulated within the broader concerns of agricultural policy in the constitutional requirement of 'equitable, efficient, productive and sustainable' land use.[16] Also in the National Land Policy of Kenya, the Government is required to institute measures that would enhance large and small scale production of food for the maintenance of food security in the country.[17]

The other concern that seems to emerge from Chapter Eighteen is co-operation. Article 105(1) of the Treaty provides that the co-operation in agriculture among the Partner States is expected to result in the emergence of a common agricultural policy, food sufficiency within the community, an increase in the production of crops, livestock, fisheries and forest products for domestic consumption, exports within and outside the Community, and as inputs to agro-based industries within the Community.[18] It is also intended to ensure post-harvest preservation and conservation of improved food processing.

14 EAC Treaty, article 105(1).

15 Constitution of Uganda, Clause XIV(b).

16 Constitution of Kenya, article 60(1).

17 Sessional Paper No. 3 of 2009 on National Land Policy, Para. 120(e).

18 EAC Treaty, article 105(1)(a) to (d).

The use of co-operation as a regulatory approach in Chapter Eighteen of the EAC Treaty contrasts with that applied in Chapter Eleven of the EAC Treaty on trade liberalization, where the Partner States are required to develop and adopt regulatory instruments governing trade liberalization expressed in terms of prescriptive norms.[19] This is the approach adopted in article 75 of the EAC Treaty, which requires that the Protocol governing the Customs Union, should address, *inter alia,* subsidies and countervailing duties.[20] In adopting harmonization and co-operation as regulatory processes in addressing matters relating to agriculture in the EAC Treaty, Chapter Eighteen commits the Partner States to adopt internationally accepted quality standards such as in relation to food processing,[21] co-operate in various aspects such as quality seed development[22] and livestock breeding,[23] develop common regulatory frameworks such as in livestock multiplication, trade in semen, embryos, breeding stock, drugs and vaccines,[24] and harmonise policies such as quarantine policies in seed and livestock multiplication and distribution,[25] and for enforcement of pests.[26]

To the extent that one of the objectives of co-operation in agriculture in the Treaty is to increase production of crops, livestock, fisheries and forest products for, *inter alia,* exports within and outside the Community, agricultural subsidies by the Partner States must conform to both EAC and WTO law. The lattice of legal rules governing subsidies in the EAC inheres in both the EACCUP and the EACCA. This prescriptive structure, which also defines the scope of regulation of agricultural subsidies in the EAC, will be examined in the next part, so as to delineate the contours of such subsidies in trade among the EAC Partner States.

19 EAC Treaty, article 74.

20 EAC Treaty, article 75(1)(g).

21 EAC Treaty article 105(2)(e).

22 EAC Treaty article 106(a).

23 EAC Treaty article 107(a).

24 EAC Treaty article 107(d).

25 EAC Treaty article 106(e) and 107(e).

26 EAC Treaty article 108(a).

3.2 Scope of Agricultural Subsidy Regulation in the East African Community

3.2.1 Applicability of Article 17 of the East African Community Customs Union Protocol

The EACCUP provides for subsidies in article 17. Article 17(1) of the Protocol provides that if a Partner State grants or maintains any subsidy, including any form of income or price support which operates directly or indirectly to distort competition by favouring certain undertakings or the production of certain goods in the Partner State, it should notify the other Partner States in writing. The information to be supplied to the other Partner States include the extent and nature of the subsidization, the estimated effect of the subsidization and the quantity of the affected product or products exported to the Partner States and the circumstances making the subsidization necessary.[27]

Article 17 of the Protocol seems directed towards subsidies whose effect is principally limited to a Partner State, hence the requirement that the support "operates directly or indirectly to distort competition by favouring certain undertakings or the production of certain goods in the Partner State". There are however obvious concerns about the likely effects of the subsidies on other Partner States, hence the need to disclose the nature and effects of such subsidies to other Partner States. The fact that the effect of such subsidy is mainly limited to the subsidizing state could explain the failure by the Protocol to provide for remedies where such subsidization occurs. This appears to be consistent with section 14 of the EACCA, which provides that a partner state may grant subsidy to any undertaking if it is of the opinion that it is in the public interest to do so.

Subsidies granted in the public interest include those granted to consumers of certain categories of products or services to promote social services,[28] for development of small and medium sized enterprises,[29] for restructuring, rationalizing and modernizing of specific sectors of the economy,[30] for less developed regions,[31] for research and development,[32] for financing of a

27 EACCUP, article 17(2).
28 EACCA, article 17(1)(a).
29 EACCA, article 17(1)(b).
30 EACCA, article 17(1)(c).
31 EACCA, article 17(1)(d).
32 EACCA, article 17(1)(e).

public sector,[33] for the promotion and protection of food security,[34] for the protection of the environment,[35] for education and training of personnel,[36] for the conservation of the cultural heritage,[37] and for the compensation of damages caused by natural disasters or by macroeconomic disturbances.[38] The Council of Ministers may however exempt other categories of subsidies on the recommendations of the Competition Authority and taking into account the materiality of the subsidy for the achievement of the objective, the compatibility of the subsidy with the objectives of the Community including opening of partner states' market, and the establishment of a competitive environment in the Community.[39]

3.2.2 Applicability of Section 16 of the East African Community Competition Act

In contrast, section 16(1) of the EACCA prohibits Partner States from granting subsidies which distort or threaten to distort competition in the Community. Among the subsidies which have this effect are those which promote exports or imports between the Partner States,[40] and those granted on the basis of the nationality or residence of persons or country of origin of goods or services.[41]

(i) The European Community Standard for Distortion of Competition

It should be noted that the notion of distortion of competition provided in section 16(1) of EACCA is also expressed in article 87.1 of the European Community ('EC') Treaty. The latter article provides in part, that state aid distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, and is thereby incompatible with the common market. In the EC it is therefore necessary that the state aid be selective or specific by favouring certain undertakings or the production of certain goods.[42] If such benefit received by an undertaking or production allows them to compete in

33 EACCA, article 17(1)(f).

34 EACCA, article 17(1)(g).

35 EACCA, article 17(1)(h).

36 EACCA, article 17(1)(i).

37 EACCA, article 17(1)(j).

38 EACCA, article 17(1)(k).

39 EACCA, article 17(2) and (3).

40 EACCA, article 16(2)(a).

41 EACCA, article 16(2)(b).

42 *Id* note 9, at 327.

more favourable conditions, the government measure would artificially alter the efficient allocation of resources produced by market forces.[43]

Selectivity is however not limited to a specific production process. Thus in *Spain v Commission*[44] the European Court of Justice ('ECJ') considered that the RENOVE Plan, through which Spain granted assistance for the purchase of industrial vehicles by natural persons, SMEs, regional entities and bodies providing public services, was selective because it excluded large enterprises.[45] Indeed even where a measure that is potentially applied to all enterprises in fact only benefits some enterprises (*de facto* selectivity) the aid is selective. In *Commission v Italy*[46] the ECJ examined a measure by which Italy reduced social welfare contributions by four per cent for male workers and ten per cent for female workers. It observed that such a measure favoured *de facto* industries with a large number of female workers, in particular the textile, clothing, footwear and leather industries. Therefore such a measure constituted a state aid.[47]

A benefit is, however, not considered selective when it is granted justifiably for reasons intrinsic to the nature of the general system.[48] In addition, where the government measure does not correct a market failure, or is not based on objectives that increase Community welfare in the EC, such a measure is considered to negatively affect competition.[49]

The determination of whether a specific measure distorts of threatens to distort market competition involves an assessment of all the circumstances surrounding the granting of the aid, such as the market share of the beneficiary enterprise, the number of competitors in the market, the specific structure of the affected market. In *The Netherlands and Leewarder Papierwarenfabriek v Commission*,[50] since the Commission did not mention any circumstance such as situation of the relevant market or Leewarder's position in the market which implied that the aid in question distorted or threatened to distort competition, the ECJ annulled the Commission Decision.

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43 Case 730/79, *Philip Morris v Commission*, 1980 ECR 2671 at para. 11 where the ECJ stated: "When financial state aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade the latter must be regarded as affected by that aid".

44 C-351/98, ECR [2002] I-8031.

45 *Id*, para. 43.

46 Case 203/82, ECR [1983] 2525.

47 *Id*, para. 4.

48 C-353/95 P, *Tierce Ladbroke v Commission*, ECR [1997] I-7007, at paras. 33-35.

49 *Id* note 9, at 328.

50 Cases 296 & 318/82, ECR [1985] 809.

(ii) Distortion of Competition in the EAC

It has been noted that in the EAC, subsidies that promote exports or imports between the Partner States, and those granted on the basis of the nationality or residence of persons or country of origin of goods or services, distort competition in the EAC and are thus prohibited.[51] The effect of section 16(1) as read with section 16(2)(a) of the EACCA is to create an irrebutable presumption that export and import subsidies within the EAC and those granted on the basis of the nationality or residence of persons or country of origin of goods or services within the Partner States is distortionary of competition in the EAC.

As regards other subsidies which are not exempted subsidies, they are subject to a determination as to whether or not they distort or threaten to distort competition, and all the circumstances of the market must be reckoned in a manner similar to that undertaken in the EC.[52] The requirement in section 15(2) of the EACCA that before a Partner State grants any subsidies it must notify the East African Competition Authority which determines whether such subsidy is a prohibited subsidy, or is not among exempted subsidies is a procedural design intended to facilitate the stated determination. When the Authority determines upon notification by the Partner State that a subsidy is illegal, it is required to recover the subsidy from its recipient.[53]

The last element in section 16(1) of the EACCA is that the distortion of competition must be in the Community. This requirement is similar to that in article 87.1 of the EC Treaty which prohibits state aid that affects trade between Member States. If a subsidy therefore only benefits products or services that are not traded between Partner States, that is, that circulate within the territory of a Partner State, such subsidy would not be subject to section 16 of the EACCA, and would likely be the kind contemplated in article 17 of the EACCU Protocol. The requirement of distortion of trade in the Community also underscores the scope of section 16, namely, that it applies only to subsidies that affect trade amongst the Partner States of the EAC.

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51 *Id* note 41.

52 In T-288/97, *Regione Antonama Friuli Venecia Giulia v Commission*, ECR [2001]I-1169, the EC Court of First Instance stated: "[B]ecause of the structure of the market, a feature of which is the presence of a large number of small scale undertakings in the road haulage sector, even relatively modest aid is liable to strengthen the position of the recipient undertaking as compared with its competitors in intra-Community trade. In that context, the effects on competition and trade of a relatively small amount of aid may not therefore be negligible. It follows that such aid cannot be regarded as of little importance."

53 EACCA, section 15(4).

WTO rules governing subsidies generally, and agricultural subsidies in particular, constitute the overarching framework regulating agricultural support in trade between the Partner States of the EAC, and third parties. This framework will be examined in the following part, with a view to ascertaining whether the pursuit of the agricultural objectives in the EAC Treaty may be accommodated within it.

4. The World Trade Organization Agreement on Agriculture

In multilateral trade relations, trade in agriculture is governed by the AoA. The scope of the AoA is however limited to farming and livestock products.[54] Fish and fish products, and forest products are not included in its subject matter,[55] and are thus governed by the ASCM. This contrasts with the EAC Treaty, which in Chapter Eighteen provides for crops, livestock, fisheries and forest products.

Furthermore, while the AoA recognizes the non-trade concerns of countries such as food security and the need to protect the environment in its preamble, its philosophy appears to be that liberalization is the panacea for all problems in the agriculture sector. It is, however, indisputable that the concerns surrounding agriculture in Africa generally extend beyond mercantilism. Elsewhere it has been observed that trade liberalization may not guarantee food security for Sub-Saharan African countries as decreasing commodity prices and escalating tariffs in Organisation for Economic Co-operation and Development ('OECD') countries remain major hurdles to increasing income and food security in the said countries.[56]

In view of the large portion of the population of the EAC that depends on agriculture on a largely subsistence basis, two principal concerns arise in relation to the AoA. First, what are the constraints imposed by the AoA? Second, to what extent does the AoA allow wiggle room for EAC Partner States to pursue

54 AoA, Annex 1.

55 *Id*, Part 1.

56 Pingali P. & Stringer, R. "Food Security and Agriculture in Low Income Food Deficit Countries: 10 Years After the Uruguay Round", *ESA Working Paper No. 03-18*, Agriculture and Economics Division, FAO, Rome, 6.

their non-trade concerns, including development objectives? These issues will be examined in the course of the analysis of the framework of the AoA.

4.1 Scope of Agreement on Agriculture

The three main areas of agricultural trade policy addressed by the AoA are market access, domestic support and export subsidies. As the above policy areas are examined in the part following, an overview of their significance for EAC Partner States will also be provided. It should, however, be noted that the commitments of developing countries under the Agreement in the trade policy areas are affected by the Special and Differential Treatment ('SDT')[57] in two ways; first, a transient flexibility to developing countries in implementing reduction commitments over a longer period of ten years, and secondly, excusal of least developed countries from undertaking reduction commitments.[58] In effect, rather than ensuring the flexibility to implement trade policies that are consistent with their development objectives, the SDT provisions amount to no more than providing additional time for the majority of developing countries to implement the agreement.

4.1.1 Market Access

Market access may be defined as the right of exporters to access foreign markets. The AoA regulates market access using two principal methods. First, it requires the tariffication of all non-tariff barriers; and secondly, it prohibits agriculture specific non-tariff barriers. Each of these market access mechanisms will be examined in detail.

(i) Tariffication

Tariffication is the process of conversion of all non-tariff market protection measures into the tariff equivalent. This denotes that all non-tariff barriers such as quantitative restrictions and export and import licensing are converted to tariffs, to provide the same level of protection.[59] The scope of this obligation as expressed in article 4 of AoA includes in the first instance tariffication, whereby

57 AoA, article 15.

58 AoA, article 15(2).

59 The footnote to article 4 lists some of the non-tariff border measures which were required to be converted into tariffs: quantitative import restrictions, minimum import prices, variable import levies, discretionary import licensing, voluntary export restraints and non-tariff measures maintained through state trading enterprises.

each member country has established a bound (or maximum) tariff for every item in a once-and-for-all opportunity, followed by tariff reduction.

The preference for bound tariffs rather than MFN applied tariffs was common to many developing countries, although for developed countries the tendency was to bind their tariffs at the level of their applied rates during the base period so that MFN applied tariffs tended to be mostly equal to bound rates. Alternatively, developed countries tended to have some very high tariffs on sensitive products. The average bound and applied tariffs for developed and developing countries are as shown in Table 1 below.

Table 1: Average Agricultural Tariffs in Developed and Developing Countries

		Bound	Applied
Agriculture	Developed Countries	38	34
	Developing Countries	61	25

Source: UNCTAD (2010)

Many developing countries thus have higher bound rates of not less than 100 %, and much lower applied rates, for agricultural products. Table 2 below shows the tariff profiles of selected developing countries, for different agricultural commodities based on simple averages of final bound duties and applied duties according to information available at the WTO Secretariat; only *ad valorem* duties or *ad valorem* equivalents of *non-ad valorem* duties were used.

Table 2: Tariff Profiles of Selected Developing Countries

Import Market	Fruits and Vegetables		Coffee, tea, date, cocoa and preparation		Sugars and Sugar confectionery		Spices, cereals and other food preparations		Grains		Animal and Animal Products	
	Applied	Bound	Applied	Bound	Applied	Bound	Applied	Bound	Applied	Bound	Applied	Bound
Kenya	31.8	100	17.0	100.0	34.5	100.0	23.0	100.0	24.7	100.0	27.4	100.0
Uganda	15.0	79.2	10.0	77.9	11.0	78.1	11.2	78.1	8.2	73.8	13.0	73.3
Malawi	20.4	125.0	21.9	95.2	17.5	125.0	22.0	125.0	5.0	99.1	13.0	125.0
Zimbabwe	34.3	150.0	33.5	139.6	26.9	150.0	25.2	143.3	15.0	142.2	34.8	150.0
Botswana	10.3	30.1	9.2	68.9	4.2	73.7	10.6	41.2	2.5	28.8	16.1	44.2
Morocco	48.6	34.0	43.3	34.0	35.1	134.5	47.0	51.2	18.5	82.9	126.9	103.9
India	32.4	105.4	56.3	133.1	48.4	124.7	34.6	126.5	49.4	86.3	33.0	105.0
Bangladesh	25.3	189.2	29.3	187.5	30.0	190.6	23.9	195.6	6.3	158.1	20.7	192.6

Source: WTO (2005)

The Uruguay Round Country Schedules show that amongst East African Community Partner States, Kenya bound at average ceiling level of 100% although its average applied rate was 17%.[60] Uganda's agricultural products were mostly bound at ceiling rates of 80 per cent; Tanzania's average bound rate was 240 per cent, while the average applied rate was 28 per cent; Rwanda's average bound rate for most agricultural products was 80 per cent, and Burundi's 130 per cent. The updated applied tariff rates for agricultural commodities by East African Community Partner States, although still low compared to the bound tariff rates, now tend towards uniformity as a result of the application of the Common External Tariff as required by article 12 of the EACCUP in the East African Community Customs Union.[61]

(ii) Tariff Reduction

The tariffication formula set minimum tariff reduction requirements at two levels, the level of individual tariff lines, and the overall averages for all agricultural products to be implemented over a six-year implementation period commencing in 1995. Thus developed countries were required to reduce tariffs for all agricultural products on average by thirty-six percent from the base tariff rate with a minimum reduction of fifteen per cent per tariff line over a six-year period, while the developing countries by two-thirds of that applicable to developed countries over the ten-year implementation period.[62]

The tariff reduction formula, however, allowed for flexibility to reduce some tariff lines by a small percentage of only 10 and 15 percent in developing countries and developed countries, respectively whenever the average cut of 24 and 36 percent was met.[63] This led to a further dispersion of tariff rates since higher tariffs were often reduced by a smaller percentage than tariffs that were already low.[64]

The wide range of different tariff structures has made it difficult during the ongoing Doha Round of multilateral trade negotiations to find a tariff

60 United Nations Centre on Trade and Development, *Flexibilities for Developing Countries in Agriculture: Market Access Formula*, United Nations, New York & Geneva, 2010, 5

61 See *https://www.wto.org/english/tratop_e/schedules_e/goods_schedules_table_e.htm*

62 The reduction process was undertaken in accordance with the Modalities for the Establishment of Specific Binding Commitments under the Reform Programme, which was a provisional document whose legal status ended with the conclusion of the Uruguay Round of Multilateral Trade Negotiation. WTO, "Tariff Negotiations in Agriculture, Reduction Methods", available at *https://www.wto.org/english*

63 Annex 5.

64 *Ibid*.

reduction formula that is considered fair or acceptable by all parties pursuant to the continuation of the reform process dictated by article 20 of the AoA. The July 2004 Framework Agreement mandated that there be a strong element of harmonization in the reductions made by the developed countries and that higher levels of permitted trade distorting domestic support be subject to deeper cuts.[65] The overall base level of trade distorting domestic support including the Final and Total AMS, and permitted *de minimis* level and Blue Box payments and the Final Bound Total AMS were required to be cut independently, both through a tiered approach.

One proposal that has been made is that the commitment to reduction of tariffs on average by 36 percent and 24 percent by developed and developing countries may be considered part of a principle of reduction by 2/3, which means developing countries make 2/3 of the cuts that developed countries make.[66] The proposal raises the question whether it means that developing countries undertake 2/3 of the cuts for a given tariff, for example, on a tariff of 50%, or that cuts in each tier are two thirds lower, or that their overall average cuts are two thirds of those that developed countries make.[67] A tiered formula with higher cuts in higher tariffs may lead to higher average cuts in those countries that start with higher initial bound tariffs, even if cuts in each tier respect the 2/3 concept. One country may find all or almost all its tariffs in the highest tier, with correspondingly high overall cuts, whereas other countries may have most of their tariffs in the lower tiers. This would mean that some developing countries would make higher cuts than developed countries, with the effect that the special and differential treatment from which developing countries benefit would be eroded.[68] A deep reduction of bound rates that may or may not cut into the developing countries' applied rates would not only reduce their policy space, but also have other social and economic implications.

Another proposal that has been made to address the disparity is that overall trade distorting support should be reduced to a percentage of the total value of agricultural production.[69] On this view, a reduction to 5 per cent of the value of

65 WTO DOC WT/L/579, Annex A, P.A-1, para. 6.

66 *Id* note 56 at 6.

67 *Ibid*.

68 *Ibid*.

69 Anwarul Hoda & Ashok Gulati, *WTO Negotiations on Agriculture and Developing Countries*, John Hopkins University Press, Baltimore, 2007, 252.

agricultural production would be consistent with the objective of fundamental reform in world agriculture.[70]

As for least developed countries, whilst they bound their agricultural tariffs, they were exempted from the tariff reduction commitments.[71]

(iii) Prohibition of Agriculture Specific Non-Tariff Barriers

This is the second principal market access mechanism under the AoA. Article 4(2) of the AoA prohibits the subsequent use of agriculture specific non-tariff barriers which are required to be converted to tariffs.[72] In Chile-Price Band System,[73] Argentina brought a complaint concerning Chile's price band system which imposed variable tariffs on imports of wheat, wheat flour, edible vegetable oils and sugar. Under the system, additional duties were imposed on imported commodities if market prices in "markets of concern to Chile" fell below an administrative price band. Chile argued that article 4(2) was limited to measures which had actually been converted or requested to be converted into customs duties-non tariff barriers- during the Uruguay Round, which was not the case with the price band system, which only covered the payment of customs duties. However, the Appellate Body rejected this position and observed,

Chile's price band system is a measure "similar" to "variable import levies" or "minimum import prices" within the meaning of article 4.2 and footnote 1 of the Agreement on Agriculture. In other words, the fact that the duties that result from the application of Chile's price band system take the same form as 'ordinary customs duties' does not imply that the underlying measure is consistent with article 4.2 of the Agreement on Agriculture.[74]

(iv) Tariff Rate Quotas

Tariffication, however, also led to the concern that it could result in high bound tariffs which, if applied, could be prohibitive for any trade to take place. As a result, the AoA provides for minimum market access whereby WTO members were required to maintain import access opportunities at the time of negotiating

70 *Ibid*.

71 AoA, article 15(2).

72 However, article 4(2) does not prevent the use of non-tariff import restrictions consistent with the provisions of GATT, 1994 or other WTO agreements which are applicable to general trade in goods such as trade restrictive measures maintained over the balance of payment provisions.

73 Appellate Body Report, Chile – *Price Band System and Safeguard Measures* Relating to Certain Agricultural Products (Chile – Price Band System), WT/DS207/AB/R, adopted 23 October 2002

74 *Id*, para. 279

the AoA at a certain minimum level. This was achieved through the 'tariff rate quotas' ('TRQs'), which is a two-levelled tariff in which the tariff rate charged depends on the volume of imports.[75] A lower (in quota) tariff is charged on imports to ensure minimum market access or the quota volume, while a higher (over-quota) tariff is charged on imports in excess of the quota volume. TRQs therefore allowed some third parties to supply protected high priced markets without paying the substantial import duties that either exclude other imports or reduce drastically their profitability. Pre-existing or new commitments to preferential suppliers such as EU's reliance on New Zealand for butter, and on some ACP states for sugar were covered by TRQs.[76]

(v) Special Safeguard Measures

The high tariffs were also reinforced by the AoA provision on Special Safeguard Measures ('SSGs') in article 5. SSGs allow additional duties to be imposed, but only on items which have been so designated in a member's schedule, if either the volume of imports exceeds a trigger level or if prices fall below a certain level, and it is not necessary to demonstrate that serious injury is being caused to the domestic injury. The trigger thresholds are related to previous flows, but the two safeguard mechanisms, that is price and volume safeguards, cannot be invoked concurrently.[77]

Developing countries were mainly disqualified from the use of SSGs. This is because to qualify, countries had to have non-tariff barriers (quantitative restrictions on imports) in place at the time tariffication took place under the Uruguay Round.[78] Only twenty-two developing countries had non-tariff barriers that enabled them to qualify. In contrast sixteen developed and Eastern European countries qualified. In addition, out of the total number of SSG products (6,072) that were available to all thirty eight countries, only 31.8% (1,930) were available to developing countries as against 68.2% (4,142) to developed countries.[79]

Nevertheless, SSGs under article 5 is alternative to the general safeguards under article XIX of the GATT, 1994 and article 8 of the Agreement on

75 AoA, article 5.

76 Organisation for Economic Co-operation and Development, *The Uruguay Round Agreement on Agriculture: An Evaluation of its Implementation in OECD Countries*, Paris, 2001.

77 AoA, article 5(1).

78 *Ibid*.

79 The EU could use SSG against 539, the US 189, Canada 150, Australia 10 and Switzerland 961: Action Aid, *The WTO Agreement on Agriculture*, 5, available at *www.actionaid.org.uk*

Safeguards.[80] Thus if a WTO member has recourse to SSGs, it cannot also rely on the general safeguards measures.

(vi) Sanitary and Phytosanitary Measures

The market access entitlements of developing countries, including EAC Partner States, are, however, threatened by sanitary and phytosanitary requirements. A concern has been raised that with the progressive reduction of high tariffs, there is increasing propensity by developed countries to deny market access to agricultural commodities from developing countries on the basis of sanitary and phytosanitary standards.[81] The AoA affirms that members agreed to give effect to the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement'),[82] which governs minimum levels of quality, health and safety standards for both domestically produced and imported goods with a view to the protection of human, animal or plant life and health. The SPS Agreement confers on WTO Members the right to unilaterally set health and safety standards they deem appropriate, but to do so in a manner that least hinders trade.[83] Members also have the right to take measures they consider necessary to protect animal, plant and human life and health, provided the measures are scientifically justified, based on an assessment of risks, and are no more than necessary, and are not arbitrary or unjustifiable, and do not constitute a disguised restriction on trade.[84]

The realisation that with weak institutional and physical infrastructure and capacity, satisfying the increasingly complex requirements of sanitary and phytosanitary standards by developed countries may further constrain market access by developing countries is also a cause for concern. Indeed it is widely contended that SPS type measures can be used as non-tariff barriers, as they can be manipulated in certain circumstances so as to serve as protectionist measures.[85]

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80 AoA, article 5(8).

81 Ministry of Commerce (India), "Review of the WTO Agreement on Agriculture: Likely Issue for Negotiations", *India & the WTO*, May 1999 Vol.1, No. 5 at 7; See also Fulponi, L., M. Shearer and J. Almeida, "Regional Trade Agreements-Treatment of Agriculture", *OECD Food, Agriculture and Fisheries Working Paper*, No. 44, OECD Publishing, 29 at fn. 21.

82 AoA, article 14.

83 Article XX of GATT, 1994 also allows member countries to introduce measures that are necessary to protect human, animal and plant life or health so long as the measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.

84 SPS Agreement, article 2.

85 Institute of Economic Affairs, *Implications of an EPA for Kenya's Agricultural Market Access in the European Union*, IEA Research Paper Series No. 6, May 2006, Institute of Economic Affairs, Nairobi,

There is therefore a clear need for adequate technical assistance to developing countries, including EAC Partner States on fair and reasonable terms to enhance compliance capacity with respect to sanitary and phytosanitary standards.

4.1.2 Domestic Support

The second area of agricultural trade policy is domestic support which aims to identify acceptable measures that support farmers, and to prohibit trade distorting support to farmers. Domestic support measures by members which have trade distortive effects as they are used to provide farmers with incentives to produce substantially more of a particular commodity than they would do without such policies are represented as an "Amber Box". The AoA does not prohibit such measures, but commits members to reduce them.[86] The reduction commitments by members are quantified in the form of Aggregate Measurement of Support (AMS), which expresses the total annual support for individual agricultural commodity. The sum total of all such domestic support provided for the agricultural sector, being the aggregate of all AMS constitute the final bound commitments expressed as Total Aggregate Measurement of Support.[87]

The calculation and application of the AMS is, however, not product specific and as such, accords some flexibility in domestic support measures as long as global commitments expressed in individual country's Schedules are not exceeded.[88] The entitlement of countries to aggregate reductions across a range of different products has enabled developed countries to reduce tariffs on less sensitive products which they do not produce themselves, while maintaining high tariffs (tariff peaks) on goods they produce. In addition, to protect their domestic food manufacturers from competition, it is common for developed countries to increase tariff rates with each processing step. This tariff escalation inhibits the growth of agricultural processing in developing countries, as they open up their markets in accordance with their commitments.

Different percentage reduction levels from the 1986-88 base years over different periods are applicable for developed and developing member countries with scheduled reduction commitments, while for members with no scheduled reduction commitments, non-exempted domestic support must not exceed

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2006, 32 and 35.

86 Section 1, Part IV of Schedule of Concessions.

87 Schedule of Commitments, Part IV.

88 AoA, article 6(1).

de minimis levels of five percent and ten percent of the value of production for developed and developing countries, respectively for the year.[89] Evidently, the higher the Base AMS declared by a member country and accepted by other WTO members, the greater the allowable subsidies after the agreed percentage cuts have been made. Here again most developing countries, other than least developed countries which are not bound to make any reductions, failed to submit substantial Base AMS in the AoA and hence their final AMS is similarly modest.

(i) Exempt Support Measures

Three categories of exempt support measures are provided for in the AoA as discussed below.

(a) ***Green Box Measures*** - Green-Box Measures are fundamentally required not to have any or at most, minimal distorting effects on trade or production.[90] Examples include government assistance on general services like research, pests and disease control, training, extension and advisory services, public stock holding for food security purposes, domestic food aid, and direct payment to producers like governmental financial participation in income insurance and safety nets, relief from natural disasters and payments under environmental assistance programmes.[91]

(b) ***Blue-Box Measures*** - The second category of exempt support measures are direct payments under production limiting programmes (Blue-Box Measures).[92] These domestic measures would normally be in the Amber Box, but are exempted from reduction commitments because they also require farmers to limit their production. The measures must conform to the requirements of article 6(5) of the Agreement which provides that the payments must be made directly out of the government budget to the producers, and be conditional upon some form of production limiting requirement imposed on the recipient of the support such as payments based on fixed area and yields, payments made on 85% or less of the base level of production, and livestock payments made on a fixed number of head. These payments are however not immune from challenge in appropriate cases.

89 AoA, article 6.4.

90 Annex 2, paragraph 1.

91 Annex 2, paragraphs 2-13.

92 AoA, article 6(5)(a).

(c) ***De Minimis Support*** - The third exemption category is *de minimis* support. WTO members are not bound to include *de minimis* support in their Total AMS.[93] Thus where product specific support does not exceed 10% of the total value of production of the agricultural product in question, or of the value of the total agricultural production in the case of non-product specific support in developing countries, and 5% for developed countries, there is no requirement to reduce support, but instead support may be raised to the *de minimis* ceiling.[94] Most developing countries submitted a 'zero base' AMS for domestic support on the basis either that any such trade distorting measures it maintained fell within the exempted categories and/or were within the *de minimis* levels, or because of budgetary constraints they do not provide such support.

In general, therefore, in the case of poor developing countries, the failure to schedule reduction commitments implies that combined with the regulation of the current AMS not exceeding the base AMS, these countries can only provide specific support up to 10% of the value of production, and non-product specific support up to 10% of the total value of total agricultural production.

(d) ***Developmental Measures*** - Another exemption from the domestic reduction commitments is developmental measures. These measures are based on article 6.2 of the AoA which exempts from reduction commitments measures of assistance designed to encourage agricultural and rural development which are an integral part of the development programmes of developing countries. The developmental measures in this category are investment subsidies generally available to agriculture in developing countries, agricultural input subsidies generally available to low income and resource poor producers, as well as domestic support to producers to encourage diversification from growing illicit narcotic crops. These domestic policies are likely to have a more direct impact on food production, food stock, prices and food security in East African Community countries, and enable governments to use suitable production policies that are exempt from the calculations of the country's bounded total AMS.

During the 2005 Hong Kong Session, developing countries were accorded the right to designate an appropriate number of products as special products, guided by indicators based on the criteria of food security, livelihood

93 AoA, article 6(4).

94 AoA, article 6(4)(b).

security, and rural development needs. It was inevitable that it would be left to developing countries to self-designate special products given the diversity in their agricultural situations, and the difficulty in agreeing to more specific criteria. The concession is, however, of questionable practical significance since developing countries were already able to provide support based on the development box and other exemptions. But the risk is that if the prerogative to self-designate special products is widely applied, the principal industrialised countries would edge towards the least liberal of their proposals for flexibility for sensitive products and not deepen cuts in domestic support.[95]

(ii) Implications for Domestic Support

The position of developing countries with respect to exemption from the reduction commitments appears to be severely. The framework was technically unaccommodating of developing countries, which largely had to rely on SDT, developmental measures and the *de minimis* provision. When viewed in addition to their low AMS, this means that their scope for providing subsidies to their agriculture depends heavily on the continued recognition of development measures and *de minimis* support. Whilst the agreed framework for negotiation of domestic support under the AoA during the Doha Round includes recognition that SDT remains an integral part of all elements of the negotiations, and would be embodied in the schedules of concessions and commitments and as appropriate in the rules and disciplines to be negotiated, its impact is severely limited.[96]

A fundamental shift in the approach of developing countries and especially East African Community Partner States is probably warranted. While developing countries have engaged in negotiations for continuing the reform process during the Doha Round in a more spirited way than was the case during the Uruguay Round probably because the stakes have become clearer, the focus needs to shift from the emphasis laid on SDT and more on equal treatment.[97] There was little value in developing countries being allowed in the Uruguay Round to make reductions in tariffs at a lower rate and over longer period while some developed countries retained the possibility of maintaining tariffs at multiples of 100 per cent on some key products. Similarly while developing countries were limited to *de minimis* of 10 per cent separately for product specific and non-

95 *Id* note 69 at 249.

96 Doha Ministerial Declaration, para. 13.

97 *Id* note 69 at 244-245.

product specific support, the EC current Total AMS was almost 18 per cent of the value of its agricultural production in 2000-2001.

(iii) Export Subsidies

The third policy area in the AoA is export subsidies. These are subsidies defined as contingent on export performance.[98]

(a) ***Forms of Export Subsidies*** - Article 9.1 of the AoA provides that export subsidies may take the form of direct export subsidies,[99] government exports of non-commercial stocks at a price lower than comparable prices for such goods on the domestic market,[100] export payments financed by virtue of government action, including payments financed by a levy on the product,[101] cost reduction measures such as subsidies to reduce marketing costs for export including handling, upgrading and other processing costs, and costs of international transport and freight,[102] internal transport subsidies applying only to exports,[103] and subsidies for commodities such as wheat contingent on their incorporation in export products made of wheat.[104]

(b) ***Payments in Article 9.1(a) to (c)*** - The payments in article 9.1(a) to (c) have been held to include payments other than money, and may include payments in kind. This issue arose in Canada-Dairy.[105] The dispute concerned Canada's "commercial export milk" scheme, which allowed domestic dairy processors to buy milk for export at lower prices than the milk destined for the domestic market, and farmers and dairy processors to freely set the price to be paid for milk destined for export. The United States and New Zealand launched non-compliance WTO dispute settlement proceedings on the ground that Canada's milk export system did not conform to its WTO obligations. Both the DSB panel and the AB found that Canada was providing illegal export subsidies to Canadian dairy processors.

The Appellate Body in its third report noted that Canadian "government action" controls virtually every aspect of domestic milk supply and

98 AoA, article 1(e).

99 AoA, article 9.1(a).

100 AoA, article 9.1(b).

101 AoA, article 9.1(c).

102 AoA, article 9.1(d).

103 AoA, article 9.1(e).

104 AoA, article 9.1(f).

105 *Canada-Measures Affecting the Importation of Dairy Products-Second Recourse to Article 21.5 of the DSU by New Zealand and United States (Canada-Dairy)*, WT/DS 103 & 113/AB/R, 13 October 1999

management: Canadian Government agencies fix the price of domestic milk, government action controls the supply of domestic milk through quotas, the imposition by government of financial penalties that divert CEM (unsubsidized freely sold milk for export into the domestic market), government pools allocate and distribute revenues to producers from all domestic scales, and government action also protects the domestic market from import competition through tariffs.[106] The Appellate Body stated:

> The effect of these different government action is to secure a highly remunerative price for sales of domestic milk by producers…as such we agree with the Panel that payments made through the supply of CEM at below the COP (cost of production) standard are financed by virtue of government action.[107]

(c) ***Reduction Commitments*** - Article 3 of the SCM now prohibits all subsidies on exports of agricultural products except as provided for in the AoA. Article 8 of the AoA prohibits WTO members from granting export subsidies that do not conform to it, and the commitments in their schedule, while article 9.2(a) required each WTO member to specify in its schedule of commitments the maximum level of budgetary outlay and the maximum quantity exported by product on an annual basis. The volumes and outlay commitments for each product or group of products specified in a member's schedule are individually binding, and are the basis of the reduction commitments in varying percentages and periods between developed and developing countries.[108] However, developing countries are not obliged to undertake reduction commitments for subsidies to reduce the costs of marketing exports of agricultural products, and internal and international transport and freight charges as listed under article 9(1)(d) and (e).[109] Least developed country members are however not subject to reduction commitments.[110]

In the East African Community such subsidies are virtually non-existent, as exporters of agricultural commodities do not receive direct subsidy. However, it should be noted that the EAC is seemingly premised on a vision of an export-oriented economy for the Partner States.[111] Export subsidies are therefore a

106 *Id*, paras. 144 and 145.

107 *Id*, paras. 145 and 146.

108 AoA, article 9.2(b)(iv).

109 AoA, article 9(4).

110 AoA, article 15(2).

111 EAC Treaty, Article 7(1)(c)

germane issue. During the Uruguay Round, Kenya did not report any such subsidies, and accordingly has neither a commitment to reduce them, nor the option of granting them in the future. As regards Uganda, it also does not offer any subsidy specifically designed to promote exports, nor does it maintain any export duties. There are, however, incentive schemes for export promotion of the nature listed in the SCM in the EAC.

Section 139 of the East African Community Customs Management Act allows drawback of import duty on goods imported for use in the manufacture of goods which are exported. Similarly section 140 empowers the Council of Ministers to grant remission of duty on goods imported for the manufacture of goods in a Partner State. Pursuant to this section, the East African Community Customs Management (Duty Remission) Regulations, 2008 authorises the Council to grant remission of duty on goods imported for use in the manufacture of goods for export.[112] A manufacturer of goods for export is therefore required to pay duty on any imported goods that are not used in the manufacture of goods for export, or where the goods so manufactured are not exported.[113] This remission scheme allows manufacturers of agro-based products to import raw materials duty free for value addition for export. In general, however, the amount of subsidies granted under the schemes in the EAC is so little as to be called into question.

EAC Partner States could, however, take advantage of the three export subsidies allowed to developing countries, if needed, on a limited scale for selected products such as cut flowers and fruit.

5. Conclusion

The exclusion of benefit in the concept of subsidy in the EAC Treaty requires rectification so as to align the Treaty with the WTO Agreement on Subsidies and Countervailing Measures as this will make implementation of trade obligations in the EAC more certain.

It has also been noted that the current legal framework of the AoA can accommodate developing countries' agricultural subsidies for non-trade objectives such as food security and rural development since they can operate within the developmental measures and *de minimis* exemptions. However, the architecture could be problematic in future since it does not allow them to take advantage of the different mechanisms in the Agreement, and is thereby likely

112 EAC Customs Management (Duty Remission) Regulations, regulation 3(a),

113 *Id*, Regulation 7(1)(a),

to constrain them especially as they increase the volumes of agricultural output amidst expanding economies. As has been suggested, a shift in philosophy from SDT to equal treatment could probably better serve EAC Partner States' interest.

At the same time, there is need for EAC Partner States to be more fully engaged in ongoing reform negotiations of agricultural trade policy, so as to ensure that the flexibilities available to them, in common with other developing countries, are not whittled down, at the same time as they guard against abuse of entitlements such as those relating to sanitary and phytosanitary measures, and poise themselves to exploit new opportunities presented by the process.

Conserving the African Rhino: Reconsidering Regulated Trade in Rhino Horn in A South African Context

Michael Sang* and Brian Sang YK**

Abstract

It is a fact that our planet is losing the last of its large, iconic land mammals. It also appears that this trend will likely persist, as evidenced by recent statistics. But what is more tragic is that human greed, and a misguided approach to development, are the primary causes of this loss. African rhino populations have shrunk to an all-time low following the aggressive surge in rhino poaching, which is fuelled by the insatiable demand for rhino horn in the illicit market of international trade in wildlife. Current statistics reveal that the African rhino is critically endangered, having been hunted to near-extinction. The international response to the problem of illicit trade in rhino horn has largely been within the framework of the Convention on International Trade in Endangered Species of Wild Fauna and Flora, which prohibits trade in rhino products. However, operating singly, prohibition measures cannot in and of themselves conserve the African rhino from the rising tide of poaching and illegal trade in the rhino horn. This article argues that the more promising approach to sustainably conserving the African rhino is a multipronged strategy that takes into account the peculiar circumstances in the source country and the end-market. It suggests that legalisation of trade in rhino horn should not be excluded entirely, but should be regulated and strictly controlled.

1. Introduction

Illegal international trade in wildlife in general, and endangered species in particular, has been and continues to be a major threat to global biodiversity.[1] This

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1 Report of the Convention on International Trade in Endangered Species of Wild Fauna and

illegal trade is growing at an alarming pace, is getting more sophisticated, and is currently estimated by United Nations Environmental Programme (UNEP) to generate a turn-over of 70 to 230 United States (US) billion dollars annually.[2] The figure is likely to increase with the escalating price of 'rare' products and the expanding market.[3] Illegal trade in natural resources, which benefits only few criminal networks, is also depriving developing nations of billions of US dollars in lost revenues and development opportunities.[4] Owing to its geographical and climatic conditions, Africa has borne the disproportionate and crippling burden of what is in reality a global burden: the protection of endangered large land mammals, namely the rhino and elephant.[5] It is indeed a matter of serious concern that as poaching threatens to decimate the African elephant and rhino population to near-extinction levels, 'it also funds a wide range of destabilizing actors across Africa, with significant implications for human conflict.'[6] A significant source of revenue for several criminal, militia and terrorist groups in Africa is derived from wildlife and forest crime,[7] and this has both regional and global security implications.[8] Therefore, poaching should no longer be viewed narrowly as a conservation issue, but more holistically as an international issue for which practicable and long-term solutions must be devised.[9]

Flora Secretariat on the Interpretation and Implementation of the Convention, Species Trade and Conservation of Rhinoceroses (Sixteenth Meeting of the Conference of the Parties, Bangkok) CoP16 Doc 54.2 (Rev.1) 1 paras 1-2; S Ellis, 'Of Elephants and Men: Politics and Nature Conservation in South Africa' (1994) 20(1) *Journal of Southern African Studies* 53-69.

2 United Nations Environmental Programme, The Environmental Crime Crisis: Threats to Sustainable Development from Illegal Exploitation and Trade in Wildlife and Forest Resources (UNEP 2014) 4.

3 K Nowell, *Assessment of Rhino Horn as a Traditional Medicine* (2012) <http://www.rhinoresourcecenter.com/index.php?s=1&act=pdfviewer&id=1389957235&folder=138> accessed 6 October 2015; See also, Ecolocalizer, 'Poaching Cartel Fulfills Rhino Horn and Elephant Ivory "Orders" Placed by Chinese Nationals' <http://ecolocalizer.com/2009/08/02/poaching-cartel-fulfills-rhino-horn-and-elephant-ivory-orders-placed-by-chinese-nationals/> accessed 6 October 2015.

4 United Nations Environmental Programme (n 2) 2; International Fund for Animal Welfare, 'The $200 Million Question: How Much does Trophy Hunting Really Contribute to African Communities?' (2013) *Economists at Large Report* 1-19.

5 R Orenstein, *Ivory, Horn and Blood: Behind the Elephant and Rhinoceros Poaching Crisis* (Firefly Books 2013); F Maisels and others, 'Devastating Decline of Forest Elephants in Central Africa' (2013) 8(3) *PLoS ONE*

6 V Vira and T Ewing, *Ivory's Curse: The Militarization and Professionalization of Poaching in Africa* (Bone Free 2014) 5.

7 N Garret and A Piccinni, *Natural Resources and Conflict: A New Security Challenge for the European Union* (Swedish Institute for Peace Research, 2012); L Shelley, 'The Unholy Trinity: Transnational Crime, Corruption, and Terrorism' (2005) 11(2) *Brown Journal of World Affairs* 101-111.

8 International Fund for Animal Welfare, Criminal Nature: The Global Security Implications of the Illegal Wildlife Trade (IFAW 2013).

9 R Emslie and M Brooks, *African Rhino – Status Survey and Conservation Action Plan* (Gland & Cambridge 1999) 74.

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),[10] which came to force in 1975, lists the African rhino in the two top-tiers (appendices) of protected status.[11] The African black rhino is placed in Appendix I, the most protected status under CITES, which prohibits all commercial trade in products of the species.[12] For its part, the African white rhino is placed in Appendix II which, even though does not ban trade in the species, subjects trade in products of that species to stringent regulation.[13] Despite the protective listing under the CITES appendices, the African rhino is currently among the most endangered species, especially in South Africa, which has one the largest rhino populations.[14]

Indeed, it has been observed that the 'number of rhinoceroses illegally killed in South Africa has reached its highest levels in recent history and off-take will eventually become unsustainable if poaching incidents continue to increase at current rates.'[15] This alarming state of affairs is partly due to the shift in focus on rhino poaching from East Africa to southern Africa, thus resulting in 95% of recorded losses in African rhino population taking place in South Africa and Zimbabwe.[16] The increasing value of rhino horn in the illegal market, which is worth more per kilogram than gold, cocaine, platinum or heroine,[17] has also led to the surge in poaching in South Africa.[18] It has been observed that '[i] in Africa, black and white rhinos were widely exterminated by hunting until

10 Convention on International Trade in Endangered Species of Wild Fauna and Flora (adopted 3 March 1973, entry into force 1 July 1975) 12 ILM 1085 (1973).

11 M 'tSas-Rolfes, 'Assessing CITES: Four Case Studies' in B Dickson and J Hutton (eds), *Endangered Species, Threatened Convention: The Past, Present and Future of CITES* (Taylor & Francis 2013) 70.

12 Article II(1) of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (n 10).

13 Article II(2)(a), *ibid*.

14 United Nations Environmental Programme (n 2) 37; J Rademeyer, *Killing for Profit: Exposing the Illegal Rhino Trade* (Zebra Press 2012).

15 Convention on International Trade in Endangered Species of Wild Fauna and Flora, 'Sixteenth Meeting of the Conference of the Parties' (Bangkok, 3-14 March 2013) CoP16 Doc 54.2 (Rev.1) 4 para 15.

