THE LAW SOCIETY OF KENYA JOURNAL

VOLUME 17 2021

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THE LAW SOCIETY OF KENYA JOURNAL

Volume 17 2021

DESIGNED & PRINTED BY:

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THE OFFENCE OF MONEY LAUNDERING IN KENYA: Is The Standard Of Conduct Ascertainable?

Constance Gikonyo*

1. Introduction

The constitutionality of the Kenyan money laundering provisions was recently challenged and upheld by the court. Nonetheless, the court did not discuss in detail specific issues raised in the petition. This paper seeks to fill this gap by undertaking a scholarly analysis of the central concepts in the money laundering definition and make a conclusion on whether it is vague and imprecise. The examination is based on reviewing relevant literature, case law and analysing the contents of sections 3, 4 ,7 and 9 of 2009 (POCAMLA). To assist in benchmarking and identifying viable interpretation of these provisions reference is made to decisions from the United Kingdom. From the analysis it is evident that it is possible to ascertain the aspects to prove in order to demonstrate commission of the offence. This discourse helps to clarify the salient features of the offence and possibly promote understanding and its use.

The origin of the term money laundering is anecdotal and a number of versions exist.[1] The commonly held version holds that the term is linked to mafia activities in the 1970s, in the United States of America. In a bid to disguise their ill-gotten wealth the mafia invested in "launderettes" through which the legitimate earnings were mixed with the illegitimate earnings from drugs, prostitution and gambling. [2]Thus, the process of mixing the legitimate funds with the "illegitimate funds" so as to "cleanse" them was considered a process of laundering. Another cited origin is during the Watergate Scandal when the print media used the term 'money laundering' when reporting on the matter.[3]

The earliest reported use of the term in a judicial context was in the case of US v $4,225,625.39[4] in 1982. In this case although the court used the term it did not specifically expound on its meaning. Subsequently, money laundering was not defined as a crime under the laws of any jurisdiction until 1986. Then the United States and the United Kingdom became the first countries to introduce legislation classifying money laundering as an offence in domestic jurisdictions.[5] Internationally, the first convention to define and require states to criminalise money laundering was the United Nations Convention against Illicit Traffic in Narcotic Drugs & Psychotropic Substances.[6] The

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1 J D Serio, 'Fuelling Global Crime: The Mechanics of Money Laundering' (2004) 18(3) International Review of Law, Computers & Technology 435, 442-443; R Durrieu Rethinking Money Laundering & Financing of Terrorism in International Law Towards a New Global Legal Order (Leiden: Martinus Nijhoff Publishers, 2013), 14.

2 B Unger, 'Money Laundering Regulation: From Al Capone to Al Qaeda' in B Unger & D Van der Linde (eds), Research Handbook on Money Laundering (Cheltenham: Edward Elgar, 2013), at p 19.

3 B Unger 'Introduction' in B Unger & D Van der Linde (eds) Research Handbook on Money Laundering (Cheltenham: Edward Elgar, 2013), at p 3.

4 [1982] 551 F. Supp. 314 (S.D. Fla. 1982). Unger, n 3 p3; n 1 p14.

5 Serio, n. 1., p. 101. The United States Money Laundering Control Act 1986; 18 USC 1956-1957; s 24 Drug Trafficking Offences Act 1986, United Kingdom.

unique aspect of this convention is that money laundering is defined in relation to the predicate offence of drug trafficking.[7]

Presently there are a number of definitions of the term money laundering as provided in conventions, by organisations and authors. For example, the The United Nations Convention against Transnational Organised Crime[8] and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism.[9] Both have similar meaning. The Financial Action Task Force on Money Laundering (FATF) frames money laundering as the processing of criminal proceeds to disguise their illegal origin.[10] The United Nations Office on Drugs and Crime (UNODC)[11] and the International Monetary Fund (IMF)[12] adopt a similar explanation to the FATF.