16 T Milliken and others, *African and Asian Rhinoceroses – Status, Conservation and Trade* (IUCN/SSC 2009).

17 Anonymous, 'Rhino Horn Worth More than Gold, Diamonds and Cocaine' (2011) 45 *Oryx* 463-464.

18 SM Ferreira and B Okita-Ouma, 'A Proposed Framework for Short-, Medium- and Long-Term Responses by Range and Consumer States to Curb Poaching for African Rhino Horn' (2012) 51 *Pachyderm* 52; R Thomas, 'Surge in Rhinoceros Poaching in South Africa' (2010) 23(3) *TRAFFIC Bulletin*.

conservation measures were implemented. Subsequently, rhinos have been eliminated by poaching for their rhino horn.'[19]

Moreover, there has been a marked increase in incidences of cross-border rhino poaching from neighbouring Mozambique, where the African rhino has been hunted down to virtual extinction.[20] In response to this, the government of South Africa has made considerable and commendable effort to stem the rhino poaching crisis as evidenced in its investment of funds toward the security and conservation of rhino populations. However, these efforts have not been entirely successful.[21] There has, therefore, been proposal that trade in rhino horn should be legalised as a means of safeguarding rhino populations.[22]

This article begins with a brief description of the international regime for African rhino conservation and the regulation of wildlife trade. In that part, the article focuses specifically on the salient regulatory features of CITES and the UNCBD.[23] It subsequently discusses the challenge of conserving the African rhino from the threat of poaching and illegal trade in rhino horn within the specific context of South Africa. The article then explains the steps which South Africa has taken so as to implement specific measures to protect the African rhino, and evaluates the extent to which these efforts have or have not been successful. Afterward, the article critically discusses the arguments for and against the legalisation of trade in rhino horn, drawing parallels with comparable experiences of efforts to conserve other endangered species. The article argues that there is indeed a valid basis for legalising, albeit with strict controls and within the framework of CITES, trade in rhino horn in a manner that provides local communities with incentives to conserve the African rhino, thereby ensuring the long-term survival of this species.

2. The Rhino: A Vulnerable Species Under Siege

Rhinos are currently one of the most critically endangered species of large land mammals which have disappeared entirely from several African and Asian nations in recent years.[24] There are five species of rhino that exist today, three in Asia

19 Dickson and Hutton (n 11) 70.

20 J Milgroom, 'Induced Volition: Resettlement from the Limpopo National Park, Mozambique' (2008) 26(4) *Journal of Contemporary African Studies* 435-488.

21 C Ellof, 'Rhino Poaching in South Africa – Is it a Losing Battle?' (2012) *Position IT* 57-62.

22 C Walker and A Walker, *The Rhino Keepers* (Jacaranda Media, 2012) 16.

23 United Nations Convention on Biological Diversity (adopted 5 June 1992, entry into force 29 December 1993) 31 ILM 822 (1992).

24 United Nations Environmental Programme (n 2) 8.

and two in Africa.[25] In Asia, the forest-dwelling Javan rhino (sunda rhinoceros) has become extinct in its indigenous habitat, and only few individuals of this species exist in protected sanctuaries. The decline in numbers of the Javan rhino has been attributed, to a great extent, on habitat loss, and to a lesser extent, on poaching for their horn. A subspecies of the Javan rhino was recently discovered in the tropical forest in Vietnam. The Sumatran rhino (dicerorhinus sumatrensis), which is also a forest-dwelling species, was on the verge of the same fate as its Javan counterpart, but conservation efforts have seen their population increase to 300. Just like the case with the Javan rhino, the Sumatran rhino is threatened by habitat loss and illegal poaching for its horn.

The Indian rhino (rhinoceros unicornis) is relatively well conserved, but it is highly endangered and its future remains uncertain. While there was an increase in Indian rhino numbers in the early 1980s, there was a subsequent decline in the late 1980s, followed by a marked increase thereafter, with a documented current population of over 2,000 animals. The statistics from Chitwan Park in Nepal shows that rhino recovery increased from 50 in 1973 to over 500 individuals by 2000.[26] But the presence of numerous armed groups seriously threatens government-driven rhino conservation efforts.[27] Such groups are known to 'sponsor and organize hunts, arming poachers with AK-47s to kill rhinos to extract their horns and to battle forest guards.'[28]

In Africa, the northern white rhino (ceratotherium simum cottoni), a sub-species of the African white rhino, is on the verge of extinction,[29] 'with only a handful of animals in a single population in the Democratic Republic of Congo.'[30] African black rhino (diceros bicornis) populations have dwindled significantly, and are reported to have become extinct in 18 of their former habitats.[31] The result of the consecutive decades of relentless hunting of African rhino, since the 1960s to the early 1990s, was the plummeting of black rhino

25 Milliken and others (n 16).

26 Government of Nepal, Ministry of Forests and Soil Conservation and Department of National Parks and Wildlife, 'The Greater One-Horned Rhinoceros Conservation Action Plan for Nepal (2006-2011)' <http://awsassets.panda.org/downloads/rhino_action_plan_25aug_06_low.pdf> accessed 6 October 2015.

27 K Thapa and others, 'Past, Present and Future Conservation of the Greater One-horned *Rhinoceros Unicornis* in Nepal' (2013) 47(3) *Oryx* 345-351.

28 United Nations Environmental Programme (n 2) 50.

29 F Maisels and others (n 5).

30 T Milliken, *Illegal Trade in Ivory and Rhino Horn: An Assessment to Improve Law Enforcement under the Wildlife* TRAPS Project (TRAPS, 2014) 14.

31 A Gillespie, *Conservation, Biodiversity and International Law* (Edward Elgar, 2011) 58; Vira and Ewing (n 6) 71.

numbers from approximately 100,000 in the 1960s to only 2,410 animals in the early 1990s.[32] Recorded statistics show that black rhino numbers dropped from 65,000 in 1970 to 2,600 as of 1998.[33]

Southern white rhino (ceratotherium simum simum) populations are by contrast increasing steadily, and this is evident in South Africa and Zimbabwe.[34] The case of the southern white rhino is one of great irony, as it was the rarest and most endangered species at the turn of the century. However, its current population is higher than all other rhino species combined. Indeed, it has been observed that 'the recovery of the Southern White rhinoceros, which was rescued from near extinction with a total population of only 20 individuals a century ago, stands as one of the world's great conservation successes.'[35] The increase in white rhino numbers has been attributed to careful management. This notwithstanding, statistical reports of global rhino populations indicate that there are less than 4,000 rhinos. This confirms the sobering fact that the rhino is a vulnerable species whose continued survival is threatened because it is under siege from poaching and illicit trade in its horn.

While deprivation of rhino habitat due to increasing human encroachment has been cited as one of the contributors to the steady decline in global rhino populations, this can hardly explain the sharp decrease of rhino populations in recent years.[36] The more convincing explanation is that the high demand for rhino horn in East Asian markets is directly proportional to the rapidly reducing numbers of rhino. In a trend reminiscent of the rhino crisis of the 1990s, where rhinos were poached on an industrial scale to meet the demand for rhino horn for traditional Chinese medicine and dagger handle production in Yemen, the resurgence of high demand for rhino horn in Vietnam resulted in the unfolding of another rhino poaching crisis in 2008. The statistics reveal a notable increase in the cases of poaching, from 13 in 2007, to 83 in 2008, and to 1,004 in 2014.[37]

It is therefore evident that poaching and illegal trade in rhino horn is the most pronounced threat to the rhino populations that remain on the planet. This means that there is an urgent need for international conservation efforts to refocus on the necessary strategies and steps that require to be adopted in order

32 Milliken (n 30) 14.

33 'tSas-Rolfes (n 11) 70.

34 Gillespie (n 31) 58; K Krause, *Small Arms Survey 2015: Weapons and the World* (CUP 2015).

35 'tSas-Rolfes (n 11) 71.

36 R Ellis, *Tiger Bone and Rhino Horn: The Destruction of Wildlife for Traditional Chinese Medicine* (Island Press 2013) 234.

37 Milliken (n 30) 14.

to reverse this dispiriting trend. The particularly high demand for rhino horn in Vietnam has been reported to be the direct result of the emergence of new markets for which Vietnam is a transit country, and the proliferation of new uses for rhino horn.[38] This calls for an examination of the international legal regime for the rhino conservation, in order to determine how best the African rhino can be conserved, in the context of the scourge of poaching and illegal trade in the rhino horn.

3. The International Legal Regime for Rhino Conservation

3.1 The CITES Convention

3.1.1 Adoption and Objects

Exploitation of wildlife for profit is not a recent phenomenon, as the international trade in wildlife has been ongoing for centuries.[39] This resulted in declining populations of certain wildlife species, but this 'was neither as frequent as in this century, nor regarded as a matter of any great concern.'[40] Human capacity to exploit wildlife has, however, been increasing with greater scope and ingenuity, thereby causing significant depletions of many wildlife species. In particular, the rapid increase in the rate and facility with which man is able to exploit wildlife for commercial trade, coupled with the insatiable demand for wildlife products, has led to alarming depletions of some species. When the International Convention for the Regulation of Whaling was adopted in 1946,[41] there was widespread concern that the expanding international trade in wildlife and their products constituted a fundamental threat to species survival.[42] It was precisely the concern that, if unchecked, over-exploitation of wildlife for international trade will cause the extinction of some species that necessitated the adoption of CITES.[43]

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38 J Shaw, Rhino Horn Trade and CITES: An Overview from TRAFFIC (TRAFFIC, 2013) 8; T Milliken and J Shaw, The South Africa –Vietnam Rhino Horn Trade Nexus: A Deadly Combination of Institutional Lapses, Corrupt Wildlife Industry Professionals and Asian Crime Syndicates (TRAFFIC, 2012).

39 C Huxley, 'CITES: The Vision' in Dickson and Hutton (n 11) 3, 4.

40 *Ibid*.

41 International Convention for the Regulation of Whaling (adopted 2 December 1946, entry into force 10 November 1948) 161 UNTS 72.

42 Huxley (n 39) 5.

43 DS Favre, *International Trade in Endangered Species: A Guide to CITES* (Martinus Nijhoff, 1989) xvii.

CITES, known in its early days as the 'Washington Convention', was drawn up in 1973 with a view to protect and conserve certain endangered animal and plant species from the threat of overexploitation that typifies the international wildlife trade.[44] After having been ratified by ten State Parties, CITES entered into force in 1975. The specific object of CITES is to regulate the export, import, or re-export of endangered species,[45] and this includes 'any animal, whether dead or alive, or any "readily recognizable part or derivative thereof."'[46] It is important to note that CITES focuses exclusively on the protection of specific species of animals and plants from the dangers of poaching and illegal trade, and thus it does not concern itself with the protection of the broader ecological habitat, or the management of wildlife.[47]

Since its adoption in 1973, CITES has generated much interest because of the importance of its principal objective, which is to halt the commercial overexploitation of wildlife resources.[48] Pursuant to this goal, the CITES regime has had to confront challenging realities such as the killing or capture of wild animals, and illegal international trafficking of wildlife and plant species for commercial gain.[49] CITES functions by categorising species that are endangered in various levels of protection and concomitant restrictions of trade, and it therefore offers a viable avenue for an action-oriented approach to the conservation of wildlife.[50] It has been observed that the 'inclusion of particular species in the appendices of CITES has often been heralded as a triumph for conservation, and the imposition of trade bans and the seizure of shipments of illegal specimens have both been seen as positive contributions to international conservation.'[51] CITES has not, however, been without criticism. Critics have pointed out that none of the actions, such as trade bans or seizures of illegal

44 JP Kazmar, 'The International Illegal Plant and Wildlife Trade: Biological Genocide?' (2000) 6(1) *University of California Davis International Law and Policy* 105, 110 (pointing out that '[c]atastrophic declines in the populations of numerous plant and animal species first aroused widespread concern in the early 1970s.'

45 Article 1(c) of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (n 10).

46 B Padgett, 'The African Elephant, Africa, and CITES: The Next Step' (1995) 2(2) *Indiana Journal of Global Legal Studies* 529, 531.

47 Favre (n 43) 30.

48 M Bolton, *Conservation and Use of Wildlife Resources* (Kluwer Academic, 2012).

49 P Conckin, *The State of the Earth: Environmental Challenges on the Road to 2100* (University Press of Kentucky, 2006) 145.

50 J Roman, *Listed: Dispatches from America's Endangered Species Act* (Harvard University Press, 2011).

51 Huxley (n 38) 3.

wildlife shipments, are conservation efforts in the strict sense.[52] However, while it cannot be denied that those actions are not real conservation actions, it must be borne in mind that they are necessary tools that support and strengthen broader conservation efforts.

3.1.2 CITES Structure of Protection and Conservation

The framework for the protection and conservation of species under CITES is structured by their categorisation in the appendices that denote the respective level of species endangerment. CITES has Appendices I to III, with the most critically endangered being listed in Appendix I.[53] Animals and plants listed in Appendix I are those species that are rare or endangered. Appendix I species are those 'threatened with extinction which are or may be affected by trade. Trade in specimens of these species must be subject to particularly strict regulation in order to endanger further their survival and must only be authorized in exceptional circumstances.'[54] With few exceptions, related to scientific and zoological research, all trade in Appendix I species is prohibited. The decision to list a particular species under Appendix I is informed by regional population data of that species' ecosystem, thus indicating that global endangerment is not a conclusive basis for listing.[55]

The most important effect of listing a species in Appendix I is the fact that this imposes a ban on commercial trade in that species or any of its readily recognisable part or derivative. Article III(3)(c) of CITES further restricts non-commercial trade in Appendix I species by requiring the presentation of both import and export permits, which effectively 'serves as a double check on illegal trade in appendix I species.'[56] In addition, these permits are only acceptable to the extent that it can be demonstrated that such trade would not endanger the 'survival of the species',[57] and that the specimen being traded in was obtained legally from the source country.[58] Appendix II species consist of all those 'species

52 F van Dyke, *Conservation Biology: Foundations, Concepts, Applications* (McGraw-Hill, 2008) 73.

53 JL Garrison, 'The Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Debate Over Sustainable Use' (1994) 12(1) *Pace Environmental Law Review* 306.

54 Article II(1) of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (n 10).

55 Padgett (n 46) 533.

56 *Ibid*.

57 Article III(2) of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (n 10).

58 Article III(3), *ibid*.

which, although not necessarily threatened with extinction now, may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival.'[59] The listing in Appendix II of a particular species is a consequence of the recognition that while that species is not yet under threat of extinction, strict control of international trade in that species is essential to prevent its decline and its becoming endangered.[60] An Appendix II listing, therefore, mitigates the risk that a plant or animal species will become rare or endangered. Appendix III is reserved as a special class in which state parties to CITES may list a species of special national concern to certain member states in order to restrict trade in that species. An Appendix III listing enables individual member states to secure special protection for a species regardless of the fact that it may not satisfy the criteria for either Appendix I or II categorisation.

On the basis of the foregoing discussion, there is the question of the effect of the listing of the African rhino as protected species under the CITES regime of protection and conservation. The African white rhino species was listed as an Appendix I species at the founding conference of CITES in 1973, while the African black rhino, which was hitherto less endangered, was moved from Appendix II to I in 1977. The consequence of these Appendix I listings of the African rhino species, alongside the Asian ones, was a sharp increase in the price of rhino horn. The statistics of the price increases, in response to the prohibition of all trade in rhino products, are relevant to illustrate this. It is reported that 'in Japan, recorded import prices per kg increased from US$75 in 1976 to US$308 in 1978; in South Korea prices increased from US$49 in 1976 to US$355 in 1979 and US$530 in 1981; and in Taiwan they rose from US$17 in 1977 to US$477 in 1980 to US$1,159 in 1985.'[61] The increase in prices of rhino horn resulted in the decimation of populations of African rhino species in many African countries due to the lucrative nature of poaching rhinos and illegal trading in their products. In the period between 1981 and 1987, the population of African black rhino in Zambia dropped from 3,000 to barely 100 individuals, while the Tanzanian population dropped from 3,795 to 275.[62]

The unprecedented rise in prices of rhino horn in the consumer market also resulted in the emergence of ancillary practices such as stockpiling and

59 Article II(2)(a), *ibid*.

60 Bolton (n 48) 24.

61 Dickson and Hutton (n 11) 71.

62 'tSas-Rolfes (n 11) 71.

speculative trading.[63] It would, therefore, seem ironic that the absolute prohibition of all trade in African rhino products engendered the opposite effect; that is, it impacted little on increasing rhino numbers, did not stop the trade in rhino horn and led to an unprecedented increase in the price of rhino horn in the black market. While it may seem subjectively biased, the immediate consequence of the absolute prohibition of all trade in rhino products, especially rhino horn, was a surge in poaching of the African rhino and an increasing professionalization of speculative stockpiling of rhino horn. These initial setbacks had to be addressed institutionally, and this resulted in responsive decisions being made subsequently by the implementation mechanisms established under CITES.

3.1.3 Implementation of the Objects of CITES

Member states of CITES are exclusively responsible for the implementation of the Treaty. One of the mechanisms of implementing CITES is the biennial meeting of member states during conferences of parties to the Convention. This offers a structured forum for reviewing the extent to which CITES has achieved its objects, to deliberate on how best to improve the conservation of species, and to propose changes in the level of protection and permission of trade in endangered species.[64] The enforcement of mandates of CITES depends on the commitment of members states to integrate the specific trade restrictions into domestic law. Article IX of CITES requires member states to establish scientific authorities to determine whether or not to grant export and import permits for the trade in endangered or protected species.

3.1.4 Decisions of Conferences of Parties to CITES on the African Rhino

Since its inception, CITES had listed both the African black rhino and African white rhino under Appendix I, effectively banning the commercial trade in these species. The consequent increase in the price of rhino horn, and the high demand for it, resulted in continued trade in spite of the absolute prohibition by CITES. The international black market dynamics further exacerbated poaching and illegal hunting of rhinos as well as speculative stockpiling of rhino horn. In light of this situation, a resolution was passed by the parties to CITES at the Third Conference of Parties (CoP3) in 1981 regarding the problem of trade in

63 M 'tSas-Rolfes, *Rhinos: Conservation, Economics and Trade-Offs* (IEA Unit, 1995).

64 Decisions of the Conference of the Parties to CITES in Effect after its 16th Meeting. <https://www.cites.org/sites/default/files/eng/dec/valid16/E16-Dec.pdf> accessed 6 October 2015.

rhino horn.[65] In that resolution, the parties to CITES, as well as non-parties to the Treaty, were called upon to take joint and individual measures to prevent the international trade in rhino horn. States were also urged to desist from selling the stocks of rhino horn in governmental custody. However, the resolution was largely ignored and trade in rhino horn continued.

In 1987, another resolution was passed at the Sixth Conference of Parties (CoP6) calling for more stringent measures to combat illicit trade in rhino horn. The 1987 resolution called for the complete prohibition, both internationally and domestically, of trade in all rhino products. It also urged governments to destroy their stockpiles of rhino horn, with the option of getting compensation for the loss of their stockpiles, and further urged the parties to CITES to use political and diplomatic means to ensure that trade in rhino horn was not allowed by any country. Like its predecessor, the 1987 resolution was similarly ignored.

Dismal compliance by states with the 1981 and 1987 resolutions of conferences of parties to CITES inspired some countries to think of alternative ways of addressing the problem of illicit trade in rhino horn, and declining rhino populations. In Zimbabwe, the wildlife department conducted a dehorning operation and moved the rhino populations to protected reserves. South Africa, which was experiencing increases in its white rhino population in the years following the adoption of CITES, subsequently made the case for down-listing of the African white rhino from Appendix I to Appendix II. With the support of Zimbabwe, it argued, at the Eighth Conference of Parties (CoP8) in 1992 for the need to down-list the white rhino, thereby legalising trophy hunting, as a means of discouraging and lessening the impact of poaching and illegal trade.[66] While this proposal was rejected at CoP8, the African white rhino was subsequently down-listed to Appendix II at the Ninth Conference of Parties (CoP9).

After achieving the down-listing of the African white-rhino, South Africa pushed its legalisation agenda further at the Tenth Conference (CoP10), arguing for the legalisation of trade in 'parts and derivatives' of the African white rhino. Additionally, the South African representative at CoP10 requested the CITES Secretariat to consider its proposal, and to investigate the viability of establishing

65 See, Trade in Rhinoceros Horn, Conf 3.11 <http://www.ciesin.columbia.edu/repository/entri/docs/cop/CITES_COP003_res011.pdf> accessed 6 October 2015.

66 P Mofson, 'Zimbabwe and CITES: Influencing the International Regime' in Dickson and Hutton (n 11) 107.

a scheme of controls to prevent the illegal trade in rhino parts and derivatives.[67] However, South Africa's proposal at CoP10 was turned down, and there have been no subsequent proposals on legalising international trade in rhino horn.

Subsequent decisions concerning the African rhino have focused primarily on the need to establish greater cooperation between South Africa and end-market states, such as Vietnam, where the African rhino horn is sold illegally.[68] For example, at the Fourteenth Conference of Parties (CoP14), the Parties adopted Decision 15.71 urging the CITES Secretariat to 'examine the implementation of Resolution Conf. 9.14 (Rev. CoP15) in those range States where illegal killing of rhinoceros poses a significant threat to rhinoceros, particularly Zimbabwe and South Africa'.[69] The Parties also urged the Secretariat to 'examine progress with regards to curtailing illegal trade in rhinoceros parts and derivatives by implicated States, particularly Vietnam.'[70]

3.2 The UNCBD Regime

One of the limitations of CITES is the fact that it focuses narrowly on particular species, without considering other important contextual factors in the habitat of that species.[71] It has been suggested that in order to improve its effectiveness, there is need for CITES to expand its interaction with other complementary regimes, including those that are not concerned with conservation *per se*, in order to develop more formidable enforcement mechanisms.[72] Complementary regimes include the UNCBD, which provides a comprehensive conservation framework that takes into account the complex interrelationships between individual species and their habitat.[73] This is apparent from the Preamble of the

67 Walker and Walker (n 22) 168.

68 Milliken and Shaw (n 38).

69 Reaffirmed in the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 'Fifteenth Meeting of the Conference of the Parties' (Doha, 13-25 March 2010) CoP15 Com. II. 29, 1.

70 Convention on International Trade in Endangered Species of Wild Fauna and Flora (n 15) 4.

71 Garrison (n 53) 301-302.

72 J Lanchbery, 'The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES): Responding to Calls for Action from Other Nature Conservation Regimes' in S Oberthur and T Gehring (eds), *Institutional Interaction in the Global Environment* (MIT Press, 2006) 157, 176.

73 PF Storey, 'Development vs. Conservation: The Future of the African Elephant' (1994) 18(2) *William & Mary Environmental Law and Policy Review* 375, 388.

UNCBD, which recognises the intrinsic 'ecological, genetic, social, economic, scientific, educational, cultural, recreational, and aesthetic value' of biodiversity.[74]

3.3 Complementarity of CITES and the UNCBD

Apart from its laudable holistic focus on the conservation of species, as well as their habitats, in addition to safeguarding the interests of local communities, the UNCBD has some provisions that are complementary to those of the CITES Convention.[75] These provisions are particularly important when considered in light of the urgent need to develop long-term and sustainable strategies to conserve the African rhino.

One of the provisions of the UNCBD that can play a significant role in the protection of the African rhino is the recognition of sustainable use.[76] Sustainable use refers to 'the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.'[77] The concept of sustainable use is important because it introduces some flexibility, which is not readily available in CITES, in the protection of certain flora and fauna. In practical terms, it permits the utilisation of beneficial interest from biodiversity in the greater interest of advancing long-term conservation, albeit under strict regulation.

The UNCBD also requires developed contracting states to extend to their less developed counterparts the necessary monetary and technological assistance that is 'relevant to the conservation and sustainable use of biological diversity'.[78] This is premised on the environmental law principle of similar but differentiated obligations, and it further requires developed state parties to the UNCBD to provide financial resources to enable developing country parties to meet the costs of measures which fulfil the obligations of the Treaty.[79] This provision is relevant to African rhino conservation because it underscores the importance of international cooperation in effective and sustainable conservation.

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74 Preamble, United Nations Convention on Biological Diversity (n 23); T Dobson, 'Loss of Biodiversity: An International Environmental Policy Perspective' (1992) 17 *North Carolina Journal of International Law and Commercial Regulation* 277, 282.

75 H Possingham and others, 'Limits to the Use of Threatened Species Lists' (2002) 17 *Trends in Ecology and Evolution* 506.

76 Storey (n 73) 393.

77 United Nations Convention on Biological Diversity (n 23) 824.

78 *Ibid* 829.

79 *Ibid* 830.

Article 13 of the UNCBD requires state parties to enhance knowledge and public awareness on the essential need for biodiversity, stipulating the obligation to 'promote and encourage understanding of, and the measures required for, the conservation of biological diversity.'[80] This provision is pertinent to the conservation of African rhino which has long suffered due to unfounded beliefs concerning the benefits of its horn. The UNCBD further emphasises the importance of systematic research to aid in decision-making, by specifically highlighting the need for state parties to develop 'programs for scientific and technical education in measures for identification, conservation, and sustainable use of biological diversity.'[81]

4. The Challenges of Conserving the African Rhino: The South African Context

Recent statistics indicate that over 98% of the African rhino population is extant in only four range states: Kenya, South Africa, Namibia and Zimbabwe.[82] This section focuses on the South African rhino population. But before examining the implementation of protective measures aimed at conserving the African rhino in South Africa, it is important to briefly describe the peculiar context in which these measures have been implemented. This is important because it provides useful background on which the relative success or failure, in protecting the African rhino, can be objectively assessed. South Africa shares a long, wild and unsettled border (350 kilometres) with Mozambique in the north, where there is a large trans-bordered wildlife park, namely the Kruger-Limpopo Trans-Frontier Park.[83] This trans-border park is currently the habitat of a significant population of African rhino in South Africa. There is a huge disparity in the level of governance, socio-economic conditions and living standards between South Africa and Mozambique, which poses a real threat for the African rhino due to the increased motivation for poaching.[84] These factors have contributed to the phenomenon of cross-border poaching, which primarily targets the African rhino.

Besides the crushing poverty that typifies life in the Limpopo Province of Mozambique, it is useful to note that there are currently no African rhinos

80 *Ibid* 827.

81 *Ibid* 827.

82 T Milliken, *Illegal Trade in Ivory and Rhino Horn: An Assessment Report to Improve Law Enforcement under the Wildlife TRAPS Project* (USAID, 2014) 14.

83 Vira and Ewing (n 6) 69.

84 *Ibid*.

in Mozambique.[85] This view is supported by a 2014 study on poaching by the Born Free Foundation, which observes the sobering fact that 'Mozambique's rhino population has … been poached into extinction three separate times: once at the turn of the century, again during the civil war, and just recently around 2013 when the last of resettled South African rhinos were killed.'[86] It is also helpful to bear in mind that Mozambique is a country that has been scarred by civil war and, therefore, has a serious problem of the proliferation of small arms.[87] Coupled with the favourable price of rhino horn in the East Asian market (about 65,000 US dollars per kilogram), it is unsurprising that heavily armed Mozambican criminal syndicates that organise and control the cross-border poaching into South Africa have emerged.

In addition, there is also the problem, largely on the Mozambican part of the Kruger-Limpopo Trans-Frontier Park, of huge population pressure from human settlements in the form of clustered villages inside and around the Park. This creates problems of human-wildlife contact, directly impacting the survival of the African rhino. Moreover, the fact that large portions of the Park are unfenced further exacerbates the problem, thereby increasing the risk of the African rhino falling victim to poachers. Apart from external problems, the South African government is not entirely free from blame concerning the poaching of the African rhino. Some reports have indicated complicity of governmental authorities, namely the security forces, in poaching and illegal trade in wildlife.[88]

The above challenges are only part of the intractable difficulties that the South African government has had to grapple with in the important project of conserving the African rhino. It is noteworthy that despite the South African government's laudable efforts to conserve the endangered African rhino population, including the coordination of a 'joint task force of rangers and South African military',[89] the cross-border poachers from Mozambique have continued to decimate the African rhino population. The alarming toll that

85 M Faul, 'Rhinos in Mozambique Likely Extinct, Expert Says: Elephants May be Next' (2 May 2013) <http://www.huffingtonpost.com/2013/05/02/rhinos-mozambique-extinct_n_3200840.html> accessed 6 October 2015.

86 Vira and Ewing (n 6) 71.

87 *Ibid*. See also, Ministry of the Interior of Mozambique and World Health Organisation, 'Firearm-Related Violence in Mozambique' (2009) <http://www.smallarmssurvey.org/fileadmin/docs/C-Special-reports/SAS-SR10-Mozambique.pdf> accessed 6 October 2015.

88 R Reeve and S Ellis, 'An Insider's Account of the South African Security Forces' Role in the Ivory Trade' (1995) 13(2) *Journal of Contemporary African Studies* 227.

89 Vira and Ewing (n 6) 72.

the scourge of poaching has taken on the African rhino population is captured by the following grim statistics emerging from South Africa's Kruger National Park:

Poaching incidents have registered a 300% increase between 2010 and 2013, with 2,778 rhinos (approximately 25% of the park's estimated total of 9,000-12,000) poached since 2008, and 80-90% of this toll attributed to cross-border Mozambican poachers. A record 1,004 rhinos were killed in 2013, a 50% increase over 2012.[90]

The South African Department of Environmental Affairs similarly reported in 2014 that while only 13 rhinos were illegally killed in South Africa in 2007, at least 1,004 rhinos were illegally killed in 2013.[91] These statistics are corroborated by the findings of CITES Rhino Working Group, which reported that between January and April 2014, at least 294 rhinos were killed in South Africa.[92] Most recently, it was reported that 49 rhinos were illegally killed in the first three months of 2015.

The shocking statistics above make it clear that poaching continues to be a clear and present danger for African rhino populations, requiring a comprehensive and multi-pronged strategy to eliminate.[93] The international legal regime that regulates trade in wildlife may provide some helpful solutions in this regard. The following section highlights some of the protective measures that South Africa has implemented in terms of the international regime applicable to the trade in African rhino and rhino horn.

5. Implementation of Measures to Protect the African Rhino In South Africa

The regulatory scheme of CITES, through its listing of species in various appendices, which indicate the level of threat and required protection, sets forth an important normative benchmark for the conservation of species. However, these provisions are in and of themselves woefully inadequate because the

90 *Ibid* (footnotes omitted).

91 Republic of South Africa, Department of Environmental Affairs, 'Rhino Poaching Statistics' (2014) <https://www.environment.gov.za/projectsprogrammes/rhinodialogues/poaching_statistics#2014> accessed 6 October 2015.

92 Convention on International Trade in Endangered Species of Wild Fauna and Flora, 'Report of the Working Group' (Sixty Fifth Meeting of the Standing Committee, Geneva, 7 -11 July 2014) SC65 Doc 43.1.

93 European Union, 'Guidance Document: Export, Re-export and Intra-Union Trade of Rhinoceros Horn' (June 2014) <http://ec.europa.eu/environment/cites/pdf/guidance_rhino_horns.pdf> accessed 6 October 2015.

CITES regime lacks a treaty-based enforcement mechanism.[94] Accordingly, the enforcement of CITES prescriptions rests with individual member states whose responsibility is to domesticate the mandates enshrined in CITES in their national laws, and therefore 'to a great extent, the success of the treaty depends on the adequacy of domestic legislative enactments and the extent of enforcement in individual States.'[95] This section explores the extent to which South African law, as evidenced in its legislative enactments, has integrated the mandate of CITES with regard to the protection of the African rhino.

5.1 Legislative Enactments

The primary legislative enactment in South Africa pertinent to the conservation of the African rhino is the National Environmental Management: Biodiversity Act of 2004.[96] This legislation integrates the listing scheme of CITES into South African domestic law. In particular, section 56(1) of the Act lists the white rhino as protected species, while the black rhino is listed as an endangered species. This listing was further secured by means of subsidiary legislation, namely, the CITES Regulations, which affirmed that the black rhino was protected under Appendix I, while the white rhino was under Appendix II.[97]

Section 57(1) of the National Environmental Management: Biodiversity Act of 2004 also domesticates the CITES mandate by prohibiting the trade in species that are threatened or protected. The listing criteria in section 56(1) of the Act place the African rhino in this category and hence this provision prohibits trade in rhino horn. This provision was strengthened by Government Gazette No. 31889 of 2009, which instituted a national moratorium on the trade of 'individual rhino horns and any derivatives or products of the horns within South Africa.' [98] It also set forth procedural regulations regarding the control of trade in rhino horn, such as the requirement of permits before carrying out any restricted activities.

Pursuant to Government Gazette No. 32426 of 2009, prohibition on the trade in rhino horn was further restricted through the introduction of mandatory norms for the marking of rhino horns, and strict standards for

94 R Reeve, 'Wildlife Trade, Sanctions and Compliance: Lessons for the CITES Regime' (2006) 82(5) *International Affairs* 892.

95 Padgett (n 46) 532.

96 National Environmental Management: Biodiversity Act, No. 10 of 2004.

97 Convention on International Trade in Endangered Species of Wild Fauna and Flora Regulations, Government Gazette No. 33002, Notice R 173 (5 March 2010).

98 Government Gazette No. 31889, Notice No. 148 (13 February 2009).

legal trophy hunting of white rhinoceros.[99] This restrictive provision was likely prompted by the increase in the poaching of rhino in general, and the 'abuse of legal trophy hunting through the sale of trophies to Asian nationals … resulting in significant quantities of legal horn entering international trade.'[100] This regulation was subsequently amended by Government Gazette No. 35248 of 2012, which sought to establish and clarify the standards for the marking of individual rhinos and rhino horns, and the restriction of trophy hunting of white rhinoceros in order to curtail international trade in animals meant to be strictly for trophy hunting purposes.[101]

5.2 Law Enforcement Efforts

South Africa's law enforcement mechanism with regard to the protection of wildlife is recognised as being among the best in Africa.[102] The most notable feature of law enforcement efforts by the South African government to conserve the African rhino is the sharing of intelligence and material resources between the security forces.[103] For instance, in 2013, the South African army loaned material resources, upon request, to rangers in the Kruger National Park. Additionally, the military provided material and deployed personnel to the Park, consisting of '265 soldiers … which included elements from an intelligence tactical regiment, the Special Forces, and an unidentified number of helicopters to help combat poachers.'[104]

The legal framework of the South African penal system also supplies critical support to the anti-rhino-poaching effort by instituting strict penalties for such offences. In recognition of the intrinsic and economic value of the African rhino, and in a bid to deter poaching and illegal trade in rhino horn, South African courts have handed down very severe prison sentences.[105] Some examples

99 Government Gazette No. 32426, Notice No. 756 (20 July 2009).

100 PA Lindsey and A Taylor, 'A Study on the Dehorning of African Rhinoceroses as a Tool to Reduce the Risk of Poaching' (South Africa, Department of Environmental Affairs, 2011) 8.

101 Government Gazette No. 35248, Notice No. 304 (10 April 2012).

102 Vira and Ewing (n 6) 71-72.

103 *Ibid* 72.

104 *Ibid*.

105 *Ibid* 70; Endangered Wildlife Trust, 'Vietnamese Citizen Gets 10 Years Imprisonment for Illegal Possession of Rhino Horn' (6 July 2010) <http://www.phasa.co.za/what-is-in-the-news/general-newsflashes/item/99-vietnamese-citizen-gets-10-years-imprisonment-for-illegal-possession-of-rhino-horn.html> accessed 6 October 2015.

include the sentencing of Mozambican poachers to 25 years' imprisonment, and 40 years imprisonment for a transnational poacher.[106]

The law enforcement efforts in South Africa are an important feature in combating the poaching of the African rhino, and the illegal trade in rhino horn, but it has not been able to stem the surge in poaching incidents. This has led the South African government, and other stakeholders, to begin discussing other alternatives to better protect the African rhino. One of the alternative approaches that have been suggested is the legalisation of trade in rhino horn. The following section discusses the salient features of this option.

5.3 Commercial Use and Management of the African White Rhino

In the late 1980s and early 1990s, South Africa raised its concerns that the CITES regime had performed dismally as far as the protection of the African rhino populations was concerned. Successive resolutions passed during the Conference of Parties to CITES, calling on non-party states to take measures to disrupt international trade in rhino horn, and recommending that political, economic and diplomatic pressure be brought to bear on states that allowed continued trade in rhino horn, hardly made an impact. Most states ignored these resolutions, which also had mandatory clauses requiring the destruction of government-owned rhino horn stockpiles, and the enactment of domestic legislation prohibiting import or export trade in rhino horn. It is only Japan that appears to pay some heed to these resolutions. Statistics from Zimbabwe illustrate the extent of the failure of resolutions of the Conference of Parties to CITES to stem the tide of rhino poaching during that period, as 'Zimbabwe's black rhino population was reduced from 1,750 animals in 1987 to 430 in 1992, despite a policy of shooting poachers on sight.'[107] This confirms that the concerns raised by South Africa concerning the status and fate of the African rhino were well-founded.

Having been dissatisfied with the effect of the CITES absolute ban on trade in rhino horn, South Africa alongside other nations opted to explore the alternative of controlled trade. This decision was likely prompted by the fact that South Africa had acquired substantial stockpiles of rhino horn confiscated by government authorities in line with the imperatives of the CITES absolute

106 E Conway-Smith, 'South Africa: Rhino Poachers from Mozambique Jailed for 25 Years' (Johannesburg, 2 February 2012) <http://www.globalpost.com/dispatch/news/regions/africa/south-africa/120201/south-africa-rhino-poaching-mozambique-poachers-sentenced-25-years> accessed 6 October 2015.

107 Dickson and Hutton (n 11) 72.

prohibition regime.[108] The rationale for regulated trade proceeded from the premise that, if sold, the legally obtained stockpiles of rhino horn in the government's custody could offer the much needed source of revenue to fund and strengthen national efforts to conserve the African rhino. This was translated into practice by the Natal Parks Board, which initiated, in 1986, a program aimed at increasing African white rhino populations in state-owned parks as well as private conservancies. Rhinos were auctioned to private owners who kept them in their land for various purposes ranging from game-viewing to trophy hunting.[109]

In 1990, the first group of African black rhino, a species that had only been near extinct in South Africa few years before, was auctioned to private land-owners running conservancies. Both species would subsequently become popular among private land-owners, and these can be credited for the recovery in the numbers of rhinos in South Africa. Market dynamics played a crucial role in the effective conservation of the African rhino because with increasing demand and a corresponding rise in the price of live rhinos, there were consequent concerted efforts among the entrepreneurial land-owners to breed more rhinos thereby enhancing the survival rate of the species.

The fact that structured and regulated trade in African white rhinos, by way of harnessing private initiative in South Africa, has provided a sustainable revenue stream for the owners of private conservancies, inevitably gives rise to both 'the incentive and means to invest in rhino conservation.'[110] By taking the decision to trade in live African rhinos, the Natal Parks Board generated much revenue directly from auctioning and indirectly from the proceeds of trophy hunting and tourist viewing, which was reinvested into further rhino conservation efforts. Convinced of the observable benefits of regulated trade in rhino horn, in 1994, the South African delegation pressed for the downlisting of the African white rhino to Appendix II in order to permit the international trade of live rhinos and game trophies. This proposal was accepted and subsequently passed by the ninth Conference of Parties, where it was agreed that only live animals and trophies can be traded internationally, while all other trade in rhino products was to remain prohibited.

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108 DJ Pienaar and others, 'Horn Growth Rates of Free-ranging White and Black Rhinoceros' (1991) 34(2) *Koedoe* 95-105.

109 Dickson and Hutton (n 11) 73.

110 *Ibid* 74.

6. A Critique of Both the Prohibition and Controlled Trade Approaches

The South African experience of the successful conservation of African white rhino populations, by way of strictly restricted and regulated trade, indicates that this can be a viable way forward. However, there was insufficient support for the proposal, by the South African government at the CoP10 that trade should be permitted for parts and derivatives of the African rhino, including rhino horn, as opposed to exclusive trade in live rhinos. Varying reasons have been advanced to explain why South Africa's proposal to permit trade in rhino horn was rejected. Some commentators view the rejection of the South African government proposal as political, due to the fact that the less financially able range states with inadequate funding for field protection may have opposed the proposal because they stood to gain no immediate benefit from it.[111] Other commentators provide an ecological-diversity-based rationale for the rejection of sanctioning trade in rhino horn, arguing that it would support an experiential basis for other controversial proposals such as the legalisation of trade in tiger bone and ivory.[112] Notwithstanding the reason for the continued restriction of trade in rhino horn, it is important to critically analyse the debate on whether or not trade in rhino horn should be permitted, an issue that has assumed critical relevance in Africa since indigenous rhino species remain endangered.

In order to arrive at an objective and informed conclusion as to whether or not trade in rhino horn should be legalised, it is important to consider both the arguments for and against such legalisation. This will ensure that the subsequent policy direction in this regard will be guided by the viability of legalised trade in rhino horn, the sustainability of the African rhino and the effectiveness of measures to dismantle the growing black market in Asian countries.[113] The following section undertakes a critical analysis of the current debate on the legalisation of international trade in rhino horn and then suggests the way forward for the conservation of the African rhino.

111 *Ibid*.

112 J Mills and P Jackson, *Killed for a Cure: A Review of the Worldwide Trade in Tiger Bone* (Traffic International, 1994); R Ellis (n 36).

113 S Metcalfe, 'Decentralization, Tenure and Sustainable Use' in Dickson and Hutton (n 11) 153.

6.1 Arguments for Legalisation

One of the more persuasive arguments for legalisation of trade in rhino horn derives its force from both economic and conservation rationales.[114] Its central thesis is based on the rule of supply and demand, whereby proponents of legalisation contend that since the scarcity of rhino horn in the market pushes up the price, and creates an incentive for poachers and illegal traders, the situation may be remedied by expanding the market, increasing supply of rhino horn and consequently lowering its price.[115]This argument is logical because by reducing the current price of rhino horn, the market forces will cut down the 'profitability of the illegal market and concomitant incentives for poaching'.[116]

The conservation rationale of this argument is that increased visibility of a previously black market economy in rhino horn would likely enhance the ease and accuracy of monitoring 'ongoing consumer demand relative to supply.'[117] Moreover, the proceeds from the legal trade in rhino horn can be reinvested in bolstering the African rhino conservation effort. In light of these salient benefits, an appropriately structured and strictly-controlled scheme for legal trade in rhino horn seems to be a sensible approach to the effective and sustainable conservation of the African rhino.[118]

6.2 Arguments against Legalisation

The arguments that are raised in opposition to the legalisation of trade in rhino horn are often based on the uncertainties of such a course of action, and the significant risks that they imply. The fact that illegal trade in rhino has long been hidden from mainstream economists means that there is a lot that remains unknown. Hence, it is difficult to say with any degree of accuracy that legalised trade would be sufficient to meet the demand. Nor is it any easier to accurately determine whether legalisation would necessarily expand the market for rhino horn thus lowering its price.

It has also been argued that whereas there may be an underlying conservation rationale in legalising trade in rhino horn, there is the foreseeable risk that some actors in this project may deviate from the primary focus on protection and

114 M t'Sas-Rolfes, 'CITES and the Trade in Rhino Horn' (2011) <http://www.wrsa.co.za/industry-a-auctions/item/157-cites-and-the-trade-in-rhino-horn> accessed 6 October 2015.

115 *Ibid*.

116 *Ibid*.

117 *Ibid*.

118 T'Sas-Rolfes (n 114) 15.

conservation.[119] This risk is referred to as the 'free rider' problem and it arises because the monetary benefits of African rhino conservation are spread thinly over an entire community, while in the case of poaching an individual takes a larger proportion of the benefit.[120]

Legalisation of trade in rhino horn would likely lead to private rhino farming, whereby these animals could be raised with a view to dehorning and selling. This would mean that private owners would progressively accumulate rhino horn stockpiles, thus posing a serious security risk.

6.3 The Way Forward: Legalisation of Trade for Better Conservation?

The discussion of the merits and demerits of the legalisation of international trade in rhino horn makes clear that while there are salient benefits of legalising such trade with strict controls, there is also need to exercise precaution and to study more closely the impact of this move. Below are some proposals on the possible way forward.

6.4 Amending CITES to Accommodate Trade in the Rhino Horn

An examination of the provisions of CITES reveals that in order for trade in rhino horn to be legalised, such a decision would require an amendment of CITES that must be adopted by the Conference of Parties. Article XVII of CITES provides that in order to amend the Convention, an extraordinary meeting of the signatories must be convened by the Secretariat, at the request of at least one-third of the signatories, in order to deliberate on the proposed amendment. It is also a procedural requirement that the text of the amendment under discussion must have been sent by the Secretariat to the signatories 90 days prior to the meeting. The amendment would then be subjected to a vote, and if it garners the requisite two-thirds majority support it will enter into force after 60 days, but will only apply selectively to parties that support it. While this procedure appears cumbersome and unlikely to succeed, given the opposition of western States to trade in rhino horn, it is still worth exploring in order to legitimise international trade in the African rhino.

119 Walker and Walker (n 22) 168.

120 PA Goldman, 'Resolving the Trade and Environment Debate: In Search of a Neutral Forum and Neutral Principles' (1992) 49 *Washington and Lee Law Review* 1279, 1294.

6.5 Adopting an African Rhino Convention

There are important parallels that can be drawn between the endangered African rhino and the vicuna: both species have products (vicuna wool and rhino horn) that are extremely valuable and in very high demand; the products of both species are capable of growing back once utilised; both species live in habitats surrounded by impoverished communities; and both species have been threatened with extinction due to poaching and illegal trade.[121] However, the most significant difference is that while the vicuna has successfully been saved from the danger of poaching and risk of extinction, the African rhino remains critically endangered.

The success behind the resurgence of a healthy vicuna population lies in the adoption, in 1979, of the Vicuna Convention which was signed by all vicuna range states, including Peru, Bolivia, Chile and Ecuador.[122] This Convention adopts a proactive and collaborative approach to vicuna conservation, which entails the concurrent implementation of a 'joint protection strategy' in all its range states.[123] More importantly, the Vicuna Convention makes allowance for the nexus between trade and conservation. As a result, corporate actors established business plans whereby impoverished local communities would be paid to protect vicuna populations and to gather vicuna wool sustainably.[124] Subsequent to the sale of this wool in the international market, a large portion of the profit would be reinvested into improving the lot of the local communities.

So successful was the Vicuna Convention in conserving vicuna populations in the South American range states that its CITES listing was down-listed in order to allow for trade in the species. Specifically, in 1994, the ban on trading in vicuna was lifted, placing it in Appendix II, and consequently, 'strict control measures were put in place for certain herds and all farmers had to comply with CITES regulations, but vicuna could be farmed, herded, sheared and their wool sold on the market, without a single animal coming to any harm.'[125] Moreover, statistics of the International Union for Conservation of Nature (IUCN) South American Camelid Specialist Group indicate that there is a correlation

121 T Jacobsen, 'Rhino and Vicuna: A Parallel' (2012) 2 <http://www.rhinoresourcecenter.com/pdf_files/133/1331765741.pdf> accessed 6 October 2015.

122 *Ibid* 3.

123 *Ibid*.

124 *Ibid* 3-4.

125 *Ibid*.

between vicuna conservation and sustainable use and poverty alleviation in South American range states.[126] This could provide a useful basis and powerful illustration for the unique benefits of legalising trade in rhino horn.