Scholars too have contributed to the numerous definitions of money laundering. Unger defines it as 'the process of disguising the unlawful source of criminally derived proceeds to make them appear legal.'[13] Using economics terminology, Masciandaro states that 'money laundering is an autonomous criminal economic activity whose essential function lies in the transformation of liquidity of illicit origin, or potential purchasing power, into purchasing power usable for consumption, saving, investment or reinvestment'.[14] Durrieu interprets it as the 'autonomous process of making money or any other economic value that comes from a criminal source A, look like money or any other economic value coming from a legitimate source B'[15]. According to Alldrige 'it is the process of transforming the proceeds of illegal activities into legitimate capital.'[16]

From these definitions, key unifying elements that constitute recurring features for the offence of money laundering can be delineated as; to undertake it, one needs to be in possession of property derived from a proscribed activity, have the relevant mens rea and carry out the actus reus with the ultimate aim of obscuring the illegal origin and facilitate utilising the criminal proceeds. These elements point to money laundering being a process and an autonomous offence. It is a process undertaken in order to hide the unlawful origin of funds gained after committing a predicate

6 1582 UNTS 95 (Vienna Convention). Adopted 20 December 1988, entry into force 11 November 1990, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=VI-19&chapter=6&clang=_en.

7 Predicate offence is defined in article 2(h) of the United Nations Convention against Transnational Organised Crime.

8 2225 UNTS 209 (Palermo convention). Adopted 15 November 2000, entry into force 29 September 2003, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-12&chapter=18&clang=_en.

9 CETS no 198 (Warsaw convention), (adopted 16 May 2005, entered into force 1 May 2008) https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/198 .

10 FATF, 'What Is Money Laundering?' at http://www.fatf-gafi.org/pages/faq/moneylaundering/ last accessed 13 January 2020.

11 UNODC, 'Introduction to Money Laundering' at https://www.unodc.org/unodc/en/money-laundering/introduction.html?ref=menuside last accessed 20 January 2020).

12 International Monetary Fund, 'The IMF and the Fight Against Money Laundering and the Financing of Terrorism' (IMF Factsheet, 2017)https://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/16/31/Fight-Against-Money-Laundering-the-Financing-of-Terrorism Last accessed 20 January 2020).

13 B Unger, Can Money Laundering Decrease? 41(2013) Public Finance Review 658, 659.

14 D Masciandaro, 'Economics of Money Laundering: A Primer' (Paolo Baffi Research Centre, Working Paper 171, 2007), 2 at http://www2.econ.uu.nl/users/unger/papers/Masciandaro.pdf accessed 22 June 2014.

15 Serio, n. 1., p. 101.

16 P Alldrige Money Laundering Law Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime (Oxford: Hart Publishing, Oxford), p 2.

offence. Ultimately, the purpose of a successful money laundering process is to allow a criminal to enjoy illicit proceeds by consumption, investing or re-investing in a legal economy. Alldrige succinctly summarises this rationale as follows:

> Clean money is worth more than dirty money. Clean money — money untainted by criminal association — can be invested in profitable activities or spent on consumption, more or less conspicuous, without risk of recrimination. Dirty money, generally speaking, can only be invested or spent less profitably, less visibly, and at a risk of punishment. It also carries the risk of being used as evidence of the initial crime.[17]

On the other hand, the focus of anti-money laundering laws is to prevent the offender from enjoying their illegal proceeds and ensure accountability. This is achieved through criminalisation of money laundering internationally and domestically. The development of Kenya's anti-money laundering regime was triggered by the recognition at the international level of the ill effects of money laundering on economies. This led to the evolution of prohibitory and preventative strategies to address the problem.[18] In this regard, conventions were negotiated and organisations created in order to target money laundering.[19] Kenya has ratified the relevant conventions[20] and subsequently enacted the (POCAMLA).[21]

The motive to review the provisions on the money laundering offence in Kenya is informed by the matter of Matagei.[22] The petitioner filed an application seeking sections 3, 4, 7 of POCAMLA defining the money laundering offence be declared unconstitutional. The basis for the petition was that the clauses were over-broad, over-reaching and containing unsatisfactorily defined words, hence infringing on the principle of legality. Further, the impugned sections do not set an ascertainable standard of guilt so as to protect against arbitrary enforcement. Specifically, issues were raised that certain words and phrases were not defined appropriately. These include "knows," "ought to reasonably know", "engages in any agreement or arrangement," "money laundering" and "proceeds of crime". As a result, the petitioner contended that these vague and imprecise terms cast the criminal net too wide and do not set an ascertainable standard of guilt to protect against arbitrary enforcement. Although the court upheld the constitutionality of these provisions, it did not discuss in detail the specific issues stipulated above.

Further, despite having POCAMLA legislation inforce since 2010, to date there is limited jurisprudence concerning its application. The Matagei case is significant because it is the first addressing matters of constitutionality of the money laundering provisions in Kenya. Accordingly, there is a need to critically consider the issues raised in order to establish whether indeed the offence

17 Serio, n. 1., p. 101.

18 Prohibitory measures are the criminalisation of money laundering by identifying and categorising predicate offences from whence laundered funds are sourced. Preventative measures aim to ensure the following: customer due diligence (CDD); reporting of suspicious transactions (STR); regulation and supervision and; sanctions against organisations that fail to operate appropriate systems. See B Vettori 'Evaluating Anti-Money Laundering Policies: Where Are We?' in B Unger and Van de Linde (eds) Research Handbook on Money Laundering (Cheltenham: Edward Elgar, 2013), pp 474-485.

19 Serio, n. 1., p. 101

20 Kenya ratified the Vienna and Palermo conventions on 19 October 1992 and 16 June 2004 respectively.

21 Chapter 59B of the Laws of Kenya. The act's date of commencement was 28 June 2010.

22 Matagei v Attorney General [2019] eKLR at < http://kenyalaw.org/caselaw/cases/view/178891/ >accessed on 23 April 2020.

of money laundering in Kenya is over-broad, over-reaching and does it set an ascertainable standard of conduct. Essentially, from reading sections on the offence, is it possible to discern the mens rea, acti rei elements, targeted proceeds and offender. This paper is focussed on unpacking these central concepts and hence make a conclusion on whether the definition is vague and imprecise.

Before engaging in the analysis it is necessary to note that due to POCAMLA's underutilisation, Kenyan jurisprudence on the offence of money laundering is limited. Therefore, reference will be made to court decisions from the United Kingdom for purposes of comparison. Both Kenya and the United Kingdom share the common-law tradition and have similar legislations and have acceded to international money laundering conventions. Moreover, the United Kingdom has advanced greatly in terms of the functional capabilities of the courts in dealing with money laundering cases compared to the Kenyan courts. Accordingly, jurisprudence from the United Kingdom provides persuasive authority and guidance on how possible issues arising can be addressed by Kenyan courts. Consequently, the examination may be influential in assisting countries in the sub-regional or regional context in understanding the offence of money laundering. To achieve the stated aim of this paper it is divided as follows. Part two, provides a general overview of the crime of money laundering as defined in the Kenyan legislation and the penalties involved. For one to engage in money laundering it requires property of a criminal origin. Consequently, under POCAMLA, what qualifies property to be of a criminal origin? This examination is undertaken in part three. Parts four and five focus on establishing who the potential offender is and, when does the jurisdiction to prosecute for a money laundering offence arise. Parts six and seven will review the mental and physical elements required for the money laundering offence. The analysis in the previous sections culminates with the discussion in part eight advocating that money laundering is a separate and autonomous offence. Lastly, part nine focuses on the evidence needed to prove criminality in money laundering offences.

2. The Definition of Money Laundering Under POCAMLA

The definition is given by reference to the principal money laundering offences set out in sections 3, 4 and 7 of POCAMLA.[23] For one to commit these transgressions they should be in possession of proceeds of crime and have the relevant mens rea. That is, an individual knew or ought reasonably to have known that the property or part of it is the proceeds of crime. Consequently seek to conceal or disguise the illegal origin of the proceeds by undertaking the relevant physical act.