7. Conclusion

In the early years of the coming into force of CITES, both African rhino species were listed in Appendix I, effectively banning all trade in rhino products, including the horn. The African white rhino was subsequently listed in Appendix II due to increased numbers, and this allowed restricted trade in African white rhino products. The CITES ban and restriction of trade in the African black rhino and the African white rhino respectively, are important statements of principle on the critical need to conserve these species from over-exploitation. However, operating singly, these measures cannot in and of themselves conserve the African rhino from the rising tide of poaching and illegal trade in rhino horn. As has been demonstrated in this article, the CITES Appendix I and II listing of the African rhino species did not succeed in eliminating either illicit trade in rhino horn or poaching. Indeed, in some instances, it has fuelled further illegal trade in rhino horn and poaching. It is noteworthy, however, that African white rhino populations appear to be increasing in southern African range countries, but it remains unclear whether this can be attributed to effective implementation and enforcement of CITES.

A more promising approach to sustainably conserving African rhino species is a multipronged strategy that takes into account the peculiar circumstances in the source country and the end-market, involves the local communities in range countries, and which emphasises on 'trade for conservation'.[127] The case of South Africa, which has been discussed in this article, demonstrates that effectively regulated trade in rhino horn may provide a practicable way forward in the efforts to conserve the African rhino. In particular, the practice by the Natal Parks Board, which has long advocated for a sustainable approach that combines structured commercial use and collaborative conservation and management of rhino populations, supplies a concrete testament to the prospects of controlled trade in rhino horn for conservation of the African rhino. Indeed, as has been demonstrated in this article, a strictly controlled regime of rhino horn trade will be better placed to achieve progressive dual objectives. First, it would grant the

126 G Lichenstein, 'Vicuna Conservation and Poverty Alleviation? Andean Communities and International Fibre Markets' (2010) <http://www.thecommonsjournal.org/index.php/ijc/article/view/139> accessed 6 October 2015.

127 S Oldfield, *The Trade in Wildlife: Regulation for Conservation* (Routledge, 2014).

local range communities a beneficial stake in the African rhino conservation, thereby creating an incentive for anti-poaching efforts. Second, it would ensure that the proceeds from the trade in rhino horns are reinvested in strengthening efforts to conserve and better secure the African rhino, thereby ensuring the longer-term survival of the species.

Demystifying the Quest for Devolved Governance of Agriculture in Kenya

Faith Simiyu*

Abstract

This paper seeks to demystify the quest for the devolution of agriculture in Kenya by highlighting the indicators of devolved governance in the Constitution of Kenya of 2010 and examining the extent to which they have been incorporated in the agricultural sector. Indeed, the promulgation of Kenya's Constitution portended a plethora of reforms. Key amongst them was the devolution of various sectors, including agriculture. For the agricultural sector, the devolved framework was anchored in Part 2 of the Fourth Schedule. It was provided therein that the national government was to have exclusive responsibility in formulating agricultural policy while the county governments were to facilitate, implement and oversee all other agricultural related matters, including the implementation of national agricultural policies. It is notable that, in performing their roles under the Constitution, both levels of government are required to observe and be guided by the principles of distinctiveness, and interdependence as encapsulated in article 6(2). Collectively, these principles echo the indicators of devolution. It is in this regard that this paper explores how the Agriculture, Fisheries and Food Authority Act, and the Crops Act, as the national government blueprint for the devolution of agriculture, enforces the constitutional structures.

1. Introduction

The enactment of the Constitution of Kenya in 2010 saw the introduction of various reforms in the legal and administrative structures of the country. Amongst these reforms was the introduction of devolved governance at the national and county levels. A fundamental requirement of this two-tiered devolved governance structure was that both levels of government must respect, observe and be guided by the principles of distinctiveness and inter-dependence

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as encapsulated under article 6(2) of the Constitution.[1] Collectively, these principles echo the fact that both governments are autonomous institutions but are interrelated and must, therefore, conduct their affairs on the basis of mutual co-operation and consultation; especially when discharging their devolved functions in various sectors, including agriculture.

The Fourth Schedule of Kenya's Constitution provides the mechanisms by which the national and county government shall discharge their devolved functions within the agricultural sector. Specifically, Part 1 of the Fourth Schedule bestows the national government with the exclusive responsibility of agricultural policy formulation. The county governments, for their part, have to discharge the other residual agricultural functions. These would include the implementation of the agricultural policies developed at the national government level, besides setting out their own policy frameworks for optimisation of the productivity of the sector.

Strikingly, the Constitution largely lacks specific provisions to reinforce a robust regime for discharge of devolved agricultural functions. These are largely left to the legislative bodies at the two levels of devolution. It is in this regard that, at the national government level, two important pieces of legislation, namely, the Agriculture, Fisheries and Food Authority Act, 2013 (hereafter "AFFA Act"); and the Crops Act, 2013, have been enacted as the blueprint towards devolved governance of agriculture.

The aim of this paper is to investigate the extent to which the two statutes have remained sacrosanct to the principles of devolution as set out in the Constitution of Kenya of 2010. This issue has indeed been a subject of debate.[2] In particular, perceptions have emerged that there exists a scope for conflicts and confusion between the national and county governments while they discharge their respective functions in the agricultural sector.[3] It is in this respect that it is sought herein to demystify the quest for a structured devolved governance scheme in the agricultural sector as envisioned in the Constitution and other statutes governing the sector.

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1 Constitution of Kenya 2010, article 6(2)

2 Wahome Mwaniki, 'Cabinet approves changes to Agriculture, Fisheries and Food Authority Act" *Daily Nation* available at http://mobile.nation.co.ke/business/Agriculture-Law-Cabinet-Amendments/-/1950106/2160202/-/format/xhtml/-/stbtgiz/-/index.html (accessed on 4 November 2014).

3 The Cabinet has approved proposed amendments to a new law on agriculture in an attempt to diffuse tension between national and country governments on management and regulation of the sector. See Wahome Mwaniki (n 1 above).

The investigation in this paper is set out in two substantive parts. While the first part gives an overview of devolution in the agricultural sector as provided for in the Constitution of Kenya, the other part explores the extent to which two constitutional indicators of devolution, namely the principle of distinctiveness and that of interdependence of the governments have been incorporated in the statutes enacted to regulate the agricultural sector in the country.

2. An Overview of Devolution in the Agricultural Sector

2.1 Definition of Devolution

Devolution is a complex undertaking which derives different meanings in varying contexts. In one sense, devolution refers to the transfer of power or functions from one level of government (usually the central or national government) to a lower level of government such as the local government.[4] In another sense, devolution is considered a form of decentralization in which the authority for decision-making, functions and powers are transferred from the central government to quasi-autonomous units or levels of local governments.[5] For example, South Africa has three tiers system of decentralised government structures; operating at the national, provincial and local levels.[6] For its part, Germany also has three centres of devolution operating at the federal level, the lander level and the local government levels, whilst in Kenya, two planes have been created: one at the national level and the other operating at the county level.

2.2 Devolved Framework for Agriculture in Kenya

As already noted, the Fourth Schedule of the Constitution of Kenya provides the framework for devolution and distribution of functions between the national and county governments. In the agricultural sector, Part 1 of that Schedule, stipulates for agricultural policy as a national government function, while Part 2 supplies county government functions in the agricultural sector to include:

(a) Crop and animal husbandry;

(b) Livestock sale yards;

(c) County abattoirs;

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4 YP Ghai, & JC Ghai, *Kenya's Constitution: An Instrument for Change* (Katiba Institute, 2011) 139.

5 Odero Steve, 'Devolved Government' in PLO Lumumba, M.K. Mbondenyi and S.O. Odero (eds), *The Constitution of Kenya: Contemporary Readings*(LawAfrica, 2011).

6 The local level of devolution in South Africa comprises of municipalities and districts.

(d) Plant and animal disease control; and

(e) Fisheries.[7]

Interestingly, the Constitution itself does not define the term 'agriculture'. In fact, the term 'agriculture' is only mentioned twice in the Fourth Schedule of the Constitution. It merely provides a list of the probable sub-sectors within which counties may discharge functions considered to fall under 'agriculture'. The sub-sectors include crop and animal husbandry, livestock sale yards, county abattoirs, plant and animal disease control and fisheries.

It is indeed notable that the Constitution gives a very broad context to agriculture. The investigation in this paper will, however, limit itself, and even though the conclusions will be cross-cutting, the specific legislation explored will not include those addressing the areas of livestock and research.

Based on that provision of the Constitution, it can be implied that the national government is to act as the 'regulator' of agriculture through policy formulation whilst the counties are to 'implement' national policies on agriculture. In addition, counties are to act as 'facilitators' and 'providers' of agricultural services in the various sub-sectors.

2.3 Perspectives of Devolution

There is no uniform model or variants of devolution, and various perspectives exist so as to meet the peculiar needs of the countries where they are adopted. However, the realisation of devolution is premised on the legislative framework created to facilitate its design and implementation. Thus, in order to derive the methods, design and processes of devolution in any country one must examine the Constitution, the ordinary laws and the administrative arrangements of the country in question.[8] From these, four models within which devolution may operate can be identified. These include:

2.3.1 Administrative Devolution

Administrative devolution revolves around the transfer of responsibility for planning, financing and management of selected public functions from the central government to lower units of the government. For instance, under administrative devolution in Kenya, the national executive powers are vested

7 Constitution of Kenya, 2010, section 29 of Part 1 of the Fourth Schedule; section 2 of Part 2 of the Fourth Schedule.

8 YP Ghai, & JC Ghai, *Kenya's Constitution: An Instrument for Change* (Katiba Institute, 2011) 139.

in the presidency and the cabinet, which executes all national government functions. At the county level, on the other hand, the Governor and the county executives are tasked with administration and execution of county functions conferred by the Constitution and other statutes. Thus, under the Constitution,[9] the national government is exclusively tasked with discharging such functions as national security and international relations. The county governments, on the other hand, have the responsibility for county health services, county transport etc.

2.3.2 Political Devolution

Political devolution involves the creation of sub-national levels of government that are endowed with autonomous decision making power within the framework of legitimately elected governments at both levels. Under this framework, both levels of government have legal authority conferred upon them by the people during an electoral process. For instance, at the national level, in Kenya, both the President, together with his running mate, and the Members of Parliament,[10] are elected through a universal franchise. Similarly, at the county level, the governor and his running mate, as well as the members of the county assemblies are regularly voted into office. Both the national and the county leaders are politically accountable to the people that vote for them and can therefore be removed through a political process established under the Constitution.[11]

2.3.3. Fiscal Devolution

Fiscal or financial devolution entails the alignment of monetary functions among different levels of government whereby the different levels of government set and collects taxes. For example, the devolved units may be allowed to impose some sort of levy on services that they directly provide to the people, such as fees imposed on agricultural crops, or trade licences for businesses carried out within the units, while the national/central government continues to impose general taxes.

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9 Schedule Four.

10 Under Chapter 11 of the Kenyan Constitution, these include both the Members of the National Assembly and the Senators.

11 This may be through regular elections carried out every five years or the impeachment processes for the President and Governors, and recall provisions for the Members of Parliament.

2.3.4 Economic or Market Devolution

This occurs through privatisation and deregulation. This form of devolution requires the shifting of responsibility for the provision of goods and delivery of services from the central government to the private sector.[12] Private corporations, non-governmental organizations and community-based organizations may be given responsibilities previously performed by the government such as street lightning, beautification of parks amongst other responsibilities, in an effort towards economic devolution.

2.4 Principles of Devolution in Kenya

To give effect to the dimensions of devolution discussed above, the Constitution supplies a devolved framework underpinned by the principles of distinctiveness and interdependence of the national and county governments.[13] Thus, for example, the national and county governments are obliged to cognisance of the said principles when discharging their devolved administrative functions listed in the Fourth Schedule of the Constitution. A key parameter of administrative devolution that is of concern in this paper is that of agriculture and its interplay with the key principles of distinctiveness and inter-dependence of government relations.

Two key principles underpinning devolution in Kenya generally and in agriculture specifically, are provided in the Constitution. These are the principle of distinctiveness and the principle of interdependence of government.[14]

According to these principles, the governments at the national and county levels are distinct and inter-dependent and must conduct their mutual relations on the basis of consultation and cooperation. It is, hence, required that the governments at either level must perform their functions, and exercise their powers, in a manner that, "respects the functional and institutional integrity of government at the other level." They must assist, support and consult and, when appropriate, implement the legislation of the other level of government. Further, the governments at both levels are supposed to liaise with the other level for the purpose of "exchanging information, coordinating policies and administration and enhancing capacity."

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12 Odero Steve, 'Devolved Government' in PLO Lumumba, M.K. Mbondenyi and S.O. Odero (eds), *The Constitution of Kenya: Contemporary Readings* (LawAfrica, 2011).

13 Constitution of Kenya, 2010, article 6(2); 189(1).

14 These principles remain anchored in the Constitution of Kenya, 2010, article 6(2); 189(1).

It is also stated that the, "Government at each level, and different governments at the county level, shall cooperate in the performance of functions and exercise of powers and, for that purpose, may set up joint committees and joint authorities".[15]

The core principles established by the Constitution have great ramification to the operation of governmental function and require some further attention.

2.4.1 The Principle of Distinctiveness

The principle of distinctiveness recognizes that each level of government is autonomous from the other. The autonomy encompasses certain distinct features such as political autonomy, functional autonomy, financial autonomy and administrative autonomy. Essentially, this connotes a measure of autonomy amongst the two levels of government so that each level has the flexibility to make its own decisions which include financial, functional and administrative arrangements in the discharge of government functions.

The Constitution echoes the principle of distinctiveness providing that, "government at either level shall perform its functions and exercise its power in a manner that respects the functional and institutional integrity of government at the other level".[16]

The demand for 'respect [of] the functional and institutional integrity of government…' can be construed arguably requires recognition of the principle of distinctiveness of government. This means that no level of government is sub-ordinate to the other or an agent of the other and must respect the functional and institutional autonomy. Hence, neither level of government should encroach on the constitutionally assigned functional area of the other nor purport to undermine the institutional autonomy of the other government.

In the context of agriculture, this connotes that the national government should exclusively formulate agricultural policies while the county government is to facilitate the provision of all agricultural services.[17] In doing so, government at either level will be performing its functions and exercise its power in a manner that respects the constitutional status and institutions of government at the other level and, in the case of county government, within the county level.

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15 Constitution of Kenya 2010, article 189.

16 Captured in article 189(1) (b).

17 This is the devolved framework for agriculture under the Fourth Schedule of the Constitution of Kenya, 2010.

2.4.2 The Principle of Interdependence

The principle of interdependence recognises that whereas the two levels of government are autonomous, they cannot operate in isolation. Both levels must realize that some of their functions are concurrent in nature, requiring consultation and cooperation.

An important area of cooperation and consultation involves assistance, support, consultation and liaisons between the various government levels for purposes of exchanging information, coordinating policy and other administrative arrangements and where appropriate, in the implementation of legislation.[18]

The principle of interdependence therefore requires cooperation and consultation by specifically providing that government at either level need to cooperate in the performance of their functions and exercise of powers and, for that purpose, they may set up joint committee, joint authorities or intergovernmental forums for cooperation.

Given the foregoing, the indicators of devolved governance, as premised on this principle of distinctiveness and interdependence, can be elaborated below.

2.5 Indicators of Devolved Governance

The indicators of devolved governance are to be derived from the principles of distinctiveness and inter-dependence already discussed. It should be emphasized that whereas the principle of distinctiveness asserts the functional and institutional autonomy of the national and county government; the principle of inter-dependence recognizes that even though both governments are autonomous, they must necessarily cooperate and consult each other in the discharge of their functions. Table 1 below provides a summary of the preceding principles and how they are to be used as indicators of devolved governance.

18 Captured in article 189(1)(b).

Table 1: Indicators of devolved governance

Principle	Indicator of Devolved Governance
Distinctiveness	• Autonomy of the national and county government, • Flexibility in decision making by the national or county government, and • Respect of the functional and institutional integrity.
Principle of Inter-dependence	• Consultation, and • Cooperation

Source: Author

Notably, when discharging their devolved agricultural functions, as encapsulated in the Fourth Schedule of the Constitution, the national and county governments must be guided by the indicators of devolved governance. The Fourth Schedule of the Constitution, however, fails to define the exact degree of autonomy, flexibility, consultation and cooperation between the national and county governments on matters agriculture. The Constitution assumes that the governments at each level will implement the same; especially when discharging their devolved agricultural functions. Thus, the national government enacted the AFFA Act and the Crops Act as the framework within which the national and county governments are to discharge their devolved agricultural functions. The next section assesses the extent to which the two Acts have incorporated the indicators of devolved governance.

3. Incorporation of Indicators of Devolved Governance In the Agricultural Sector

How, and to what extent have the indicators of devolved governance been incorporated in the laws regulating the agricultural sector in Kenya? This question may be assessed generally from the preambular declarations or specific substantive provisions of the respective legislation examined below. But first, we elaborate on the legal framework for Agriculture in Kenya as a background to the assessment.

3.1 The Legal Framework for Agriculture in Kenya

Prior to the enactment of the Constitution in 2010, Kenya's agricultural sector was governed by over 131 pieces of legislations.[19] Historically, legislations

19 Muriu, Rogo & Biwott, Hillary, *Agriculture Sector Functional Analysis: A Policy, Regulatory and Legislative Perspective* (International Institute for Legislative Affairs, 2013)

enacted in the agricultural sector were sector specific and created specialized state corporations for sub-sectoral management. Accordingly, legislation on agriculture were spread over the more than ten sub-sectors of agriculture that include crops, horticulture, livestock, fisheries, aquaculture, research, extension, marketing, veterinary, wildlife, forestry and water. From the early 1990's, however, it became apparent that numerous legislation in the agricultural sector had made management of the sector complex, at the same time, they had become outdated. Agricultural policy reviews called for an overhaul of the legal and institutional framework for agriculture in order to consolidate and harmonize existing legislation.[20] The enactment of the Constitution in 2010 gave the impetus to the process of harmonization of agriculture legislation.

The Constitution introduced a leaner government through a reduction of the number of ministries from forty four as was the case before, to twenty two.[21] It followed, the agriculture sector needed to be consolidated and thus legislation were enacted in the year 2013 for purposes of streamlining the laws on agriculture. These legislation included: (i) The Agriculture, Fisheries and Food Authority Act, 2013 (AFFA Act); (ii) the Crops Act, 2013; (iii) the Kenya Agricultural and Livestock Research Act, 2013 and (iv) the Pyrethrum Act, 2013.

Whether the said legislation have in fact harmonized the agriculture sector is debatable and beyond the scope of this paper. The paper instead focuses on the AFFA Act and the Crops Act whose objectives were *inter alia* to consolidate the laws on the regulation and promotion of agriculture generally; as well as enable the national and county governments discharge their devolved agricultural functions.

In the next part, the devolved framework for agriculture entailed in the Fourth Schedule of the Constitution will be examined together with the AFFA Act and the Crops Act, in order to assess whether the indicators of devolved governance have been incorporated in the laws regulating the agricultural sector in Kenya.

3.2 Agriculture, Fisheries and Food Authority Act, 2013

The AFFA Act *inter alia* makes provisions for the respective roles of the national and county governments in furtherance to their devolved agricultural functions. In particular, the preamble of the AFFA Act seeks:

20 Agriculture Sector Development Strategy (Government of Kenya, 2010).

21 Agriculture Sector Development Strategy (Government of Kenya, 2010).

> [T]o provide for the consolidation of the laws on the regulation and promotion of agriculture generally, to provide for the establishment of the Agriculture, Fisheries and Food Authority, to make provision for the respective roles of the national and county governments in agriculture excluding livestock and related matters in furtherance of the relevant provisions of the Fourth Schedule to the Constitution and for connected purposes.[22]

The extent to which the preamble of the AFFA Act has incorporated the indicators of devolved governance entailed in the principle of distinctiveness and inter-dependence is debatable. The preamble merely seeks to advance the devolved agricultural functions listed in the Fourth Schedule of the Kenyan Constitution but does not lay emphasis on the indicators of devolved governance. However, a look at the substantive provisions of the AFFA Act reveals an attempt to further the provisions of the Fourth Schedule to the Constitution. This is evident from the fact that the national government is to act in accordance with the Fourth Schedule to the Constitution by being responsible for agricultural policy formulation, and assisting the county governments on agricultural matters.[23]

The AFFA Act also seeks to advance the indicators of devolved governance by establishing a national state corporation known as the 'Agriculture, Fisheries and Food Authority' (hereafter AFFA Authority). The AFFA Authority is to act in consultation with the county government in the discharge of its agricultural functions.[24] In addition, the AFFA Authority is to advice the national government and the county governments on agricultural levies. The requirements of acting in 'consultation' with and 'advising' the county government, implies that as a creature of the national government, the AFFA Authority is to act as the intergovernmental forum for consultation and cooperation between the national and county governments. Further, it also implies that the AFFA Authority will be discharging its functions in a manner that respects the principle of inter-dependence that requires consultation and cooperation between the national and county governments, as indicators of devolved governance.

In retrospect, a further scrutiny of the functions of the AFFA Authority reveals that the AFFA Act largely encroaches on, remains aloof of and undermines the principle of distinctiveness that indicates devolved governance as comprising of flexibility in decision-making, autonomy, functional and

22 The preamble of the AFFA Act, 2013.

23 AFFA Act 2013, section 29 (1); section (2).

24 AFFA Act 2013, section 4.

institutional integrity of government. This is because the AFFA Authority is mandated to discharge functions that are beyond the scope of agricultural policy formulation. The AFFA Authority has been mandated to promote best practices in agriculture, maintain a database on agricultural products and control the production, processing, marketing, grading, storage, collection, transportation and warehousing of agricultural products. Further, the AFFA Authority is to monitor agriculture and be responsible for determining the research priorities in agriculture.[25] These functions do not make it apparent or implied, the role of counties as facilitators and providers of agricultural services; a role that has been constitutionally ascribed to counties in the Fourth Schedule.

In turn, it can be argued that the AFFA Authority will overstep on the counties flexibility in decision-making within the agricultural sector. This is because the AFFA Act is silent on the extent to which the county government shall have the ability to manoeuvre within its area of jurisdiction in agricultural matters, especially when acting in accordance with Part 2 of the Fourth Schedule to the Constitution.

Accordingly, the questions that linger are: what is the role of the county government as facilitator of agricultural activities in the sector? Conversely, can national state corporations (as creatures or organs of the national government) purport to overstep the principle of distinctiveness as an indicator of devolved governance? To the extent that these questions remain unanswered, it is certainly deducible that the AFFA Authority, as a creature of the national government, has been given mandates that undermine most if not all, indicators of devolved governance in Kenya.

3.3 Crops Act, 2013

The preamble of the Crops Act provides that it seeks to consolidate and repeal various statutes relating to crops, and to provide for the growth and development of agricultural crops. It makes no provision that impliedly or explicitly incorporate the indicators of devolved governance. However, the substantive provisions of the Crops Act mimic and advance the devolved framework established under the Constitution and the AFFA Act.

The substantive provisions of the Crops Act buttress provisions of the Fourth Schedule of the Constitution providing that the county governments shall implement the national government policies. Related, the Crops Act seemingly upholds the Constitutionally prescribed 'facilitative' role of counties

25 AFFA Act 2013, section 4(b), (c) and (d).

in matters agriculture providing that the counties shall be responsible for crop development, plant disease control and soil and water conservation.[26]

The Crops Act also makes provisions that advance cooperation and consultation indicators of devolved governance under the principle of inter-dependence. The Act provides for cooperation between the national and county governments when providing an enabling environment for the development of the crop subsector. Further, the national and county governments are to collaborate in determining and promoting the implementation of agricultural policies and measures designed to promote, support and enhance productivity in the crop subsector.[27] Similarly, the Cabinet Secretary may, in consultation with the AFFA Authority and the county governments, make regulations for the better carrying into effect of the provisions of the Crops Act.[28] Therefore, based on these provisions, it is arguable that the principle of inter-dependence, as an indicator of devolved governance, has been incorporated under the Crops Act.

The principle of distinctiveness, as indicated by flexibility in decision-making, autonomy, functional and institutional integrity of government, also seems to have been incorporated in the Crops Act; albeit with varying degree of success. On one hand, flexibility in decision-making has been incorporated as an indicator of devolved governance through substantive provisions on fees to be levied by counties. Specifically, counties have the autonomy to impose fees for the development of agricultural crops within the county, the issuance of trade licences to any persons or cooperative societies trading in crops within the county.[29] In doing so, the fees imposed by a county government "shall not in any way prejudice national economic policies, economic activities across county boundaries or national mobility of goods, services, capital or labour". [30]

On the other hand, autonomy, functional and institutional integrity of government as indicators of devolved governance, seem to be watered-down through the functions of the AFFA Authority. The AFFA Authority undertakes most if not all, of the functions related to the crops sub-sector, with no apparent roles prescribed to counties. These functions include: the facilitation of marketing and distribution of crops, monitoring and dissemination of market information,

26 Crops Act 2013, section 6.

27 Crops Act 2013, section 6(2) and 6(3).

28 Crops Act 2013, section 40(1).

29 Crops Act 2013, section 17(2).

30 Crops Act 2013, section 17(2).

including identification of the local supply-demand situation, transportation of scheduled crops, establishment of wholesale markets and agricultural produce collection centres, agricultural research, agricultural extension, enforcement of standards in grading, sampling and inspection, tests and, formulate policies and guidelines on dealing with other crops, amongst other functions.[31] Additionally, the AFFA Authority regulates all aspects of crops with a view to promoting productivity, facilitating market access, training of farmers and provision of extension services, and providing incentives to farmers.[32]

Undoubtedly, given the functions of the AFFA Authority, the impression created is that little if any room, has been given to the county governments in the management of the crops sub-sector. It may accordingly been inferred that to a large extent, the principle of distinctiveness as an indicator of devolved governance, has not been adhered to under the Crops Act.

Table 2 below provides a summary of the findings of the foregoing.

Assessment of Extent of Incorporation of Devolved Governance

	Structure of Legislation		Indicator of Devolved Governance				
		Principle of Distinctiveness	Principle of Inter-dependence				
		Autonomy of the national and county government	Flexibility in decision making by the national or county government	Respect of the functional and institutional integrity of each government	Consultation	Cooperation	✓ Implies that the stated indicator of devolved governance has been incorporated X Implies the stated indicator of devolved governance has not been incorporated
AFFA Act, 2013	Preamble	X	X	X	• ✓	✓	
	Substantive Provisions				✓	✓	
Crops Act, 2013	Preamble	X	X	X	X		
	Substantive Provisions	X	✓	X	✓	✓	

31 Crops Act, 2013, section 8.

32 Crops Act, 2013, section 13.

4. Conclusion

Kenya's devolved framework for agriculture is encapsulated in the Fourth Schedule of the Constitution. The Constitution provides that the national government shall exclusively formulate agricultural policies whilst the county government shall facilitate the provision of all agricultural services. The success of the said devolved agricultural framework is dependent upon the incorporation of two key principles in legislation governing the agricultural sector. The principles are: the principle of distinctiveness and inter-dependence. The principle of distinctiveness espouses the indicators of devolved governance that call for autonomy, flexibility in decision-making, respect of the functional and institutional integrity of government at either level. The principle of inter-dependence requires consultation and cooperation between governments.

This paper has conducted an assessment of the extent to which the said principles have been incorporated under the legislation governing the agricultural sector being, the AFFA Act and the Crops Act. The paper has highlighted the fact that both legislation have largely been successful in incorporating the principle of inter-dependence. This success has been achieved through the creation of the AFFA Authority that acts as an inter-governmental mechanism for cooperation and consultation between the national and county governments. However, both legislation have failed to incorporate the principle of distinctiveness. This is because the AFFA Authority has largely been mandated to discharge most if not all, of the functions that oscillate around agricultural service delivery. Accordingly, to demystify the quest for devolved governance of agriculture in Kenya, there must be a shift or decentralization of power and control of agriculture from performance management models built around the AFFA Authority, to the recognition of the distinctive role of counties in devolved agriculture. The question that therefore lingers is: how and to what extent counties can assert their distinctiveness in matters agriculture?

Regulation of Mobile Money: A Case-Study of Kenya's M-Pesa

Priscilla M. Musikali* **and Lois M. Musikali§**

Abstract

M-Pesa by Safaricom is the main mobile money transfer service in Kenya. Its use has been able to decentralise money services by reaching out to rural and poorer populations in Kenya so as to ensure that they have equal access (with the rest of the population) to basic banking services. Technological innovation through M-Pesa, has changed the way people transfer money and at the same time resulted in a need for those transfers to be monitored for consumer protection purposes and for crime reduction. The role of this paper is to assess the effectiveness of the Kenyan legal framework on the regulation of M-Pesa. It examines the meaning of regulation and reasons for regulating M-Pesa in Kenya. Regulatory issues surrounding mobile money in Kenya are highlighted with a view to evaluating the extent to which M-Pesa regulation has been efficient.

1. Introduction

The growth of M-Pesa in Kenya has been described as transformational because of its ability to provide efficient mobile money services that comply with relevant regulatory standards, such as anti-money laundering regulation standards. The success of M-Pesa has also been marked by its inclusion of the entire population, especially the poorer population whose access to basic financial services is limited. For these reasons, it has been deemed necessary to regulate the service for the benefit of its consumers, to ensure that M-Pesa continues to be a successful mobile transfer system. This paper considers the various regulatory issues surrounding mobile banking in Kenya. In particular it considers whether regulation of M-Pesa in Kenya (as well as mobile banking generally) is necessary. In so doing it reviews arguments for and against the regulation of mobile money, and evaluates the effectiveness of Kenya's current regulatory framework for M-Pesa mobile money.

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2. The M-Pesa Platform

2.1 The Concept

M-Pesa by Safaricom is the main mobile money transfer service in Kenya. Literary translated, 'M-Pesa' it means 'mobile money,'[1] the latter of which is a form of electronic money.[2] For its part, electronic money refers to the value that is stored for the purpose of carrying out payments through sale terminals, devices, or open computer networks.[3] E-money is money issued as Kenyan currency, accepted as payment by people other than the issuer, and stored magnetically or electronically.[4] Mobile money is a wide term that refers to the use of mobile phones to access financial services,[5] that is, the use of 'mobile technology to trigger a financial event'[6] through transactions and information services. The use of the mobile phone for banking in African countries stems from a need to increase the diversity and availability of financial services.[7] Mobile money includes mobile banking, which involves the carrying out of financial transactions using mobile phones.[8] It is also a form of branchless banking.[9] Makin acknowledges that 'mobile' and 'branchless' banking are interchangeable terms as they both offer a subset of banking services, rather than true banking.[10] Mobile banking can be used for payments of both goods

1 *'Pesa'* is the Swahili word for money.

2 Samuel Mbuguah and Simon Karume, 'Trends in Electronic Money Transfer in Kenya' (2013) 4 Journal of Emerging Trends in Computing and Information Sciences 1, 69.

3 Basel Committee on Banking Supervision, 'Risk Management for Electronic Money Transfers' (BS/97/122, Basle 1998) <www.bis.org/publ/bcbs35.pdf> accessed 25 September 2015.

4 Central Bank of Kenya, 'E- Money Regulation 2013' (Central Bank of Kenya 2013). <https://www.centralbank.go.ke/images/docs/NPS/Regulations%20and%20Guidelines/Regulations%20-%20E-%20Money%20regulations%202013.pdf> accessed 25 September, 2015, Clause 4: Definitions

5 Marina Solin and Andrew Zerzan, 'Mobile Money: Methodology for Assessing Money Laundering and Terrorist Financing Risks' (Mobile Money for the Unbanked, GSMA 2010). <http://www.gsma.com/mobilefordevelopment/wp-content/uploads/2013/09/amlfinal35.pdf> accessed 25 September 2015 (hereafter referred to as 'Solin'), 20.

6 *Ibid*

7 Paul Makin, 'Regulatory Issues Around Mobile Banking' (Consult Hyperion, OECD 2010) <www.oecd.org/ict/4d/43621885.pdf> accessed 17 July 2014(hereafter referred to as 'Makin'), 1.

8 Michael Klein and Colin Mayer, 'Mobile Banking and Financial Inclusion: The Regulatory Lessons' (2011) The World Bank Policy Research Working Paper 5664 (WPS5664) <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-5664> accessed 1 August 2014 (hereafter referred to as 'Klein'), 2.

9 Jim Rosenberg, 'Regulation of Agents Can Make or Break Mobile Banking for the Poor' (*CGAP*, 8 March 2010) <www.ccgap.org/news/regulation-agents-can-make-or-break-mobile-banking-poor> accessed 25 June 2014.

10 Makin (n7), 1.

and services as it provides the user with control and instant access compared to visiting a conventional bank branch.[11] Most users of mobile banking do so for the purposes of convenience and to organise their finances in a more efficient manner.[12] Mobile banking in Kenya is mainly telecom-led, which means that the operator stores value directly, although they (the operator) may work in conjunction with banks to ensure that prudential norms are followed.[13]

The introduction of M-Pesa in 2007 was inspired by the existence of a Safaricom service that enabled users to transfer and share airtime.[14] M-Pesa works through the use of Short Message Service (SMS) to transmit and withdraw funds between users, and also to make payments and deposit money.[15] M-Pesa is a non-bank based financial services provider[16] that essentially allows for the transfer of money using a mobile phone.[17] Its non-bank based model operates on the premise that there is no direct contractual relationship between consumers and licensed financial institutions: rather, any transactions are carried out at a retail agent[18] where cash is exchanged for electronic value record.[19] M-Pesa can also be considered a 'place of business' pursuant to section 59(b) of the Kenyan Finance Act:[20] this is because under the mandate of the Central Bank of Kenya, the service is available to the public and is involved in the transaction of financial business in Kenya. M-Pesa is not a bank and does not perform banking business because,[21] firstly, the consumer enjoys control of their

11 Future Foundation, 'Emerging Trends in Mobile Banking' (In association with Monitise, 2011), 4.

12 *Ibid*.

13 Arvind Ashta, 'Evolution of Mobile Banking Regulations' (2010) Burgundy School of Business-CEREN Working Papers Series <http://ssrn.com/abstract=1583080> accessed 7 October 2015 (hereafter referred to as 'Ashta'), 3.

14 International Monetary Fund, 'Kenya: Fifth Review Under the Three Year Agreement Under the Extended Credit Facility and Request for a Waiver and Modification of Performance Criteria- Staff Report; Staff Settlement; and Press Release' (April 2013) IMF Country Report No. 13/107 <www.imf.org/external/pubs/ft/scr/2013/cr1307.pdf> accessed 21 August 2014, 14, Box 3. Kenya's Mobile Banking Revolution.

15 *Ibid*.

16 Rasheda Sultana, 'Mobile Banking: Overview of Regulatory Framework in Emerging Markets' (4th Communication Policy Research, South Conference, Negombo, Sri Lanka, 8 December 2009) <http://dx.doi.org/10.2139/ssrn.1554160> accessed 7 October 2015 (hereafter referred to as 'Sultana'), 5, Table 1. Models of M-banking.

17 B Ngugi, M Pelowski and J G Ogembo, 'M-Pesa: A Case Study of the Critical Early Adopters' Role in the Rapid Adoption of Mobile Money Banking in Kenya' (2010) 43 EJISDC 3, 1.

18 An agent, as used in this essay, is someone who is employed by an electronic money issuer to provide agency services on their behalf. See Central Bank of Kenya (n 4), Clause 4: Definitions.

19 Sultana (n 16), 4.

20 Finance Act, 2013, section 59(b) (as amends the Banking Act Chapter 488, section 2).

21 Kenya's Banking Act, Chapter 488, Laws of Kenya, makes no reference to electronic banking, and

electronic value while it is in their M-Pesa account.[22] Furthermore, M-Pesa does not pay interest on consumer deposits: therefore, the electronic money is not a bank deposit.[23] Additionally, M-Pesa deposits cannot be used to lend or for other trading business but are held in trust accounts within banks; which require authorisation for any withdrawals.[24] M-Pesa also falls outside the definition of 'banking business' because of its business structure, even though the service accepts repayable money from the public.[25] Bearing in mind that M-Pesa is a non-bank based mobile money service, it can thus be said that it provides basic banking services without actually being a bank.

In order to open an M-Pesa account, one must submit proof of identity at an M-Pesa outlet, after which the user is given a Personal Identification (PIN) number that will be used for future transactions.[26] Registration by an agent involves checking and verifying the identity of a user and processing an account opening request after checking that anti-money laundering regulations have been followed.[27] There is no money or fee payment necessary to open an M-Pesa account: however, low fees apply when transactions are being made.[28] Deposits and transactions are usually made at an outlet or agent, and once a deposit has been made into an M-Pesa account, it is converted into an electronic float (e- float), which is measured in the same units as cash.[29] Money stored

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confines itself to cash and cheques only. Kenya's Banking Act maintains that a bank is a company that either carries on, or proposes to carry on, banking business in Kenya. To this effect, banking business in Kenya involves: firstly, accepting monetary deposits from the public, which are repayable at the end of a fixed term on demand or with notice, and secondly, using money held on deposits or current accounts to lend, invest or 'in any other manner for the account and at the risk of the person so employing the money'. Thirdly, banking business can be demonstrated by the acceptance of money by members of the public on current accounts, or the accepting of cheques from the public. See generally Kethi D Kilonzo, 'An Analysis of the Legal Challenges posed by Electronic Banking' (2007) 1 Kenya Law Review, 323.

22 Bankable Frontier Associates, 'Enabling mobile money transfer: The Central Bank of Kenya's treatment of M-Pesa' (Case Study, Alliance for Financial Inclusion, 2010) <http://www.gsma.com/mobilefordevelopment/wp-content/uploads/2013/09/enablingmobilemoneytransfer92.pdf> accessed 7 October 2015, 4.

23 *Ibid*.

24 *Ibid*.

25 CGAP, 'Regulation of Branchless Banking in Kenya' (*CGAP*, Update on Regulation of Branchless Banking in Kenya, January 2010) <https://www.cgap.org/sites/default/files/CGAP-Regulation-of-Branchless-Banking-in-Kenya-Jan-2010.pdf> accessed 7 October 2015, 3.

26 Nidhi Mardi and Bhavya Srivastava, 'Reaching the unbanked: The dynamics of M-Pesa' (*The Indian Economist*, 27 December 2013) <http://theindianeconomist.com/reaching-the-unbanked-the-dynamics-of-m-pesa/> accessed 29 July 2014 (hereafter, Nidhi).

27 Klein (n 8), 13.

28 B Ngugi, M Pelowski and J G Ogembo (n 17) 1, 6.

29 Nidhi (n 26).

in M-Pesa accounts is accessible through proper SIM, PIN and photograph identification.[30] All deposits and electronic floats paid into Safaricom M-Pesa accounts are usually kept separate from Safaricom accounts and in various banks for safety reasons.[31] This reduces any credit risk that may affect Safaricom or the M-Pesa customer.[32] Thus, while it is a non-bank transfer system, M-Pesa works in tandem with 'pooled accounts held in commercial banks.'[33] Withdrawals of cash are made by visiting an M-Pesa agent who exchanges e-money value for cash with the customer.[34]

With regard to safety, all M-Pesa transactions are also recorded.[35] The daily deposit and transaction limit are set.[36] Although there is no direct contractual relationship between the consumer and M-Pesa, there is a direct contractual relationship of exclusivity between agents and Safaricom,[37] through which Safaricom has a right to monitor these agents.[38] Safaricom agents usually pre-buy mobile money from M-Pesa and sell it against cash to potential consumers: hence they invest their own funds which also lowers credit risk.[39] M-Pesa does not participate in any lending or investment services.[40] It is claimed that any interest made on deposits to M-Pesa accounts is given to charity and does not go back to the depositor.[41] Hence M-Pesa is used mainly for deposit-taking.

M-Pesa is not only restricted to Safaricom: users can also transfer money to recipients on different networks, but such transfers are usually charged at rates that are higher than those of transactions between M-Pesa users.[42] In addition,

30 *Ibid*.

31 Klein (n 8), 13.

32 Bankable Frontier Associates (n 22), 4.

33 Claire Alexandre, 10 Things You Thought You Knew about M- Pesa' (*CGAP*, 22 November 2010) <www.cgap.org/blog/10-things-you-thought-you-knew-about-m-pesa> accessed 7 October 2015.

34 Loretta Michaels, 'It's Better than Cash: Kenya Mobile Money Market Assessment' (Global Broadband Initiative, USAID November 2011) (hereafter, Michaels), 17.

35 Nidhi (n 26).

36 Alexandre (n 33).

37 John Syekei and Eunice Maema, 'Proposed Interoperability regulations challenge M-Pesa' (2014) 8 EFPL&P 1, 12.

38 Claudia McKay, 'No Single Recipe When Structuring Agent Networks' (*CGAP*, 22 February 2011) <http://www.cgap.org/blog/no-single-recipe-when-structuring-agent-networks> accessed 1 August 2014

39 Alexandre (n 33).

40 Klein (n 8), 20.

41 *Ibid,* 9.

42 The Guardian, *Money, Real Quick: The Story of M-Pesa* (Electronic Commerce, Guardian Books 2012) Chapter 7: Change is Not Easy.

recipients on a different telephone network can only receive money but they cannot send it electronically via M-Pesa.[43] In this way, M-Pesa transactions can be compared to voice calls, such that voice calls between users of one network are cheaper than call rates across different networks.[44] Although originally meant to facilitate microfinance payments, M-Pesa has expanded and now offers product savings as well as salary payment options.[45] It is also used for (person-to-business) bill payments[46] and to buy physical goods and services.[47] M-Pesa also features M-Kesho, which is a bank account that allows consumers to earn interest on a minimal amount of money.[48]

2.2 Factors Facilitating the Use, and the Unique Features of the M-Pesa Service

The launch of M-Pesa was necessary as other alternatives for sending money, such as through the post office or by public transport, were slow, costly or unreliable.[49] Buku and Meredith[50] contend that the pre- M-Pesa options of 'commercial banks, post offices, forex bureaus, bus companies, and friends and family'[51] were extremely unsafe and generally unavailable to most Kenyans. There may also be liquidity shortages at rural post offices and there are a smaller number of banks in rural areas.[52] As the number of Kenyan bank branches is relatively low, there is insufficient infrastructure to gain access to all customers.[53] It is also difficult, in practice, for banks and other financial institutions to reduce costs in rural and poorer areas because it is expensive for banks to meet liquidity,

43 *Ibid*.

44 *Ibid*.

45 T S, 'Why does Kenya lead the world in mobile money?' *The Economist* (27 May 2013) <http://www.economist.com/blogs/economist-explains/2013/05/economist-explains-18> accessed 7 October 2015.

46 Michaels (n 34) 19.

47 *Ibid*, 4.

48 Mbuguah and Karume (n 2) 69.

49 Nidhi (n 26).

50 Mercy W Buku and Michael W Meredith, 'Safaricom and M- Pesa in Kenya: Financial Inclusion and Financial Integrity' (2012- 2013) 8 Wash J L Tech & Arts 3, 375, 387.

51 Olga Morawczynski, 'Surviving in the ''Dual System'': How M-Pesa is Fostering Urban- To- Rural Remittances in a Kenyan Slum' (2008) University of Edinburg Soc Studies Unit Working Paper <http://www.mobileactive.org/files/file_uploads/Olga_Morawczynski-M-PESA-2008.pdf> accessed 22 August 2014.

52 Nidhi (n 26).

53 CGAP (n 25), 2.

reporting and deposit protection costs.[54] Moreover, banks in rural areas may be hard to physically access because of the distance, therefore transaction costs remain high.[55] In addition, banking and landline infrastructure is expensive to build and maintain,[56] thus fewer people had access to banking and financial services.

Prior to the introduction of M-Pesa, the banking sector also excluded rural areas due to Structural Adjustment Programs (SAPs) that were facilitated by the World Bank.[57] M-Pesa thus seemed necessary to fill the gap left by a lack of access to banking accounts that was experienced by nearly 80 percent of the population in 2006.[58] Access to banking services before the launch of M-Pesa was also a preserve of the rich because poor members of the rural population could not afford expensive banking fees.[59] Urban populations were also experiencing slow and overburdened bank branches.[60] In short, the banking sector at the time was generally inefficient and nearly inaccessible.

It is also important to note that the use of M-Pesa was facilitated by a large amount of mobile use over landline use,[61] as the Kenyan market in 2006 had a rapidly growing mobile phone market.[62] Other factors that influenced the access of M-Pesa into the Kenyan market include brand development through advertising, ease of use of the service, high literacy levels in Kenya and inexpensive, safe transactions.[63] Since the collapse of Kenyan banks in the 1980s and 1990s that had been triggered by the use of Non-Performing Loans,[64] Kenyan banks were considered untrustworthy and it was thus easier for

54 S Johnson, M Malkamaki and K Wanjau, 'Tackling the 'Frontiers' of Microfinance in Kenya: The Role for Decentralised Services' (2009), 6.

55 Mwangi S Kimenyi and Njuguna S Ndung'u, 'Expanding the Financial Services Frontier: Lessons From Mobile Phone Banking In Kenya' (*Brookings*, 16 October 2009). <http://www.brookings.edu/research/articles/2009/10/16-mobile-phone-kimenyi> accessed 18 June 2014.

56 Josh Mayer, 'How mobile payments might be the global money- laundering machine criminals have dreamed about' (*Quartz*, 17 June 2013) <http://qz.com/94570/how-mobile-payments-might-be-the-global-money-laundering-machine-criminals-have-dreamed-about/> accessed 23 August 2014.

57 B Ngugi, M Pelowski and J G Ogembo (n 17) 1, 4.

58 Bankable Frontier Associates (n 22), 2.

59 *Ibid*.

60 *Ibid*.

61 Nidhi (n 26).

62 Bankable Frontier Associates (n 22) 2.

63 Nidhi (n 26).

64 Central Bank of Kenya, 'Credit Reference Bureaus' (*Central Bank of Kenya*, 2009) <https://www.centralbank.go.ke/index.php/bank-supervision/credit-reference-bureaus> accessed 8 August 2014.

M-Pesa to access the market as an alternative to the banking sector.[65] Safaricom was confident that the service would be a success because the Department for International Development had carried out a successful study of mobile banking in rural areas of Kenya.[66] However, this study had some flaws with wealth ranking terms - for instance, persons who were labelled as poor in some areas were not as poor as poorer populations in other areas.[67]

A unique feature of M-Pesa is that one only needs a Subscriber Identity Module (SIM) card to access M-Pesa services: these cards can be used in different phones[68] and it is therefore not necessary to own a mobile phone in order to access the service. Another unique feature is the ability of M-Pesa consumers to transfer money between different banks by moving it from one bank to their M-Pesa account, then sending it to a different M-Pesa account where the funds can be stored in a different bank.[69] Citing William and Suri, Michaels explains that a majority of M-Pesa users store money in their accounts for safety and ease reasons.[70] Using M-Pesa, money can also be transferred instantly and at lower prices compared to banks.[71] This fast method of payment is useful for foreign workers and travellers.[72] A 2009 Financial Services Deepening Survey showed that more people were using M-Pesa for purposes of remittance and that a large number of monetary transfers in Kenya were done through M-Pesa.[73] Less people now use alternative banking methods - the usage of post offices dropped from 24 to 1 percent between 2006 and 2013, while the use of public transport for domestic payments decreased from 27 to 5 percent in the same period.[74] As it is the main method of transferring money for around half of the Kenyan population,[75] it can be agreed that M-Pesa provides services that banks do not.