The *acti rei* encompasses a number of distinct and alternative acts, these are: i) entering into any agreement or engaging in any transaction or engaging in any arrangement or performing any other act in relation to criminal property with the intention of: a) concealing the nature, source, location, disposition or movement or ownership or any interest of the said property or;[24] b) enabling or assisting anyone to avoid prosecution (whether in Kenya or elsewhere) or;[25] c) removing or diminishing any such property acquired directly or indirectly as a result of commission of an offence;[26] or ii) acquiring, using, having possession of proceeds of crime;[27] or iii) transporting, transmitting, transferring or receiving a monetary instrument or anything of value.[28] As regards attempts, it is only the offence of transporting, transmitting, transferring or receiving monetary

23 POCAMLA, s 2 'money laundering' means an offence under any of the provisions of sections 3, 4, and 7.
24 Ibid, s 3(a)(b)(i).
25 Ibid, s 3(a)(b)(ii).

instruments which specifically mentions that endeavouring to undertake any of the acts amounts to an offence. By contrast, the sections providing for the other primary money laundering offences do not. Nonetheless, it may be inferred that applying provisions of the Penal Code dealing with inchoate offences is appropriate and lawful.[29] Therefore, attempts, conspiracies and accessories to commit offences relating to money laundering are punishable.

Upon conviction for a money laundering offence, in the case of a natural person, one faces imprisonment for a maximum term of fourteen years or a maximum fine of Kenya Shillings 5 million or the amount of the value of the property involved in the offence. With regards to the fine the court is to settle for the higher amount. Nonetheless an individual can have both a fine and imprisonment imposed. For a body corporate upon conviction it can be liable to pay a maximum fine of Kenya shillings twenty five million or the amount of the value of the property involved in the offence. Similarly, between the two amounts, the court should choose the higher.[30]

As per section 6 of POCAMLA, the defences for a money laundering offence are mainly two. That an individual did file a suspicious transaction report as required under section 44 or an employee of a reporting institution has made a report as per section 47(a). Likewise section 19 reiterates the contents of section 6 but in more general terms. The section provides that an individual shall not be liable to prosecution with respect to acts done in carrying out a function, in good faith and with due diligence, relating to performance or enforcement of any obligation under the act. This wording may be inferred as providing a general defence. Consequently, anyone who is able to prove these elements will have justified that their actions do not qualify as money laundering. The following subdivisions will focus on relevant elements in defining the money laundering offence in Kenya.

3. Property that Represents the Proceeds of Crime

For one to engage in money laundering they must be having proceeds of crime. The offence is not confined to cases involving only money or cash; generally it involves property that is the proceeds of crime. Accordingly of importance are the terms, 'property' and 'proceeds of crime' because for money laundering to take place there must be 'proceeds of crime' which can be in different forms of property. Proceeds of crime are derived from committing a predicate offence; it is the benefit derived from a crime. Accordingly, 'offence' is a key concept which under POCAMLA is defined as any act that is a crime under Kenyan law. [31]Further, the dual criminality requirement found in section 127 of POCAMLA provides that earnings from foreign crimes in Kenya would be considered proceeds of crime, as long as the criminal conduct occurring in the foreign state constitutes a crime under Kenyan law. Essentially, in defining the predicate offences for money laundering Kenya has adopted the all crimes approach.[32]

26 Ibid, s 3(a)(b)(iii).
27 Ibid, s 4(a).
28 Ibid, s 7.
29 Penal Code, Chapter 63 Laws of Kenya, ss 388, 389, 391, 393, 394 & 396. n23, s 16(i).
30 n23, s 16(i).
31 n23, s 2.
32 Predicate offences may be described by reference to all offences; or to a threshold linked either to a category of serious offences; or to the penalty of imprisonment applicable to the predicate offence (threshold approach); or to a list of predicate offences; or a combination of these approaches. See FATF Recommendation 3 and article 2b of the Palermo Convention.

The meaning of proceeds of crime in POCAMLA is given an expansive interpretation. First, it captures 'any property or economic advantage'. 'Property' is given the broadest meaning possible since it covers both real and personal property; tangible or intangible. As well as any interest or right in property that is evidenced by legal documents or instruments. Additionally, use of the term 'economic advantage' infers that benefit is given a wide meaning to include obtaining a pecuniary advantage. In such an instance one obtains an interest only if he evades liability to which he is personally liable.[33] That is, avoiding accountability for a financial obligation one was responsible for in person.

Second, such property should be derived "directly or indirectly, as a result of or in connection with an offence." "'As a result of" applies to any consequence of committing an offence[34] while "in connection with" widens the scope to cover situations where a person obtains property in anticipation of committing a crime.[35] Hence a benefit can be acquired as an outcome of having completed the commission of an offence or gained prior to actual complete commission of an offence. A defendant legally "obtains" a benefit if they have a legal interest in particular property.[36] In construing the phrase "in connection with" an offence, the courts have held that though it may have a very wide meaning, a restrictive interpretation is to be applied.[37]

To achieve a narrow interpretation requires application of the *causa causans* test; the proximate or adequate cause. There should be some consequential relation between the benefit and unlawful activity.[38] The benefit in some way must represent the conclusive consequence of the unlawful[39] activity, since a definite link between the proceeds of crime and the particular offence is evident. Principally, a causal link has to be established.

Third, proceeds of crime not only targets the original property that was acquired from the commission of an offence, but goes further than this. It focusses on other forms of property that these initial proceeds were converted or transformed into. Even if the initial proceeds were intermingled, with "clean" property the "dirty" amount can be targeted on a proportional basis. Further if the original amount directly received from the predicate offence has been re-invested, the income, capital or other economic gains derived from such property can be pursued. Fourth, the proceeds of crime can be followed "irrespective of the identity of the offender". As discussed below this implies that there is no distinction to be made between proceeds of self or third party laundering.

Fifth, POCAMLA should have a retrospective approach since the proceeds of crime involved could have been generated from a predicate offence committed before the commencement of the act. However, in relation to the money laundering offence this aspect is not succinctly clear. This is because aside from section 52(3) POCAMLA which states generally, that an individual will have benefitted from an offence if they received or retained proceeds of crimes before or after the

33 R v May [2008] AC 1028 at 48; R v Chambers [2008] EWCA Crim 2467 at 52; E. Rees, R. Fisher and R. Thomas, Blackstone's Guide to the Proceeds of Crime Act 2002 (Oxford: Oxford University Press, 4ed, 2011), at p 27-28.

34 R v Waller [2009] 1 Cr App R (S) 76.

35 R v James & Blackburn [2011] EWCA Crim 2991 p49; n 33 p 31-32. R v Ahmad [2012] 2 All ER 1137.

36 R v Fulton & Another [2017] 2 Cr App R (S) 11 at 22; n 33 p48; R v Waya [2013] 1 AC 294 at 64; n 33 p 25-26.

37 Lipschitz NO v UDC Bank Ltd [1979] (1) SA 789 (A) at 804 as restated in NDPP v Cook Properties [2004] 2 ALL SA 491 pp13 & 64-66.

38 A Kruger Organised Crime and Proceeds of Crime Law in South Africa (Durban: Lexis Nexis, 2 ed, 2013), at p102.

39 n37 (NDPP v Cook Properties) p72.

commencement of POCAMLA. Specifically, this proviso applies for purposes of only parts six to twelve of the act. That is, with regards to criminal and civil forfeiture.

Consequently, in relation to the money laundering offence application of the *nullum crimen sine iure* principle is instructive. According to this principle, a person cannot or should not face criminal punishment except for an act that was criminalised by law before they performed the act. Consequently, the money laundering offence can only apply in relation to proceeds of crime acquired after 28 June 2010; when POCAMLA became operational. Nevertheless, to facilitate fulfilment of parliament's rationale in enacting POCAMLA; that of taking away criminal benefit gained.[40] The statute should be amended to explicitly state that the proceeds of crime involved could have been derived, received or retained, before or after thecommencement of the act. This will permit retrospective application in money laundering offences.[41]

4. The Offender

POCAMLA applies to proceeds of crime "irrespective of the identity of the offender".[42] The meaning of this statement has not been addressed in case law as yet. Nonetheless it would seem that the character of the offender is not in issue. Since the act encompasses either a natural or legal person involved in self or third party laundering.[43] Own proceeds laundering applies to all three principal money laundering offences and captures persons who are the authors of the predicate offence. Third party laundering applies when someone else, not the individual who committed the predicate offence is involved. It is mainly targeted through the acquisition, using and having possession offences.

Because of the definition of criminal property, as discussed above, there is no distinction between proceeds from an individual's own crimes and from crimes committed by others. Thus, self-laundering is as much money laundering, as similar activities performed by third parties laundering another's criminal proceeds. Besides to be charged with a money laundering offence it is not necessary for an individual to have been convicted of the predicate offence.