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65 Kelly Martin, 'M- Pesa: A Kenyan Success Story in Perspective' (*BillingViews*, 5 November 2012) <http://www.billingviews.com/m-pesa-kenyan-success-story-perspective/> accessed 8 August 2014.

66 Johnson, Malkamaki and Wanjau (n 54) 8- 9.

67 *Ibid*, n 2.

68 Nidhi (n 26).

69 Klein (n 8), 20.

70 Michaels (n 34) 10.

71 International Monetary Fund (n 14).

72 Mayer (n 56).

73 Sultana (n 16), 9, Figs 1- 4.

74 FinAccess Kenya, 'FinAccess National Survey 2013' (FSD Kenya, 2013) <www.fsdkenya.org/finaccess/documents/13-10-31_FinAccess_2013_Report.pdf> accessed 20 August 2014, 34, Fig 6.14- Magnitude of mobile money transfers (%).

75 Sultana (n 16), 14, Table 8: Impact of different M-banking models.

The popularity of M-Pesa is based on its availability and use, by consumers, to transact money.[76] This popularity is also shown by its prevalent use: as of July 2014, M-Pesa had around 18 million registered users.[77] Additionally, there are over 46, 000 M-Pesa agents in Kenya[78] who provide inexpensive alternative means of deposit to everyone, particularly rural populations and poorer people. In fact, the use of M-Pesa is now so common that the number of M-Pesa users is set to surpass the number of deposit account users, according to evidence by the Central Bank of Kenya and Safaricom.[79]

It is widely known that at the launch of M-Pesa by Safaricom (a subsidiary of Vodafone) in 2007, the system of M-Pesa was largely self-regulatory but heavily overseen by both Safaricom, the Central Bank of Kenya and the international community through the International Monetary Fund and the Financial Action Task Force. The Central Bank of Kenya[80] has the general responsibility of implementing policies that improve the 'establishment, regulation and supervision' of functional payment, settlement and clearing systems, which may include M-Pesa.[81] In so doing the Central Bank works together with the Communications Authority of Kenya to regulate M-Pesa in Kenya.[82] It is thus important to understand the link between provision and regulation of mobile banking services in Kenya.

76 Peter Vanham, 'Mobile money: Kenya good, India bad' (*Financial Times (Blogs)*, 28th May 2012) <http://blogs.ft.com/beyond-brics/2012/05/28/mobile-money-kenya-good-india-bad/> accessed 5 July 2014.

77 Zoe Flood, 'Kenya's mobile innovation brings digital money closer' (*BBC News Business*, 4 July 2014) <http://www.bbc.co.uk/news/business-28142515> accessed 9 July 2014.

78 Michaels (n 34).

79 Special Report: International Banking, 'Payments: The end of a monopoly' *The Economist* (10 May 2014) <http://www.economist.com/news/special-report/21601624-and-no-end-new-ways-pay-your-bills-end-monopoly> accessed 24 July 2014.

80 Established under the Central Bank Act, Chapter 491, Laws of Kenya.

81 See the Central Bank Act section 4A (1)(d).

82 Rasheda Sultana (n 16), 5, Table 1. Models of M-banking.

3. Regulating The M-Pesa Platform

3.1 The Relationship between Regulation and Mobile Banking

Ogus defines regulation as a mode of control that is sustained and focused 'by a public agency over activities that are valued by a community'.[83] This suggests that the restriction of behaviour is exercised in order to achieve a desired result, or to prevent an undesirable outcome; a notion that is known as 'red light' regulation.[84] Klein and Mayer point out that mobile banking is noteworthy because it raises significant regulatory and competition policy issues: this is the link between mobile banking and regulation.[85]

Although the Central Bank of Kenya allowed the launch and operation of M-Pesa outside the banking system,[86] M-Pesa is nonetheless regulated by both a telecommunications and a financial regulator,[87] with the Central Bank being the primary regulator.[88] The Communications Authority of Kenya is the telecommunications regulator for telephone operations in Kenya.[89] The Central Bank, as financial regulator, is tasked with the maintenance of financial stability, the protection of consumers and with the promotion of social objectives through facilitating access to financial services.[90] Since the telecommunications operator essentially 'owns' the customer,[91] this affirms the reasoning that Safaricom could be, as it is, responsible for offering M-Pesa. As a matter of public law, the Central Bank would also be expected to bear responsibility for M-Pesa because as a financial regulator, the bank oversees other banks that store value for M-Pesa (as required by the non-bank model).[92] Hence the regulation of M-Pesa in Kenya is done under the scrutiny of two institutions.

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83 P Selznick, 'Focusing Organisational Research on Regulation' in R Noll (Ed), *Regulatory Policy and Social Sciences* (Berkeley, CA 1985) 363.

84 Anthony Ogus, *Regulation: Legal Form and Economic Theory* (Clarendon Law Series, Clarendon Press 1994) 2.

85 Klein (n 8), 4.

86 Nidhi (n 26).

87 Sultana (n 16) 5, Table 1. Models of M-banking.

88 *Ibid*, 10.

89 *The Guardian* (n 42).

90 Makin (n 7) 3.

91 Sultana (n 16), 5, 1. Models of M-banking.

92 *Ibid*.

3.2 Why Regulate M-Pesa?

Regulation of mobile money can be justified by the need to prevent market failure[93] and also to protect the public interest.[94] However, this is not a good enough reason to justify regulation of any market; critics assert that there are other rationales for regulation that are both social and rights based.[95] One of the main objectives that is achieved by regulating mobile money is to ensure that poorer populations can have increased and better access to basic banking services without needing to go to a bank branch.[96] This theory is known as financial inclusion, which means having access to formal financial institutions.[97] Financial inclusion is described by the Reserve Bank of India as the idea that poorer and more vulnerable sections of a population can fairly access the 'appropriate financial products and services needed by all sections' of the population.[98]

Mardi and Srivastava advocate for financial access being the goal of regulation, arguing that as a large population of India does not have access to basic banking services, so they are in effect alienated because transfers cannot be made to them, particularly from residents of urban areas.[99] According to Mardi and Srivastava these populations are excluded in the first place because banks have stringent Know-Your- Customer (KYC) regulations that make obtaining bank loans much more difficult than getting loans from other parties such as middlemen.[100] It is generally accepted that a lack of access to financial services presents an impediment to economic growth and development.[101] On the other hand, access serves poorer users better than credit services when the users have to handle emergencies and deal with sudden demands for large amounts of money.[102] Thus, Mardi and Srivastava reason that financial inclusion is vital in order to ensure that the population benefits from government schemes.[103]

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93 Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (Second Edition, OUP, 2011) (hereafter referred to as 'Baldwin'), 15.

94 John G Francis, *The Politics of Regulation: A Comparative Perspective (Comparative Politics)* (Blackwell Publishers, 1993) Chapter 1.

95 Tony Prosser, 'Regulation and Social Solidarity' (2006) 33 Journal of Law and Society 3, 364.

96 Ashta (n 13), 10.

97 B Ngugi, M Pelowski and J G Ogembo (n 17), 1.

98 Nidhi (n 26).

99 *Ibid*.

100 *Ibid*.

101 Mwangi S Kimenyi and Njuguna S Ndung'u (n 55).

102 Rhys Bollen, 'Recent Developments with Banking Services in Developing Countries' (2009) 24 JIBLR 10, 509.

103 Nidhi (n 26).

Moreover, regulation affords such consumers equal opportunities in accessing banking services that are also accessible to those consumers who can visit a conventional bank branch.[104] Unfair treatment of consumers in mobile banking is evidenced when sophisticated branchless banking, coupled with the use of technology as well as agents, is made accessible within a short period of time to many consumers who may be technologically inexperienced: thus, these consumers are disadvantaged as they are presented with complex information at once.[105] Certainly, regulation is imperative to the protection of the interests of these consumers.

The use of M-Pesa in Kenya has been possible because M-Pesa connects both rural and urban dwellers.[106] By providing over the counter (OTC) services, M-Pesa not only increases financial inclusion through government revenues, but also aids in making both small and large scale payments easier even to those who may not own mobile phones.[107] Alexandre argues that M-Pesa does not guarantee financial inclusion because it facilitates inclusion as a means to access and transactions rather than an end or an intermediary between consumers and banking services.[108] This shows that financial inclusion is a key role of regulation of mobile money.

Regulation also helps to control the rise of monopolies.[109] Monopolies are characterised by the presence of a single seller in a market, whereby that seller has a unique product and creates conditions that pose a hardship towards potential competitors.[110] They can also be created if the regulatory goal of social objectives is downplayed because the consequent emphasis on conservatism leads to 'raising the barrier to entry'[111] for potential competitors. In monopolies, access to information and knowledge on important issues, such as quality and terms and conditions, is limited on the part of consumers.[112] Consumer

104 Rosenberg (n 9).

105 Denise Dias and Kate McKee, 'Protecting Branchless Banking Consumers' (*CGAP*, 15 September 2010) <www.cgap.org/publications/protecting-branchless-banking-consumers> accessed 1 July 2014.

106 Nidhi (n 26).

107 Chris Bold, 'Mobile Banking for Those with No Mobile' (*CGAP*, 13 October 2010) www.cgap.org/blog/mobile-banking-those-no-mobile> accessed 2 July 2014.

108 Alexandre (n 33).

109 Michael Tarazi and Kabir Kumar, 'Branchless Banking Interoperability and Agent Exclusivity' (*CGAP*, 24 January 2012) <http://www.cgap.org/blog/branchless-banking-interoperability-and-agent-exclusivity> accessed 5 July 2014.

110 R Pierce and C Gellhorn, *Regulated Industries in a Nutshell* (Nutshell Series, West 1999) 38.

111 Makin (n 7), 3.

112 Pierce and Gellhorn (n 110), 38.

knowledge is vital in the prevention of monopolies as it helps consumers to analyse different products, thus encouraging competition and lowering prices.[113] Monitoring and regulation prevent behaviour that would be deemed anti-competitive, such as hiking product prices.[114]

Monopolies are also undesirable because not only do they prevent the efficient use of resources, but they also inflate the price of products at the expense of consumers.[115] Eventually, market failure occurs due to lack of competition.[116] M-Pesa enjoys monopoly status with 80 percent of electronic money transactions being made through this service.[117] Safaricom, the mobile operator that launched M-Pesa, enjoys dominance because it is a trusted network that uses a large budget to market itself.[118] While the systemic risk posed by M- Pesa is little due to a small percent value of transactions, it is easy to understand that the market share of potential competition can be affected as M-Pesa has been dominant in its market.[119] Out of 40 million Kenyans, the fact that M-Pesa has 18 million subscribers[120] is indicative of a large market share and monopoly status.

Critics have expressed concerns that the creation of M-Pesa pre-determined its rise to monopoly status by using up cash merchants, which led to a restriction of potential competition.[121] Abuse of dominant power by M-Pesa is further fuelled by the restriction, by Safaricom, that forbids Safaricom agents from trading with other competitors.[122] Safaricom, through its complex administrative structure, has so far managed to keep such transactions with competing companies from happening as agents are contractually bound to the mobile network.[123] The problems posed by Safaricom's M-Pesa being a monopoly are varied. For instance, as with any monopoly, performance could be decreased if there is no

113 F Hayek, 'The Use of Knowledge in Society' (1945) 35 American Economic Review 519.

114 Baldwin (n 11), 24.

115 Pierce and Gellhorn (n 110), 37.

116 Baldwin (n 11), 16.

117 *The Guardian* (n 42).

118 Nidhi (n 26).

119 Klein (n 8),17.

120 Flood (n 77).

121 Tarazi and Kumar (n 109).

122 Kiriro wa Ngugi, 'Money transfer business in Kenya is prone to abuse and gross exploitation' *Daily Nation* (Kenya, 22 September 2013) <http://mobile.nation.co.ke/blogs/-/1949942/2002856/-/format/xhtml/-/72vo4lz/-/index.html> accessed 10 August 2014.

123 *Ibid*.

competition.[124] Monopoly power can also be exacerbated by the practice of unfair competition; a major problem that regulators face.[125] As a monopoly, it is easy for Safaricom to charge whichever rates that it desires since the telephone operator controls its user SIM cards through which the M-Pesa service can be accessed.[126] As such, it is difficult for competitors to achieve a reasonable market share to lower the monopoly power of M-Pesa unless they have similar control.[127] This leaves the potential competitor with the choice of using either SMS or GPRS, none of which can really compete with M-Pesa in terms of control or access.[128] Regulation serves to standardise a market by making sure that other sellers can access the market without heightened transaction costs.[129]

Tarazi and Kumar raise questions on the most suitable approach that would be suited to limit the occurrence of a monopoly.[130] The authors caution that regulators need to have regard to several issues in the regulation of potential monopolies, such as the extent to which regulators can control M-Pesa without restricting competition as this would be counterproductive.[131] As a monopoly, it is reasonable to assume that M-Pesa would be difficult to compete with if not regulated; considering that it provides many services that banks would provide[132] but with the added advantage of being branchless and thus more accessible.[133] Thus, regulation is vital for the purpose of giving sufficient information to consumers and also for the reduction of monopoly power.

Rosenberg is of the opinion that generally, regulation serves to improve the development of branchless banking, which includes mobile banking.[134] However, there are more specific reasons why regulation of mobile money is vital. For instance, regulation is done in order to prevent financial crimes.[135] It is also done not only for the purpose of maintaining secure transactions, but also to make

124 Brendan Greely, 'One good paper: Monopoly lower in Mobile Money' (*Bloomberg Businessweek*, 13 March 2013) <http://mobile.businessweek.com/articles/2013-03-13/one-good-paper-monopoly-power-in-mobile-money> accessed 24 July 2014.

125 Tarazi and Kumar (n 109).

126 *The Guardian* (n 42).

127 *Ibid*.

128 *Ibid*.

129 Baldwin (n 11), 24.

130 Tarazi and Kumar (n 109).

131 Ashta (n 14), 10.

132 Tarazi and Kumar (n 109).

133 Ashta (n 14),10.

134 Rosenberg (n 9).

135 Ashta (n 14), 10.

sure that the payment system and the economy are kept stable.[136] Regulation is vital in maintaining the 'soundness and probity' of financial institutions which play an important economic role.[137] Furthermore, the regulation of non-banks has been described as the key to reaching out to potential customers.[138]

Additionally, regulation is done for reasons of maintaining control and ensuring that mobile banking operators, such as M-Pesa, do not succumb to the various risks that come about as a result of lack of control.[139] These risks include investment risks on the part of users, storage risks, transfer risks and exchange risks.[140] As Ashta writes, if the Central Bank were to only regulate banks and not the telecom or mobile banking operators, there would be dire financial consequences as the monetary policy maker would have no control over the operators.[141] Investment risks include investment failures and systemic risks, which are monitored by both prudential and conduct of business regulation.[142] Conduct of business regulation is also used to deal with storage errors such as theft and incorrect records, as well as transfer errors that pertain to accounting and transmission.[143]

3.3 Arguments in Favour of Regulation of Mobile Money

Regulation of mobile money is advantageous as it bolsters trust in the mobile money scheme.[144] Consumers need to have confidence that the mobile banking service will not expose them to privacy breaches, loss of service and fraud, and these risks are heightened when agents are used in non-bank based models[145] such as M-Pesa. In addition, regulation usually guarantees that high standards are upheld in order to facilitate the continuity of services.[146]

136 Sultana (n 16), 15.

137 Philip Ruttley, 'The WTO financial services agreement' (1999) 1 JIFM 3, 109.

138 Paul Leishmann, 'Understanding the Unbanked Customer and Sizing the Mobile Money Opportunity' in GSM Association, 'Mobile money for the Unbanked Annual Report 2009' <http://www.gsma.com/mobilefordevelopment/wp-content/uploads/2009/09/FINAL-mmu_2009_annual_report.pdf> accessed 8 August 2014, 20.

139 Ashta (n 14), 9.

140 Klein (n 8), 17.

141 Ashta (n 14), 9.

142 Klein (n 8).

143 *Ibid*, 17.

144 Nidhi (n 26).

145 Sultana (n 16), 5.

146 Baldwin (n 11), 24.

Another reason why regulation is beneficial is because it safeguards consumers against the risks associated with money laundering and unfair treatment.[147] These risks include insolvency, whereby consumers are usually left unprotected and at the mercy of creditors, who are usually rich investors.[148] In case of insolvency, it is difficult to determine the party who would bear the burden of proof.[149] It also remains open to question whether intangible methods of proof such as digital signatures[150] and PINs[151] are admissible before the courts. Insolvency also ties in with the notion of moral hazard in that it is challenging to determine if financial institutions would respect their obligation to refund money that goes missing in the case of monetary transfers to a wrong number.[152] One can only imagine that with many users, M-Pesa is considered too big to fail: indeed research has found that M-Pesa has had a big impact on users, who would be faced with a 'large negative impact' if the service was unavailable.[153] However, the threat of moral hazard is low because while most electronic money transactions occur through M-Pesa (20 percent of Gross Domestic Product (GDP)[154]), this represents a very small countrywide value (less than 5 percent) thus M-Pesa poses a small systemic risk.[155] It is clear that the regulation of Safaricom and M-Pesa is imperative in order to protect the interests of consumers and thus acts as a potential solution to the problems discussed.

3.4 Arguments against Regulation of Mobile Money

It is worth noting that as transactions are being done, the mobile operator can access financial information that is shared in the texts that facilitate transactions.[156] Scholars agree that the risk of breach of privacy is increased if a mobile operator has monopoly power.[157] This risk is quite real in the case of M-Pesa since it is

147 Rosenberg (n 9).

148 Ashta (n 14), 10, 20.

149 Kilonzo (n 21), 323.

150 *Ibid*, 328.

151 Ashta (n 14), 19.

152 Ashta (n 14), 19-20.

153 Sultana (n 16), 14, Table 8: Impact of Different M-banking Models.

154 Mayer (n 56).

155 Alexandre (n 33).

156 Ashta (n 14), 19-20.

157 *Ibid*, 10.

the main provider of services of its kind in Kenya[158] and therefore possesses the power of a monopoly. Indeed, as of 2011, Safaricom dominated the Kenyan mobile money market with ninety-nine percent market share.[159] Concerns have also been expressed that regulation acts as an obstacle to effective competition and economic growth.[160] This has been illustrated by the World Bank Report on Doing Business,[161] which suggests that regulation in itself does not impact growth and competition.

Despite the arguments advanced against regulation, there has been general consensus that regulation is necessary and essential to ensure smooth working of public services.[162] Thus regulation is important to ensure that M-Pesa functions properly.

3.5 Licensing of M-Pesa

Any financial business that wishes to be licensed in Kenya must be involved in deposit taking or lending.[163] According to Chatain et al,[164] the licensing of mobile money issuers is either provider-based or service-based. Solin and Zerzan, on the other hand, suggest that licensing and regulation should be service-based and also risk-based[165] in order to apply equally to all financial entities and to keep up with technological innovations. In other words, the same risk should apply to everyone.[166] Makin points out that M-Pesa began its operations under a special licence, the rationale being that since the branchless banking service behaved like a financial institution, 'the only responsible approach' was to licence it as such.[167] In granting the license, the Central Bank

158 Tarazi and Kumar (n 109).

159 Michaels (n 34) 8.

160 Baldwin (n 11), 9.

161 World Bank, Doing Business 2014: Understanding Regulations for Small and Medium-Size Enterprises (Washington, DC, 11th Edn, World Bank Group, 2013) 2.

162 Baldwin (n 11), 9.

163 Banking Act, Chapter 488, section 2(1) (a), (c) , Laws of Kenya; Also see Kaplan & Stratton, 'International Survey of financial markets law and regulation: Kenya' (2001) JIFM Supp (Special Issue), 295.

164 Pierre-Laurent Chatain, Andrew Zerzan, Wameek Noor, Najah Dannaoui and Louis de Koker, 'Overview of Anti-Money Laundering and Combating the Financing of Terrorism Regulatory Practices and Risk Management Frameworks for Mobile Money' in Pierre-Laurent Chatain, Andrew Zerzan, Wameek Noor, Najah Dannaoui and Louis de Koker (eds), *Protecting Mobile Money Against Financial Crimes: Global Policy Challenges and Solutions* (World Bank 2011) abstract.

165 Solin (n 5), 7.

166 *Ibid*.

167 Makin (n 7), 8.

took into account the 'safety, reliability and efficiency of the service'.[168] The Central Bank has expressed that it will continue to take a light touch approach to regulation of mobile money in order to boost its growth in Kenya.[169]

4. How M-Pesa Is Regulated In Kenya

The system of M-Pesa is highly monitored by the Central Bank of Kenya (CBK), and Safaricom ensures that M-Pesa agents are well-trained and supervised.[170] In Kenya, Safaricom and the Central Bank of Kenya enjoy a good working relationship; hence M-Pesa has been allowed to grow within an appropriate business environment, outside the banking system regulations.[171] It can consequently be reasoned that strict regulations could not have achieved these benefits as they might have limited the ability of Safaricom to operate according to its own business model.[172] It is widely believed that the lack of a regulatory structure at the launch of M-Pesa was beneficial as any regulation may have been 'drafted in a vacuum' whereby there was no prior regulatory experience, hence these regulations would have been 'too strict and confining'.[173] Nevertheless, the Central Bank of Kenya regularly ensures that the system is kept secure.[174] This shows that while regulation is important, it is not essential to have detailed regulations at the beginning of a mobile money service, otherwise having complicated regulations may impair the ability of the service to operate successfully.

In 2009 it was stated that the Treasury and the Central Bank of Kenya would continually supervise the development and workings of M-Pesa.[175] The National Payment System Act, 2011 mandates the Central Bank to designate a payment system if the Bank forms an opinion that 'the designation is necessary to protect the interest of the public'.[176] The Act specifies that designation will be done by means of a notice that specifies the payment system, the system

168 Sultana (n 16), 10.

169 Michaels (n 34), 16.

170 Alexandre (n 33).

171 Nidhi (n 26).

172 Nidhi (n 26).

173 CGAP (n 25), 2.

174 Nidhi (n 26).

175 Joseph Kinyua, 'Ministry of Finance Audit Findings on M-Pesa Money Transfer Services' (*Kenya Political*, 27 January 2009) <http://kenyapolitical.blogspot.co.uk/2009/01/ministry-of-finance-audit-findings-on-m.html> accessed 27 June 2014.

176 National Payment System Act No. 39 of 2011 (Revised Edition 2012) section 3(1) (b).

operator and any terms and conditions that are relevant to the designation.[177] There is no evidence that the Banking Act regulates non-banks.[178] Nevertheless, the National Payment System Act[179] refers to the regulation of all payment systems, which are defined as arrangements that allow for the movement of money or payment between payers and beneficiaries. As M-Pesa money is held in trust accounts, the consumers and recipients can be described as beneficiaries of the money: thus, the Act is applicable to M-Pesa.[180]

The Central Bank has introduced regulations governing the regulation of electronic money, or e-money, through the E-Money Regulation, 2013.[181] These regulations apply to M-Pesa because it is an issuer of electronic money,[182] and it is also licensed as a financial institution[183] as required by clause 3.2 (a) of the E-Money Regulation, 2013. Clause 5 of the E-Money Regulation, 2013 requires that an issuer should fulfil the requirement of being a bank or financial institution in order to gain authorisation to conduct financial business.[184] An issuer of electronic money is defined as a person who has authority to issue e-money, and can be either a bank or a financial institution.[185] Persons who are neither banks nor financial institutions are required to obtain permission from the Central Bank according to E-Money Regulation, 2013.[186] Amongst the requirements for authorisation provided for in the E-Money Regulation, 2013 are: financial soundness, robust and appropriate systems of technology, incorporation as a limited liability company under the Companies Act, and the requirement of being a fit and proper person with the necessary experience and capabilities to undertake the relevant functions.[187] Such authorisation expires at the end of every year but there is an option of renewing the licence.[188] Failure to comply with clause 5 requirements, cessation of business in Kenya, winding up or dissolution can result in the Central Bank revoking or suspending the

177 *Ibid*, s 3 (2).

178 Bankable Frontier Associates (n 22), 4.

179 National Payment System Act No. 39 of 2011 (Revised Edition, 2012) section 2: Interpretation.

180 Bankable Frontier Associates (n 22), 4.

181 Central Bank of Kenya (n 4).

182 *Ibid*, clause 4: Definitions.

183 Makin (n 7), 8.

184 Central Bank of Kenya (n 4) clause 5.1.

185 *Ibid*, clause 4.0, Definitions.

186 *Ibid*, clause 5.2.

187 *Ibid*.

188 Central Bank of Kenya (n 4) clauses 5.4- 5.5.

licence.[189] Hence it can be said that as long as issuers maintain requirements for authorisation, they can continue to carry out financial business in Kenya.

Clause 6 of this regulation applies to smaller issuers and is therefore not applicable to M-Pesa as, with more than 18 million users as of July 2014, it is expected that electronic money issued by M-Pesa is acceptable as a means of payment by a number of persons that is greater than one hundred persons as is specified by clause 6.4 of the regulation.[190] Additionally, M- Pesa transaction limits exceed ten thousand shillings,[191] so the clause is non-applicable. Clause 7.4 demands that an issuer and account holder of electronic money should enter into a written agreement: this is usually done when opening an M-Pesa account.[192] Furthermore, issuers of electronic money are expected to appoint agents to act on their behalf: these agents must have permits, be financially sound and capable of lawful provision of the necessary services.[193] Agent exclusivity is forbidden but regulators allow service providers to have individual agent agreements for purposes of supervision and liability.[194]

The E-Money Regulation, 2013 also emphasises that all processed transactions should be recorded by an issuer for seven years.[195] Clause 12 specifies that disclosure that is easily understood, and accountability, are vital for consumer protection.[196] Disclosure should be done in writing, informing customers that; among other factors, e-money cannot earn interest as it is not an investment or savings account.[197] The E-Money Regulation, 2013 stresses the importance of communication between the consumer and issuer through the making of oral or written complaints and the acknowledgement of those complaints.[198] Monthly reports must be made to the Central Bank:[199] this promotes accountability.

189 *Ibid*, Clause 5.6.

190 *Ibid*, Clause 6.4 (c) (ii).

191 Alexandre (n 33).

192 Kiriro wa Ngugi (n 122).

193 Central Bank of Kenya (n 4) Clause 9.4 (a)- (d).

194 Central Bank of Kenya, 'Guideline on Agent Banking- CBK/PG/15' (2012). <http://www.bu.edu/bucflp/files/2012/01/Guideline-on-Agent-Banking-CBKPG15.pdf> accessed 27 August 2014.

195 Central Bank of Kenya (n 4) Clause 10 (Record Keeping).

196 *Ibid*, Clause 12.4.

197 *Ibid*, Clause 12.1 (d).

198 *Ibid*, Clause 12.5.

199 *Ibid*, Clause 13.

Inaccessibility, due to the monopoly status of M-Pesa, has given rise to a need for control to ensure better access: thus, banks have been urged to partner with mobile service providers in a process known as interoperability.[200] The National Payment System Act encourages interoperability between the bank and operators in terms of recognition, by the bank, of a payment system management body[201] and through the authorisation of Payment Service Providers.[202] Interoperability refers to gaining access to a network by accepting simultaneous standards.[203] The idea of interoperability is a positive one as it increases competition and enables the telecommunications and financial regulators to work together.[204] It is also beneficial because costs are lowered.[205] Moreover, interoperability encourages product innovation that goes beyond airtime top-up and domestic transactions.[206] The trust of consumers is an added bonus.[207] Hayat[208] supports the notion of interoperability, stating that 'mobile payments should not be seen as a turf war between the financial and communication sectors'; rather, it should act as an addition to the financial services in place. However, other academics write that interoperability could result in stunted growth for M-Pesa due to reduced incentives for mobile operators to offer service.[209] Hence, interoperability could be counterproductive for the M-Pesa service.

It is interesting that many banks are mostly absent from the mobile payment system, but the regulators are licensing new competitors owned by banks to enter the mobile money market.[210] In response to the clear need for fair competition, three mobile virtual network operators (MVNOs) have been recently licensed

200 *The Guardian* (n 42).

201 National Payment System Act No. 39 of 2011 (Revised Edition 2012) section 7.

202 *Ibid*, section 2.

203 D S Grewal, *Network Power: The Social dynamics of globalization* (New Haven, Yale University Press, 2008) 173.

204 Klein (n 8), 18.

205 D S Grewal (n 203).

206 Gunnar Camner, 'Expanding the Ecosystem of Mobile Money: Considerations for Interoperability' in GSM Association, 'Mobile Money for the Unbanked Annual Report 2012' <http://www.gsma.com/mobilefordevelopment/wp-content/uploads/2012/10/2012_MMU_Annual-Report.pdf> accessed 16 August 2014, 9.

207 Klein (n 8), 19.

208 Mohammed Aslam Hayat, 'Mobile payments: Will Colombo keep its leadership in South Asia?' *Financial Times* (Pakistan, 12 July 2009) <http://www.sundaytimes.lk/090712/FinancialTimes/ft323.html> accessed 1 August 2014.

209 J Bellis and L Nagel, 'Interoperability of mobile money services' in GSM Association, 'Mobile money for the Unbanked Annual Report 2009' <http://www.gsma.com/mobilefordevelopment/wp-content/uploads/2009/09/FINAL-mmu_2009_annual_report.pdf> accessed 8 August 2014, 80

210 Special Report: International Banking (n 79).

by the Communications Authority of Kenya: Zioncell Kenya, Finserve Africa and Mobile Pay.[211] Airtel Kenya, the main competitor to Safaricom, will host these operators.[212] It can be reasoned that the main reason that supports the licensing of additional mobile virtual network operators is to allow the country to 'maintain the high level of mobile money innovation while increasing the level of competition' in order to lower prices for consumers.[213]

Concerns have been raised on the licensing of these three networks that provide similar services to M-Pesa, with critics claiming that the quality of services would be lowered if licenses were granted.[214] Safaricom has also argued that as the cost of obtaining licences is quite low, this could lead to the provision of sub-par services if there are no sufficient contractual guidelines to govern the business dealings of the new operators.[215] This mobile operator is against the licensing of MVNOs, as Safaricom deems it unfair to be forced, through directives, to share infrastructure on which it has heavily invested.[216] Moreover, the framework guiding these issues is thought to be insufficient and unclear.[217]

Nevertheless, the regulator is of the opinion that introducing new operators to provide similar services to Safaricom will ensure that monopoly trends are broken in favour of fair competition.[218] In addition, licensing will benefit consumers by offering attractive and more 'innovative, value-added services' which will in turn boost consumer loyalty and bring consumer prices down. The licensing of these new MVNOs is also advantageous in that it will ease market access and target specific market needs, thereby improving overall access to the market.[219] For the purpose of lowering consumer prices and keeping their loyalty, it is fair to license these new mobile virtual network operators.

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211 Erik Heinrich, 'The apparent M-Pesa monopoly may be set to crumble' (*Fortune*, 27 June 2014) <http://fortune.com/2014/06/27/m-pesa-kenya-mobile-payments-competition/> accessed 24 July 2014

212 *Ibid*.

213 *The Guardian* (n 42).

214 Okuttah Mark, 'Equity gets special window to enter mobile telecoms market' *Business Daily* (Nairobi, 10 April 2014) <http://www.businessdailyafrica.com/Corporate-News/Equity-gets-special-window-to-enter-mobile-telecoms-market/-/539550/2275070/-/aliqe1z/-/index.html> accessed 25 July 2014.

215 Kamau Mbote, 'Demystifying Mobile Virtual Networks (MVNOs)' (*CIO East Africa*, 27 May 2014) <http://www.cio.co.ke/blog/demystifying-mobile-virtual-networks-mvnos> accessed 25 July 2014.

216 *Ibid*.

217 *Ibid*.

218 Okuttah (n 214).

219 Mbote (n 215).

In response to the argument about the inadequacy of the framework on MVNOs, the Communications Authority has stated that a framework is to be launched to deal with the issues raised.[220] Concerns that the use of M-Pesa is hurting the banking sector are not valid as the service has daily deposit and transaction limits.[221] Furthermore, the fact that Finserve is owned by Equity Bank Kenya[222] should open up the market for more banking services that are provided by actual banks, which is reassuring for potential consumers.[223] On a positive note, this could also be a successful way of aiding the bank to venture into the market as this bank provides varied products and services.[224] Another option of accessing the market and gaining market share would be for the regulator to draw up sufficient regulations that encourage the three operators to partner with M-Pesa.[225]

The fact that M-Pesa does not lend or invest funds can also be used by banks to gain access to the market share enjoyed by M-Pesa, thus lowering its monopoly power.[226] More people are currently using banks across Kenya, with two thirds of the adult population being aware of agent banking.[227] It is important to note that there are around 20,000 CBK agents that facilitate banking services.[228] It can thus be said that the licensing of new mobile virtual network operators and the use of bank agents is an effective way of reducing unfair competition and gaining market share.

5. Conclusion

It has been demonstrated that the reasons for regulation of M-Pesa include the prevention of monopolies, prevention of anti-competitive behaviour and unequal bargaining power, and the provision of information. It is also evident from this work that mobile banking in Kenya needs to be regulated, not only to preserve order and control, but also to ensure that consumers are protected against losses that are incurred because of potential insolvencies. In such cases,

220 *Ibid*.

221 Michaels (n 34), 12.

222 Heinrich (n 211).

223 *Ibid*.

224 *Ibid*.

225 *Ibid*.

226 Klein (n 8), 20.

227 FinAccess Kenya (n 74).

228 Central Bank of Kenya, '2013 Annual Report'. <https://www.centralbank.go.ke/images/docs/CBK AnnualReports/2013annualreport.pdf> accessed 21 August 2014.

the consumer is in a more vulnerable position to bear the consequent losses because of uncertainties as to whether refunds will be given. With regard to the appropriateness of the method of regulation, this paper has shown that M-Pesa's success can to a large extent be attributed to the fact that it was allowed to operate on its own. This paper has also pointed out that the Central Bank has introduced recent regulations on the use of electronic money, such as the Electronic Money Regulation, 2013. In relation to monopolies, the move by the Communications Authority of Kenya to license three new mobile virtual operators is a positive move towards the reduction of unfair competition. This paper has illustrated that market access can also be bolstered through partnerships with banks and other competitors in order to offer better services at lower costs. Since the Electronic Money Regulation, 2013 is relatively recent, it may be too soon to tell whether it is effective. The regulation is, however, quite stringent and clear, and also encompasses a wide range of issues affecting M-Pesa mobile money.

Part II: General Articles

Legal and Financial Responsibility in Promoting Health Equity in Kenya

Attiya Waris* & Laila Abdul Latif§

Abstract

In 2001 the African heads of state met in Abuja and agreed to allocate a minimum of 15 per cent of their budgets to health care in order to meet the needs of their citizens and towards the achievement of better health. However, this does not take into account the specific health sector spending decisions and health equity within a state's population. This paper attempts to make a first analysis of the terms progressive realization and state responsibility in the context of health equity. The difficulties in conceptualizing and achieving human rights and health will be canvassed. The paper will finally focus on the Kenyan state's duty and responsibility in progressively achieving health in the context of article 43 of the Kenyan Constitution of 2010, which includes health care and services under state responsibility and article 172 which maintains a strong state control on finances. The result of which is while there is a strong health equity based constitutional provision, the 2013/2014 national budget did allocated only 5.9% of the state budget to health underscoring the need to make a stronger link between state responsibility as evidenced through the fiscal regime and progressive realization.

1. Introduction

Kenya's first Constitution after independence[1] did not explicitly provide for the right to health or health care. Neither the Public Health Act,[2] nor any of

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1 Constitution of 1963-2010.

2 Chapter 242 of the Laws of Kenya (1921).

the laws addressing health formally recognized health equity.[3] Equity in health, however, became a subject of discussion in the country's national health sector strategic plans of 1994–2000 (NHSSP I) and 2005-2010 (NHSSP II). In its first plan, Kenya stated its policy intention to ensure an equitable allocation of resources to reduce disparities in health and to review the existing legal framework.[4] In its second plan the country pointed out the need to strengthen health sector interventions and operations needed to meet the health and socio-economic development targets set in the plan.[5] It focused on reducing inequalities as a means to achieving the targets set out in the plan particularly by improving equitable access to health services and health financing.[6] This plan also recognised the role that the health sector plays in equity within the wider social and economic development.[7] Accordingly in 2010, Kenya made a major commitment to the right to health. This commitment is today explicitly recognised in article 43(1) of its Constitution.

This article provides for the right to health and health care as follows:

Every person has the right—

(a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;

(b) to accessible and adequate housing, and to reasonable standards of sanitation;

(c) to be free from hunger, and to have adequate food of acceptable quality;

(d) to clean and safe water in adequate quantities;

(e) to social security; and

(f) to education.

(2) A person shall not be denied emergency medical treatment.

(3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependants.

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3 KEMRI-Welcome Trust Research Programme, Mustang Management Consultants, Ministry of Public Health and Sanitation, Training and Research Support Centre (2011) Equity Watch: Assessing Progress towards Equity in Health in Kenya, KEMRI, EQUINET, Nairobi and Harare

4 Kenya: *Health Policy Framework*, Ministry of Health, Nairobi (1994).

5 RHF unit cost/cost sharing review study and the impact of the 10/20 policy, Ministry of Health, Nairobi (2005).

6 'Reversing the trends. The second national health sector strategic plan of Kenya (NHSSP II) 2005-2010', Ministry of Health, (2005).

7 Vision 2030: Sector plan for health 2008-2012, Ministry of Medical Services (MoMS) and Ministry of Public Health and Sanitation (MoPHS). Government of Kenya, (2008).

Article 2.1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) states that:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.[8]

Article 209(1) of the Kenyan Constitution sets out the power to impose taxes and charges. It states that:

(1) Only the national government may impose—
  (a) income tax;
  (b) value-added tax;
  (c) customs duties and other duties on import and export goods; and
  (d) excise tax.
(2) An Act of Parliament may authorise the national government to impose any other tax or duty, except a tax specified in clause (3) (a) or (b).
(3) A county may impose—
  (a) property rates;
  (b) entertainment taxes; and
  (c) any other tax that it is authorised to impose by an Act of Parliament.

These three legal provisions set out the state responsibility and how they are intended to be achieved nationally. Socio-economic rights are to be realised progressively through the allocation of adequate financial resources and by the setting up of infrastructure countywide. Consequently, the Kenyan government is to allocate the maximum of its available resources towards the realisation of these rights. In the event the state fails to allocate the maximum of its available resources to realising these rights, it shall be considered to be in violation of the ICESCR under the Maastricht Guidelines on violations of economic, social and cultural rights.[9] Despite this there are no enforceable repercussions on a state that fails to comply with these treaties and guidelines.

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8 United Nations, 1976. International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc.A/6316 (1966), 993 U.N.T.S. 3, entered into force 3 January 1976.

9 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht,' *Human Rights Library University of Minnesota*. Available at: https://www1.umn.edu/humanrts/instree/

The sources of government revenue come from taxation and other forms of state revenue and are split between many needs of both recurrent and development expenditure. This decision on how spending takes place is a political and ideological one made up of compromises at many levels in the annual budget process of any state. It is against this background that the paper discusses state responsibility in mobilizing adequate resources through fair and progressive funding to enhance and promote health equity in Kenya. Accordingly, the paper is divided into five sections. The first section contains the introduction to the subject under consideration. The second section contains the background on international responsibility for financing health and where it stands today for states individually as well as collectively. The third section examines the Kenyan state's responsibility in promoting health equity. The fourth section highlights a number of findings showing how Kenya has discharged its fiscal responsibility in ensuring health equity in Kenya, the fifth section identifies the challenges to the sources of financing for health equity, and the sixth section concludes the paper.

2. Financing the Right to Health

There are three main core texts that are the source of all discourse on human rights: the Universal Declaration of Human Rights, the International Convention on Civil and Political Rights, and the International Convention on Economic, Social and Cultural Rights. All these texts do not specifically contain a definition of human rights; however they state that the purpose of human rights is to enhance human dignity.[10] Broadly speaking, as a result, human rights are the concrete expression of values that are designed to enhance human dignity. Contemporary thought is what gives these values the form of rights bestowed on individuals and groups.

Some scholars regard the absence of a definition of human rights as an impediment to its realisation. However, Donnelly regarded it as a sign of its continually evolving content, which reflects the relationship of society within itself and with the state. This approach will be adopted in this paper as it allows one to draw into human rights the existing concepts of welfare and well-being. Human rights and human dignity can thus be perceived as the modern-day interpretation of social welfare as espoused by Schumpeter and economic and welfare scholars. This then allows the discussion of welfare and human rights

Maastrichtguidelines.html.

10 United Nations General Assembly. Universal Declaration of Human Rights (1948) article 1.

to proceed as one with the improvement of human rights of people part of the ultimate expenditure aim of the development of a state into a fiscal state.[11]

From the initial broad starting point in the UDHR, ICCPR and ICESCR the content of human rights obligations have developed very significantly. The content of these texts list out human rights to include: the right to life, liberty and security of the person; freedom from slavery and servitude; freedom from torture or cruel, inhuman and degrading treatment; to recognition everywhere as a person before the law; equality before the law and without any discrimination to equal protection of the law; effective remedy by the competent national tribunals; arbitrary arrest, detention or exile; full equality to a fair and public hearing by an independent and impartial tribunal; right to be presumed innocent until proved guilty; protection of the law against such interference or attacks; right to freedom of movement and residence; right to seek and to enjoy in other countries asylum; right to a nationality; right to marry and to found a family; right to own property; right to freedom of thought, conscience and religion; freedom of opinion and expression; right to freedom of peaceful assembly and association; right to take part in the government; right of equal access to public service in his country; right to social security; right to work, right to rest and leisure; right to a standard of living adequate for the health and well-being; right to education; right freely to participate in the cultural life of the community.[12]

Regionally, African states formed the African Union and have negotiated and created a regional human rights treaty, the ACHPR.[13] This treaty includes all of the rights listed above except for the right to social welfare and additionally recognise both individual and peoples' rights, family protection by the state,[14] guarantee peoples' right to equality,[15] the right to self-determination,[16] to freely

11 Waris, *Tax and Development* (2013) LawAfrica, Nairobi.

12 Although the entire set of listed rights are found in the United Nations General Assembly. Universal Declaration of Human Rights (1948) articles 1-27, the latter half from the right of equal access to public services are the content of the ICESCR. See Resolution of ACHPR number 236 of Illicit Flows.

13 A Charter is not legally binding, but it is worthwhile referring to as it constitutes the expression, at the highest level, of a democratically established consensus on what is considered as the catalogue of fundamental rights for all. The recognition of the African Charter is based on its application, use and the weight of its recommendations which are mere recommendations and not enforceable.

14 Organisation of the African Union. African Charter of Human and Peoples Rights (1982) article 18.

15 ACHPR article 19.

16 ACHPR article 20.

dispose of their wealth and national resources,[17] the right to development,[18] the right to peace and security,[19] and the right to a generally satisfactory environment.[20] Most recently the African Commission on Human and Peoples Rights passed a resolution stating that states needed to monitor their fiscal allocations to human rights in order to achieve both immediate and progressive realization of rights.[21]

Over the years the content, purpose, applicability, realisation and enforcement of human rights continues to be questioned, evolve and grow. Today additional international instruments have been developed with the recognition of more states internationally that have added their voices to the discourse of international human rights law. The framework for international human rights law allows for additions to the list of rights to be included in the content of human rights through additional treaties, covenants, declarations and resolutions. These newer rights added onto the continually evolving list of rights include the right to development, peace and a healthy environment. It also makes provision for states to deviate from these rights through a system of reservations to the international treaties.[22]

Domestically a state chooses what will form the list of human rights of its citizens by signing and ratifying a treaty or refusing to do so. Today, most states of the world have signed and ratified these treaties.[23] Some states have either not signed or ratified both these treaties,[24] while certain states like the USA

17 ACHPR, article 21.

18 ACHPR, article 22.

19 OAU, ACHPR article 23.

20 ACHPR, article 24.

21 United Nations (2004) The ICCPR was concluded in 1966 and has been ratified by 152 states, 45 states, however, are not yet party to this treaty and 8 states have signed it but have not as yet ratified it. The ICESCR has been ratified by 146 states, 51 states are not yet party to the treaty, and 8 states have signed it but have not as yet ratified it.

22 In addition, in practice, national deviations are not really permitted. The UN Committees do not allow differences in interpretation between states, and from the Human Rights Commission's general comment 24 it would seem that most of the reservations that try to change the content of the obligations are actually not valid.

23 The states that have signed but not ratified both treaties include: China, Comoros, Cuba, Guinea-Bissau, Laos, Nauru, Pakistan, and São Tomé and Príncipe. States that have neither signed nor ratified it include Antigua and Barbuda, Bahamas, Bhutan, Brunei, Burma (Myanmar), Fiji, Kiribati, Malaysia, Marshall Islands, Micronesia, Oman, Palau, Qatar, Saint Kitts and Nevis, Saint Lucia, Saudi Arabia, Singapore, Solomon Islands, Tonga, United Arab Emirates, Vanuatu and Vatican City (through the Holy See).

24 The states that have signed but not ratified both treaties include: China, Comoros, Cuba, Guinea-Bissau, Laos, Nauru, Pakistan, and São Tomé and Príncipe. States that have neither signed nor ratified it include Antigua and Barbuda, Bahamas, Bhutan, Brunei, Burma (Myanmar), Fiji, Kiribati, Malaysia,

and South Africa have abstained from ratifying the ICESCR. States that have neither signed nor ratified only the ICESCR but have signed and ratified the ICCPR include Andorra, Haiti, Mozambique, Nauru, South Africa, and United States of America. Kenya became a member of the United Nations in 1963 after it gained independence and adopted the UDHR. Its international human rights treaty status remained the same until 1976 when Kenya signed and acceded to both the international covenants, that is, the International Covenant on Economic, Social and Cultural Rights (ICESCR)[25] and the International Covenant on Civil and Political Rights (ICCPR).[26] These covenants or treaties are internationally legally binding. To date Kenya, has signed and ratified 7 of the 9 core international human rights treaties[27] in addition to several other treaties.[28] Regionally, Kenya is party to the 1986 African Charter on Human and Peoples' Rights (ACHPR)[29] in addition to several other regional treaties and protocols.[30] Kenya has not registered any reservations to any of the international human rights treaties, declarations, charters, covenants or protocols to which it is a party. As a result, Kenya has shown that by ratifying these treaties it has accepted that its citizens are entitled to all the rights listed above.

Marshall Islands, Micronesia, Oman, Palau, Qatar, Saint Kitts and Nevis, Saint Lucia, Saudi Arabia, Singapore, Solomon Islands, Tonga, United Arab Emirates, Vanuatu and Vatican City (through the Holy See).

25 Ratified on 3 January 1976 with a reservation to article 10(2) Office of the United Nations High Commissioner for Human Rights (2004).

26 Ratified 23 March 1976 without reservation Office of the United Nations High Commissioner for Human Rights. Ratification Status of the ICCPR (2004).