What is required is to provide information showing the crime(s) leading to the targeted criminal proceeds Besides to be charged with a money laundering offence it is not necessary for an individual to have been convicted of the predicate offence. What is required is to provide information showing the crime(s) leading to the targeted criminal proceeds.[44] This is premised on the understanding that money laundering is a separate and autonomous offence from the predicate offence. As stated by the court, 'criminality of the money laundering offence has to be gauged in the first instance by the nature and scale of that activity, not the nature and scale of the underlying crime.'[45] Appropriately, money laundering offences can be committed by those who are unaware of both the type and extent of the primary criminal activity.

40 National Assembly Official Report (Hansard) of 8 May 2008 as per the words of Dr Shaban and Mr Wamalwa at 946 and 951 respectively.

41 Proceeds of Crime Act 2002, s 340(4) which permit for retrospective application in the United Kingdom.

42 n23 s 2 'proceeds of crime' means any property or economic advantage derived or realised, directly or indirectly, as a result of or in connection with an offence irrespective of the identity of the offender…' [Emphasis mine].

43 Ibid

44 Republic v Director of Public Prosecutions Ex Parte Patrick Ogola Onyango [2016] eKLR at 150. http://kenyalaw.org/caselaw/cases/view/123501/ ,<accessed 20 January 2020>.

45 n36 (R v Fulton & Another) p23.

[46] Further interpretation of the phrase 'irrespective of the identity of the offender' could infer that the nationality of the offender is not of importance for purposes of granting Kenya jurisdiction over an individual for a money laundering offence. This is because though the predicate offence can be committed in any territory, Kenya can have authority over an individual as long as they undertook the laundering within Kenya. Additionally jurisdiction can be established if the proceeds of crime are within the country. This lends credence to the fact that of importance is establishing the aspect of territoriality and not nationality. Hence POCAMLA can apply 'irrespective of the identity of the offender' in terms of nationality as long as the offender is a natural or legal person[47] and territoriality for the commission of laundering is ascertained.

According to the definition of 'person' under POCAMLA it captures both natural and legal persons. Furthermore, the lack of distinction between natural and legal persons as offenders is extended. This is because certain officers such as directors, managers, secretary or officer(s) of a body corporate [48] can be held liable on behalf of the legal person. English courts have held a company director liable for money laundering arising from his position.[49] Thus, a body corporate or its officers who facilitate any of the money launderings acts can potentially be prosecuted. This affirms the logic that POCAMLA applies 'irrespective of the identity of the offender' in terms of distinguishing between a body corporate and its officers. Since directors and administrators are accountable for money laundering committed in their official capacity.

5. Jurisdiction to Prosecute for a Money Laundering Offence

In relation to money laundering offences a state can exercise jurisdiction in a number of ways, as follows. The offence, is committed against its national; is perpetrated by its national or a habitual stateless person resident within its territory or; if the offence is linked to money laundering planned to be carried out within its territory.[50] With regards to territorial jurisdiction it is both substantive and procedural jurisdiction. [51] The former is the power of a state to define any conduct as a crime and to enact substantive criminal law regarding the conduct. The latter is the power of a state to investigate and prosecute a defendant who violates the substantive criminal law.

The definition of offence under POCAMLA does not set a geographical limitation rather it encompasses the extraterritoriality of money laundering offences. Accordingly it is possible for a Kenyan court to have jurisdiction where a substantial measure of the criminal activity takes place within Kenya. This is because the definition of offence captures acts proscribed under Kenyan law or a criminal offence perpetrated in a different jurisdiction but which is also an offence under Kenyan law; the dual criminality requirement. Hence, the definition of money laundering targets all forms of proceeds of crime derived from carrying out an offence. Aptly, even proceeds from offences committed outside Kenya are pursued and an individual can be charged with a money laundering offence.