27 The International Convention on the Elimination of All Forms of Racial Discrimination ratified 13 Sept. 2001; Convention on the Elimination of All Forms of Discrimination against Women ratified 24 August 1984; Convention against Torture and Other Cruel, In-human or Degrading Treatment or Punishment Ratified 21 Feb. 1990; Convention on the Rights of the Child ratified 30 July 1990; International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families not ratified; Convention on the Rights of Persons with Disabilities Ratified 19 May 2008; International Convention for the Protection of All Persons from Enforced Disappearance Signed 6 Feb. 2007, not ratified.

28 Kenya also has ratified the Optional Protocols to the Children's Rights Convention on the rights of children in armed conflict and on the prohibition of child trafficking, prostitution and pornography. In June 2005, Kenya ratified the Rome Statute for the International Criminal Court. Kenya has so far not ratified the Optional Protocols to the human rights treaties which enable individuals to submit complaints to the UN treaty bodies.

29 These regional treaties support the implementation of human rights on the regional level, and often reflect additional human rights concerns particular to specific cultural contexts.

30 Ratified the Convention Governing Specific Aspects of Refugee Problems in Africa, and the African Charter on the Rights and Welfare of the Child. By ratification of the Protocol to the ACHPR on the Establishment of an African Court on Human and Peoples' Rights (African Court) in 2005 Kenya has accepted the jurisdiction of the African Court but not on individual complaints. The Maputo Protocol to the ACHPR on the Rights of Women in Africa has not yet been ratified by Kenya.

3. State Responsibility and Progressive Realisation

Once a state becomes a signatory to the diverse treaties, it takes on the duty to protect, promote and respect human rights. This duty has been set out from the commencing clause of the United Nation's Charter,[31] later in the Tehran Declaration,[32] and the Vienna Declaration,[33] and most recently in 2004 by a General Assembly Resolution,[34] through General Comment 31 where it was stated at paragraph 5 that, "The obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole. All branches of government … are in a position to engage the responsibility of the State Party."[35]

The above comment places the realisation of rights on the government. There was no further step taken to concretise what fiscal implications a statement of this nature entails. Instead, the international community avoided reference to the issue of resources, especially domestic resources like tax revenue and its allocation on the grounds of the sovereignty of nations and the importance of allowing states to pursue their own economic policies. General Assembly resolutions reaffirmed that states should not interfere in the domestic policies of other countries.[36]

A further analysis into the specificity of terminology regarding resource allocation, within the international arena leads to the use of the terms the 'limitation to resources' or resource 'constraints'. These terms are used repeatedly almost as a refrain while espousing 'progressive realization' of human rights 'obligations'.[37] These terms are used to allow the delimitation and exclusion by states from the human rights obligation of undertaking their obligations.

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31 United Nations. Charter of the United Nations (1945) article 55.

32 United Nations General Assembly. Proclamation of Tehran (1968).

33 United Nations General Assembly. Vienna Declaration and Program of Action: World Conference on Human Rights (1993). The 1993 Vienna Declaration that has been adopted by over 170 states.

34 General Assembly resolutions to be non-binding. Articles 10 and 14 of the UN Charter refer to General Assembly as "recommendations"; the recommendatory nature of General Assembly resolutions has repeatedly been stressed by the International Court of Justice. However, some General Assembly resolutions dealing with matters internal to the United Nations, such as budgetary decisions or instructions to lower-ranking organs, are clearly binding on their addressees.

35 United Nations General Assembly. Nature of the General Legal Obligation Imposed on States Parties to the Covenant (2004).

36 Examples include United Nations General Assembly. Declaration on Friendly Relations between States (1970) and United Nations; United Nations General Assembly. Resolution on the Permanency of Sovereignty over Natural Resources (1962).

37 Human Rights Committee (1990).

Under human rights law, the state has the primary responsibility to respect, protect and fulfil the human rights of all those in its territory. The Conventions, Declarations, resolutions and comments together all set out the minimum standards that states agree to be bound by. However, the method used to meet these standards is seen as a matter of state concern. By participating in the international human rights framework, states agree to undertake that their Constitutions, laws, policies, and budgets reflect these legal obligations and those policies will be applied in order that they move towards achieving these minimum standards.[38]

Rights, therefore, only become more than mere declarations if they confer power on bodies whose decisions are legally binding. Thus the people who do not live in a state having effective remedies in reality have no legally enforceable rights.[39] Any and all legal rights exist in reality only when and if they have budgetary costs. If the claims to grant the right to free education, for example, this will only take place in reality and on the ground in the country if there are adequate resources to build schools near communities that require this service. In the Kenyan case as discussed in the next section free education was set out as a right upon independence but only in 2003 did the government actually make it fiscally and legally possible.

Discourse on the state's obligation to respect, fulfil and protect human rights has led to the division of human rights into the immediately realisable civil and political rights and the progressively realisable economic, social and cultural rights. It was initially perceived that civil and political rights were negative and did not require state intervention or fiscal resources whereas economic social and cultural rights were a fiscal burden and on the basis of limited resources required progressive realisation. The choice to provide the latter rights was left to the political leanings of states. As a result states that felt that economic and social rights were not their main responsibility did not sign and ratify the ICESCR like the US that believes in the self-funding of most services, whereas the states like Russia following communist and socialist ideology attempted to provide these services and so were willing to sign and ratify the ICESCR. In addition, traditional human rights scholars argued that the implementation of welfare rights involved a large outlay of resources, while the implementation of liberty rights do not require resources in that they are obligations on the state

38 Waris, *Tax and Development* (2013) LawAfrica, Nairobi.

39 European Union. European Convention on Human Rights (1953) article 13 states that rights are reliably enforced when subscribing states treat them as domestic law.

to refrain from certain activities. The realisation of economic and social rights was left entirely dependent upon the relative wealth of a society.[40]

The Committee on Economic, Social and Cultural Rights (CESCR) set out this distinction best in General Comment number 3:

The principal obligation of result reflected in article 2(1) is to take steps "with a view to achieving progressively the full realization of the rights recognized" in the Covenant. The term "progressive realization" is often used to describe the intent of this phrase. The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the ICCPR which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.[41]

Despite rights being termed as obligations, no state deals with them as obligations. Even if a state fails to 'fully utilise its resources' there is no enforcement mechanism of the United Nations at any level that can compel fulfilment. Sanctions have taken place in the past for failure to meet human rights obligations that have resulted in legislative changes but there have been no reflected changes in fiscal behaviour.[42]

When the final version of the ICESCR was adopted, it was celebrated as being the first comprehensive international human rights instrument to

40 Waris, *Tax and Development* (2013) LawAfrica, Nairobi.

41 E/CN.4/SR (1987) (statement by Mr Smirnov, USSR) in McCorquodale and Baderin (2007) 9.

42 Waris, *Tax and Development* (2013) LawAfrica, Nairobi.

be legally binding on state parties.[43] However, some states, for example, New Zealand, entered reservations when ratifying it citing resource scarcity.[44] The lack of international enforceability which also recognises the inherently limited resources at the disposal of a state is found in numerous examples. State action to the term immediate fulfilment is evidenced by their submissions to the United Nations and its constituent bodies. Thus, despite the fact that there are tiers of achievement in human rights, no state can claim to have achieved complete and immediate achievement of human rights or even civil and political rights, if the use of the term immediate is to be understood and addressed. Among other reasons, this includes resource constraints.

There are two steps to the realisation of human rights. The first is their adoption in the Constitution, legislation and policy of the state, and the second is the actual allocation of fiscal resources to the human rights that remain as yet unrealised and require resources.

4. Findings Showing Fiscal Responsibility of the Kenyan State Towards the Health Sector

In 2001 the African heads of state met in Abuja and agreed to allocate a minimum of 15 per cent of their budgets to health care in order to meet the needs of their citizens. They also called upon high-income countries to fulfil their commitment of allocating 0.7 per cent of their gross national product as official development assistance for developing countries.[45]

The public expenditure survey reports of 2005, 2008 and 2009 indicate that a large proportion of the money allocated to the health sector is not spent. This, therefore, means that the remaining funds have to be returned to the treasury by end of the financial year.[46] For example, in previous years only 40 per cent of the Kenyan health sector's development budget was spent.[47]

Despite the fact that both government health expenditure per capita and total health expenditure per capita are increasing, with increases in the resources

43 E/CN.4/SR (1987) (statement by Mr Smirnov, USSR) in McCorquodale and Baderin (2007) 9.

44 New Zealand. Core Document Forming Part of the Reports of States Parties: New Zealand (2006).

45 African Union Heads of State (2001) Africa summit on HIV/AIDS, tuberculosis and other related infectious diseases, Abuja, Nigeria, retrieved on 25 March 2011 online at: http://www.un.org/ga/aids/pdf/abuja_declaration.pdf.

46 Reversing the trends. The second national health sector strategic plan of Kenya (NHSSP II) 2005-2010, Ministry of Health, (2005), and Guidelines for prevention of mother to child transmission of HIV/AIDS in Kenya, MoH, Nairobi. (2009).

47 Guidelines for prevention of mother to child transmission of HIV/AIDS in Kenya, MoH, Nairobi. (2009).

allocated to the health sector in absolute terms, both total and government per capita levels are below the level of US$34 per capita for basic interventions or US$60 per capita for health system costs.[48] This raises challenges for the Kenyan government and economy to gradually increase the level of funding to the health sector to avoid over-reliance on external funding.[49]

The total budget for 2013/2014 financial year stands at Kenya Shillings (KShs) 1.642 Trillion out of which KShs 605.99 billion is for Recurrent Expenditure, Kshs 380.29 billion is for Consolidated Fund Services, KShs 453.7 billion is for Development Expenditure, KShs 198.69 billion is for County Governments Allocations and KShs 3.4 billion is for the Equalization Fund. The health sector has been allocated KShs 34.66 billion whereas KShs 130.56 billion has been allocated to the Ministry of Education, Science and Technology. In an effort to improve quality and transform the education system to knowledge based economy, the 2013/14 budget has allocated KShs 10.3 billion towards free primary education, KShs 2.6 billion for school feeding program, KShs 20.9 billion for free day secondary education and KShs 1.17 billion for secondary school bursary programs. Other programs that are set to benefit include upgrade of national schools (KShs 800 million), Higher Education Loans Board (Kshs 4.9 billion) and youth polytechnics (KShs 826 million).[50] These figures are all expressed in the table below in the form of percentage of total budget.

Types of Expenditure	**Amount in Kenya Shillings -Billions**	**Percentage of Total Expenditure**
Recurrent Expenditure	0,605.99	36.000
Consolidated Fund Services	0,380.29	21.000
Development Expenditure	0,453.70	25.100
County Government Allocation	0,198.69	11.000
Equalization Fund	0,003.40	00.002
Health	0,034.66	01.900
Education	0,130.56	07.220
Total	1,807.29	100%

The health budget amounted to 1.9% of the 2013-2014 annual budget.

48 KEMRI-Wellcome Trust Research Programme, Mustang Management Consultants, Ministry of Public Health and Sanitation, Training and Research Support Centre (2011) Equity Watch: Assessing Progress towards Equity in Health in Kenya, KEMRI, EQUINET, Nairobi and Harare.

49 KEMRI-Wellcome Trust Research Programme, Mustang Management Consultants, Ministry of Public Health and Sanitation, Training and Research Support Centre (2011) Equity Watch: Assessing Progress towards Equity in Health in Kenya, KEMRI, EQUINET, Nairobi and Harare.

50 KPMG, Kenya 2013 Budget Brief. Regional Economic Highlights.

The less fortunate, the elderly and persons with disabilities have received a significant boost aimed at doubling the beneficiaries of the welfare program started under the previous government. This is through allocation of KShs 8 billion for the orphans and vulnerable children, KShs 3.2 billion to double the number of the elderly persons under the cash transfer scheme, KShs 1.22 billion for the disabled persons, KShs 400 million for presidential secondary bursary scheme, KShs 360 million for the urban food subsidy and KShs 100 million for albinos. Despite this the state has not paid considerable attention to the health sector in budget allocation. This has been observed from the states' budget allocation to the health sector, which has been on a reducing scale. In 2010, 7.2 per cent of the total budget was allocated to the health sector. In 2011, only 6.1 per cent was allocated while in the 2013/14 budget, the health sector allocation has been reduced to 5.9 per cent of the total budget. This is alarming since the health sector is the means through which the socio-economic right to the highest attainable standard of health is to be realised. Hence, limited financing of this sector negatively impacts the progressive realisation of the first socio-economic right listed under article 43(1)(a) of the Constitution of Kenya.

Kenya has various sources of funding to complement tax funding. The National Hospital Insurance Fund (NHIF) is mandatory for those working in the formal sector and voluntary for others. Contributions range from Kshs 360 to KShs 3,840 (US$4.6-49.20) per annum based on income level but as the rates have remained static over 40 years while incomes have increased, their progressivity has been eroded. Those working outside the formal sector contribute a flat rate of KShs 1,920 per annum.[51]

The Government of Kenya has introduced various other tax-based funding schemes for health. For example in 1999, the Local Authorities Transfer Fund provided for services in large urban local authorities and supplemented funds for less financially viable authorities. The Constituency Development Fund, introduced in 2004, allocates 2.5 per cent of government's annual budget to promote constituency development, with allocations to constituencies based on their population and poverty levels.[52]

Government health expenditure increased to 35 per cent of total health expenditure in 2008 and external funding to 40 per cent, while household contributions fell. A large share of these external funds are for HIV and AIDS

51 MoMS and MoPHS (2009) Health care financing policy and strategy: systems change for universal coverage, GoK, Nairobi; Public expenditure tracking survey, MoH, Nairobi. (2008).

52 MoMS and MoPHS (2009) Health care financing policy and strategy: systems change for universal coverage, GoK, Nairobi; Public expenditure tracking survey, MoH, Nairobi. (2008).

related interventions, with most from PEPFAR and the Global Fund for AIDS Tuberculosis and Malaria (the Global Fund).[53] The National Hospital Insurance Fund proposed an increase and revision to contributions in September 2010 to structure contributions progressively. However, the Central Organisation of Trade Unions (COTU) went to court to block this process, citing lack of consultation during the design period.[54] The first court judgement ruled in favour of the Fund and COTU appealed in the High Court.

In January 2007, the Ministry of Health initiated a health financing strategy to achieve universal coverage, based on values of equity, solidarity and transparency. The proposed policy options include: a social health insurance system with significant tax funding; decentralisation; tax deductions for employers who co-pay for their contributing employees; channelling donor funds centrally; community-based health insurance; demand side financing; and strengthening private health insurance.[55]

5. Discussion: the Challenges to the Sources of Financing for Health Equity

Despite the foregoing, Kenya has not met the Abuja commitment and has made slow and faltering progress towards it. Instead, Kenya spends the least share of government expenditure on health and has been making negative progress towards this target.[56] As a result, Kenya's progress towards the Abuja Declaration may need to be met through a progressive and incremental increase in the budget allocation to the health sector. This is despite the fact that the trend in Kenya in budget allocation to the health sector is regressive.

Various factors outside the health sector, such as delays in transferring funds to the ministry and then from the ministry to the districts are also responsible for lack of spending in the sector. Cumbersome procurement processes that have to conform to the provisions of the Public Procurement and Disposal Act also make it difficult for facilities to implement development plans on time.[57] Furthermore, government health expenditure in Kenya as a share of the total

53 GoK and Health Systems 2020 Project (2009) Kenya national health accounts 2005/2006, Health Systems 20/20, Abt Associates Inc, Bethesda, MD.

54 Jilo R. (2010) 'Court halts new NHIF rates', *Daily Nation*, Nairobi.

55 MoMS and MoPHS (2009) Health care financing policy and strategy: systems change for universal coverage, GoK, Nairobi.

56 Govender V., D. McIntyre, R. Loewenson *Progress towards the Abuja target for government spending on health care in East and Southern Africa*, (2008 EQUINET, Harare).

57 Public expenditure tracking survey, MoH, Nairobi. (2008).

government spending has fluctuated since 2005. It rose to a maximum of 7.9 per cent in 2006 but again fell to 6 per cent in 2008. This decline in 2008 may have been associated with the effects of the political violence in the country.[58]

Equitable health financing requires that contributions to health care are on the basis of ability to pay. Wealthier people need to contribute a larger proportion of their income than poorer people, with cross-subsidies between wealthy and poor people. Countries enhance equity by moving away from out-of-pocket payments and finance health systems through prepayments, including tax funding and health insurance.[59] Between 2000 and 2005 government expenditure on health was relatively constant as a share of total health expenditure, while the out-of-pocket spending share fell. This was mainly because the share of external funding increased from 16.4 per cent in 2001 to 31 per cent in 2005 (by US$180 million). As a share of total health expenditure, private expenditure fell from 54 per cent in 2001 to 39.3 per cent in 2005 and total household spending fell from 51.1 per cent in 2000 to 35.9 per cent in 2005.[60]

The NHIF provides a defined benefit package covering all diseases and maternity. Government facilities, including the teaching and referral hospitals, provide comprehensive cover to fund members without any co-payments, while faith-based facilities and private for profit facilities provide benefits but with a co-payment. The Local Authority Transfer Fund (LATF) has had limited success in improving services or financing due to weak administrative capacities.[61] About 25 per cent of all these funds support health related development spending, such as building dispensaries, but not recurrent inputs, such as staff or medicines. [62]

As a result the government share of health expenditure increased in 2008, as did external funding, while the household, out-of-pocket spending share fell after 2007.[63] The main shift has been between out of pocket spending and external funding, with much of the latter focused on AIDS spending within the

58 Chuma, J. (2010) Rapid assessment of the impact of the global economic crisis on health spending in Kenya, World Bank, Washington.

59 World Health Organisation (WHO) (2005) Social health insurance: sustainable health financing, universal coverage and social health insurance, WHO 58th assembly, Geneva.

60 Household health expenditure and utilization survey report 2003, MoH Nairobi. (2004) and GoK and Health Systems 2020 Project (2009) Kenya national health accounts 2005/2006, Health Systems 20/20, Abt Associates Inc, Bethesda, MD.

61 Public expenditure review: policy for prosperity 2010, MoPND and Vision 2030, Nairobi. (2010).

62 Public expenditure review: policy for prosperity 2010, MoPND and Vision 2030, Nairobi. (2010).

63 Household health expenditure and utilization survey report 2003, MoH Nairobi. (2004) and GoK and Health Systems 2020 Project (2009) Kenya national health accounts 2005/2006, Health Systems 20/20, Abt Associates Inc, Bethesda, MD.

health sector. This shows that there is a need and scope to increase government funding to ensure a sustainable equitable domestic source of financing. The new financing strategy, outlining the path to universal coverage in Kenya, introduces national health insurance. Elements of the strategy have met initial resistance, for example to adjustments in contribution rates and the move towards universal health insurance.[64] Consultations, political commitment and careful implementation are required to move towards progressive health care financing. In the meantime the health sector needs an increasing share of tax revenue to improve service quality and boost people's confidence in the sector. Better tax collection has not translated into a larger share of the government budget for health.[65]

6. Conclusion

In the competition for resources and acknowledging the contribution that other sectors make to health, there is need to explore ways of enhancing resource mobilisation, rather than reducing allocations to other sectors that potentially impact on health. One possible source of better financing is to improve on tax efficiency and compliance, and introduce additional taxes earmarked for health that target high-income groups (such as taxes on airline travel).

The discussion in many states today is to increase taxation rates and types however based on the information and research in the field of financing it is clear that the need really rests in the better management and allocation of resources and it is clear that Kenya does not meet the target of 15% of its budget. This lack of political will has resulted in inequities not only in the collection of taxes from those less fortunate but also in the poor re-distribution of taxes in achieving the progressive realization of the right to health in an equitable manner.

64 Household health expenditure and utilization survey report 2003, MoH Nairobi. (2004) and GoK and Health Sys-tems 2020 Project (2009) Kenya national health accounts 2005/2006, Health Systems 20/20, Abt Associates Inc, Bethesda, MD.

65 MoMS and MoPHS (2009) Health care financing policy and strategy: systems change for universal coverage, GoK, Nairobi; World Health Organisation (WHO) (2005) Social health insurance: sustainable health financing, universal coverage and social health insurance, WHO 58th assembly, Geneva; Public expenditure review: policy for prosperity 2010, MoPND and Vision 2030, Nairobi. (2010).

Liberalizing Access to Courts in Fundamental Human Rights Cases in Nigeria: An Appraisal of the 2009 Fundamental Human Rights Enforcement Rules

Peter Ademu Anyebe*

Abstract

Although, in most cases, there is no machinery for their enforcement, so important are human rights that they are now recognized under international law. The obligation to promote human rights is contained in various paragraphs of the UN Charter, and there are of course the Universal Declaration of Human Rights (1948) and other various UN conventions on the subject. Furthermore, regional instruments have also been adopted to buttress the protection of these rights. Thus, most European countries are now parties to the European Convention on Human Rights which contains elaborate enforcement machinery, and we even have an OAU Convention on Human Rights titled the African Charter on Human and Peoples' Rights, which has been made part of the laws of Nigeria.[1] This paper argues that for human rights provisions to be effective, they need to go beyond the normative, textual essence and become a part of the legal culture of a given society.[2] And this can only be given effect if their enforcement by the courts are unconstrained.

1. Introduction

Access to justice or court refers to the substantive and procedural mechanisms existing in any particular society designed to ensure that citizens have the opportunity of seeking redress for the violation of their legal rights within the legal system. It focuses on the existing rules and procedures to be used by citizens

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1 I.E.Sagay: *A Legacy for Posterity: The Work of the Supreme Court (1980-1988)* (hereinafter "Work of Supreme Court"), (Lagos: Nigerian Law Publications, 1988) p. 170.

2 R Coomaraswamy, 'To Bellow like a cow: Women Ethnicity, and the Discourse of Rights' in Cook (ed) Human Rights of Women, p. 39.

to approach the courts for the determination of their civil rights and obligation[3]. It may also be considered as the ability of people from disadvantaged groups to prevent and overcome human poverty by seeking and obtaining a remedy, through the justice system, for grievances in accordance with human rights principles and standards.[4] Accordingly, the International Covenant on Civil and Political Rights provides amongst others that each State Party to the Covenants must undertake to ensure that any person whose rights or freedoms are violated has an effective remedy by having his rights determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State.[5]

In line with the above, in Nigeria, anyone who alleges that any of the provisions under Chapter IV of the 1999 Constitution has been, is being or likely to be contravened may apply to the High Court for redress.[6] Therefore, anyone whose fundamental rights[7] have been violated has access to the court to seek legal redress in Nigeria, being that the Constitution confers a special jurisdiction on the High Courts.[8] This provision is similar to article 8 of the Universal Declaration of Human Rights, 1948 that provides thus: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or law".

In pursuance of the power conferred on the Chief Justice of Nigeria by section 42(3)[9] of the Constitution, the Fundamental Rights (Enforcement Procedure) Rules, 1979 have been made to facilitate application and procedure for the enforcement of the rights. However, in accordance with statutory instrument number 37 of 2009, and pursuant to the powers conferred on the Chief Justice of Nigeria by section 46(3) of the Constitution of the Federal Republic of Nigeria, 1999, he has issued a new Fundamental Rights (Enforcement Procedure) Rules, 2009 (called "the 2009 Rules").

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3 http://www.scielo.br/scielo.php Accessed on 19 May 2014.

4 http://www.undp.or.id/factsheets/2008/GOV Accessed on 19.12.2011 Accessed on 19 May 2014; see also, C.C.Ani, Access to Justice in Nigerian Criminal and Civil Justice Systems in E. Azinge and B. Owasanoye *(eds) Rule of Law and Good Governance* (Lagos: Nigerian Institute of Advanced Legal Studies, Lagos, 2009) p.376.

5 Article 2.

6 This right is guaranteed by section 46(1). This is equivalent to section 42(1) of the 1979 Constitution.

7 Fundamental Right under the 2009 Rules has been defined in Order 1 to mean any of the rights provided for in Chapter IV of the Constitution, and includes any of the rights stipulated in the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.

8 *Nwangwu v Duru* (2002) 2 N.W.L.R. (pt.751) 265.

9 1979 Constitution of the Federal Republic of Nigeria. This has the equivalent of section 46(3) of the Constitution of the Federal Republic of Nigeria, 1999.

However, over the years, there has been a pattern of deliberate denial of citizens' access to the courts in Nigeria through various negative legal devices.[10] These access curtailing devices include ouster clauses, limitation acts, protection of public officers from suits and the doctrine of State Immunity.[11] Also falling within this group is the problem of *locus standi*. In no doubt all these devices have been put in place to deny or curtail citizens' access to the courts. It is the intention of the writer to dwell briefly on *locus standi* as a device in curtailing access to court in fundamental rights cases.

This paper basically deals with liberalizing access to courts in Fundamental Human Rights and it will attempt to highlight briefly the meaning of fundamental right, constitutional provisions for fundamental rights in Nigeria under the 1999 Constitution, appraisal of the Fundamental Rights (Enforcement Procedure) Rules (or a comparative commentary on the salient provisions of the 1979 and 2009 Rules); the determination of the justiceability of a cause of action under the Fundamental Human Rights (Enforcement Procedure) Rules, liberalizing access to courts in Fundamental Rights cases, a brief comment on the various devices that have restricted access to justice in fundamental cases, paying particular attention to *locus standi*, significance of Public Interest Litigations as provided under the 2009 Rules and conclusion.

Fundamental Right as a concept will appear very regularly in this article, hence, there is the need to start with a brief meaning of what it is.

2. Brief Meaning of Fundamental Right

Fundamental Right means any of the rights provided for in Chapter IV of the Constitution, and includes any of the rights stipulated in the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.[12] It is a right guaranteed by the Constitution and it is a right, which every person is entitled to, when he is not subject to the disabilities enumerated in the Constitution, to enjoy by virtue of being a human being.[13] Furthermore, the nature of

10 Akin Ibidapo-Obe Enforcement of Rights and the Problem of *Locus standi* in *Nigeria in Essays on Human Rights* in Nigeria, Concept Publications Limited, 2005, p. 205.

11 *Ibid* -Examples of Ouster Clauses, see Civil Disturbances (Special Tribunal) Act, 53 Laws of the Federation of Nigeria, 1990; Public Officers Protection Act, Chapter 379, Laws of the Federation of Nigeria, 1990; the State Security (Detention of Persons Act. The Doctrine of Sovereign Immunity was upheld in *Queen v Administrator-General, Ex parte Bangbelu,* (1962) W.N.L.R. 344.

12 Order 1, rule 2, 2009 Rules; see also fn No.8.

13 *Odogu v A.G.Fed. and others* (2002) 2 HRLRA 82 at 83.

Fundamental Right has been expatiated in the case of *Uzoukwu v Ezeonu*,[14] where Nasir, P.C.A, (as he then was) observed among others that the right is derived from and out of the wider concept of natural rights. It is a right which every civilized society must accept as belonging to each person as a human being. It is termed human rights. When the United Nations made its declaration it was in respect of Human Right as it was envisaged that certain rights belong to all human beings irrespective of citizenship, race, and religion and so on. This has now formed part of International Law. Fundamental Rights remain in the realm of domestic law. They are fundamental because they have been guaranteed by the fundamental law of the country; that is by the Constitution[15]. Kayode Eso, J.S.C. (as he then was) offered a definition of human right in the case of *Ransome Kuti v Attorney-General of the Federation* as "but what is the nature of a fundamental right?[16] It is a right which stands above the ordinary laws of the land and which in fact is antecedent to the political society itself. It is a primary condition to a civilized existence".

Human rights are those basic rights and freedoms to which all humans are entitled. They are rights that human beings have simply because they are human beings and independent of their varying social circumstances and degrees of merit.[17] They speak to all human beings and as such are underpinned by the principle of universality, which is the cornerstone of international human rights law[18]. This principle, as first emphasized in the Universal Declaration of Human Rights, 1948, has been echoed in numerous other international human rights conventions, declarations, and resolutions.[19] The Vienna World Conference on Human Rights, in June 1993, for example, noted that it is the duty of States to promote and protect all human rights and fundamental freedoms, regardless of their political, economic and cultural systems.[20]

The United Nations defines human rights as those rights which are inherent in our nature and without which we cannot live as human beings.

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14 (1991) 6 NWLR (pt. 200) 708.

15 *Ibid*, pp. 760-761; see also *Enahoro v Abacha* (1998) 1 HRLRA 424 at pp. 444-445.

16 (1985) 2 N.W.L.R (pt.6) 211 at pp. 229-230.

17 C.Heyns & K. Stefiszyn (eds) *Human Rights, Peace and Justice in Africa*: Pretoria, 2004, p. 209.

18 F. Abioye and F. Mnyongani: Governance, Human Rights and the Public Sphere in Africa: The case of Zimbabwe, in *Malawi Law Journal*, Vol.3, 2009, p. 186.

19 The Declaration was adopted and proclaimed by General Assembly Resolution 217 A (III) of 10.

20 See the *Vienna Declaration and Programme of Action*, U.N. Doc A/CONF.157/23, 12 July1993, available at http://www.unhchr.ch/huridoca.nsf, as in Funmilayo Abioye & Freddy Mnyongani, op.cit.

The word "right" means justice, moral, what the law supports or approves,[21]while in another place, "right" has been defined as justice, ethic, correctness or consonance with the rule of law or the principles of morals.[22] Professor J.O. Akande (of the blessed memory), stated that "right" connotes: "A just claim, when someone is described as having a right, he is acknowledged to be entitled to something to which he has a just claim under the law. Consequently, by virtue of his creation, man has certain rights which are common to all men."[23]

The next segment deals with constitutional provisions of the Fundamental Rights wherein, attempt will be made to briefly highlight (without going into details) the fundamental rights under the 1999 Constitution and references will be made to the 1979 Constitution of the Federal Republic of Nigeria where necessary.

3. Constitutional Provisions for Fundamental Rights under the Nigerian Constitution

None of the Constitutions designed during colonial administration in Nigeria was aimed at safeguarding human rights.[24] The learned Author stated further that it would have been most interesting to see how a Constitution with human rights provisions would have been fashioned at a time when under inter-temporal law, slavery, forced labour, racial discrimination and restriction of movement were legitimate instruments in the hands of the colonial administrators not only in Nigeria, but all over Africa.[25] It was also stated that before 1959, the protection accorded human rights in Nigeria was non-statutory, extra-constitutional, to be found in common law tradition.[26]

However, in the mid-50s, agitation for self-government commenced, and in response, a Constitutional Conference was held in London. At the Conference, the minority tribes urged the British colonial government to allay

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21 Mike Ikhariale, "The Jurisprudence of Human Rights" in Journal of Human Rights Law and Practice, Vol.5, No.1, January, 1995, and p. 51.

22 E. Azinge, "Milestone Decisions on Human Rights" in A.U. Kalu and Y. Osinbajo (eds) p. 197.

23 J.O. Akande, "Securing Individual Rights under Federalism", "Proceedings of the Conference on Constitutions and Federalism held at the University of Lagos, Akoka from 23-25 April, 1996, p 87.

24 M.A. Ajomo, "The Development of Individual Rights in Nigeria's Constitutional History in M.A. Ajomo and Bolaji Owasanoye (eds) *Individual Rights under the 1989 Constitution* (Lagos: Nigerian Institute of Advanced Legal Studies, 1993), p.3.

25 *Ibid*.

26 Amaeze Guobadia, Human Rights in Nigeria: A Historical Perspective in A.U. Kalu and Y. Osinbajo (eds) *Perspectives on Human Rights,* Vol.12, (Lagos: Federal Ministry of Justice, 1992) p.59.

their fears by the creation of State for them before granting independence. Thus a Commission, known as the Willink Commission was set up to look into the problems of the minorities within Nigeria and submit a report to that effect.[27] Consequently, following the reports of Sir Henry Willink's Commission of 1958,[28] the 1960 Constitution provided for fundamental rights in Chapter II of the Independence Constitution.[29] This was also reproduced in Chapter III of the 1963 Republican Constitution with minor amendments.[30]Thereon, subsequent Nigerian Constitutions provided for and retained the Fundamental Rights Chapters.[31] These rights are similar to the provisions of the African Charter on Human and Peoples' Rights and are enforceable by the courts.[32] The rights are contained in Chapter IV, sections 33-44 of the Constitution of the Federal Republic of Nigeria, 1999. The principles enshrined by Fundamental Rights-provisions in written Constitutions, are not new. Such rights have been long part of the laws of the U.S.A., France, India and the Republic of Ireland. In comparison to the impressive list of rights under the American, Indian and Germany Constitutional provisions, the list of rights under the Nigerian Constitution is very comprehensive and the rights closely touch the people's lives. Therefore, there is the need to ensure that they are observed. Briefly, they are as follows:

(i) *Right to Life*[33] - This guarantees and protects the right to life. It also recognizes deprivation of life so long as it is pursuant to the execution of the sentence of a court in a criminal offence of which the accused has been found guilty in Nigeria.[34] Except killing for one of the reasons enumerated above, any

27 T.F. Yerima, "Appraising The Significance of the Liberal and Utilitarian Conceptions of Human Rights in the 1999 Constitution of Nigeria, *Ikeja Bar Review*,Vol. 2 Part 1, 2007, p. 203.

28 See Report of the Commission Appointed to enquire into the fears of Minorities and Means of Allaying them. (mnd.505) 1HMSO, 1958.

29 See sections 17-31, 1960 Constitution.

30 Sections 18-32 of the Republican Constitution of Nigeria, 1963.

31 Chapter IV in the 1979 Constititution, and the 1989 Draft Constitution that was never implemented.

32 The African Charter was adopted by the Organization of African Unity (OAU) in Banjul, The Gambia on 19 January 1981. The Nigerian Government adopted the treaty in 1983 when the National Assembly enacted the African Charter on Human and Peoples' Rights (Ratification and Enforcement)Act Cap. 10, Laws of the Federation of Nigeria, 1990. This, therefore, meets the provision of section 12 of the Constitution to the effect that a treaty cannot be implemented or have a force of law unless the National Assembly enacts it into a municipal law. See *Abacha v Fawehinmi* (2000)4 SCNJ 400 at 466-467.

33 Section 33, Constitution of the Federal Republic of Nigeria, 1999.

34 *State v Agbo* (1973) 3E.C.S.L.R 4; *Musa v State* (1993) 2N.W.L.R (pt. 277) 550; *Kalu v State* (1990) 2 N.W.L.R. (pt. 277) 550; Article 3 of the United Nations Universal Declaration of Human Rights and the Fifth and Fourteenth Amendments of the United States Constitution. See the case of *Coker v Georgia* 433 U.S.97 Ct.2861 (1977).

killing of human being is unconstitutional and also amount to the breach of criminal law.[35]

(ii) *Right to Dignity of Human Person*[36] - Every individual is entitled to respect for the dignity of his person. The right to protect a person from torture, inhuman or degrading treatment, slavery or servitude, forced or compulsory labour except as permitted by the section.[37]

(iii) *Right to Personal Liberty*[38] - This guarantees personal liberty subject to the exceptions specified in sub-section (1), it is aimed at unlawful arrest or detention and provides for release from such detention and consequential remedies.

(iv) *Right to Fair Hearing*[39] - This section provides for fair hearing both in civil and criminal matters.[40] The principle of fair hearing, that is provided for in the Constitution as a fundamental right is usually expressed in the Latin maxims of *Nemo Judex in Causa Sua*,[41] and *Audi Alteram Partem*.[42]

(v) *Right to Private and Family Life*[43] - This provides that the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected.[44]

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35 *Aliu Bello v A.G. Oyo State* (1986)5N.W.LR. (pt.45) 823.

36 Section 34, Constitution of the Federal Republic of Nigeria, 1999; Articles 4, 5 and 23(1) of the United Nations Universal Declaration of Human Rights.

37 The right is given to any individual whether a Nigerian citizen or an alien and it extends to the actions of not only the State but also the actions of all governmental agencies and private individuals- See, *Alhaja Abibatu Mogaji and others v Board of Customs & Excise and another* (1982) 3 N.C.L.R. 552; *Uzoukwu v Ezeonu* II (1991) 6 N.W.L.R. (pt. 200) 708.

38 Section 35, Constitution of the Federal Republic of Nigeria, 1999; Fifth and Fourteenth Amendments of the United States Constitution and article 21 of the Indian Constitution.

39 Section 36 *ibid*; Article 10 of the United Nations Universal Declaration of Human Rights and the Sixth Amendment of the United States Constitution.

40 See *Baba v Nigerian Civil Aviation Training Centre and others* (1991) 5 N.W.L.R. (pt.192) 388; *Alakija v Medical Disciplinary Committee* (1959) F.S.C.38 and *Kanda v Government of Malaya* [1962] AC 322 and *Jones v National Coal Board* (1957) 2Q.B.55.

41 It means that a person shall not be a judge in his own case: *Gani Fawehinmi v Legal Practitioners Disciplinary Committee* (1985) 2N.W.L.R. (pt.7) 300; *Alakija v Medical Disciplinary Committee* (1959) 4 F.S.C.38.

42 It signifies that no man shall be condemned unheard or without having an opportunity of being heard-see *P.R.P v. I.N.E.C.* (2004) AII F.W.L.R. (pt. 209)1071 at 1085.

43 Section 37, Constitution of the Federal Republic of Nigeria, 1999; Article 12 of the United Nations Declaration of Human Rights; Fourth Amendment of the United States Constitution and Article 8 of the European Convention for Protection of Human Rights and Fundamental Freedoms,1950.

44 See *Ezeadukwa v Maduka* (1997) 8 N.W.L.R. (pt. 518) 665.

(vi) *Right to Freedom of Thought, Conscience and Religion*[45] - However, nothing in this section shall entitle any person to form, take part in the activity or be a member of a secret society.[46]

(vii) *Right to Freedom of Expression and the Press*[47] - It includes freedom to hold opinions and to receive and impart ideas and information without interference, but subject to restrictions justifiable in a democratic society as provided in sections 39(3) and 45(1).[48] This is similar to the First Amendment to the United States Constitution which prohibits Congress from making any law which shall abridge "the freedom of speech or of the press".

(viii) *Right to Peaceful Assembly and Association*[49] - It includes the right to form or belong to a particular political party, trade union or similar association. However, it can validly operate if it can be justifiable under the provision of section 45(1) of the Constitution.[50]

(ix) *Right to Freedom of Movement*[51] - This section allows a citizen to move freely throughout Nigeria and reside in any part thereof, and a citizen shall not be expelled from Nigeria or refused entry thereto or exit there from. The right is also subject to restrictions justifiable in a democratic society as provided in sections 41(2) and 45(1) of the Constitution.[52]

(x) *Right to Freedom from Discrimination*[53] - This is to the effect that a Nigerian citizen cannot be discriminated on ground of ethnic grouping,

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45 Section 38, Constitution of the Federal Republic of Nigeria, 1999.

46 Section 38(4) *ibid*.

47 Section 39, *ibid*; See also article 19 of the United Nations Declaration of Human Rights.

48 See *Innocent Adikwu v Federal House of Representatives* (1982) 3 N.C.L.R. 394; *Ukaegbu v Attorney-General of Imo State* (1983) All NLR. P.179; Article 19(1)(a) of the Indian Constitution.

49 Section 40, Constitution of the Federal Republic of Nigeria, 1999.

50 See *Ukaegbu v Attorney- General of Imo State*, op cit.; and *Agbai v Okagbue* (1991) 7 N.W.L.R. (pt.204) 391; *Tony Momoh v Senate of the National Assembly*(1981)1 N.C.L.R 262; *Habu v Nigerian Union of Teachers* [2005] AII FWLR(pt.270) 2062 at 2080; *INEC v Musa* (2003) FWLR (pt.145) 729 at 779; *ANPP v IGP* Suit No. FHC/ABJ/CS/54/2004 of 24th June, 2005 where the Federal High Court held in the case that the Public Order Act Cap. 382, Laws of the Federation of Nigeria, 1990, which requires citizens to seek and obtain a police permit before embarking on a public procession or rally violated the constitutional right of peaceful assembly and association and consequently was unconstitutional, illegal, null and void; Article 20(1) of the United Nations Declaration of Human Rights and the First Amendment of the United States Constitution.

51 Section 41, Constitution of the Federal Republic of Nigeria, 1999.

52 See *Agbakoba v The Director, State Service Security Service* (1994) 6N.W.L.R (pt. 351) 475; and *Shugaba Abdulrahman Darman v Federal Minister of Internal Affairs and others* (1981) 2 NCLR 459; *Chief F.R.A. Williams v Majekodunmi* (No.3) (1962) AII N.L.R 413. See also article 13(2) of the Universal Declaration of Human Rights, 1984.

53 Section 42, Constitution of the Federal Republic of Nigeria, 1999; Article 2 of the United Nations Declaration on Human Rights.

place of origin, sex, religion or political opinions save as provided by section 42(3) of the Constitution.[54]

(xi) *Right to Acquire and Own Immovable Property*[55] - It also protects the right to prompt payment of compensation for compulsory acquisition of property.[56]

4. Restrictions on and Derogation from Fundamental Rights

Qualifications have been incorporated into the 1999 Constitution in pursuance of public interest, and the right of others. Thus, section 45 stipulates that nothing in sections 37, 38 39, 40 and 41 shall invalidate any law that is reasonably justifiable in a democratic society:

(a) In the interest of defence, public safety, public order, public morality or public health; or

(b) For the purpose of protecting the rights and freedoms of other persons.

The effect of these provisions is that none of the rights and freedoms entrenched in the Constitution are absolute or sacrosanct and cannot be treated as ends in themselves.[57] Thus, the scheme of the 1999 Constitution as regards human rights is that while guaranteeing to the Nigerian people the respective human rights, the Constitution has made it abundantly clear that these human rights can be reasonably restricted provided that such restrictions satisfy the test laid down in the Constitution. In this way, the Constitution adjusts the claims of individual rights and the claims of public good.[58]

Generally, the rights guaranteed under the Constitution of the Federal Republic of Nigeria, 1999 are not as detailed as those rights guaranteed under the International Covenant on Civil and Political Rights.[59] It does not make any special provisions for the protection of the more vulnerable members of the society like women, children, the disabled as well as the aged.[60] Under article

54 *Uzoukwu v Ezeonu* II, *supra*.

55 Section 43, Constitution of the Federal Republic of Nigeria, 1999; article 17 of the United Nations Declaration of Human Rights.

56 This constitutional right is subject to the provisions of the Land Use Act, Chapter L5, LFN, 2010.

57 I.A.Ayua, "Strategies For Human Rights Promotion and Protection for Effective Discharge of Government's Human Rights Obligations" in M.T. Ladan (ed) Law, *Human Rights and the Administration of Justice in Nigeria*, Essays in Honour of Hon. Justice Uwais, CJN, pp.129-130.

58 *Ibid*.

59 Such as the right to democratic governance in article 25 ICCPR; the right of aliens lawfully in the territory of a State in article 13 ICCPR; the right of the family and need for free and full consent of spouses to marriage in article 23 ICCPR; and the rights of ethnic, religious and linguistic minorities in article 27 of the ICCPR.

60 M.T. Ladan, "Should All Categories of Human Rights Be Justifiable?" in M.T. Ladan (ed) Law,

18(3) of the African Charter, the State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the women and child as stipulated in International Declarations and Conventions. By virtue of article 18(4) of the same Charter, the aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.[61] Nigeria should as a matter of urgency follow the footsteps of Ghana and South Africa by making the rights of women, children, the disabled and the aged, fundamental and justiciable constitutional rights.[62]

In Nigeria, the procedure for obtaining redress for contravention or likely contravention of any of the fundamental rights provisions is spelt out by the Fundamental Rights (Enforcement Procedure) Rules, 2009 made by the Chief Justice of Nigeria under the authority of section 46(3) of the Constitution of the Federal Republic of Nigeria, 1999 and all that powers enabling him in that behalf. In view of this, the Fundamental Rights (Enforcement Procedure) Rules, 2009 shall be appraised forthwith.

5. An Appraisal of the Fundamental Rights (Enforcement Procedure) Rules

The fundamental rights entrenched in the Constitution are very important, so much so that an individual whose rights have been infringed or contravened has the right to seek redress in a competent Court of law. In the context of the 1979 Constitution, section 42,[63] thereof and the Fundamental Rights (Enforcement Procedure) Rules, 1979 vest in an individual who alleges that any of the provisions of Chapter 4 has been, is being or likely to be contravened or infringed in any State in relation to him may apply to a High Court in that State for redress.

In analyzing the Fundamental Rights (Enforcement Procedure) Rules, 1979 in the case of *Federal Republic of Nigeria v Ifegwu*,[64] Ayoola, J.S.C (as he then was) stated as follows:

As it is, the enforcement procedure is in three limbs. The first limb is that the fundamental right in Chapter 4 has been physically contravened

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Human Rights and the Administration of Justice in Nigeria, Essays in Honour of Hon. Justice Muhammed Lawal Uwais, CJN, Published by Ahmadu Bello University, Zaria, 2001, 70.

61 *Ibid*.

62 *Ibid*.

63 It has equivalent 0f Section 46 of the 1999 Constitution.

64 (2003) 5 S.C 252 at pp.303-304.

or infringed. In other words, the act of contravention or infringement is completed and the plaintiff goes to court to seek for a redress. The second limb is that the fundamental right is being contravened or infringed. Here, the act of contravention or infringement may or may not be completed. But in the case of the latter, there is sufficient overt act on the part of the respondent that the process of contravention or infringement is in existence substantially. In the third limb, there is likelihood that the respondent will contravene or infringe the fundamental right or rights of the plaintiff. While the first and second limbs may ripen together in certain situations, the third limb of the subsection is entirely different. By the third limb, a plaintiff or applicant need not wait for the completion or last act of contravention or infringement.[65]

Fundamental rights are not to be enjoyed in semantics only or in their mere inclusion in the pages of the Constitution, the intimidating list in the 1989 Constitution notwithstanding. They become meaningless unless there is also provision for access to an independent Judiciary to enforce the rights. It is for this reason that the Constitution confers a special jurisdiction and in no ambiguous manner on the High Court with respect to the enforcement of these rights.[66]

This segment will appraise the recently promulgated Fundamental Rights (Enforcement Procedure) Rules, 2009 (called "the 2009 Rules"). It will be compared to the 1979 Fundamental Rights (Enforcement Procedure) Rules where it is appropriate to do so.

The Fundamental Rights Enforcement (Procedure Rules) is general rules which every applicant seeking to enforce his or her fundamental right must invoke.[67] They are rules of practice and procedure available to any High Court in Nigeria.[68]

Unlike what obtained under the 1960 and 1963 Constitutions, under the 1979, 1989 and 1999 Constitutions, a citizen who fears that his fundamental right is 'being or likely to be contravened' can go to Court to forestall contravention of his fundamental right.[69]

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65 *Ibid* at p. 303.

66 M.A.Ajomo, "The Development of Individual Rights in Nigeria's Constitutional History" in M.A.Ajomo and Bolaji Owasanoye (eds) *Individual Rights Under the 1989 Constitution*, NIALS, 1993, P.3

67 *Hon.Justice C.C Nwaogwugwu v President, FRN and others* (2007) CHR 154.

68 Per Uwaifo, J.S.C, in *Abacha v Fawehinmi* (2000) 4.S.C. (pt.II) 1 at 63.

69 Section 42 of the Constitution of the Federal Republic of Nigeria, 1979, section 44 of the draft Constitution of the Federal Republic of Nigeria, 1989 and section 46 of the Constitution of the

The practice and procedure for the exercise of the court's jurisdiction to enforce the observance of guaranteed rights is to be prescribed by the Chief Justice of Nigeria.[70] In view of this, the then Chief Justice made the first Fundamental Rights (Enforcement Procedure) Rules, 1979 that came into effect on 1 January 1980. The powers of the Chief Justice to make rules under section 42(3) of the 1979 Constitution is expressly stated to be with respect to the enforcement of the rights in Chapter IV and is accordingly limited and confined to the fundamental rights prescribed in the Chapter.[71] Before the promulgation of the rules, the courts had adopted a liberal attitude in the matter, refusing to allow procedural technicality to impede the exercise of the jurisdiction. It allowed an appeal to be made simply by originating notice of motion.[72] Consequently, until 1979 there were no provisions on the procedure to be adopted in the enforcement of fundamental rights. Thus, in the case of *Fajinmi v The Speaker, Western House of Assembly*,[73] it was held that even on the subject of enforcement of human rights violations, prior to the promulgation of the 1979 Constitution, the Courts liberally approved applications in these matters to reach them by any of the processes known to the law.[74]

Under the 1999 Constitution, in pursuance of the power conferred on the Chief Justice of Nigeria by section 46(3) has made rules with respect to the practice and procedure of a High Court for the enforcement of the rights.[75] This is the Fundamental Rights (Enforcement Procedure) Rules, 2009 (referred to as the '2009 Rules'). The Rules are coming some 30 years after the last that became operational in 1979 which has become outmoded in the light of the developments in human rights jurisprudence.[76] With a commencement date of 1 December 2009, the 2009 Rules represent a massive improvement on the old one by, amongst others, removing some of the impediments to the judicial enforcement of fundamental rights and simplifying the procedure for judicial relief.[77]

Federal Republic of Nigeria, 1999.

70 B.O. Nwabueze, 'The observance of the Rule of Law and Fundamental Human Rights' in Yemi Osinbajo and Awa. U. Kalu (eds) *Law Development and Administration in Nigeria*, op cit p.354.

71 Per Karibi-Whyte, J.S.C. in Sea *Trucks (Nig) Ltd. v Anigboro* (2001) 2 N.W.L.R. (pt.696) 159 at 178.

72 *Ibid* at p. 355.

73 (1962) 1 S.C.N.L.R. 300.

74 See further, the case of *Abacha v Fawehinmi* (2000) 4 S.C (pt.11)76-77.

75 See section 42(3) of the Constitution of the Federal Republic of Nigeria, 1979.

76 N.A. Inegbedion, Reflections on the New Fundamental Rights (Enforcement Procedure) Rules ,2009 in *Legislative Practice Review,(NJLPL Vol. 2, No. 1 2010)* Published by Hybrid Consult, 2010, 1.

77 *Ibid*.

6. Contents of the 2009 Rules

6.1 The Overriding Objectives of the Rules

Under the preambles to the Rules, there are seven overriding objectives postulated by the new Fundamental Rights (Enforcement Procedure) Rules, 2009. The first objective states that the Constitution especially Chapter IV, as well as the African Charter, shall be expansively and purposely interpreted and applied, with a view to advancing and realizing the rights and freedoms contained in them and affording the protections intended by them.[78]

This is followed by the second objective which states that for the purpose of restricting the applicant's rights and freedoms, the Court shall respect municipal, regional and international bills of rights cited to it or brought to its attention or of which the Court is aware, whether these bills constitute instruments in themselves or form parts of larger documents.[79] Such bills include:

The African Charter on Human and Peoples' Rights and other instruments (including protocols) in the African regional human rights system; and

The Universal Declaration of Human Rights and other instruments (including protocols) in the United Nations human rights system.[80]

For the purpose of advancing, but never for the purpose of restricting the applicants' rights and freedoms, the Court, under these provisions, may make consequential orders as may be just and expedient.

The above provisions are in accordance with section 12(1) of the 1999 Constitution of the Federal Republic of Nigeria. Thus, in the case of *Abacha v Fawehinmi*,[81] it was held that the African Charter on Human and Peoples' Rights was duly adopted by Nigeria in 1983 by the enactment of the African Charter on Human and Peoples' Rights (Ratification and Enactment) Act, 1983, Cap. 10, Laws of the Federation of Nigeria, 1990. As a result, the rights and obligations therein covered under the said Charter became fully and legally enforceable in Nigeria as any other municipal or domestic law of the land. Uwaifo, J.S.C, (as he then was) put it more explicitly that by the African Charter

78 Paragraph 3(a) of the Fundamental Rights (Enforcement Procedure) Rules, 2009.

79 Court means the Federal High Court or the High Court of a State or the High Court of the Federal Capital Territory, Abuja: See Order I, rule 2 of the 2009 Rules- thus, both the Federal High Court and the High Court of a State are given concurrent jurisdiction in respect of the enforcement by a person in the State of any violation or threatened violation of his fundamental rights conferred by Chapter IV.

80 Paragraph 3.

81 (2004) 4 S.C (pt. II) at p. 24.

of Human and Peoples' Rights (Ratification and Enforcement) Act, Chapter 10, Volume 1, Laws of the Federation of Nigeria, 1990, Nigeria adopted the African Charter on Human and Peoples' Rights as part of their municipal law the provisions of the Charter are enforceable in the same manner as those of Chapter 4 of the 1979 Constitution by application made under section 42 of the Constitution.[82]

It is certainly therefore right to state that Courts in Nigeria cannot accord any respect to any international bill of rights that has not been domesticated in accordance with section 12 of the Constitution.[83]

Another objective of the Rules is that the Court shall proactively pursue enhanced access to justice for all classes of litigants, especially the poor, the illiterate, the uninformed, the vulnerable, the incarcerated, and the unrepresented.[84]

Paragraph 3(e) of the 2009 Rules states that the Court shall encourage and welcome public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of *locus standi*.[85] In particular, human rights activists, advocates, or groups as well as any non-governmental organizations, may institute human rights application on behalf of any potential applicant. In human rights litigation, the applicant may include any of the following: (i) anyone acting in his own interest; (ii) anyone on behalf of another person; (iii) anyone acting as a member of, or in the interest of a group or class of persons; (iv) anyone acting in the public interest and association acting in the interest of its members or other individuals or groups.

This provision is a wholesale adoption of section 38 of the Republic of South Africa's Constitution, 1996 on the same subject matter and is completely novel in our human rights jurisprudence.[86] Other provisions for public interest litigation in the Constitutions of other countries are found in article 199 sub-article (1) (b) of the Constitution of Pakistan, 1973 which provides that, subject to the provisions of the Constitution, a High Court may, if it is satisfied that no other adequate remedy is provided by law, on the application of anyone, make an order directing that a person in custody, within the territorial jurisdiction of the Court, be brought before it so that the Court may satisfy itself that he is

82 *Ibid* at pp.63-64.

83 N. A. Inegbedion, *op.cit.* at p. 2.

84 Paragraph 3(d) of the 2009 Rules, *op. cit.*

85 Public interest includes the interest of Nigerian Society or any segment of it in promoting human rights and advancing human rights law-See Order I, rule 2, of the 2009 Rules.

86 N. A. Inegbedion, *op cit.* p.4.

not being held in custody without lawful authority or in an unlawful manner. Further, article 50(1) of the Ugandan Constitution of 1965 states that any person who claims that a fundamental or other right or freedom guaranteed under the Constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation. Under sub-section (2), any person or organization may bring an action against the violation of another person's or group's human rights.[87] The combined effect of the two provisions is to permit the public interest litigation with a view to getting around the common law principle of *locus standi*.[88] The difference between these other provisions and the Nigerian position is that in the former, the provision for public interest litigation is contained in their Constitution while in the latter, it is contained in the 2009 Rules which is not of equal status with the CFRN, 1999. The constitutionality of the provision for public interest litigation in the 2009 Rules is therefore very much in doubt.[89]

The Rules further provided that the Court shall in a manner calculated to advance Nigerian democracy, good governance, human rights and culture, pursue the speedy and efficient enforcement and realization of human rights.[90]

Under paragraph 3(g), it is stated that human rights suits shall be given priority in deserving cases. Where there is any question as to the liberty of the applicant or any person, the case shall be treated as an emergency.

6.2 Commencement of Action

This is provided for under Order II of the 2009 Rules. Under the 1979 Rules, it was provided that no application for an order enforcing or securing the enforcement within that state of any such rights shall be made unless leave therefore has been granted in accordance with the Rules.[91] This provision was mandatory and a *sine qua non* in the proceedings under the Enforcement Rules as contravention of it vitiated an action.[92] However, under the 2009 Rules, leave of the Court is no longer required before an action for the enforcement of fundamental rights may be commenced. The action may now be made by

87 *Ibid*.

88 *Ibid*.

89 *Ibid*.

90 Paragraph 3(f), 2009 of the Rules, *op cit*

91 Order I, rule 2 subrule 2 of Fundamental Rights (Enforcement Procedure) Rules, 1979.

92 *Ejefor and others v Okeke* (2000) 7 N.W.L.R. 363 at 378.

any originating processes accepted to the court.[93] Furthermore, it is provided that an application shall be supported by a statement setting out the name and description of the applicant, the relief sought, the grounds upon which the reliefs are sought, and supported by an affidavit setting out the facts upon which the application is made.[94] This provision is similar to the 1979 Rules. Every application shall be accompanied by a Written Address which shall be succinct argument in support of the grounds of the application.[95] This shall be done within 5 days. The respondent in turn has also 5 days from the date of service on him of the applicant's application, to file his address and may accompany it with a counter affidavit.[96] The applicant may on being served with the respondent's Written Address, file and serve an address on points of law within 5 days of being served, and may accompany it with a further affidavit.[97] The 1979 Rules require an application for the enforcement of fundamental rights to be brought within twelve months from the date of the happening of the event, matter, or act complained of while the 2009 Rules provide that an application for the enforcement of Fundamental Rights shall not be affected by any limitation Statute whatsoever.[98] It is interesting to note that while motion on notice or summons must be filed within 14 days of grant of leave under Order II, rule 1(2) of the 1979 Rules, the application shall be fixed for hearing within 7 days from the day the application was filed under Order IV of the 2009 Rules. This provision is important due to the fact that the return date for the hearing of the motion on notice is crucial. Anything more than that invalidates the whole proceedings.[99]

93 Order II, rule 2 of the 2009 Rules.

94 Order II, rule 3, *ibid*.

95 Order II, rule 5, *ibid*.

96 Order II, rule 6, *ibid*

97 Order II, rule 7, *ibid*

98 Order III, rule 1, *ibid*.

99 *Ogwuche v Mba and others* (1994) 4 N.W.L.R. (pt. 336) 75 at 85; *Umoh v Nkan* (2001) 3 N.W.L.R. (pt. 701) 512 at 524.

6.3 General Conduct of Proceedings

It is generally provided that the hearing of the application may from time to time be adjourned where extremely expedient, depending on the circumstances of each case or upon such terms as the Court may deem fit, provided the court shall always be guided by the urgent nature of the application under these rules.[100] There is the provision for *ex parte* application to be heard in order to grant interim reliefs by the court where it is satisfied that exceptional hardship may be caused to the applicant when his life or liberty is involved before the service of the application.[101] However, where an order is made on a motion *ex parte*, a party affected by it may within seven days after service of the order, or within such further time as a Court may allow, apply to the Court by motion to vary or discharge it.[102] Again, the Court may, on notice to the party obtaining the order, either refuse to vary or discharge it with or without imposing terms as to costs or security, or, as may seem just.[103]

6.4 Service of Court Process

Order V of the 2009 Rules provides for mode of service of court process and more particularly, the application must be served on all parties directly so long as a service duly effected on the respondent's agent will amount to personal service on the respondent.[104] Substituted service of court process is provided for under the Rules.[105] Delivery of the document to any senior officer of any Government agency that has office both in the State where the breach occurred and head office either in the Federal Capital Territory or elsewhere; a service on the agency through its office in any state where the breach occurred will be considered as a sufficient service.[106] Order V, rule 8 provides that when a party to be served is in the service of any Ministry or Extra Ministerial Department of Government, the court may transmit the document to be served and a copy thereof to any senior officer of the Department of Government in the Judicial Division or place where the party to be served works or resides or of the Local Government in whose service the party to be served is, and such senior Officer,

100 Order IV, rule 2 of the 2009 Rules.

101 *Ibid*, Order IV, rule 3

102 *Ibid*, Order IV, rule 6.

103 *Ibid*.

104 Order V, rule 2, *ibid*.

105 *Ibid*, rule 7.

106 *Ibid*, rule 7(c).

or Local Government shall cause the same to be served on the proper party accordingly.

6.5 Notice of Preliminary Objection Disputing the Court Jurisdiction

Court here means the Federal High Court or the High Court of a State or the High Court of the Federal Capital Territory, Abuja.[107] Under Order VIII, rule 1, where the respondent is challenging the Court's jurisdiction to hear the application; he may apply to the Court for an setting aside the proceedings. Thereof, the respondent's Notice of Preliminary Objection must be filed along with the counter affidavit to the main application.[108] However, where the respondent elects, not to file a counter-affidavit to the main application, the Court shall presume that the respondent has accepted the facts as presented by the applicant.[109] On the date of hearing, the preliminary objection shall be heard along with the substantive application.[110] The Court after hearing the application may either strike out the application for want of jurisdiction or set aside the service of the originating application.[111] On the other side, where the Court does not decline jurisdiction, the Court shall go ahead to give its Ruling on the substantive application.[112]

6.6 Effect of Non-Compliance

Where at any stage in the course of or in connection with any proceedings there has, by any reason of anything done or left undone, been failure to comply with the requirement as to time, place or manner or form, the failure shall be treated as an irregularity and may not nullify proceedings except as they relate to the mode of commencement of the application and the subject matter is not within Chapter IV of the Constitution or the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.[113] This provision of the Rules is to the effect that where an irregularity which consists in the failure to comply with a provision which is not fundamental to the trial occurs, the

107 *Ibid*, Order I, rule 2

108 Order VIII, rule 2 of the 2009 Rules.

109 *Ibid*, rule 3.

110 *Ibid*, rule 4.

111 *Ibid*, rule 5 (a) and (b).

112 *Ibid,* rule 6.

113 Order IX, rule 1(i) and (ii), *ibid*.

irregularity is curable if it does not result in a failure of justice.[114] However, where the noncompliance is a fundamental defect, it is not a mere irregularity but an illegality.[115]

The 1979 Rules treated non-compliance as a nullity as it is trite that Rules of Court are meant to be observed. Therefore, non-compliance with the stipulation of fixing hearing within 14 days of obtaining leave under Order II, rule 1(2) of the Fundamental Rights (Enforcement Procedure) Rules, 1979 resulted in the breach of the Rules thereby rendering the proceedings on the motion on notice a nullity as the trial Court lacked jurisdiction to hear the motion on notice.[116]

6.7 Determining the Justiciability of a Cause of Action under the Fundamental Human Rights (Enforcement Procedure) Rules, 1979 and 2009

There is a limit of relief prescribed in Chapter IV of the 1979 and 1999 Constitutions. Therefore, there is no doubt and the law is well settled that claims for the enforcement for the rights prescribed under Chapter IV of the 1979 and 1999 Constitutions may be brought in High Courts in that State for redress.[117] Therefore, the power of the Chief Justice to make Rules under sections 42(3) and 46(3) of the 1979 and 1999 Constitutions respectively is expressly stated to be with respect to the enforcement of the rights in Chapter IV and is accordingly limited and confined to the fundamental rights prescribed in the Chapters. This follows upon the construction of the provisions *expressio unius est exclusion alterius*. The relief prescribed in Chapter IV are those in sections 30-40 now sections 33-44 of the 1999 Constitution.[118] It is clear, therefore, from the *ipsissima verba* of this section and particularly the expressions underlined which are clear and unambiguous that the relief, which may be claimed by means of this procedure, is limited and confined to any of the provisions of Chapter IV of the Constitution. Any exercise of jurisdiction in respect of subject matters outside Chapter IV is without jurisdiction, unconstitutional and

114 *R v Eguabor* (1962) AII N.L.R 287.

115 *Ahmadu v Kano N.A.* (1966) N.N.L.R.167.

116 *Ogwuche v Mba supra*. The effect of non-compliance with the 1979 Rules was considered by the Courts in the cases of *Ezeadukwa v Maduka* (1997) 8 N.W.L.R. (pt. 518) 527 at 658 and *Umoh v Nkan* (2001) 3 N.W.L.R. (pt. 701) 512 at 525.

117 See sections 42(1) and 46(1) of the 1979 and 1999 Constitutions of the Federal Republic of Nigeria.

118 Per Karibi Whyte in *Sea Trucks v Anigboro* (2001) 10 W.R.N 78 at 97.

void.[119] Accordingly, an action for wrongful dismissal from employment cannot be brought under the fundamental rights procedure rules. Wrongful dismissal belongs to common law class of actions; whereas action for contravention or threatened contravention of a fundamental right belongs to a constitutional class of actions which is specially provided for. It follows that the appropriate procedure must be adopted in each class of actions. Where the main or principal claim is not enforcement or protection of a fundamental right, the fundamental rights procedure rules are inappropriate.[120]

Therefore in determining the justiciability of a cause of action under the 1979 and 2009 Rules, the proper approach is to examine the reliefs sought by the applicant; the grounds for such reliefs and the facts relied upon. If they disclose that breach of fundamental right is the main plank, redress may be sought through the Fundamental Rights (Enforcement Procedure) Rules. But where the alleged breach of fundamental right is incidental or ancillary to the main complaint, it is incompetent to proceed under the Rules.[121]

6.8 Application to Quash any Proceedings

In the case of any application for an order to remove any proceedings for the purpose of their being quashed, the applicant may not question the validity of any order, warrant, commitment, conviction, inquisition or record unless before the hearing of the application he has served a certified copy thereof together with a copy of the application on the Attorney-General of the Federation or of the State in which the application is being heard as the case may be, or accounts for his failure to do so to the satisfaction of the Court hearing the application.[122]

Where an order to remove any proceedings for the purpose of their being quashed is made, in any such case, the order shall direct that the proceedings shall be quashed forthwith upon their removal into the Court which heard the application.[123]

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119 *Ransome Kuti v A.G of the Federation* (1985) 2 N.W.L.R. (pt.6) 211; *Maria David Osuagwu v A.G. Anambra State and others* (1993) 4 N.W.L.R. (pt.285) 13 CA.

120 Per Uwaifo, J.S.C. in *Grace Jack v University of Agriculture, Makurdi* (2004) 14 W.R.N. 91 at 107.

121 *Tukur v The Government of Gongola State* (1989) 4 N.W.L.R. (pt.117) 517; *Egbuonu v Borno Radio Television Corporation* (1997) 12 N.W.L.R.29.

122 Order X, rule 1 of the 2009 Rules.

123 *Ibid*, Order X, rule 2.

6.9 Hearing of the Application

Order II, rules 5, 6 and 7 of the 2009 Rules made provisions for applicant's written address, respondent's written address and applicant's address on point of law while Order XII provides that the hearing of the application shall be on the parties' written addresses.[124] There is the provision for parties to orally argue on matters not contained in their written addresses provided such matters came to their knowledge after the filing of the written addresses.[125] Such oral argument will not be more than twenty minutes granted to each party. Furthermore, when all the parties 'written addresses have been filed and come up for adoption and either of the parties is absent, the Court shall either on its own motion or upon oral application by the counsel for the party present, order that the addresses be deemed adopted if the Court is satisfied that all the parties had notice of the date for adoption and a party shall be deemed to have notice of the date for adoption if on the previous date last given, the party or his counsel was present in Court.[126] It has been stated that this provision is similar with Order XVII, rules 9(4) of the Court of Appeal Rules, 2007 which provides that:

> When an appeal is called and the parties have been duly served with the notice of hearing, but if any party or any legal practitioner appearing for him does not appear to present oral argument even though briefs have been filed by all the parties concerned in the appeal, the appeal will be treated as having been duly argued.[127]

This rule certainly provides for speedy trial. It is therefore in all fours with paragraphs (f) and (g) to the preamble of the 2009 Rules which provide as follows:

> (f) The Court shall in a manner calculated to advance Nigerian democracy, good governance, human rights and culture, pursue the speedy and efficient enforcement and realization of human rights.
>
> (g) Human rights suits shall be given priority in deserving cases. Where there is any question as to the liberty of the applicant or any person, the case shall be treated as an emergency.

This provision is in no doubt in consonant with fair hearing package built into section 36 of the Constitution of the Federal Republic of Nigeria,1999 which provides that in the determination of his civil rights and obligations, including

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124 Order XII, rule 1 of the 2009 Rules.

125 *Ibid*, rule 2.

126 Order XII, rule 3 of the 2009 Rules.

127 N.A. Inegbedion, *op.cit*. p.9.

any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a Court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.[128] This provision can only be successfully invoked where the "determination of the civil rights and obligations" of the person complaining of its violation are in issue; the observance of this provision is not *sine qua non* to every situation involving a hearing.[129]

The expression "reasonable time" within the provisions of section 33(1) and (4) (now section 36(1) and (4) of the Constitution of the Federal Republic of Nigeria, 1999) is not defined in the Constitution. The expression is not also defined in the Fundamental Rights (Enforcement Procedure) Rules, 1979. And that is understandable. The expression is fluid, vague and generic, and therefore incapable of a precise legal definition, a *fortiori*, legal meaning.[130] On the other hand, in the case of *Effiom v State*,[131] the term "reasonable time" was defined to mean among other things, the period of time which, in all circumstances of a case, is necessary to ensure that justice is not only done but appears to a reasonable persons to have been done to all concerned in a case. It means such length of time as may fairly, properly and reasonably be allowed in the trial of a case having regard to the surrounding circumstances and the overall interest of justice.

The same Constitution provides that every person who is charged with a criminal offence shall be entitled to be given adequate time and facilities for the preparation of his defence.[132] A problem arises when the two subsections are read together. While section 36(4) anticipates quick dispensation of justice, the practical impact of section 36(b)(b) is likely to inhibit the provision of section 36(4). Matters relating to section 36(b) include among others adjournment of cases to enable an accused person brief counsel or call witnesses. Therefore, an application of these is bound to result in some delay in the judicial process. Accordingly, the Court owes allegiance to two seemingly conflicting rights. This is because while the Court is under a constitutional duty to ensure a quick hearing within the provision of section 36(6), the same Court is bound by

128 See section 33 of the Constitution of the Federal Republic of Nigeria, 1979.

129 *Baba v Nigerian Civil Aviation Training Centre and another* (1991) 5 N.W.L.R. (pt.192) 388 at 430.

130 Niki Tobi,J.S.C.,Fundamental Rights (Enforcement Procedure) Rules and Speedy Trials in *Judicial Lectures: Continuing Education for the Judiciary,1991*, Chapter 5.

131 (1995) 1 N.W.L.R (pt. 373) 507 at 635-636.

132 Section 36(6)(b) of the Constitution of the Federal Republic of Nigeria,1999. Previously, sections 33(4) and 33(6)(b) of the Constitution of the Federal Republic of Nigeria, 1979.

section 36(6)(b) to give the accused adequate time to prepare his defence. As it is, the Court has a wide discretionary power to exercise and in doing so, it must take into consideration the interest of the accused person who the Constitution presumes innocent until the contrary is proved.

6.10 Order which the Court May Make

At the hearing of any application, under these Rules, the Court may make such orders, issue such writs, and give such directions as it may consider just or appropriate for the purpose of enforcing or securing the enforcement of any of the Fundamental Rights provided for in the Constitution or African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act to which the applicant may be entitled.[133] Nothing in these Rules shall affect the power of Court to punish for contempt.[134]

6.11 Transitional Provisions

By Order XV of the 2009 Rules, the Fundamental Rights (Enforcement Procedure) Rules, 1979 are hereby abrogated.[135] Therefore, from the commencement of these Rules, pending Human Rights applications commenced under the 1979 Rules shall not be defeated in whole or part, or suffer any judicial censure, or be struck out or prejudiced, or be adjourned or dismissed, for failure to comply with these Rules provided the applications are in substantial compliance with the Rules.[136] Such pending Human Rights applications may continue to be heard and determined as though they have been brought under the Rules,[137] and where in the course of any Human Rights proceedings, any situation arises for which there appears to be no adequate provision in these Rules, the Civil Procedure Rules of the Court for the time being in force shall apply.[138] On this provision, it has been correctly observed that it is an innovation of the new Rules which is completely absent in the old 1979 Rules. The result of such absence is that the courts have always treated the 1979 Rules as *sui generis*.[139] Thus in *Chukwuogor and others v Chukwuogor and*

133 Order XI of the 2009 Rules, *op. cit*.

134 *Ibid*, Order XIV,

135 *Ibid*, rule 1.

136 *Ibid*, rule 2.

137 *Ibid*, rule 3.

138 *Ibid*, rule 4.

139 N.A.Inegbedion, *op cit*, at p.13.

another[140] Omokri, J.C.A opined that, the Fundamental Rights (Enforcement Procedure) Rules are made by the Chief Justice of Nigeria in exercise of his power pursuant to the Constitution of the Federal Republic of Nigeria. They are peculiar Rules restricted to the enforcement by a citizen of his right under Chapter IV of the said Constitution. It makes no provision for the importation of any other Rules of Court for the enforcement of such rights. It is therefore clearly wrong for the lower court to fall back to the High Court Rules and purport to derive its power to extend time therefrom. The pronouncement of Omokri, J.C.A., no longer represents the law under the new 2009 Rules. Consequently, any lacuna in the 2009 Rules can be filled by reference to the relevant High Court (Civil Procedure) Rules.[141]

Furthermore, the Fundamental Rights (Enforcement Procedure) are not meant to be an exclusive procedure for seeking enforcement of rights. Indeed, its provisions are not exhaustive and may be supplemented by the appropriate rules of the High Court concerned where the Rules are deficient in any manner.[142]

To further demonstrate the flexibility of the Enforcement Procedure Rules, the courts have held that a claim under the Common Law of Tort could be joined in an application under section 42 of the 1999 Constitution.[143]

Thus, while the Enforcement Procedure Rules admit of new frontiers of claim, the traditional remedies are preserved thus:

> … may make such orders, issue such writs, and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the Fundamental Rights provided for in the Constitution or African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act to which the applicant may be entitled.[144]

Thus in the case of *Asemota v Yesufu and another*,[145] it was held that the remedy provided for in section 42 of the Constitution[146] supplements or is in addition to the existing remedies for enforcing or securing constitutional redress of

140 (2007)AII F.W.L.R.(pt. 349) 1154 at 1167.[C.A].

141 N.A.Inegbedion, *op cit* at p.14.

142 *Ladejobi v Attorney-General of the Federation* (1982) 2NCLR563; see also Order XV, rule 4 of the 2009 Rules.

143 *Federal Minister of Internal Affairs v Shugaba Darman* (1982) 3NCLR 915; *Nwigwe v Onuaguluchi* (1985) 6NCLR 480.

144 Order XI of the 2009 Rules.

145 (1982) NCLR 419.

146 Chapter 62, Laws of the Federation, 2010.

enshrined constitutional rights by the writs of *habeas corpus*, and/ or order of *Certiorari, Mandamus* and or Prohibition.[147]

7. Liberalizing Access to Courts in Fundamental Rights Cases

This part moves to the issue of '*Locus Standi*' or standing which has become so topical at every level of the Nigerian courts.

Indeed, these rights would have meant nothing if they were not enforceable by the courts. However, there are adequate provisions in the Constitution for their enforcement. Therefore, the 1999 Constitution like the 1979 Constitution, in addition to including the fundamental rights in their provisions, provide for, and at the same time guarantee access to the court to the subject for enforcement of these rights.

Eleven fundamental rights have been embodied in the written Constitutions of 1979,[148] and 1999,[149] respectively. These rights as contained in Chapter IV of the Constitutions differ from the principles contained in Chapter II in that whereas, the rights are justiceable,[150] the principles are not.

Section 46(1) and (2) provide for special jurisdiction of the High Court and legal aid thus:

> Any person who alleges that any of the provisions of this Chapter has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress.[151]
>
> Subject to the provisions of this Constitution, a High Court shall have original jurisdiction to hear and determine any application made to it in pursuance of the provisions of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement within that of any right to which the person who makes the application may be entitled under this Chapter.[152]

147 A. Ibidapo-Obe, *Essays on Human Rights Law in Nigeria*, (Lagos: Concept Publications Limited, 2005) 235.

148 Sections 30-40.

149 Sections 33-44.

150 Sections 13-24 of the Constitution of the Federal Republic of Nigeria, 1999.

151 This section is intended to give access to an aggrieved party to any High Court in a State where an alleged contravention of his fundamental right has taken place or is about to take place. See *Grace Jack v University of Agriculture, Makurdi* SC.262/2000.

152 The equivalent sections under the 1979 Constitution are 42(1) and (2); and 44(1) of 1989 Constitution which included the F.C.T, Abuja.

Therefore, according to Uwaifo, J.S.C (as he then was), the jurisdiction conferred on the High Court under section 46 of the 1999 Constitution is neither a supervisory jurisdiction nor the powers of judicial review. It is far beyond and outside of that. It is a special jurisdiction conferred under Chapter IV provisions mainly for the purpose of enforcing or securing the enforcement of fundamental rights.[153]

Flowing from the discussions above, the Fundamental Rights (Procedure Rules), 2009 are not available for all instances in all violations of rights. Therefore, to come by way of the Rules, Nigerian Courts have held that the Fundamental Rights should be the main claim and should not be subsidiary, ancillary or incidental to the main claim.[154]This interpretation seems to be too restrictive. This is because fair hearing being a Procedural Right is always ancillary to the main claim, and so if a worker is dismissed without fair hearing, he should be allowed to bring an application under the Fundamental Rights (Enforcement Procedure) Rules.[155]

What is more, the procedure for enforcement of Fundamental Rights in Nigeria under the 1979 Rules is highly technical wherein the leave of court must be obtained within twelve months from the date of the happening of the event, matter, or act complained of or such other period prescribed by an enactment, or, except where a period is prescribed, the delay is accounted for to the satisfaction of the court.[156] Non-compliance renders the proceedings a nullity.[157] The applicant can, however, revive his right by obtaining a fresh leave.[158]However, under the 2009 Rules, the applicant may enforce his fundamental right by any originating process accepted by the Court which shall, subject to the provisions of these Rules, lie without leave of Court.[159]

In further to liberalize access to Court, the 2009 Rules provide that where the infringement occurs in a State that has no Division of the Federal High Court, the Division of the Federal High Court administratively responsible for the State shall have jurisdiction.[160]This has significantly reduced the hardship an

153 *Fed. Rep. of Nig. v Ifegwua*, *supra* at p. 265.

154 *Ezeaduka v Maduka* (*supra*).

155 N.O.Ogbu, *Human Rights Law and Practice in Nigeria: An Introduction* (Enugu: CIDJAP Publishers Ltd, 1999) 234.

156 Order 2, rule 2.

157 *Ejefor and others v Okeke* (2000) 7 N.W.L.R (pt. 665)363 at 378.

158 *Ezeaduka v Maduka, op cit* at 635.

159 Order II, rule 2 of the 2009 Rules.

160 Order 2, rule 1, *ibid*.

applicant will face in the absence of a Division of the Federal High Court in his domain.

In the bid to further liberalize the access to court in Fundamental Rights cases, the 2009 Rules made a provision to the effect that the Court shall encourage public interest litigations in human rights field, therefore no human rights case may be dismissed or struck out for want of *locus standi*.[161] In particular, human rights activists, and advocates, or groups as well as any non-governmental organizations, may institute human rights application on behalf of any potential applicant. In human rights litigation, the applicant may include any of the following:

(a) Anyone acting in his own interest;

(b) Anyone acting on behalf of another person;

(c) Anyone acting as a member of, or in the interest of a group or class of persons;

(d) Anyone acting in the public interest, and

(e) Association acting in the interest of its members or other individuals or groups.[162]

8. Significance of Public Interest Litigation Clause in the 2009 Rules

The following segment shall highlight briefly the significance of the provisions of the Public Interest Litigations in the 2009 Rules with a view to determining the validity or otherwise of the case law on *locus standi* as decided by Nigerian Courts.

The concept of Public Interest Litigation (PIL) is a novel concept in Nigeria, while in India, largely due to the efforts of its highest Court, Public Interest Litigation has been effectively conceptualized and it is now on the way to being institutionalized.[163] It has come to be recognized as an effective weapon in the armoury of the law for securing implementation of the constitutional and legal rights of the under-privileged segments of society and ensuring social justice to them.[164]

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161 Paragraph 3(e) of the Preamble to the 2009 Rules.

162 Paragraph 3(e), of the 2009 Rules.

163 P.N.Bhagwati, 'Public Interest Litigation', a Public Lecture delivered at the Nigerian Institute of Advanced Legal Studies, Abuja (NIALS Hall of Fame Series) on 21 April 2010, 5.

164 *Ibid*, 5-6.

Public Interest Litigation as a concept has become so important that it now focuses on expose of exploitation of the disadvantaged and deprivation of their rights and entitlements by the vested interests and repression by the agencies of the State and other custodial authorities. It also seeks to ensure that the authorities of the States fulfil their obligations under the Constitution and the law under which they exist and function.[165]

Therefore, an increasing number of public interest cases are being "litigated" before international bodies such as the various committees of the United Nations administering various Statutes, Conventions, Declarations and Resolutions, as well as Regional Organs such as the African Commission on Human and Peoples' Rights; the African Court on Human and Peoples' Rights and the Court of the Economic Community of West African States (ECOWAS). For example, the Constitutional Rights' Project (CRP), the Committee for the Defence of Human Rights (CDHR) and the International Pen, have filed complaints before the African Commission on several breaches committed by the Nigerian Government with respect to civil and political rights and ECOSOC rights.[166]

It is in view of the significance of Public Interest Litigation that the clause must have been included in the 2009 Rules to the effect that the Courts shall encourage and welcome public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of *locus standi* as one of its overriding objectives.

The import of this provision is that notwithstanding the factor of *locus standi* as a limiting factor on public interest litigation, any member of the public or *bona fide* social group can maintain an application in the High Court or the Federal High Court to seek legal redress for the legal wrong or injury caused to such person or class of persons in human right cases. The question then is in the face of this provision, how valid will the judgments in the case of *Adesanya v President of Nigeria*,[167] and other classical cases on *locus standi* in Nigeria be? This shall be the thrust of the next segment of this article.

165 *Ibid*, 7.

166 A.O. Popoola, 'Public Interest Lawyering in Nigeria: Development, Basis and Limitations', A paper presented at the Sensitization Workshop on Public Interest Lawyering organized for Legal Practitioners', in the South West by Access to Justice: Lagos, August 7 2009, 13.

167 (1980) 5 S.C.112.

8.1 Limitations on Public Interest Litigation before the 2009 Rules

The problem occasioned by the strict compliance with the *locus standi* rule is captured in a statement by P.N. Bagwati, who noted thus:

> I realized that that the main obstacle which deprived the poor and the disadvantaged was the traditional rule of *locus standi* or standing which insists that only a person who has suffered a specific legal injury by reason of actual or threatened violation of his legal or constitutional right or legally or constitutionally protected interest can bring an action for judicial redress. It is only the holder of the right who can sue for actual or threatened violation of such right and no other person can file an action to vindicate such right.[168]

Under section 46 of the Constitution of the Federal Republic of Nigeria, 1999, an applicant must be the person whose right has been, is being, or is likely to be contravened and the right must fall within the fundamental rights provisions (i.e. sections 33-44 of the Constitution). Furthermore, the applicant must show that he has *locus standi* in the issue complained of.[169] The right of the complainant to institute court proceedings, otherwise known as standing is a condition precedent to any hearing of an alleged cause of action in fundamental right cases. To put it positively, the Court will exercise its judicial power in favour of a litigant whose right or obligation has been directly or indirectly involved in the litigation or who alleges that any of his fundamental rights has been, is being or likely to be contravened in relation to him.[170] Therefore, the Nigerian attitude to standing is conservative.[171] In *Olawoyin v Attorney-General of Northern Region of Nigeria*,[172] the Court refused standing to father of a minor to challenge a Regional law which banned young persons from participating in political activities. And in *Attorney-General, Eastern Nigeria v Attorney-General of the Federation*,[173] an action seeking to nullify the 1963 Census on the ground that the Prime Minister acted unlawfully in accepting highly inflated census figures was dismissed on the ground that no legal right in the territory as such would be affected, and therefore, the plaintiff lacked *locus standi* to bring

168 P.N.Bhagwati, *op.cit*. 8.

169 *Uzoukwu v Ezeonu* II (1991) 6 N.W.L.R. (pt. 200) 708 at 784.

170 Sections 6(6)(b) & 42 and 236 of the Constitution of the Federal Republic of Nigeria, 1979.

171 Mohammed Bello, 'Federalism and Pluralism' in T.O.Elias and M.I.Jegede (eds), *Nigerian Essays in Jurisprudence,* (Lagos: M.I.J. Publishers Limited, 1993) p.133.

172 (1961) AII NLR 269.

173 (1964) AII LRN 224.

the action. This was the position when the country was operating the English Parliamentary system of government.[174]

In 1979, Nigeria opted for the Presidential System of government. The case of *Senator Adesanya v The President* decided by the Supreme Court under the new Constitution had come to be popularly seen as the *locus classicus* on *locus standi* in Nigeria.[175] The plaintiff/appellant in that case, was a member of the Senate of the National Assembly who had challenged the constitutionality of the appointment of Mr. Justice Ovie Whiskey by the President as Chairman of the Federal Electoral Commission. The contention of the plaintiff/appellant during the Senate proceedings was that Mr. Justice Ovie Whiskey, at the time of his appointment, was the Chief Judge of Bendel State and was, therefore, not qualified by virtue of the fact that he was (still) in the Public Service of Bendel State of Nigeria. In the High Court, the plaintiff claimed and was granted a declaration that the appointment was unconstitutional, null and void and an injunction restraining the first defendant, the President, from swearing in the appointed Chairman. Being dissatisfied with the judgment, the defendant appealed to the Court of Appeal. It should be noted that the issue of *locus standi* was neither raised nor canvassed at the trial, but the learned trial Chief Judge observed that since the plaintiff had no personal interest in the matter, he had no *locus standi* to bring the proceedings as the relief sought by him would confer no tangible benefit on him. Counsel for the plaintiff, however, asked that the matter be referred to the Supreme Court for interpretation under the provisions of section 259(3) of the Constitution. One of the substantial questions of law referred to the Court was whether the plaintiff had *locus standi*.

In answering the question, Atanda Fatayi-Williams, C.J.N stated as follows:

> I take significant cognizance of the fact that Nigeria is a developing country with a multi-ethnic society and a written Federal Constitution, where rumour mongering is the pastime of the market places and the construction sites. To deny any member of such a society who is aware or believes of our legislative Houses, whether Federal or State, is unconstitutional, access to a court of law to air his grievances on the flimsy excuse of lack of sufficient interest is to provide a ready recipe for organized disenchantment with judicial process.

His Lordship stated further:

> In the Nigerian context, it is better to allow a party to go to court and to be heard than to refuse him access to our courts. On access, to my mind, will stimulate the

174 A.O. Popoola, *op. cit.* p. 21.

175 *Ibid.*

> free for all in the media as to which law is constitutional and which law is not, in any case, our courts have inherent powers to deal with vexatious litigants or frivolous claims

However, Senator Adesanya was denied standing. In the same case, Obaseki, J.S.C. adopted a different approach but arrived at the same conclusion, denying standing to the appellant. He said:

> The mere fact that an Act of the Executive or Legislature is unconstitutional without any allegation of infraction of rights is adverse effect on one's civil rights and obligations poses no question to be settled between the parties in court.

The immediate effect of the apparently conflicting pronouncements of the Supreme Court Justices who sat on the *Adesanya* case was that further confusions and uncertainty were injected into the law of *locus standi*. While some lower courts have relied on pronouncements that suit their bias to accord standing to litigants, others have found convenient passages in the same case to deny standing to litigants.[176]

In view of the above conflicts in the above case of *Adesanya*, it has been stated that it must have to be admitted that the state of our law on *locus standi* is far from satisfactory.[177]

8.2 Post Adesanya's Case

However, there was gradual liberal attitude by the courts towards the doctrine of *locus standi*. Thus in the case of *Attorney-General of Kaduna State v Hassan*,[178] a father was accorded a standing to secure the prosecution of the murderer of his son and in *Fawehinmi v Col. Akilu and another*,[179]the Supreme Court declared that under the Lagos State Criminal Procedure Code, a private person has standing to prosecute murder offences. Subsequently, the Code was amended and the right of private prosecution has been limited to the offence of perjury only. Therefore, there seems to be a deliberate inclination towards liberalism on questions concerning *locus standi* in constitutional cases.[180]

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176 A.O. Popoola, *op.cit*. 24.

177 P. Nnaemeka-Agu, 'Judicial Powers: *Quo Tendimus*' in T.O. Elias and M.I.Jegede (eds) *Nigerian Essays in Jurisprudence, op. cit*. p.289.

178 (1985) 2 NWLR (pt. 8) 483

179 (1987) 4 NWLR 797.

180 A.O. Popoola, *op. cit*. 24-25.

Again, in the case of *A.G. of Bendel State v A.G. of the Federation*,[181] the Supreme Court enunciated very important constitutional principles. The case arose over a new revenue sharing arrangement which was enacted by the Federal Government on 2 February 1981. The 12 state governments not controlled by the party in power at the centre, the National Party of Nigeria (NPN), were dissatisfied with the share given to the States by the Act. Their complaint was not that the Federal Government had no power to enact the enabling Act, but that the inadequate share given to the States had resulted from an unconstitutional procedure used in passing it, in that the share allocated to the States by the Act was less than what had been approved by the House of Representatives when the Act was before it. The State Governments' share under the Act represented an amended version of the bill as passed by the Senate alone, and adopted by 13 votes to 11 by the joint Finance Committee consisting of 12 members from each House, from where it went straight to the President for his assent and was assented to by him and thereby purportedly brought into force an Act of the National Assembly, without being referred back to the two Houses in separate or joint sessions after the joint Finance Committee had finished with it. Therefore, in sending the bill straight from the Committee to the President for his assent, the President of the Senate had acted upon a view of section 55(2) of the 1979 Constitution which empowered the Committee to try to resolve the differences between the two Houses over a money bill.

On *locus standi*, the Court distinguished the case before it from the case of *A.G. of Eastern Nigeria v A.G. of the Federation*[182] in order to recognize the *locus* of the Bendel State Government.[183] The Court also upheld the justiciability of political question or the legal nature of a political question i.e. a political question can raise issue of and found a legal right. Accordingly, it has been stated by a writer that this decision reinforced confidence in the Judiciary and put the reputation of the Supreme Court at its pinnacle.[184]

In 1988, Justice Eso, J.S.C., had this to say about the applicability of the doctrine of *locus standi* as propounded in the case of Senator Abraham Adesanya:

> Whatever one may say of this decision of the Supreme Court in the *Halilu* case and the previous decision in *Abraham Adesanya* case, the last has not been heard or read

181 (1981) 10 SC1.

182 *Op cit*.

183 *Ibid*, 50.

184 B.Obinna Okere, "Judicial Activism or Passivity in Interpreting Nigerian Constitution" in *Current Legal Problems in Nigeria, Proceedings of the Anambra State Law Conference*, (Enugu: Fourth Dimension Publishing Co., Ltd, 1988) 61.

> on the *locus standi* issue. But happily, the *Abraham Adesanya* case has lost its still wing in a criminal case flight.[185]

Consequently, going by the provision of the encouragement and welcoming of public interest litigations in the human rights field and further maintaining that no human rights case may be dismissed or struck out for want of *locus standi* as one of the overriding objectives of the 2009 Rules, the case law on *Adesanya* pertaining to *locus standi* is no longer valid. But again we may have to wait for a judicial pronouncement on this provision of public interest litigations in the 2009 Rules.

It shall be within place to briefly have a look at how the concept evolved in India. In India, the Supreme Court took the view that it was necessary to depart from the traditional rule of *locus standi* and to broaden access to justice by providing that a legal wrong or a legal injury is caused to a person or to a class of persons by violation of their constitutional or legal rights, and such a person or class of persons, is by reason of poverty, disability, socially or economically disadvantaged position, unable to approach the court for relief.[186] Any member of the public or *bona fide* social action group can maintain an application in the High Court or the Supreme Court seeking judicial redress for the legal wrong or injury caused to such person or class of persons.[187] Moreover, in India, the relaxation of what has been termed "Public Interest Litigations" is still more far-reaching.[188] *Locus standi* can be given to any person who writes a letter of complaint from any part of the country in the name of the Peoples' Union for Democratic Rights to the Chief Justice.[189] The rationale for this has been justified in the case of *Peoples' Union for Democratic Rights v Minister of Home Affairs,*[190] where Dayal, J, stated as follows:

> Following English and American decisions, our Supreme Court has of late admitted exceptions from the strict rules relating to *locus standi* and the like in the case of a class of litigations which have acquired classification known as "public interest litigation" that is, where the public in general are interested in the enforcement of fundamental rights and other statutory rights…Today it is perhaps commonplace to observe that as a result of series of judicial decisions since 1950, there has been

185 Eso, JSC, 'The Court as Guardian of the Constitution' being a paper presented at the All Nigeria Judges' Conference, at Abuja in 1988, 41.

186 PN Bhagwati, *op. cit.* p. 9.

187 *Ibid*.

188 PN Nnaemeka-Agu, *op. cit.* 289.

189 *Ibid*.

190 (1986) L.R.C. (Const.) 547.

> a dramatic and radical change in the scope of judicial review. The change has been described … as an upsurge of judicial activism.

Accordingly, the entire concept of Public Interest Litigation as provided for under the 2009 Rules is with a view to reaching justice to everyone in Nigeria including the poor and deprived sections of the community, so that all could, irrespective of their social or economic position, enjoy the basic human rights guaranteed under the Constitution and become equal participants in the fruits of the freedom and liberty.[191]

It has been stated that in our dynamic and ever-changing society, the Courts cannot rightly remain static while the society is changing. A much more liberal and courageous interpretation can go a long way to bring them out of the present conundrum and bolster the overall image of the Judiciary. We need not go to the length which India has gone by evolving epistolary jurisdiction.[192] But we can borrow a leaf from Canada, go a little further from Akilu No. 2, and hold that when the rest of the litigation is a public right or against a public officer in the execution of his public functions, every member of the general public who is affected or has complaint about the way he has performed it can bring an action to challenge it.[193]

The above is certainly in consonance with what Lord Denning observed:

> The tendency in the past was to limit them to persons who had a particular grievance of their own over the rest of the public. But in the recent years there have been a remarkable series of cases in which private persons have come to the court and have been heard. There is now a much wider concept of *locus standi* when a complaint is made against a public authority. It extends to anyone who is not a mere busybody but is coming to the court on behalf of the public at large.[194]

At this juncture, it is worth stating that by the provisions of the Public Interest Litigations in the 2009 Rules, Nigeria has learnt a lesson from India where its Supreme Court has done away with the erstwhile strict rule of *locus standi*. The import of this is that litigation can be initiated by organizations on behalf of groups belonging to socially and economically weaker sections of the society complaining of violation of their fundamental rights.[195] Definitely, through the

191 PN Bhagwati, *op. cit*. 11.

192 This is where the court can be moved by just addressing an epistle, that is, a letter on behalf of the disadvantaged class of persons. This was a major breakthrough achieved by the Indian Supreme Court in bringing justice closer to the large masses of people in the country.