Inclusion of the dual criminality principle aids in satisfying the legality principle. That is, one should not be convicted of any criminal offence 'on account of any act or omission which did

46 n36 (R v Fulton & Another) p 24.
47 n23 s 2.
48 Ibid ss 2 and 16(6).
49 R v Lonnie Augustus Smith [2015] EWCA Crim 333; n36(R v Fulton & Another)
50 Palermo Convention art 15; Vienna Conventionart 4
51 n51 (Palermo Convention) arts 10,11 and 20.

not constitute a criminal offence under national or international law at the time when it was committed'.[52] Further due to the transnationality of money laundering, from a practical perspective dual criminality facilitates collaboration efforts since the offence is a crime in both states.[53]

6. The Mental Element of Money Laundering

The *mens rea* element is inferred from the use of the words 'knows'[54] or 'knowingly'[55] or the phrase 'ought reasonably to have known'[56] in defining the money laundering offences. The relevant knowledge must be of facts and not of mere claims or allegations. [57] Hence, 'knows' or 'knowingly' imply awareness of the illegal origin of the proceeds; that an individual has cognizance of the unlawful origin of property they are dealing with. Additionally, knowledge is capable of an expansive interpretation in terms of the viable mental states [58] These include: (i)actual knowledge; (ii) wilfully shutting one's eyes to the obvious; (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable person would make; (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable person; (v) knowledge of circumstances which would put an honest and reasonable person on inquiry. These feasible knowledge states can be categorised into actual knowledge or wilful blindness cases.[59] Actual knowledge is when an individual has certainty; one is conscious or aware that a particular circumstance exists. Wilful blindness is ascribed where an individual deliberately shuts their eyes to the obvious.[60] That is, purposeful indifference by intentionally avoiding knowledge of the facts.

Generally, a wide interpretation of knowledge is favoured since the conventions that advocate for criminalisation of money laundering state that knowledge may be inferred from objective factual circumstances. That is, deduced from the facts and circumstances of the case, which are particular in each instance.[61] However, an exception to a wide interpretation of knowledge is advocated for in certain circumstances. In *R v Saik* in considering provisions on conspiracy charges in money laundering offences, the court held that it has to be proved conclusively that the accused knew of the criminal origin of the property; this is in relation to the *mens rea* element. Similarly in *Martin Edward Pace & Another v Crown* [63] the court clarified that in offences of attempts to launder proof only of the mental element of suspicion is not sufficient. It has to be proved that the accused knew that proceeds of crime were involved when he agreed to undertake the particular conduct.

52 International Covenant on Civil and Political Rights art15; Universal Declaration of Human Rights art 11(2); African Charter of Human and Peoples Rights art 7(2).

53 R Durrieu, 'Rethinking Money Laundering Offences: A Global Comparative Analysis' (Centre for Criminology, Faculty of Law, University of Oxford, PhD thesis, 2012), p 319.

54 n23 s 3 and s 4.

55 Ibid s 7.

56 Ibid s 3.

57 Baden v Société Générale Pour Favoriser le Développement du Commerce et de l'Industrie en France S.A. (Note) [1993] 1 WLR 509 at 575.

58 Ibid. Also cited by Millett J. in Agip (Africa) Ltd v Jackson [1990] Ch 265 at 293; C Howard 'The Mens Rea Tests For Money Laundering Offence' (1998) New Law Journal 118.

59 T Y Cheong 'Knowing, Not Knowing and Almost Knowing: Knowledge and the Doctrine of Mens Rea'20(2008)3 Singapore Academy of Law Journal 677 at 678.

60 See Palermo Convention art 2; Vienna Convention art 3; Interpretive note to recommendation 3, FATF, 'International Standards on Combating Money Laundering and The Financing of Terrorism & Proliferation' (FATF, Paris, 2012-2019); Agip (Africa) Ltd. v Jackson, n59 above at 293.

61 Baden v Societe Generale, n58 at 576.

62 *R v Saik* [2007] 1 A C 18 the case clearly indicated that in a conspiracy case you cannot have suspicion, you either know or you do not know that the property is criminal property.

63 [2014] 1 Cr. App. R. 34

Likewise, considering the similarity between the English and Kenyan provisions on conspiracies and attempts to launder, it would be prudent for Kenyan courts to reflect on the English decisions.