193 PN Nnaemeka, *op.cit*. 291.

194 Denning, *The Discipline of Law* (1979) 117.

195 A.O. Popoola, *op. cit*. 38.

provision of the Public Interest Litigation in the 2009 Rules, people can bring their problems before the courts and basic human rights and distributive justice can be ensured to them through this innovation.

In addition to the provisions of the Public Interest Litigations in the 2009 Rules, in liberalizing access to court in Fundamental Rights cases, Court of Appeal held in the case of *Adeyanju v W.A.E.C.*[196] *inter alia* that fundamental rights to be enforceable should not only be limited to the main or principal right. Galadima, J.C.A., held further in the case that it was not provided in the Constitution of the Federal Republic of Nigeria or any Constitution that the right of an individual to enforce his fundamental rights depended on a consideration whether the right breached was the main or principal cause of action or fundamental issue before the Court.[197] A fundamental right is the basic or primary right. It is an essential and important right of an individual. It can be enforced at any time. All the applicant must show is that he has the *locus standi* in the sense that his fundamental right has been contravened or is being contravened or is likely to be contravened. However, with the plethora of Supreme Court cases to the effect that where the alleged breach of fundamental right is incidental or ancillary to the main complaint, it is incompetent to proceed under the Rules, the decision thereof in the case of *Adeyanju v W.A.E.C.*[198] cannot be the correct principle of law.[199]

In order to make for easy accessibility to courts for litigants, filing fees for enforcement of Fundamental Rights have been made affordable.[200] This basic and important provision is absent in the 1979 Rules.

9. Conclusion

In conclusion, we have been able to define briefly fundamental rights and highlight the various provisions of the fundamental rights in the Constitution. We have also appraised the Fundamental Rights (Enforcement Procedure) Rules (both the 1979 and 2009 Rules). It is no doubt that the 2009 Rules are improvement upon the 1979 Rules. The Rules are used for the enforcement of any of the rights entrenched in Chapter Four (4) of the Constitution of

196 (2002) 13 N.W.L.R. (pt.785) 479.

197 *Ibid,* pp. 497-498.

198 *Op cit.*

199 *Egbuonu v Borno Radio Television Corporation*, (*supra*); *Sea Trucks v Anigboro,* (*supra*).

200 Appendix A provides for a fee of N500.00; others are: for a motion, it shall be N100.0; for an affidavit, it shall be N50.00; for a written address, it shall be N100.00 and for any other process, it shall be N100.00.

the Federal Republic of Nigeria.[201] It has been held that the Fundamental Rights (Enforcement Procedure) Rules, 1979 constituted a complete code of procedure for the enforcement of fundamental rights.[202] Therefore, anyone who alleges that any of those rights is breached, or being breached or likely to be breached should have access to court for redress. Therefore, for people to have more access to court, there should be a Constitutional amendment to enjoin the Federal Government of Nigeria to make financial provision to assist indigent citizen where his fundamental right is infringed as was provided for in the 1989 draft Constitution.[203] The vex issue of *locus standi* no longer hinders an applicant from having access to court in view of the provisions of Public Interest Litigations in the 2009 Rules. Therefore what is overriding is not the proof of the case but to accord one the standing to enable him prove his case. In this way, the importance of human rights will not only be rhetoric but also a practical reality in the lives of the people on the basis of both the civil and political rights and rights of development with the general well-being of the society.[204]

It is also suggested that the Rules should still be made simpler than they are. This is because substantive law will be meaningless if it leads to injustice. Procedural legislations are supposed to serve the end of justice and if procedure which includes legal technicalities blunts the ends of justice they should be discarded.[205]This was emphasized by Obaseki, J.S.C. (as he then was) in the case of *Governor of Lagos State v Ojukwu* that, "our administration of justice should be completely overhauled. Legal technicalities and other impediments in the dispensation of speedy justice should be discarded. Court procedure should be simplified".[206]

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201 Isah H. Ciroma, 'Critical Appraisal of the Effectiveness of International and Regional Human Rights Enforcement Mechanism' in M.T.Ladan (ed), *Law, Human Rights and The Administration of Justice in Nigeria, Essays in Honour of Hon. Justice Muhammed Lawal Uwais,* CJN, *op cit*, 144.

202 U.O. Umozurike, 'An Introduction of Human Rights Protection Under the African Charter on Human and Peoples' Rights, D.Brand et al (eds) *From Human Wrongs to Human Rights*, Part III, 3rd South African Moot Court Competition: Kwaluseni, Swaziland, (1994) Pretoria: Centre for Humans 1996, 73-83; C.M.Peters, The African Court of Justice- Jurisdictional, Procedural and Enforcement Problems: Some Thoughts in M.A.Ajomo and Adewale(eds) African Economic Treaty: Issues, Problems and Prospects, Lagos: NIALS, 260.; also see Isah.H.Ciroma, *op cit* at 145.

203 Section 44(4) of the 1989 Constitution.

204 I.A.Ayua, *op. cit* 139.

205 Muritala Aminu, 'The Observance of the Rule of Law and Fundamental Human Rights' in Yemi Osinbajo and Awa.U. Kalu (eds), *Law Development and Administration in Nigeria*, op cit, 395.

206 (1986) 1 N.W.L.R. 621.

Again, over the years, there has been a pattern of deliberate denial of citizen's access to the courts in Nigeria through various negative legal devices. These access curtailing devices include ouster clauses, limitation acts, protection of public officers from suits and the doctrine of State Immunity. Also falling within this group is the problem of *locus standi*. In no doubt all these devices have been put in place to deny or curtail citizens' access to the courts. It is the intention of the writer to dwell briefly on *locus standi* as a device in curtailing access to court in fundamental rights cases.

Gay Rights In A Polycultural Society: Problematizing The Jurisprudential Flaws In The Architecture of the Obama-Kenyatta Disputation

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Abstract

This article addresses matters concerning gay rights in Kenya in light of the debate that arose during the state visit by the American President in July 2015. It exposes the fallacies that underlie the arguments advanced by the proponents as well as the opponents of gay rights, and outlines the key jurisprudential concerns that have been ignored by both camps. For instance, whereas President Obama exposes gay right or non-discrimination against homosexuals, as an amoral principle of justice which can be embraced by all nations irrespective of their moral convictions regarding homosexuality, it is argued in the article that this has not been the case. On the contrary, the development of the American law on the point has closely followed the evolution of the moral convictions of the American society. For the other camp, the paper asserts that the argument that gay rights is a non-issue, and that homosexuality is alien to the Kenyan culture is fallacious as it is impossible to justify the assertion that culture or religion should be enforced by law, as this would lead to some difficulties in determining those beliefs to be legally enforced, and those that should not.

1. Introduction

When political positions are presented as claims of right, buttressed by ideologies so dogmatic that other possibilities cannot be recognized as having potential to legitimacy, we can understand why our present trend towards reduced civility in political and cultural discourse seems inevitable. - Robert C.L. Moffat.[1]

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1 Robert C.L Moffat "Rights and New Fundamentalism: New Essays on Toleration" *Beihet 19 Retchsthedrie 55, 56* (Eugene E. Dais etals eds 1998).

If there is one epochal event which marked the nadir of President Barrack Obama's recent visit to Kenya, it was the Obama-Kenyatta gay rights disputation. Even before President Barrack Obama arrived, the gay rights debate was already raging, with the ardent critics to the recognition of gay rights, led by the Deputy President, William Ruto, warning President Obama of serious backlash if he dared talk about gay rights on Kenyan soil. President Obama, however, did not disappoint. On the second day of his visit, he stirred the hornet's nest with his public criticism of African governments whom he accused of discriminating against law abiding citizens on grounds of their sexual orientation.[2] The criticism was not taken kindly by his host, President Uhuru Kenyatta, who responded swiftly with a counter attack, accusing him of attempting 'to force people to accept that which they do not want'.

What followed was a barrage of commendations and condemnations from the opponents and proponents of the gay and lesbian rights, almost in equal measure. While some politicians and religious leaders applauded President Kenyatta for dismissing and rebuking President Obama's gay rights message on various, but largely divergent grounds,[3] civil society organizations, especially those that advocate for protection and/or promotion of gay and lesbian rights supported President Obama's position in the matter, arguing that relegation of gay rights to a non-issue status could easily be interpreted to mean that the state condones or supports violation of the rights of gays and lesbians,[4] or that the state supports acts of violence directed at gays and lesbians. [5]

If the arguments by President Obama and President Kenyatta on the gay rights controversy are to be saved from degenerating into variants of moral nihilism[6] or moral panic,[7] there is need for a calm and dispassionate appraisal

2 See *Nation Newspaper* edition of 27 July 2015.

3 Senators Mutula Kilonzo and Kipchumba Murkomen as well as other Jubilee Alliance Members of Parliament such as Jamleck Kamau, John Muchiri and Victor Kidala, supported President Kenyatta's firm stand on the gay rights issue which they argued demonstrated that we are a sovereign nation and that we are not living as underdogs.

4 The National Gay and Lesbian Human Rights Organization, through its East Africa Bureau Chief, Gabe Joselon twitted that the comments by President Kenyatta could be used to licence rights violations against gays and lesbians in Kenya.

5 The Methodist Church of Kenya presiding bishop, Joseph Ntombura, Bishop Joseph Obanyi of the Catholic Diocese of Kakamega and Bishop David Ogunde of the Christ is the Answer Ministries supported President Kenyatta arguing that homosexuality is not only unbiblical but also that it is against our culture.

6 Nihilism is the meta-ethical view that nothing is intrinsically moral or immoral.

7 An episode often triggered by alarming media stories and re-enforced by reactive laws and public policy of exaggerated or misdirected public concern, anxiety, fear or anger over perceived threat to social order. See Charles Krinsky "Introduction, the Moral Panic Concept", *Ashgate Research*

of the fundamental jurisprudential assumptions that underpin them, with a view to exposing the fallacious premises on which any of them or both of them are based. Thus, against the background of the articulate, but undoubtedly provoking statement by Robert C. L. Moffat already cited,[8] this article intends to fill the void in the academic articulation of the gay-rights debate.

The key question which sparked off the war of words between the two presidents is the question whether it is proper and just to discriminate against people on account of their sexual orientation. This is a variant of the age-old debate on whether it is proper and just to criminalize, homosexuality. So much jurisprudential ink has been spilt on this debate with apparently no principled resolution in sight. But the debate has now evolved and acquired a completely new dimension. Attention has now shifted away from the question whether homosexuality is immoral (and therefore criminal) to the question whether, in spite of the alleged immorality and/or criminality thereof, it is proper and just to deny homosexual couples their fundamental rights and freedoms, as well as the question whether homosexual marriages should enjoy equal legal status with heterosexual marriages.

This article attempt a critical appraisal of the multiplicity of jurisprudential issues that emerge from the Obama-Kenyatta disputation, which may be reduced into the following question, namely: Is public condemnation sufficient, in and of itself, to justify making homosexuality a crime? If so, would this not be inconsistent with the constitutionally guaranteed right of individual liberty and the truism that morals, even of the largest mob, cannot come warranted for truth? But if public condemnation is not sufficient, then what more is needed? Must there be a demonstration of some present harm to particular persons affected by homosexuality? Or is it sufficient to show some effects on social customs and institutions which alters the social environment, and thus affects all members of society indirectly? If the latter, then must it be demonstrated that these social changes threaten long term harm of some standard sort, like an increase in crime, or a decrease in productivity? Or would it be enough to show that bulk of the population would deplore such change? If so, then does the requirement of harm add much to the bare requirement of public condemnation? Should law be used to institutionalize and legitimize the public condemnation, not just of the vice of homosexuality, but also of the person of the homosexual individual? Should the law discriminate openly between

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8 Note 2 *supra*.

homosexuality and heterosexuality by donating certain rights to heterosexual relationships that are denied to homosexual relationships?

From the foregoing, it is clear that this article will seek to answer, not just the question whether the morality of a community counts, but also what counts as a community's morality. For a more spectral analysis, an examination of the meaning and scope of gay rights is required; not just to contextualize the debate, but also to show that the failure to properly conceptualize the term 'gay rights' not only obfuscates issues but also encourages unnecessary emotivism that makes dispassionate debate impossible. This will be dealt with in the first section.

The next section will then confront the quintessence of the Obama-Kenyatta disputation: the question whether the morality of a community counts. It will reveal that, while President Obama adopted a consequentialist argument to prove that the morality of a community does not count, President Kenyatta employed a deontological argument to show that the morality of a community does count. For President Obama, the morality of homosexuality is a non-issue in the debate as the central concern is homosexuality itself. According to President Kenyatta, however, homosexuality itself is a non-issue but its morality is. It is, however, argued that these rival arguments are premised on shaky jurisprudential foundations.

What follows thereafter is a demonstration that rationalizing the relation between law and morality (and thereafter resolving the jurisprudential flaws in the Obama-Kenyatta disputation) is a herculean task that transcends the scope of this paper. The paper thus concludes with a call for a delicate balancing of moralism and liberty and a reminder that laws which restrain a man on the sole ground that he is incompetent to decide what is right for himself, are not just profoundly insulting to him, but also to humanity. It advances a thesis that a liberal, polycultural and multi-religious society, like ours, must avoid undue legal paternalism and instead foster freedom and tolerance of divergent moral viewpoints.

2. Re-Conceptualising Gay Rights: Preventing the Conflagration of Public Condemnation from Spreading Past The Perceived Vice of Homosexuality and unto the Person of the Homosexual

The phrase 'gay rights' has for a long time, been taken to represent gay persons' interests in the legalization of homosexual intercourse. For this reason it has been strenuously opposed by those who believe in the perceived immorality

of homosexuality. While the homosexuals and their supporters have been fighting to expand the meaning and scope of 'gay rights' their opponents have been struggling to counter their efforts. This has created lots of confusion as to the true scope and meaning of the phrase 'gay rights', if indeed such rights exist. It's therefore necessary to reconceptualise 'gay rights' and to re-define its precise meaning and scope, if public condemnation of homosexuality is to be prevented from spreading beyond the vice of homosexuality to the person of the homosexual, as well as to those who either identify with their cause or plight, or who are related to them.

Rights arguments involve universalizing the interests of an identity group by restating the interests of the group as characteristic of all people, thereby allowing the group to make its claims as claims of reason rather than of mere preference. Rights arguments are therefore binding and dispositive because they appeal to shared and uncontested truisms. It's for this reason that the supporters of homosexuality adopted rights rhetoric. But are there any such things as 'gay rights'? And if so, then what are their exact scope?

Although the meaning of the term 'right' is highly contested, the popular view of the same appears to be that expressed by Ronald Dworkin in his book entitled *Taking Rights Seriously*.[9] Dworkin distinguishes between two senses in which the term 'right' is commonly used in politics and in philosophy. Sometime people say that they have a right to something when they mean simply that they have an interest in it, either because they need it or because it is good for them to have it. This is what Dworkin calls the weak sense of the term 'right'. A successful claim of right (which Dworkin calls the strong sense of right) however is when a person is said to have a right to something not just because it is in his interest to have it, but because it is wrong for the government to deny him the enjoyment of the same, even though it would be in the general interest to do so. One cannot therefore claim a right to drive on a particular road when the government is perfectly entitled to stop him from driving on the same road. In other words, it is impossible to have a right to something if the government has a right to deny you the same thing.

On the basis of the foregoing argument, the term 'gay rights' therefore refer to all those entitlements that merit legal protection against the backdrop of homosexuality and which it would be wrong for the government to interfere

9 Ronald Dworkin, *Taking Rights Seriously Universal* (Law Publishing Co, 5th Indian Reprint, 2010) 268.

with or constrain. Accordingly, the following categories of 'rights'[10] would all be comprised within the broader rubric of gay rights:

(i) Rights that accrue to homosexual persons on account of their identity as such (or on account of their sexual orientation) which include the right to enter into same-sex relationships;

(ii) Rights that accrue to homosexual persons as human beings. Since homosexual persons (like their heterosexual colleagues) are human beings, they have rights which must be protected, like the rights to liberty, equality etc.;

(iii) Rights that accrue to non-homosexual persons but on account of homosexuality, like the right of non-homosexual persons to register organizations that protect violations of the rights of homosexuals, or the rights of children adopted by homosexual partners not to be stigmatized or discriminated against;

(iv) Rights of homosexual persons, and of those who support their cause to demand equal protection of marriages that derive from homosexual and heterosexual relationships.

Failure to distinguish clearly between the above entitlements all of which are comprised within gay rights, has led to the unfortunate situation where the public resentments and condemnation have been directed beyond the vice of homosexuality to the person of the homosexual individual as well as those who either identify with their cause or who are related to them in one way or other. Besides, the failure to draw the said distinction also confuses the gay rights debate by encouraging irrational judgments or arguments. For example, the Non-Governmental Organizations Co-Ordination Board, recently rejected an application by a non-homosexual person to register an organization to fight the pervasive violation of the rights of homosexual persons on grounds that such an organization would be immoral and would legitimize homosexuality besides destroying society.[11] The Board simply failed to distinguish the entitlement comprised in category (a) above from the entitlement comprised

10 Even though the question whether the entitlements enumerated herein can felicitously be called "rights" in the proper acceptation of that term is highly contestable (depending on the moral conviction of the readers) the terminology of rights will be used in reference to them for ease of application.

11 In petition No. 440 of 2013 *Eric Gitari v NGO's Co-ordination Board and others* the petitioner filed a constitutional petition challenging the decision by the Non-Governmental Organizations Co-ordination Board refusing to register a non-governmental organization that he wanted registered to fight for the rights of homosexual and lesbian persons on the basis of the alleged criminality and/or immorality of homosexuality. In a judgment delivered on 24 April 2014, Justices Lenaola, Odunga and Ngugi found that the said decision by the Board violated the petitioner's rights under articles 20(2), 31(3), 27(4), 28 and 36 of the Constitution.

in category (c) above. It may, for example, be immoral to steal but it cannot be equally immoral to save a thief from being subjected to mob justice! In the same manner, it may be conceded for the sake of argument that it is immoral to engage in homosexual activities, but it does not follow that it is equally immoral to protect the rights of homosexual persons from being violated either by government or by other people.

The subtle differences between the above categories of entitlements, all of which are comprised in 'gay rights' become clearer when the content thereof are examined. The question whether it would be wrong for the government to restrict a man's freedom to engage in sex with another man obviously receives a different answer from the question whether it is wrong for the government to deny a homosexual person the opportunity to join military service. While there may be compelling moral grounds for criminalizing homosexuality, there can hardly be an equally compelling reason for discriminating against homosexual persons by denying them the opportunity to join military service. This means that, while there may be justifiable grounds for denying the existence of a homosexual person's right to full sexual autonomy, there can never be any reasonable justification for denying homosexual persons right to equality and/or to liberty or to deny them the freedom to associate either with other homosexuals or with heterosexuals.

In a similar manner, the moral principle that may argue against recognition of gay marriages cannot possibly justify a refusal to register an association of homosexuals nor legitimization of stigma and discrimination against children adopted by gay couples. When the law denies homosexual persons the fundamental rights and freedoms that "all persons" are entitled to, or when it imposes unjustifiable restrictions (for example, when it prohibits registration of associations of homosexuals or associations formed to protect the rights of homosexuals) then it effectively extends public condemnation, beyond the perceived vice, and unto the person of the homosexual or to those who identify with or support the cause of homosexuals. This should never happen in an open and democratic society based on human dignity, equality and freedoms. What emerges from the foregoing analysis is the truism that whatever conception of gay rights is accepted in an open and democratic society based on human dignity, equality and freedoms, it must perforce, maintain a philosophically, socially and politically justifiable balance between moralism and liberty with a view to ensuring that the human dignity of the homosexual individual is not only protected but also promoted whatever may be the community's moral views concerning homosexuality.

From the foregoing, it follows that the term 'gay rights' must be properly conceptualized. Just as the term HIV rights mean all rights that merit legal protection in the wake of HIV pandemic (and are not just restricted to the rights of HIV infected persons) the term gay rights must include all rights that merit legal protection on account of homosexuality, without limiting it to the rights of homosexual persons to engage in same-sex relations. To construe 'gay rights' to mean the rights of homosexual persons to engage in same sex relations is to trivialize the issue, and this is what has encouraged irrationality and undue sophism in the gay rights debate as witnessed in the Obama-Kenyatta disputation.

3. Does The Morality of a Community Count? Consequentialist Versus Deontological Approach to Homosexuality

On 25 July 2015, during a joint press conference in Nairobi, President Barack Obama and President Uhuru Kenyatta sparred over gay rights. President Obama was the first to speak. As already alluded to above, he criticized African governments of discriminating against law abiding citizens on the basis of 'who they love'. Drawing on his own experience as an African-American in the United States, President Obama stated:

> If somebody is a law abiding citizen who is going about his business and working in a job, and obeying traffic signs and doing all the other things that good citizens are supposed to do and not harming anybody, the idea that (he)is going to be treated differently or abused because of who (he) loves is wrong … If you look at the history of countries around the world, when you start treating people differently, not because of any harm they are doing anybody, but because they are different that is the path whereby freedoms begin to erode … I believe in the principle of treating people equally under the law. The state should not discriminate against people because of their sexual orientation".

Reacting to the above sentiments, and in a bitter disagreement therewith, President Kenyatta responded as that:

> There are some things that we must agree we don't share. Our culture, our society do not accept (homosexuality). For Kenyans today, the issue of gay rights is a non-issue. We want to focus on other areas that are day-to-day living for our people. It is very difficult to force people to accept that which they do not want… this issue is not really an issue that is on the foremost mind for most Kenyans and that is a fact.

President Obama advanced a purely consequentialist argument in support of the proposition that the morality of a community is irrelevant to the gay

rights debate. What is relevant are the consequences of the homosexual person's conduct. If the conduct in question causes harm to some other person then it should be restrained. But if not, then there should be no interference. This argument was premised on the following jurisprudential assumptions:

(a) The theory that in a polycultural society,[12] like Kenya, no group (whether dominant or not) should be allowed to impose their moral convictions on any other group;

(b) The assumption that prohibition of all forms of discrimination against homosexuals is a dogmatic principle of universal application which can be adopted by any country without regard to the prevailing moral convictions of the people;

(c) The assumption that it is not the business of law to take positions on matters of morals except as may be necessary to prevent harms to others; and

(d) The assumption that any law which violates the principle of prohibition of all forms of discrimination against gays is invalid, or that any discrimination against homosexuals that is not founded on law is invalid.

In direct opposition to President Obama, President Kenyatta, relying on a purely deontological argument, advanced a theory that morality of a community counts. According to him, the society has a right, based on its moral conviction, to determine the rights, if at all, that will be enjoyed by homosexual persons. The major weakness in President Kenyatta's argument – which will be examined later – is that his arguments would only have been complete if, besides telling us that the morality of a community counts, he also explained what counts as the community's morality.

President Kenyatta also appeared to advance a heterodox argument that offence justifies restraint; that the society is justified in restraining any conduct that it finds offensive to its moral, religious and cultural beliefs. He premised his arguments on the following assumptions:

(a) That morality is as essential to society as, say, recognized government;

(b) That relaxation of morals is the primrose path to social decay;

(c) That the state has the right to use the law to preserve its common morality and/or its cultural traditions; and

(d) Determination of which conduct is to be declared immoral and consequently prohibited (or discouraged) is based on majoritarian views rather than on principle. Accordingly, the presence of intense feeling of disgust shared among

12 A polycultural society is a society in which a multiplicity of sub-cultures exist side by side.

> a majority of the population is the sure test of that which is to be made the subject of prohibition or regulation.

Although the above assumptions are not explicitly stated, they are implicit in the tenor of the arguments advanced by the two disputants. But how accurate are those assumptions? Is it possible for all of them to be philosophically sound? If only some of them are, then which ones? On what grounds are they so regarded? Finally, on what ground would any of the aforesaid theoretical assumptions be regarded as constituting an intellectual sleight of hand?

4. Appraising the Sophistry and Dissonance in President Obama's Gay Rights Arguments

In light of the above competing arguments by President Obama and President Kenyatta, the following part critically appraises the particular contexts alongside the jurisprudential assumptions that underpin them to determine their plausibility or otherwise.

President Obama never explicitly declared homosexuality as either moral or immoral. He dexterously avoided dealing with that controversial issue, although it was directly relevant to the debate at hand. He banished it altogether from the frame of his arguments, thereby creating the impression that, from his perspective, it was the moral status of homosexuality – rather than homosexuality itself (as contended by President Kenyatta) – that was a non-issue, especially in the context of a debate on the question whether it's proper to discriminate against individuals on grounds of their sexual orientation. Non-cognitivism claims that language does not describe the world and cannot be true or false. It does not express the belief or some cognitive mental state of the speaker. On the contrary, it expresses his feeling or attitude towards the conduct described as either moral or immoral. According to this theory, moral judgments are not cognizable. They cannot therefore be true or false. A J Ayer,[13] for example, argues that when I tell someone, "You acted wrongly in stealing my money", I am not describing a fact. I am merely expressing my feeling of outrage at what he did. Similarly, when I say that "homosexuality is immoral" I am merely expressing my feelings or emotions about it. Now because feelings are not cognitions, I cannot demand that my feelings prevail over your feelings if you regard homosexuality immoral.

To have categorically asserted that as long as a person's conduct does not cause harm to some other person then he should not be treated differently

13 A J Ayer, *Language Truth Logic* (Dover Books 1936).

(irrespective of the moral quality of his actions), President Obama was implicitly saying, with non-cognitivists and nihilists, that the moral quality of an act is irrelevant because after all moral judgments merely express the feelings or emotions of the persons making those judgments rather than describing a fact. The problem with that reasoning is that it renders morality not only meaningless but also useless. For if there is no objective moral truth, then morality does not count for anything. If morality is just but a reflection of our emotions or attitudes, then what authority does it have over us? Why should we be moral? Is there any obligation to be moral?

Besides, non-cognitivist arguments also render moral progress impossible. This is because, if there is no moral reality, then our moral views cannot get better or worse. There can be no moral progress. The only positive statement that can be made in favour of non-cognitivism is that it encourages toleration. Because if morality is just but a reflection of our choices and feelings, and my feelings or choices are different from yours, then who are you to tell me that my morality is wrong? This then implies toleration of conflicting morality. But if this is the blessing of non-cognitivism, it is also its curse; for how can it be said that every moral view has to be tolerated in a polycultural society! Should we tolerate slavery, racism, sexism, female circumcision, homosexuality, human sacrifice, and all other cultural practices whose moral status have always polarized societies?

If the attempted relegation of the perceived immorality of homosexuality to a non-issue status did not substantially attenuate the arguments by President Obama, then his attempt to disguise what was, in truth, a moral argument as a dogmatic creed did just that. The proposition that no one should be treated differently on the basis of his/her sexual orientation was presented as a matter of dogmatic jurisprudence, rather than as a matter of sociology of law,[14] and as a universal truism that is not only true of United States today, but has always been so. Consequently, prohibition of all forms of discrimination against homosexuals was glorified as an axiomatic principle of justice that should be embraced by all African States (including Kenya), whatever may be their moral views regarding homosexuality. In other words, prohibition of all forms of discrimination against homosexuals was presented as an amoral principle of universal application. How accurate is this argument?

14 Sociology of law, refers to the study of human behaviours in society in so far as it is determined by commonly recognized ethico-legal norms, and in so far as it influences them. Dogmatic jurisprudence on the other hand refers to three main jurisprudential view-points: analytical (or positive) jurisprudence, historical jurisprudence or theoretical jurisprudence. See N.S. Timasheff, What is Sociology of Law? *American Journal of Sociology* VOL. 43, No. 2 (Sep, 1937), pp 225-235.

A careful study of the jurisprudential developments in the United States of America on the subject of gay rights, however, reveals a completely different story. First, it shows that the principle of prohibition of all forms of discrimination against homosexuals has not always been part of the American law. On the contrary, it represents the culmination of a gradual process of that took several years and reached its current apogee on 25 June 2015 (exactly one month before the said statements were made), with the decision of the Supreme Court of the United States of America in the case of *Obergefell et al. v Hodges Director, Ohio Department of Health et al.*[15] It is that decision which, for the first time in American history, entrenched the principle of elimination of all forms of discrimination against homosexuals as part of American law. That principle was therefore a relatively new principle which had not even been tested in America by the time of President Obama's visit to Kenya.[16]

Secondly, the principle of elimination of all forms of discrimination against homosexuals is not a dogmatic creed, of universal application but rather, a uniquely American moral or sociology of law principle. It reflects the state of American morals on the subject of homosexuality as at 25 June 2015 when the said principle, was for the first time, entrenched into law by the Supreme Court decision in *Obergefell et al v Hodges, Director, Ohio Department of Health et al* case.[17] That decision, therefore, simply encrusted a uniquely American sense of morality, on the issue of homosexuality, with legality, and must not therefore be taken as representing a dogmatic principle of justice that can be exported outside United States of America.

As Oliver Wendell Holmes once wrote "law is the witness and external deposit of our moral life."[18] The said Supreme Court decision is therefore the witness and external deposit of the current state of American moral conviction, on the issue of homosexuality. Just as its previous decisions on the same subject

15 In the case of *Obergefell et al v Hodges, Director Ohio Department of Health et al*, the Supreme Court of the United States of American entrenched the principles of elimination of all forms of discrimination against homosexuals into American law when it removed the last form of discrimination that was still existing in America as against homosexuals, the refusal to legally recognize gay marriages. The Supreme Court of United States held that the Fourteenth Amendment requires states to recognize marriages between same-sex couples.

16 Even in America, the Supreme Court decision in *Obergefell et al v Hodges, Director Ohio Department of Health* (ibid) has come as a shock to many people who are strongly opposed to it. For example, Fox Business Trending published a story of Kim Davis, a Kentucky clerk who has vowed to defy the said Supreme Court decision and is even prepared to go to prison if that is the price she must pay for it. See www.foxnews.com/opinion/2015/09/03/exclusivekentucky-clerk-am- Prepared–to-go-to jail.html.

17 Note 15 *supra*.

18 Oliver Wendell Holmes Jr, 'The Path of Law' 10 *Harvard Law Review* 457 (1897).

have been in 1972 when the same court, in *Baker v Nelson,*[19] ruled that exclusion of same-sex couples from marriage did not present a substantial federal question (exactly the same argument that was being advanced by President Kenyatta, speaking of the moral position of Kenya today), the *Obergefell* case was just confirming the American moral position on the matter as at that time. Similarly, when the same court in *Lawrence et al v Texas*[20] held that the right of homosexual couples to engage in intimate sexual activity behind closed doors should be protected (through invalidation of the statutes that criminalized homosexuality) while the legal distinction between homosexual and heterosexual marriages should be retained, it was also merely recording the moral conviction of the American people on the said issues as at 2002, when the said decision was made.

That the *Obergefell* case effectuated a judicial paradigm shift from the *Lawrence* case is confirmed by the following excerpt from Robert C.L Moffat's article.

> The application of these tests to the issue of gay marriage does not yield results that suggest an imminent paradigm shift in the direction of mandatory state recognition (of gay marriages). Rather strained constitutional analysis would be required to make a persuasive argument that refusal by the state to adopt same-sex marriage is inconsistent with the rationales of the jurisprudence of other equal protection decisions. Certainly, great difficulty would be encountered in arguing that there is widespread unfairness perceived in the existing rationale of "live, and let be" of Lawrence. The social definition of the situation assumed in Lawrence would have to be stated as the bedroom activities of consenting adults are, as the Wolfenden Committee said, "not the law's business". The rationale appears rather clearly to reflect the presently accepted standards of societal morality.[21]

Clearly, therefore, it would be wrong for President Obama to convert a moral argument into amoral argument and proceed to advise African countries to ignore the moral sensibilities of their people and instead adopt the principle of prohibition of all forms of discrimination against homosexuals, as an axiomatic principle of justice.

The most controversial of all the propositions advanced by President Obama on the gay rights issue was, however, his argument that "… when you start treating people differently, not because of any harm they are doing anybody, but

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19 409 U.S 810.

20 539 US 574.

21 Robert C.L. Moffat, '"Not the Law's Business": The Politics of Tolerance and the Enforcement of Morality' 57 *Florida Law Review* (2005) 1097 at 1128.

because they are different, (then) that is the path whereby freedoms begin to erode". In that statement, President Obama was not raising any new principle. He was merely restating an age-old principle, first espoused by John Stuart Mill in the following terms:

> The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community against his will is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or to forebear because it will be better for him to do so, because in the opinions of others to do so would be wise or even right. These are reasons for remonstrating with him or reasoning with him, or persuading him, or entreating him, but not compelling him, or visiting him with any evil…[22]

That President Obama is a firm believer in the Millian harm principle is not in doubt. But in spite of its high sounding character, the harm principle should not be uncritically embraced, in the manner that President Obama is advocating. This is because the legal environment in which Mill wrote was far more libertarian than our present standards[23] and that is why Mill opposed legal regulations on paternalistic grounds. Anyone who accepts the Millian harm principle in the form in which it was expressed above will no doubt oppose the provisions of the Traffic Act that criminalizes failure to wear seat belts, the laws that require motorcyclists to wear helmets, laws that prohibit possession and use of dangerous drugs, laws that criminalize attempted suicide as well, as all other laws that are purely paternalistic in nature and with which many people agree.

Besides the exact meaning of harm for purposes of the harm principle is itself unclear. First, the concept of harm itself depends on social and cultural definitions. It is impossible, for example, to define theft without a concept of property, which is itself culturally defined. Second, it is impossible to classify something as harm without carrying out empirical studies on its actual consequences. Too many restrictions on liberty have been allowed on the basis only of imagined consequences, in the absence of any real information on the subject. Many legislations have been adopted without the benefit of any solid factual foundation. In many cases emotion has been substituted as the

22 John Stuart Mill, *Essay on Liberty in Utilitarianism, Liberty and Representative Government* (New American ed, 1951).

23 See Robert C.L.Moffat 'Not the Law's business – The Politics of Tolerance and Enforcement of Morality' 57 *Florida Law Review* (2005) 1097 at 1100.

sole motivation for law without any weighing of the cost and benefits of the proposals.

The next challenging turn comes when we are confronted with the question whether indirect harms are also classified as harms. It is clear that John Stuart Mills required the harm to be direct and tangible. Is that the same sense in which president Obama was using the same term? Can we categorically exclude indirect harms from relevance to public policy decisions.

John Kaplan argues that it is impossible to exclude indirect harms altogether.[24] He identifies two main categories of indirect harms that cannot be completely ignored; modelling and public ward arguments. Modelling refers to the tendency on the part of some people to admire and use those who are considered successful as role models. When a celebrity or a superstar declares that he is gay, many young people may be led to admire and even adopt a gay lifestyle as a result of that. This is an indirect harm that cannot completely be ignored.

Public ward argument on the other hand refers to the situation where a person engages in a self-destructive conduct that, imposes some financial burdens on the public. Even though no direct harm may be suffered when homosexual couples are allowed to engage in sex behind closed doors, or to contract same-sex marriages, it is not possible to completely rule out indirect harms being suffered by the public or a section thereof.

It is therefore not prudent to argue that no one should be treated differently unless he/she possesses some real and tangible direct threat to any other person.

In his speech aforesaid President Obama also made the following statement, "if someone is a law abiding citizen who is going about his business and working in a job and obeying traffic signs and doing all the things that good people are supposed to do… the idea that he is going to be treated differently or abused on the basis of who (she) loves is wrong".

This statement was the most ambiguous portion of President Obama's argument. It could mean one or two things. First, it could mean that any law that violates the principle of prohibition of all forms of discrimination against homosexuals is on some metaphysical ground, invalid. Second, it could mean that any discrimination against homosexual individuals which is not founded on law is invalid, for this is the only meaning that can be ascribed to the statement, "Any person who is abiding by the law should not be treated differently".

24 John Kaplan, "The Role of Law in Drug Control" (1971) *Duke Law Journal* 1065,1072.

This implies that if he violates the law, then he should be treated differently. Consequently, if the law in question is a statute that prohibits homo-sexuality, then it follows that the differential treatment is justified. Now, if this was President Obama's argument, then he was not raising any serious point at all. In fact, if this is what he meant, then there was absolutely no disagreement between him and President Kenyatta, because our Penal Code criminalizes homosexuality,[25] while our Constitution denies recognition to same-sex marriages.[26] If on the other hand, President Obama meant that any law that violates the principle of prohibition of all forms of discrimination against homosexuals is invalid, (which is the only time that he would be making a serious point) then his argument was completely implausible because he offered absolutely no jurisprudential argument in support of that contention.

If, as illustrated herein, President Obama's argument aforesaid suffered from formidable jurisprudential flaws, then how about President Kenyatta's arguments? How plausible were they?

25 Sections 162, 163 and 165 of the Penal Code criminalize homosexuality. Section 162 of the Penal Code criminalizes unnatural offence and provides that any person who has carnal knowledge of any person against the order of nature commits a felony and is liable to imprisonment of fourteen years. Section 163 creates an inchoate offence of attempting to commit the offence described in section 162. Finally section 165 criminalizes homosexual practices between men.

26 Article 45 of our Constitution denies recognition to homosexual marriages.

5. Morality Versus Liberty: Theorizing President Kenyatta's Argument That Offence Justifies Restraint[27]

President Obama's argument that the sole purpose for which law can rightly be used to restrict the liberty of an individual is to prevent harm to others, was completely unacceptable to President Kenyatta. Accordingly, President Kenyatta openly disagreed with President Obama on that point. Clearly President Kenyatta subscribes to the view that even where a person's conduct does not cause any harm to any other person, the society reserves the right to intervene and impose restrictions, where appropriate, with a view to preserving its common morality.[28] According to President Kenyatta, the role of law in relation to enforcement of morality may be stated thus: The law exists not merely to secure that men have the opportunity to lead a morally good life, but to see that they do. Not only may law be used to punish men for doing what is morally wrong but it should be so used; for promotion of moral virtue through law is one of the ends or purpose of a society complex enough to have a developed legal system.

The theory that one of the primary functions of law in society is to promote moral virtue finds its clearest expression in Sir Patrick Devlin's argument that every society has a right to use the law to preserve its common morality, its traditions and cultures, the same way it uses law to preserve everything that is essential to its existence, like its government. Devlin believed that a society has a right to shore up its morality, its traditions and cultures in the same way that it is justified in punishing treason.[29] Sir Patrick Devlin glorified morality as the cement of society, the bond without which men would not cohere in society. He put the point thus:

> A society possesses (common) morality simply because it is a society. What makes a society of any sort is not only political ideas but also ideas about how its members should behave and govern their lives; these latter ideas are its morals… without shared ideas on politics, morals and ethics, no society can exist… for a society is

27 If the arguments by President Kenyatta were to be summarized, it would be restated thus: "Offence justifies restraint". In other words every society has a right to restrain any conduct that offends its moral, religious and cultural convictions.

28 Common morality refers to the set of shared moral norms or convictions entrenched in a society that it is scarcely ever articulated, let alone explicitly challenged. In other words, it refers to the moral position that any two right thinking persons drawn at random may be expected to agree upon. See Beauchamp T.L (2003) "A Defence of Common Morality" *Kennedy Institute of Ethics Journal* 13 (13):259-74.

29 See Sir Patrick Devlin, 'The Enforcement of Morals'114.

> not something kept together physically; it is held by the invisible bonds of common thought.[30]

By reason of the foregoing, Sir Patrick Devlin concludes not just that every society has a right to enforce morality, but also to use the law to prohibit what it considers to be immoral. This is the argument that was being advanced by President Kenyatta. In spite of its apparent simplicity and profundity, the said argument runs into serious jurisprudential headwinds, as exemplified by the following questions: First, what exactly is meant by "morality"? Second, why should morality be enforced? Third, is the society entitled to enforce all morality or only some morality? And if only some morality, then what principles guide selection of the categories of morality to be enforced? Fourth, whether the conversion of sin into crime is based solely on majoritarian views or on principle? Finally, what is the role of punishment in the enforcement of morality?

As Ronald Dworkin explains, the terms "morality" or "moral position" or "moral conviction" are frequently used not just as terms of justification and criticism, but also as terms of description.[31] Accordingly, when we speak of a group's "morals", or "morality" or "moral conviction" or "moral beliefs", we refer to whatever attitudes that the group displays about the propriety of human conduct, qualities or goals. In this wide anthropological sense, the term immorality may mean:

(a) Whatever offends the group's religious beliefs;

(b) Whatever offends the group's culture and traditions; or

(c) Whatever offends the group's sensibilities.

It is not clear which of the above conceptions of morality does or should, underpin enforcement of morality by law, or criminalization of immorality.

The argument advanced by the Deputy President William Ruto when he warned President Obama not to talk about "gay rights" on Kenyan soil was that homosexuality violates the central tenets of Christian religion. What the Deputy President failed to realize is that a country that believes in the separation of church and state, and which protects zealously the freedom of religion cannot at the same time glorify the beliefs of one religion over those of any other religion; nor can it afford to subordinate the conscience of a non-believer to those of a believer in any religion. Such a state must at all times be

30 (1965) – *Ibid*.

31 Note 9 at p. 248.

neutral in matters of morals. This point is put in the following terms by Yves Caron:

> … In a democratic state, where religion as such is not the basis of political order, but has been used as a model for, say, defining the goals of a Christian political society, public order will not…. be affected by toleration of the (religiously defined) immoral acts.[32]

Besides, how is the law to select which tenets of any religion should be enforced from amongst a multiplicity of tenets? Moreover, does it make any sense for a society that does not enforce the moral duty to save a blind man from falling and possibly dying in a well, and which does not criminalize adultery or fornication, and finally, which does not enforce farting loudly in restaurants, to concern itself with what consenting adults do behind closed doors?

But if religion is not a proper basis for discrimination against homosexuals, then what about culture and/or traditions? President Kenyatta was explicit that one of the reasons why Kenya must discriminate against homosexuals is because "… our culture does not permit homosexuality". Indeed, he was not the first person to advance a cultural argument against homosexuality. As William Eskridge argues cultural arguments have been employed widely and frequently in attempts to justify discrimination against homosexuals.[33]

But if our culture is so sacrosanct to justify its preservation at all costs, then why should we not similarly preserve such cultural practices as the institution of slavery? Or female genital mutilation? Or human sacrifice (in some societies)? Or wife battery? Culture clearly cannot adequately justify the perpetuation of human rights violations such as female genital mutilations, wife battery, slavery and human sacrifice. Besides, why should any culture be favoured at the expense of all other cultures in a polycultural society?

The claim that 'Homosexuality is contrary to our culture' therefore translates to 'Homosexuality offends our sensibilities'. Now this raises the question of the extent to which any person is entitled to use the law to prohibit anything that he finds offensive to him.

Some acts that do not cause harm to anybody in a more concrete sense may offend others who observe them or who (as in the case of homosexuality) are aware that they take place. Should the person offended be entitled to demand

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32 Yves Caron, 'Legal Enforcement of Morals and the so-called Hart-Devlin Controversy' 15 *McGill Law Journal*, 9 at 35.

33 See William Eskridge, Jr, 'Body Politics: *Lawrence v Texas, and the Constitution of Disgust and Contagion*' 57 Florida Law Review (2005) 1011 at 1013.

prohibition of conduct that, for one reason or another, is offensive to him or her? Is offence an appropriate basis for legal restraint?

When President Kenyatta argues that, "it is very difficult to force people to accept that which they do not want", he basically means that law should be used to prohibit anything that people "do not want". In other words anything that offends them. For him, therefore, offence justifies restraint. Should this be the case in an open and democratic society based on human dignity, equality and freedom?

People often classify as immoral every conduct that offends their individual sensibilities and even proceed to the point of arguing that law should be used to restrain such conduct. If the law is to maintain its status as a rational standard, then it must not be used to enforce morality, if by morality is meant individual sensibilities. If I tell you that homosexuality is immoral, I may base my moral conviction on any of the following: First, I may argue that homosexuals are morally inferior because they do not have heterosexual desires and accordingly, they are not "real men". My moral conviction would in this case be founded on prejudice. Secondly, I may base my view about homosexuals on a personal emotional reaction. I may hold the view that homosexuals "make me sick". This too cannot be a reason for using the law to restrain homosexuality, not because moral positions are supposed to be unemotional or dispassionate – quite the reverse is true – but because the moral position is supposed to justify the emotional reaction and not *vice versa*. Thirdly, I may base my position on a proposition of fact. I may say, for example, that homosexual acts are debilitating or that homosexuality threatens the survival of the human race. I may not be able to prove such factual allegations. Accordingly, this will be nothing but a form of rationalization which cannot provide a justifiable basis for discriminating against homosexuals. Finally, I may argue against homosexuality by citing the beliefs of others. I may say, for example, that everyone knows that homosexuality is bad or immoral. If I do so, then I will simply be parroting and not relying on any moral conviction of my own.[34]

When we say that homosexuality is immoral because it offends our moral sensibilities, or that law should be used to enforce immorality–and if by immorality we mean that which offends our moral sensibilities-then we are essentially committing ourselves to the proposition that law should be used to enforce our prejudices, our emotional feelings, our rationalizations, or the

34 These arguments have been summarized by Ronald Dworkin, in his book *Taking Rights Seriously,* note 30 *supra*.

personal views of others that we share. This is also what it means when we say, with President Kenyatta, that offence justifies restraint. This is a position that cannot be defended in an open and democratic society that believes in equality, dignity and the rule of law.

If the integrity of law is to be preserved, then it should not matter whether the prejudices, emotional feelings, the rationalizations or other views sought to be enforced by law, in the name of morality, are those of an individual or a group of individuals. Still less should it matter whether they belong to the majority of the individuals. An argument that is wholly irrational because it is founded on prejudice, or emotion, or rationalization, does not change its status simply because the majority of the population subscribes to it. Accordingly, as Ronald Dworkin[35]argues, the decision as to which conduct should be restrained on grounds of immorality must be based on principle rather than on majoritarian views. It was therefore wrong for President Kenyatta to reason that if the majority of Kenyans believe that homosexuality is wrong, then it is right to use the law to restrain homosexuality.

6. Rationalizing the Relation between Law and Morality in a Liberal Polycultural And Multi-Religious Society

While an illiberal society that is culturally homogenous and in which a single religion is protected by law (like the Islamic Republic of Iran) may find it easier to use the law to enforce morality, a liberal polycultural and multi-religious society that believes in the separation of church and state (like our society) may not find it easier to enforce morality through the law for a multiplicity of reasons. First, individual liberties which are protected in the bill of rights should never be sacrificed on the altar of morality. Second, no religious, moral nor cultural conviction should be subordinated to any other similar conviction. Finally, the law of a modern society that values human autonomy should never adopt a paternalistic attitude towards the citizens, or any section of the community.

If a liberal, poly-cultural and a multi-religious society is to successfully define the relation between law and morality, then it must, perforce, attend to numerous jurisprudential challenges that are discussed herein.

First, it must adopt a rational conception of morality that eliminates from the scope of morality religious, cultural, and other personal sensibilities – which might include prejudices, emotional feelings, and rationalizations. This is a task that has eluded jurists for centuries. Unacceptable infractions of civil

35 Ronald Dworkin 'Lord Devlin and the Enforcement of Morals' 75 *Yale Law Journal* (1965066) 986.

liberties have been legitimized on the basis of prejudices, emotional feelings, rationalizations, religious beliefs and cultural practices disguised as morality. A country that is committed to the protection of civil liberties must take all reasonable measures to arrest this disturbing state of affairs.

Second, there is an urgent need to determine the question whether morality is being enforced because of its intrinsic value or because societal harmony and order is secured when people believe in morality. In other words, whether what is important for the law is the quality of the moral creed or the strength of the belief in it. If the position adopted is that morality is enforced on account of its intrinsic value, then it follows logically that all morality ought to be enforced by law. This has not been the case because no society in the world has ever attempted to enforce all moralities or moral ideas. If on the other hand, the view that morality is enforced solely because a belief in it is beneficial to society is accepted, then a distinction must be drawn between the morality that should be enforced by law (because a belief in it is beneficial to society) and morality which should not be so enforced[36] (because a belief in it may not be beneficial to society).

Even with the drawing of such distinction, the question why law should enforce morality persists. Many theorists have attempted to answer the said question without success. Lord Devlin argued that the justification for the enforcement of morality is simply that the society is threated with disintegration unless law is used to enforce morality. He put the point thus: "There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration."[37]

No evidence was given in support of such ambitious empirical generalization about a necessary condition for the continued existence of society, nor was any sensitivity betrayed to the need for such evidence. The vacuity of the above argument was exposed by H.L.A Hart who described it as disguised tautology.[38] Hart argued thus: If by society is meant "a community of ideas", then it follows that any change in those ideas would signal a disintegration of society "with absolutely no disintegration or effects whatsoever upon the members of that society." He illustrates the point in the following manners:

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36 See HLA Hart, 'Social Solidarity and the Enforcement of Morality' *University of Chicago Law Review* 35 (1967)1.

37 Note 28 *supra* at 13.

38 Note 35 *supra* at 3.

> "In this sense of "society", Post-feudal England was a different society from feudal England. But if we express this simple fact by saying that the English society was at one time a feudal society and at other time not, we make use of another sense of society with different criteria of individuation and continued identity. It is plain that if the threat of disintegration or "members drifting apart" is to have any reality or if the claim that common morality is "as necessary to society as say, a recognized government" is taken to be part of the argument for enforcement of morality, definitional truths dependent upon the identification of society with its shared morality are quite irrelevant."[39]

From the foregoing, it is clear that both arguments advanced by Lord Devlin – the conservative thesis and the disintegration thesis – fail to adequately explain why law should be used to enforce morality.

The most difficult challenge, however, concerns the need to develop a philosophically justifiable principle to guide the identification of conduct that is considered too immoral to be countenanced. The Devlinian principle which subjects the liberty of individuals to the judgment of the man on the clapham omnibus will not suffice, nor will the argument that the morality to be enforced must be marked by "intolerance, indignation and disgust"; because there is no objective method for determining when that stage is reached.[40] While one section of the society may hold the view that the level of intolerance, indignation and disgust has reached the concert pitch, the other section of the same society may not share such sentiments.

Alongside the principles that guide the identification of conduct that is considered too immoral to be countenanced, are the principles that determine how and when new moral ideas can supplant old moral ideas. If moral evolution is to be encouraged - as it should, in an open and democratic society that believes in human dignity, equality and the rule of law – then appropriate jurisprudential principles must be developed to guide the evolutionary process. As Kent Greenawalt argues, there is absolutely no justification whatsoever which can be advanced in support of an argument that any society is entitled to impose its moral ideas on all posterity.[41] The right of the current generation to

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39 *Ibid*.

40 Lord Patrick Devlin argued that the collective moral judgment of a society is, in the final analysis symbolized and expressed by the actions of the men in the jury-box twelve right minded men, twelve men on the street, or clapham omnibus, drawn at random and held to represent the moral views of the community at large. See *Eugene v Rostow* The Enforcement of Morals *Cambridge Law Review* (1960) 174 at 177. Sir Patrick Devlin further argued that the right of the society to intervene is instantiated when the levels of indignance reach what he called "the concept pitch".

41 Kent Greenawalt, 'Legal Enforcement of Morality' 85 *Journal of Criminal Law and Criminology* (1995)

pursue their own moral lights must be delicately balanced as against the rights of future generations to do the same; for why should the existing morality be frozen in amber as if the future generations lack the capacity to develop their own moral ideas?

Finally, there is need to re-examine the role of punishment in the enforcement of morality. The conventional utilitarian perspective of punishment has always been that punishment is essential in deterring conduct that is considered harmful to society. What then would be the role of punishment in relation to conduct that is not harmful in any way to the society? Why punish anyone for such conduct? And how severely? The other perspective of punishment has always emphasized its reformative role, that of helping the offender to abandon a conduct that is considered wrong, by whatever standard, (Conduct A), and to assume a conduct that is considered good or proper (Conduct B). This presupposes a widely held consensus that Conduct B is superior to Conduct A, and that the interests of the society are best served if punishment is used to coerce individuals to abandon Conduct A and instead assume Conduct B. Where, however, there is no such consensus, and accordingly, where one section of the society believes that Conduct A is more moral (and therefore superior) to Conduct B, while another section of the same society is of the opposite view, then what role should punishment serve in such a situation?

Appreciating the hollowness of the utilitarian theory of punishment in the context of enforcement of morality, Emile Durkheim argues that punishment is essentially the hostility excited by the violations of the common morality which may be either diffused throughout the society or administered by official action.[42] According to him punishment is "the passionate reaction of graduated intensity to the offences against collective conscience". One difficulty that Durkheim's theory of punishment faces, however, is how to empirically determine the content and scope of the so-called "Collective Conscience".

As to the question "why punish?" Durkheim's answer is that we do so primarily as a symbolic expression of the outraged common morality, the maintenance of which is the condition of cohesion resulting from men's likeness. Punishing the offender is required to maintain social cohesion because the common conscience violated by the offender "would necessarily lose its energy if an emotional reaction of the community in the form of punishment

710, at 723.

42 Emile Durkheim, *The Divisions of Labour in Society* (3rd 15dn. Simpson trans/1964).

did not compensate for its loss and this would result in the breakdown of social solidarity".

Durkheim's theory of punishment obviously has no place in a liberal polycultural and multi-religious society like ours because such a society cannot possibly have what he calls "collective conscience". An appropriate theory of punishment suitable for the circumstances of a society such as ours must therefore be developed if we are to rationalize the relation between law and morality in our present-day society.

7. Conclusion

Given the enormous jurisprudential challenges that are discussed above, and which are yet to be surmounted, it will not be easy to rationalize the legal enforcement of morality in a liberal, polycultural and multi-religious society such as the society which we live in today. The road ahead is still long and tenuous. The purpose of this article is therefore not to offer solutions, but to do two things: First, to show that the jurisprudential issues raised by the Kenyatta – Obama diatribe were faor more complex than the two presidents – not even their supporters – understood. Secondly, to show that the resolution of the said issues entail extensive philosophical researches that are clearly beyond the scope of this article.

In the meantime what every liberal, polycultural and multi-religious society must do is to desperately seek toleration among the various sub-cultures that live together. The pursuit of positive toleration must prioritise as much as possible freedom and reciprocity. Individuals should be enabled to lead as free a life as possible and the law should avoid undue paternalism. The only paternalism that should be tolerated is that which fosters voluntary choice, paternalism that serves the reflective values of the individuals, and not paternalism that imposes on individual's values that they reject.

Besides, there must be a delicate balancing act of the liberty of individuals as against the moral convictions of the society. No individual should be made to feel intellectually or morally subservient to the conformists who may constitute the majority. Finally, individual moral positions should never be presented as claims of right, buttressed by dogmatic ideologies as to render illegitimate all other competing arguments.

Recourse to Transitional Justice in Post-Independent African States: A Review of The Human Rights Violation Investigation Commission for Lessons in the Application of Transitional Justice

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Abstract

The post-independent history of Nigeria has been bedevilled by instability, injustice, corruption, nepotism, human rights abuses, inequitable distribution of resources, and many more malaise. To find a lasting solution, the government established the Human Rights Violation Investigation Commission, otherwise known as the "Oputa Panel" on the 8th of June, 1999 to investigate incidents of gross violation of human rights committed between January 1966 and May 1999 and to achieve reconciliation based on truth and knowledge of the truth sixteen years down the line, the Report of the Commission has not seen the light of the day, and Nigeria is worse off ever than before. This paper is therefore a post-mortem of the work of the Commission with a view to determining whether the recourse to transitional justice in Nigeria was appropriate and to derive lessons for other post-conflict nations in Africa.

1. Introduction

The United Nations Organization (UN) emerged from the smouldering ashes of the Second World War (WW II) which lasted from 1939 to 1945.[1] The war, which literally engaged and engulfed the entire human race, left in its trail untold hardship, misery and catastrophes of unimaginable proportion. That war left over five million people dead and was described as the most destructive

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1 The United Nations officially came into existence on 24 October 1945, after the ratification of the Charter by the then world powers and other states.

war in human history. Thus, the principal aims and objectives of the UN, as succinctly articulated in the preamble, were:

(i) To save succeeding generation from the scourge of war;

(ii) To reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of man and woman and of nations large and small;

(iii) To establish conditions under which justice and respect for the obligation arising from treaties and other sources of international law can be maintained and to promote social progress and better standards of life in larger freedoms.[2]

To realise these lofty objectives, the UN undertook in article 55 of the Charter to promote universal respect for, and observance of human rights and fundamental freedom for all without distinction to race, sex, language or religion.[3] And to show teeth and bite, all the members of the UN pledged themselves to take joint and separate actions in cooperation with the organisation for the achievement of the purposes set forth in article 55.[4]

Regrettably, the establishment of the UN, though a huge success story has not stemmed the tide of national and international conflicts. A gory and disturbing picture of inter-state instability and conflicts which poses major challenges for the UN's efforts to ensure global peace, prosperity and human rights for all has been painted.[5] Whereas the UN has a wide labyrinth of power to intervene wherever and whenever global peace is threatened,[6] the doctrine of state sovereignty and the principles of self-determination and the prohibition of the threat of use of force as *jus cogens* of modern international law calls for restraint.[7] Thus, article 33 of the Charter calls on:

> The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security shall, first of all, seek a solution by

2 Charter of the United Nations, 24 October 1945, (signed on 26 June 1945 came into force on 24 October 1945) 1 UNTS XVI (UN Charter) art 1.

3 Goodrich, Hambro and Simons, *Charter of the United Nations* (3rd edition, Columbia University Press, 1969) 229.

4 History of the United Nations www.un.org/en/aboutan/history.Visited on 5 October 2014..

5 Madaki, A.J, 'Fate and Protection of Women in Conflict Situations: A Dispassionate Appraisal of the Law' *International Journal of Research in Management & Social Science* 2 (2014) Issue 2 at 67-68.

6 Chapter VII of the Charter. See also Alexander Orakhelashvili, 'Peremptory Norms in International Law' (2006) 50, *Netherlands Int'l L Rev* 622.

7 James A. Green, 'the Peremptory Status of the Prohibition of the Use of Force' [2011], MJIL 215, 254.

> negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangement, or other peaceful means of their own choice.[8]

Transitional justice as a mechanism to deal with injustices by whatever name called is, therefore, a welcome concept. Indeed, mechanisms of transitional justice have been deployed by many nations in its varied forms, including Argentina in 1983, Chile in 1990, South Africa in 1995, Sierra Leone in 2002 and Kenya in 2009.[9]

However, this paper notes with a sense of regret that, like Nigeria, in many African states, commission of inquiry and the whole idea of transitional justice is only applied to calm public curiosity. The norm is to acknowledge the injustice following public outcry which in turn leads to the government setting up Commissions without sincere commitment to truth and justice.

After the return to democratic rule on 29 May 1999, Nigeria joined the rank with the establishment of the Human Rights Violation Investigation Commission (HRVIC) otherwise known as the Oputa Panel on 14 June 1999 to investigate incidents of gross violation of human rights committed between January 1966 and May 1999, and to achieve reconciliation based on truth and knowledge of the truth. Whose truth, we dare ask.[10]

Sixteen years after the establishment of the Commission, whose final report was submitted to the President on 28 May 2002 amidst fanfare, nothing has happened in the realm of implementation and this is the failure of the Oputa Panel in Nigeria; and thus the thrust of this article. What then are the lessons other post-conflict nations in Africa may learn from failure of transitional justice in Nigeria? This article examines the failures of the Oputa Panel and how other nations can learn from the Nigerian experience.[11]

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8 Green, James A., and Francis Grimal, 'Threat of Force as an Action in Self-Defense under International Law', (2011) 44 *Vand. J. Transnat'l L* 285.

9 Commission of Inquiry into Post Election Violence - Kenya http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CCYQFjAB&url=http%3A%2F%2Fwww.kenyalaw.org%2FDownloads%2FReports%2FCommission_of_Inquiry_into_Post_Election_Violence.pdf&ei=wWNUVevFIobC7gaJzYGgAw&usg=AFQjCNE2TFFa9VvaX3rEVCVAkzScq3_V1A&bvm=bv.93112503,d.ZGU. Accessed on 13 April 2015.

10 Human Rights Violations Investigation Committee Report. (2004). Available at http://www.nigerianmuse.com/nigeriawaTruthCommissionh/ndm/?u=PressRelease_Oputa_report_01012005.htm. Accessed on 24 April 2015.

11 Oputa, Chukwudifu A, *The Law and the Twin Pillars of Justice* (Government Printer, Nigeria, Owerri 1981).

2. The Concept of Transitional Justice Mechanisms

Transitional justice is defined as, "The full range of process and mechanisms associated with a society's attempt to come to terms with a legacy of a large scale past abuses in order to ensure accountability, serve justice and achieve reconciliation."[12]

From this definition, it is discernible that transitional justice is not a case of one size fitting all. No, it is a full range of processes, the choice of which process being dependent on the peculiarities and particularisation of the situations.[13] It also includes:

(i) Political choice by state undergoing governance transition.

(ii) It is adopted to deal with human rights violation, past injustices, abuses and atrocities by formal government and non-state actors.

(iii) It is a response mechanism to systematic violation of the past.

(iv) It seeks recognition for victims.

(v) It promotes possibilities for peace, reconciliation, democracy and the rule of law.

The nature of transitional justice is that it ensures that it helps in the process of healing and reconciliation. This process is of great importance since it is broad, flexible and ensures that desired outcome of justice process is achieved. The process addresses problems that cannot only be cured by courts alone, but all stakeholders have a role to play in the process. At the centre of the process are victims and the general public since it is meant to benefit them. Transitional Justice is of great importance in areas where there has been massive violations of human rights.[14]

One of the selling points and attraction to transitional justice is the fact that it is usually in the interest of all concerned; the hunted and the hunters, and therefore the likelihood of restorative justice.[15] It is an advance warning system to show that time does not run against criminal conducts. The UN

12 The UN Secretary General's Report on 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (s200H/616) 23 August 2014.

13 Sasha Gear, 'Trials of Transition: The Case of Ex-combatants', in Linda Davis & Rika Snyman eds. *Victimology in South Africa*, (Van Schaik Publishers, Pretoria 2005) 271–79.

14 Oduro, Franklin 'Reconciling a Divided Nation through a Non-Retributive Justice Approach: Ghana's Reconciliation Initiative,' (2005) 9(1) *The International Journal of Human Rights*, 327–47.

15 *Truth and Reconciliation Commission, Findings and Recommendations* (Truth and Reconciliation Commission of South Africa Report, Vol. 5, Macmillan, London, 1998) 223.

Peace Building Commission (PBC) in one of her Concept Notes summarised effectively the role of transitional justice in peace building when it stated that:

> ...transitional justice encompasses more than punitive judicial accountability meted out through prosecutions. In post-conflict situations, prosecution as a measure of transitional justice can face specific obstacles, such as inadequate human or financial resources, a corrupt or weak and ineffective judicial sector, and a perception of victor's justice and a challenge of sheer numbers when the pool of potential victims and perpetrators is in the hundreds, thousands or hundreds of thousands. But even if these challenges were successfully met, prosecution alone would be an incomplete form of justice.[16]

3. Principle of Transitional Justice Mechanisms

The motion of transitional justice mechanisms as contemplated under the UN system is aimed at ensuring the proper enforcement of fundamental international law norms through any process a state may utilise to achieve the larger goal of healing and reconciliation.[17] These mechanisms may include:

(i) Quasi-judicial mechanisms;

(ii) Non-judicial mechanisms with differing levels of international involvement (or none at all);

(iii) Domestic hybrid and international prosecution;

(iv) Truth telling initiative to determine and document violations that have occurred in the past;

(v) Promoting reconciliation;

(vi) Reparation to victims either real or symbolic; and

(vii) Memorialisation i.e. constructing legacy and monuments for identification, healing and education of future generation.[18]

A state can choose either one or a combination or more of these mechanisms. The above processes can be applicable in one situation and fail in another.[19] Each and every state should choose the process that is fitting to that particular

16 *Justice in Times of Transition* 26 February 2008 sourced from www.ou.org. Viewed on 5 October 2014.

17 United Nations Rule of Law.

18 *Ibid*.

19 Alex Boraine and Sue Valentine, eds., *Transitional Justice and Human Security* (International Center for Transitional Justice, Cape Town, 2006).

state. The most important is the end result of the whole process which is to bring peace, justice and truth.[20]

The legal foundation for fore-fronting transitional justice as a means of giving meaning to the rule of law mantra is the UN Charter itself, together with the four pillars of international legal system; international human rights law, international humanitarian law, international criminal law and international refugee law.[21] According to the UN Secretary General, the principles established in this corpus of law represent universally applicable standards adopted under the UN system to serve as the normative basis for all UN activities in support of justice and the rule of law.[22]

At the end of the day, the resort to transitional justice mechanisms should achieve some if not all of the following objectives:[23]

(i) It should build national reconciliation, by ensuring that there is healing among the members of the public. This is one of the most important goals of transitional justice, in the sense that it transcends the normal goals of justice systems such as deterrence and rehabilitation. This goal of national reconciliation most of the times is used in nations that have been dividend by different factors.[24]

(ii) It should establish the truth in order to do away with institutionalised lies and popular myths. Truth plays a central role in transitional justice and in the process of reconciliation.[25] It is from the point of truth that persons can agree to forgive each other and even build trust. Truth plays a key role in cementing relationships and even in getting justice in all areas.[26]

(iii) It should respond to the needs of the victims i.e. allow them to tell their stories, convert knowledge into acknowledgment by the state, provide opportunity for healing and integration and reparation.[27] The whole process of transitional

20 Stensrud, Ellen Emilie. 'New dilemmas in transitional justice: Lessons from the mixed courts in Sierra Leone and Cambodia', (2009) 46 *Journal of Peace Research*, 1: 5-15.

21 *Ibid*.

22 Sandoval, Clara, 'Transitional Justice: Key Concepts, Processes and Challenges' (2011).

23 Makau Mutua, 'What Is the Future of Transitional Justice?' (2015) 9 *Oxford Journals Law & Social Sciences Int J Transitional Justice*, 1-9.

24 Fischer, Martina. 'Transitional justice and reconciliation: Theory and practice', *Advancing Conflict Transformation* (The Berghof Handbook 2, 2011).

25 Alidu, Seidu, David Webb, and Gavin J. Fairbairn, "'Truths" and "Re-Imaging" in the Reconciliation Process', 21 (2009) 2 *Peace Review*, 136-143.

26 *Ibid*.

27 Uprimny, Rodrigo & Maria Paula Saffon. 'Transitional Justice, Restorative Justice and Reconciliation: Some Insights from the Colombian case", *Transitional justice, restorative justice and reconciliation: Some*

> justice ensures that all parties to a particular injustice are catered for.[28] At the heart of transitional justice that is properly conducted is a victim who must get justice for the process to yield fruits.[29]

While resort to the regular and established administration of justice mechanisms is encouraged, if well established and implemented, transitional justice mechanism can be a valuable and complimentary tool in the quest for justice and reconciliation. Good faith is needed in establishing this mechanism and, this was absent in the Nigerian case.[30]

4. Human Rights Violation Investigation Commission (HRVIC)

The Human Rights Violation Investigation Commission was established on 14 June 1999 by President Olusegun Obasanjo in the exercise of his powers under the Tribunal of Inquiry Act of 1966 vide Instrument No. 8 of 1999.

The driving force for the setting up of the Commission is the search for the truth about the country's past as the basis for the establishment of a framework for a just, fair and equitable Nigerian society.[31] Some of the Terms of Reference (TOR) of the Commission included:

(i) To find out the root causes of human rights violation in Nigeria committed during the period covered by their mandate (15 January 1966 – 28 May 1999).

(ii) To identify persons, authorities, institutions or organizations which may be held accountable and also to determine their motives.

(iii) To determine whether the state embarked on these as a state policy or whether its agents were merely overzealous.

(iv) To recommend measures to be taken either against the institutions or persons identified.

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insights from the Colombian case (2006).

28 García-Godos, Jemima. 'Victim reparations in transitional justice–what is at stake and why', 26 (2008) 2 *Nordic Journal of Human Rights*, 111-130.

29 UN Office of the High Commissioner for Human Rights (OHCHR), *Making Peace Our Own: Victims' Perceptions of Accountability, Reconciliation and Transitional Justice in Northern Uganda* (August 2007), available at: http://www.refworld.org/docid/46cc4a690.html. Accessed 4 May 2015.

30 David Gray, 'An Excuse-Centered Approach to Transitional Justice' 74 (2006) *Fordham L Rev* 2621.

31 *Violations Investigation Commission*, Report (HRVIC, 2002c, vol. 7:3.50) 17.

The question is, how did Nigeria, a country of very resilient and hardworking people that prides itself as the giant of Africa descend to the cesspit of history to warrant the setting up of the Commission?[32]

5. Nigeria in Historical Perspective

Nigeria is an amalgam of ancient Kingdoms, Caliphates, Emirates and city states with a long history of organised societies. [33] The name Nigeria was coined from the words "Niger area" after River Niger which runs from the north western portion of the country and, halfway down, in the middle joins River Benue and empties into the Atlantic Ocean. This was in 1898.[34] Like most modern-day African countries, Nigeria was under colonial rule for a considerable length of time. In 1914, the Protectorate of Northern Nigeria and the Colony and Protectorate of Southern Nigeria were merged by Sir Lord Frederick Lugard to become what was then known as the Colony and Protectorate of Nigeria.[35]

With three regions in place, power was decentralised to the region in 1954. This was the beginning of federalism in Nigeria. On 1 October 1960, Nigeria gained independence from Britain and, exactly three years down the line, Nigeria finally shook off the remaining vestiges of colonialism when it became the Federal Republic of Nigeria.[36]

Independence and republicanism came with a lot of hope and expectations. But soon after, hope and expectations gave away to despair and despondency as the leaders of the day elevated corruption, cronyism, tribalism and nepotism to arts. These vices as alleged triggered the forceful overthrow of the democratically elected government on 15 January 1966; this was the beginning of successive military regimes in Nigeria, six in all. [37]

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32 San Àìná, Raymond Olúsè. 'Nigeria's Human Rights Violation Investigation Commission (Hrvic) and Restorative Justice: The Promises, Tensions and Inspirations for Transitional Societies', www.africaknowledgeproject.org. Accessed on 4 May 2014.

33 'The History of Nigeria', sourced from www.total.com on 5 October 2014.

34 'Through the Lens of History: Biafra, Nigeria, the West and the World', at https://www.historians.org/teaching-and-learning/classroom-content/teaching-and-learning-in-the-digital-age/through-the-lens-of-history-biafra-nigeria-the-west-and-the-world/the-colonial-and-pre-colonial-eras-in-nigeria. Accessed on 1 April 2015.

35 *Nigeria: Past, Present and Future* (Embassy of Nigeria in Washington) http://www.nigeriaembassyusa.org/index.php?page=nigeria-past-present-and-future. Accessed on 28 April 2015.

36 'This historic perspective was mainly sourced from www.total.com. Accessed on 28 April 2015.

37 'Global literacy projects', at http://www.glpinc.org/Classroom%20Activities/Nigeria%20Articles/Nigeria-history%20since%201960.htm. Accessed on 20 April 2015.

The period under military rule was a potpourri of mixed blessings. The oil boom came with a massive improvement in the economy. Nigeria became the Mecca of investors as well as treasure hunters. The military that came to clean the Aegean stable became immersed in corruption and used one tribe against the other. There was unequal allocation of resources to the states. All these and more, led to failed attempts of the former Eastern Region to establish a Republic of Biafra which culminated in a civil war which was nearly genocidal and lasted from 1967 to 1970. All manners of human rights abuses were perpetrated by both sides. This includes forced displacement of people, forced marriages, forced prostitution, rape, targeting civilians, forceful acquisition of properties etc. In this regard, the Abandoned Properties Policy of the victorious Federal Government readily comes to mind. Under this policy, the properties of the Igbos scattered all over the country were declared abandoned during the course of the war. When the war ended, they could no longer recover ownership of them any longer.[38]

Successive military regimes struggled with relish to out-do the previous regime in the realm of human right abuses. The regime of Generals Mohammed Buhari and that of Sani Abacha stand out as infected thumbs. Buhari had congenital disdain for the rule of Law. Draconian legislation was passed by the Supreme Military Council. Death penalty was prescribed for not so serious crimes including drug trafficking.[39]

In fact three Nigerians were publicly executed under Buhari's signature for drug trafficking. Under decree No. 2 and 4 (and many others) thousands of Nigerians were detained without trial. [40]

A renowned and very popular journalist Dele Giwa was killed with a parcel bomb a novelty then under the regime of Babangida. The fairest and freest elections in the annals of Nigeria history were annulled on 12 June 1992 by General Babangida.

On 17 November 1993, Gen. Sani Abacha took over the reign of governance and was in power until June 1998. That era can rightly be described as the darkest in Nigeria's chequered history. Citizens in their hundreds disappeared never to be seen again. All fundamental freedoms became mere academic exercise. The

38 Uzoigwe, G. N., *The Igbo Genocide, 1966: Where is the outrage?* (2011). At www.genocidescholars.org/.../IAGS%202011%20GODFREY%20UZOI. Accessed on 14 April 2015.

39 General Buhari's Maiden Speech: 1 January 1984. At http://www.nairaland.com/859122/buhari-nigerias-head-state-1983-1985. Accessed on 3 May 2015.

40 Shaka Momodu Buhari: History and the Willfully Blind. At http://www.thisdaylive.com/articles/buhari-history-and-the-wilfully-blind/198756/. Accessed on 21 April 2015.

press was gagged, trade unions were proscribed. Civil right activists including Kenule Saro-Wiwa were executed. The despoliation and exploitation of the mineral-rich Niger Delta area continued with gusto. It was, it seemed the end of civilisation.[41]

Abacha died under mysterious circumstances on 4 June 1998. Nigerians heaved a sigh of relief. General Abdusalam Abubakar replaced him. He reversed quite a number of the policies of the Sani Abacha era and successfully transited power to a democratically elected government under Olusegun Obasanjo on 29 May 1999 under a new constitutional order; the Constitutional of the Federal Republic of Nigeria, 1999.[42]

With the change in the social order, it became imperative to bury the ghost of the past by exhuming it and conducting a thorough post-mortem; hence the establishment of HRVIC.

6. The Work of The HRVIC

As started earlier, the HRVIC was set up in 1999 with the TOR as indicated in the statutory Instrument No. 8 to investigate human rights abuses dating back to the first military *coup d'etal* of 15 January 1966 to 28 May 1999, the eve of when power was handed over to the democratically elected government of President Olusegun Obasanjo.[43]

HRVIC was comprised of Justice Chukwadifa Oputa as chairman, with Rev. Father Mathew Hassan Kukah as secretary; Mrs. Elizabeth Pam, Dr.Mudiaga Odje, Barr Bala Ngilari, Mrs. Modupe Areola and Alhaji Lawal Bamali, as members.[44]

The Commission commenced public sitting in Abuja and the proceedings were televised live for all Nigerian, and the world at large to view.[45] As if on assizes, the Commission also sat and concluded public hearing in Port Harcourt,

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41 'Nigeria: A history of coups'. At http://news.bbc.co.uk/2/hi/africa/83449.stm. Accessed on 4 May 2015.

42 Yemisi Dina, John Akintayo & Funke Ekundayo, 'Guide to Nigerian Legal Information.' At http://www.nyulawglobal.org/globalex/Nigeria.htm. Accessed on 17 April 2014.

43 Truth Commission: Nigeria. At http://www.usip.org/publications/truth-commission-nigeria. Accessed on 3 May 2015.

44 Yusuf, Hakeem O., 'Human Rights Violations Investigation Commission, the Oputa Panel (Nigeria), in Lavinia Stan, Nadia Nedelsky (eds.) *Encyclopaedia of Transitional Justice* (Cambridge University Press 2013)) 161-165.

45 *Ibid*.

Enugu and Lagos. Over 10,000 submissions were received by the Commission[46] from across a broad spectrum of interest.[46]

A lot of *viva voice* testimonies were received including representation from social-political and cultural organisations representing block interest. These groups included Ohaneze N'digbo, Arewa Consultative Forum, Ogoni People Assembly and the Middle Belt Forum.[47]

The high point of the Commission's public hearing was the appearance and public testimony of President Olusegun Obasanjo before the panel on 11 September 2001 as a victim of human rights abuses by the agent of the Sani Abacha regime.[48]

Chief Olusegun Obasanjo appeared twice before the Commission. According to Kurah:

> He appeared first to respond to petition written by his son and then he also appeared to respond to the allegations contained in the petition submitted by Dr Beko Ransom Kuti on behalf of his family regarding the destruction of the Ransom Kuti family house and the subsequent events which precipitated the death of his mother. In both instances, President Obasanjo was led in evidence by his lawyer and subsequently cross-examined.[49]

The President's appearance as reasoned by the Commission showed that no one was above the law and that the Commission was not witch-hunting or seeking vendetta.[50] The Commission saw this singular act as placing it on high moral pedestal and a signal to his other colleagues from the military

This expectation as it turned out later was misplaced. The Commission received petitions against three former military Heads of State; Generals Buhari, Babangida and Abdusalam containing very serious allegations of human rights violations, ranging from the execution of three young Nigerians for drug trafficking, the killing of Dele Giwa through a parcel bomb to the sudden death of MKO Abiola under suspicious circumstances.

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46 Kukah, MH, *Witness to Justice: An Insider's Account of Nigeria's Truth Commission* (Bookcraft, Lagos, 2011) 242.

47 Babafemi Akinrinade, 'Human Rights NGOs in Nigeria: Emergence, Governmental Reactions and the Future', (2002) 1 AHRLJ, 110-134.

48 *Ibid*.

49 'Rights Commission Insists Ex-Heads of State Must Appear'. At http://www.panapress.com/Rights-Commission-insists-ex-Heads-of-State-must-appear--13-572381-18-lang4-index.html, Accessed on 3 May 2015.

50 *Ibid*.

The three generals directly and through their counsel deplored all manners of delay tactics to avoid appearing before the Commission, who continually tried to secure their appearance. Finally the generals went to court to enforce their fundamentals rights. In suit No. FAC/ABJCS/182/2002 filed by General Babangida and Brigadier Akilu, they sought the following relief among others:

(i) A declaration that the Tribunal of Inquiry Act No. 41 of 1966 is not an enactment of any matter of which the National Assembly is empowered to make any law under the 1999 Constitution.

(ii) A declaration that it is not lawful for the Commission to summon the plaintiffs to appear before it to testify or to produce documents.

(iii) An order of prohibition prohibiting the Commission, their servants or agents whomsoever or howsoever from sitting as a body empowered to exercise powers or functions claimed to be conferred upon it.[51]

Regrettably, on 8 December 2000, the plaintiffs received a favourable ruling from the High Court not to appear before the Commission.

The ruling was upheld by the Court of Appeal on 31 October 2001. This was the beginning of the end of the Commission's activities. It was the lowest moment of the Commission. A big dent on the dark history of Nigeria that all the waters of rivers Niger and Benue cannot blot away. Kukah captured the mood of the Commission and Nigerians when he stated, "The appearance or non-appearance of the three Generals as I have noted can be considered the lowest point in the work of the Commission. However, am of the view that in the final analysis, it is the Generals not Nigerians who lost out in the case."[52]

Apart from the non-appearance of the generals, other controversies dogged the work of the Commission. Notably is the question of the constitutionality of the Commission, which the Supreme Court finally decided on 3 February 2003 that the 1999 Constitution made no provision for tribunal of enquiry.[53]

The initial zeal that greeted the establishment of the Commission melted away as one controversy after the other trailed the Commission.

Public opinion on the summoning of the three generals became polarized along ethnic and religious lines. According to Kukah, there were some voices in

51 Leon Usigbe & Lemmy Ughegbe, *Why I'm in court over Oputa*. At reporthttps://groups.yahoo.com/neo/groups/Naija-news/conversations/topics/2142. Accessed on 4 May 2015.

52 *Ibid*.

53 Guåker, Elisabeth, *A Study of the Nigerian Truth Commission and why it Failed* (2009).

the north who began to accuse the Commission of being a tool set by President Obasanjo to settle personal scores with his old enemies.[54] Even though Kukah tried to dispel these accusations, we see substance in it as Obasanjo is reputed to be very unforgiving and we always demand forties pound of flesh whenever the opportunity arises.

Another problem the Commission faced was that of poor funding as the government had made no serious funding plans for the Commission from the beginning.[55] This made the Commission to go cap-in-hand sourcing for funds from donor agencies such as the Ford Foundation and the British Council; thus jeopardising the independence and neutrality of the Commission.

The problems the Commission faced were legions, all calculated to frustrate the work as many people were anxious to see that the Commission should fail in the assignment.[56]

Finally, the full and final report of the Commission's work in eight volumes was submitted to the President on 28 May 2002, amidst misplaced fanfare typical of many Nigeria occasions.

The HRVIC made profound and far-reaching recommendations which because of its historical significance are set out below verbatim:

Summary of Recommendations

(i) A bottom-up, broad-based series of national seminars to discuss our countrys political and constitutional structure should be held as a matter of urgency.

(ii) Human Rights Education should be integrated into the curricula of our schools, with an urgent return to civic and moral education from nursery through secondary schools.

(iii) There should be harmonization of all education initiatives in the country, especially the Universal Basic Education Programme, to achieve higher national standards anchored on sound moral values.

(iv) There should be a moratorium on state and local government creation in the country, while caution should be exercised with respect to the creation of more chiefdom these exercises rather than weld the people together

54 Human Rights Violation Investigation Commission of Nigeria (HRVIC) 442.

55 Freudenreich, Johannes, and Florian Ranft, 'Learning from the Past–An Empirical Study on the Existence of a Pattern of Truth Commissions', 13 (1999) 1 *Ethics & International Affairs*, 43-64.

56 Onyegbula, Sonny. 'The Human Rights Situation in Nigeria Since the Democratic Dispensation', (2007).

tend to emphasise division and to create enmity among our peoples and communities.

(v) The Niger Delta Development Commission (NDDC) should be closely monitored, regarding project conception and execution, with local communities playing a central role in the process.

(vi) The National Assembly should, as a matter of topmost urgency, harmonise, in collaboration with the state legislatures, the findings of the various Constitution review initiatives, so as to bring into existence an acceptable Constitution.

(vii) While we are of the view that Sharia is an integral part of our religion and customary law, the Constitution should be the supreme law of the land on criminal matters. The federal government should take action to make Sharia conform to all the international legal obligations Nigeria has subscribed to, as pointed out in Volumes Two and Five of this Report.

(viii) With effect from 29 May 1999, anyone who stages a coup d'etat must be brought to trial, no matter for how long and regardless of any decrees or laws they may have passed to shield themselves from future prosecution.

(ix) The Armed Forces should be pruned down to a manageable size, while they should also review their method of internal discipline.

(x) The Directorate of Military Intelligence (DMI) should be overhauled and professionalized, with its powers and functions limited strictly to military intelligence gathering.

(xi) There should be an immediate restoration of a climate that guarantees academic freedom in our universities, and to fund them adequately.

(xii) As a matter of great urgency, steps should be taken to restore its lost dignity to the Nigeria Police, through proper funding, training and the rehabilitation of its collapsed infrastructures.

(xiii) The Report of the 1997 Kayode Eso Panel of Enquiry on the Judiciary should be released immediately.

(xiv) The Federal Ministry of Justice, in collaboration with the National Human Rights Commission, should publish readable summaries of citizenship rights and obligation in the country.

(xv) The Ministry of Women Affairs should be properly funded and equipped to take up major issues, which still confront women in Nigeria.

(xvi) The Office of the Inspector-General of Police should be made to act expeditiously on the cases of murder that the Commission forwarded to it for further investigation (see appendix).

(xvii) The Commission forwarded the cases of Chief Alfred Rewane and Alhaja Kudirat Abiola, to the Hon. Attorney-General of the Federation and Minister of Justice, who, in turn forwarded the files to the High Court of Lagos, where the cases are being prosecuted.

(xviii) Arising from these cases are the arraignment of General Ishaya Bamaiyi and others before various High Courts in Lagos. The petitions from alleged victims about the alleged violations of their human rights by the aforementioned persons (General Bamaiyi and others) were dealt with in Volumes Four and Six of this Report. However, while we affirm that matters pending before our courts should take their normal course, we advise that, in the spirit of forgiveness, reconciliation, unity and peaceful co-existence, which the Commission has belaboured in this Report, the President may wish to consider a political solution as an alternative to the on-going protracted judicial process or else accelerate the hearing of these cases.

(xix) The federal government should open up the case of Dele Giwa for proper investigation.

(xx) The federal government should open the case of Chief Moshood Abiola again for proper investigation in the public interest.

(xxi) There should be an overhaul of the country's prison system, with priority given to the rebuilding and refurbishing of prison facilities.

(xxii) The Office of Ombudsman for Prisons Welfare should be created.

(xxiii) The Office of the Minister for Human Rights should be created.

(xxiv) A Human Rights Violations Rehabilitation Presidential Fund should be established.

(xxv) A National Human Rights Day should be proclaimed and celebrated annually on June 14. These coincide with the day the Commission was inaugurated.

(xxvi) A Popular Version of the Report of the Commission should be published.

(xxvii) It is recommended that security outfits as the Strike Force, Body Guards and National Guard, which reared their ugly heads and were used to abuse the rights of Nigerians with impunity be scrapped. The outfits such as the SSS and NIA should be re-oriented to uphold the rights of Nigerians.

Military Trials

(xxviii) All cases tried under the DMI and SIP were in breach of the African Charter and the Rule of Law. As a result of the above, we recommend blanket pardon for such cases.

(xxix) That a Presidential Fund be established for payment of compensation to victims. That the government, corporate organizations, multi-nationals, Non-Governmental Organizations and International Organizations be invited to contribute to such a fund. We further recommend that the funds are to be managed by the National Human Rights Commission or any other body to be appointed by the government.

Right to Life

(xxx) That in concert with Chapter Two of the 1999 Constitution (Fundamental Objectives and Directive of Principle of State Policy), government should give all Nigerians the chance to participate meaningfully in the socio-economic activities of the nation. This way, Nigerians shall have access to decent shelter, food, clothing and social amenities. This is essential because the imperatives of government are to secure and guarantee the welfare of the people. The right to life presupposes the existence of the means to sustain that life closely interwoven with the means to sustain that right.

Employment

(xxxi) That the government should consciously and assiduously create jobs. This will reduce crime and poverty as there is a correlation between unemployment with crime and poverty. The government can accomplish this by: setting up cottage industries, reviving our infrastructures, reviving our manufacturing sector, giving out grants to small scale businesses for graduates, reviving our agriculture.

Ministry of Justice

(xxxii) We recommend that the Honourable Attorney-General of the Federation and Attorneys-General of the States should ensure that State Counsel are properly instructed as to the limit of their functions in rendering legal advice to the Police and appropriate steps be taken to discipline erring State Counsel who, rather than give legal advice, turn themselves into courts and decide cases submitted merely for advice. In the Bayelsa case

> involving Dr. Eneweri, the Counsel was forced to recommend that those on board the outboard engine where Dr. Eneweri were supposed to have been drowned, be charged with the offence of murder. And that the State Counsel that proffered the advice be joined as an accessory after the fact. The Commission is sorry to say that in other jurisdictions we found the same practice still going on. We, however, did find in one or two jurisdictions such as the Rivers State when Mr. Adokie Amasiemeka was DPP, a correct advice being given and the Commission commended him for that. As Chief Law Officers, Attorneys-General should appreciate the responsibility imposed on them by their high offices while rendering advice to the government especially on issues bordering on life and death. If such advice is rejected, he/she should have the courage to resign. We make this recommendation because the atrocities and human rights violations which occurred during the period under review would not have happened if the Attorneys-General lived up to expectation.

Regrettably, for now the efforts of the Commission continue to gather dust as successive governments have not gathered enough political capital to implement it. The off-the-cut excuse for this failure is the Supreme Court judgement negativing the power of the President to establish such a Commission in the case filed earlier by General Babangida. In their ruling the Supreme Court as per Samson O. Uwaifo argued that:

> The power to make a general law for the establishment and regulation of Tribunal of Inquiry in the form of the Tribunal of Inquiry Act of 1966 is now a residual power under the 1999 Constitution belonging to the state. The Tribunal of Inquiry Act, 1966 promulgated by the Federal Government for the entire federation under the enabling law is an existing law pursuant to section 315 of the 1999 Constitution and is deemed to be an Act enacted by the National Assembly for the Federal Capital Territory only and a law enacted by a state house of assembly under the residual powers of both legislature. This is because the National Assembly has no power under the 1999 Constitution to enact a general law on Tribunal of Inquiry in the form of the said Act to have effects throughout the Federation of Nigeria.

The judgment sounded the death knell for the works of the Commission as without the constitutional powers to establish a Commission of such national appeal by the President, the HRVIC as established cannot be of a general nature and apply throughout the Federation of Nigeria.

7. Observations

Until African nations put the rule of law on the driver of governance, conflict will continue to engulf the continent which will necessitate peace building efforts. According to Kofi Annan, "since 1970, more than 30 wars have been fought in Africa,[57] the vast majority of then intra-state in origin.[58] This being the reality, African nations must take a hard look on the failure of the application of transitional justice mechanisms in Nigeria, the most populous nation with the best economy on the continent ... Many reasons can be adduced for the failure of this mode of peace-building in Nigeria. Was President Obasanjo sincere in setting up the Commission? Was the Commission meant actually for reconciliation and peace building through dealing with the past honestly and fearlessly or for witch hunting and vendetta?

The failure of the government to have consulted widely before embarking on the exercise may be responsible for the weak legal foundation on which it was established.[59] Exercising power not conferred on the President in establishing such a Commission makes Nigeria a laughing stock. Ideally it would have been better if such a Commission was berthed through an Act of the National Assembly enacted just for that purpose as was the case in Sierra Leone, South Africa and Kenya. This obviously would have specifically enabled the Commission to have met the ends of peace building.

The composition of the 8-man Commission did not reflect geographical and ethnic balance. For a country like Nigeria where loyalty to tribes and geo-political region is much stronger than to the state, this was a serious anomaly. Out of the eight members, five were from the northern part of Nigeria with only three from the southern part of Nigeria.[60] This in itself violates the federal character principle enshrined in section 14(3) of the 1999 Constitution. The South Africa module should have been copied whereby the members of the TRC were drawn through consultation with civil society groups, the ANC and

57 Jeremy Sarkin, 'An Evaluation of the South African Amnesty Process,'in Audrey Chapman & Hugo van der Merwe (eds.) *Truth and Reconciliation in South Africa: Did the TRC Deliver?* (University of Pennsylvania Press, Philadelphia 2008).

58 Annan K, *The Cause of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa*, Quoted in Madaki, AJ, *Fate ad Protection of Women Conflict Situations: a Dispassionate Appraisal of the Law*.

59 Guåker, Elisabeth, 'A Study of the Nigerian Truth Commission and Why It Failed' (2009). At https://bora.uib.no/handle/1956/6215. Accessed on May 4 2015.

60 At http://www.nigeriavillagesquare.com/articles/guest-articles/national-conference-and-oputa-panel-12.html.

other stakeholders who were asked to send nominations of a broad spectrum[61] to serve on the Commission; thus assuring the public of its neutrality and impartiality.

At inauguration, the Commission was allotted only three months to complete the exercise. This clearly showed that from the onset, the government never intended anything good out of the Commission other than a symbolic adherence to the rule of law and peace building.

How can all the cases of human right abuses sparring thirty three years and eight regimes be thoroughly investigated within just three months in a country as vast and complex as Nigeria? This clearly showed lack of good will and a genuine and sincere quest for the truth.[62]

Ideally, as Priscilla Hayner, observed it is impossible for any short term commission to fully detail the extent and effect of widespread abuses that took place over many years' time.[63]

The absence of an amnesty clause in the instrument setting up the Commission was another challenge. How do you expect people to own up to past atrocities some of which could carry the death penalty without sufficient assurance of amnesty? The refusals of the three generals to appear before the Commission could be attributed to this. We are of the opinion that the guarantee of amnesty is a guarantee for truth telling.

8. Conclusion

Even though all the atrocities alleged in the Report may not be sufficient to invoke the Rome Statute and even if otherwise, the Rome Statute cannot operate retrospectively, the non-implementation of the Report makes the recourse and referral to the International Criminal Court (ICC) very attractive. Most of the conflicts in Africa oftentimes are triggered by personality clashes, resource control and the disdain for rule of law, which have oftentimes snowballed into "civil wars, regional conflict, genocidal and oppressive rule. " African nations have the option to resort to national structures of justice to bring impunity to an end or submit to the jurisdiction of the ICC to which 30 of them are signatories to the Rome statutes. The principle of complementarity provided in article 1 of the Rome Statute is lost to many African nations. The

61 Kukah, *M.H*, *op cit*. 459.

62 Ahiante, Andrew, 'Government Urged to Reform Judiciary', *This Day*, 7 November 2003. Available at http://www.thisdayonline.com/archive.php.

63 Priscilla Hayner, *Unspeakable Truth*.

ICC will only exercise its Jurisdiction when National Courts are unwilling or unable to investigate or prosecute such crimes as are classified under article 5 of the Statute.

Maybe one day the truth about the actual reasons for setting up the HRVIC in Nigeria will be told by Chief Obasanjo himself, but for now we console ourselves with the homily of Fr. Kukah that, "Commissions of this nature are not meant to solve problem of the nation. No, they are like the rear mirrors which should help us look back and decide whether it is safe to attempt to overtake or increase our speed."