An individual can also be deemed to have the relevant mental element if they 'ought reasonably to have known'[64] of the illegal origin of proceeds. This implies application of an objective test. This requires the use of a standard 'based on conduct and perceptions external to a particular person'.[65] As opposed to a subjective one that is 'peculiar to a particular person and based on the person's individual views and experiences'.[66] Accordingly, in determining if an individual ought reasonably to have known that they were dealing with criminal property, the issue is to be viewed from the perspective of a reasonable person and not on an individual's personal assessment, feelings, or intentions. Essentially, this requires judging the circumstances at hand from the standpoint of whether, an honest and reasonable man placed in a similar situation would have deduced the property to be proceeds of crime.

7. The Physical Acts of Money Laundering

The four main physical acts of money laundering as delineated in POCAMLA are, entering into an agreement or; engaging in a transaction or; engaging in an arrangement or performing any other act. These are part of the elements to be considered in determining the *acti rei* that encompass the money laundering offence. For one to participate in laundering criminal proceeds they should undertake all, some or one of the acts. The agreement, arrangement or transaction entered into do not have to be enforceable in law. Additionally section three states that these main acts are done with any of the following aims, to 'conceal or disguise the nature, source, location, disposition, movement, ownership or any interest or; enable or assist a person to avoid prosecution or; to remove or diminish any property. Lastly, the physical acts of acquiring, using or possession also constitute money laundering acti rei. These aspects espoused above will be considered in turn.

Performing any act entails carrying out an action, task, or function in connection with criminal property. Entering into any agreement means to agree contractually, either by coming to terms with someone or assenting to make an agreement with someone. [67] This *actus reus* contemplates individuals involved in handling criminal property belonging to others. Engaging in any transaction is the 'process or activity of doing something'. [68] Narrowly defined this entails involvement in conducting business or other dealings. It can also be interpreted widely to encompass taking part in any activity comprising two or more persons. Generally, the elements of 'performing an act' or 'entering into any agreement' or 'engaging in any transaction' are straightforward and easier to establish unlike 'engaging in any arrangement'.

Arrangements apply when an individual assists another to keep proceeds of crime. An arrangement can be 'a measure taken or plan made in advance of some occurrence'.[69] Thus, to enter into an arrangement is to become a party to it. Whereas becoming concerned in an arrangement suggests a wider practical involvement such as taking steps to put the arrangement into effect.[70]

64 n23 ss 3 and 4.
65 B Garner (ed) Black's Law Dictionary (11 ed, Thomson Reuters, 2019).
66 Ibid.
67 n65
68 Ibid.
69 Ibid
70 Bowman v Fels [2005] 2 Cr App R 19.

This offence potentially catches those involved in money laundering offences usually at the layering and integration stages. These are individuals who in the course of their work facilitate money laundering by or on behalf of other persons.

An agreement to make an arrangement will not always be an arrangement. To show that someone has engaged in an arrangement involves proving an act done at a particular time and an offence is only committed once the arrangement is actually made. Additionally the arrangement should have the effect of facilitating the acquisition, retention, use or control of criminal property by or on behalf of another person, in the present.[71] According to *R v GH* [72] it does not matter whether criminal property existed when the arrangement was first made. Of importance is that the property should be criminal when the arrangement operates on it.[73] That is, the criminal property does not have to exist when the defendant enters or becomes concerned with the arrangement but it must be criminal property at the point that the arrangement takes effect.

This strict construal is necessary because a more liberal interpretation would have serious potential consequences. For example, requiring property to constitute criminal property before an arrangement came into operation would result in intensifying and enlarging of the existing and onerous obligations to report known or suspected money laundering[74] placed on reporting entities.[75] Simply because it would require such institutions to know or be certain of the criminal nature or otherwise of property the instance it is deposited into a client's account hence into their custody. Additionally, it would impose an investigative duty on reporting institutions yet anti-money laundering preventative measures in the law do not compel such responsibilities from them. The courts have also declared what would not qualify as an arrangement. Specifically, in relation to legal professionals in *Bowman v Fels* [76] it was enunciated that arrangements do not cover or affect the ordinary steps taken by legal professionals throughout the litigation process.

The main reasoning of the court was that parliament could not have aimed at such a restrictive interpretation. Since such an interpretation aims at holding that, generally, any legal acts undertaken by lawyers on behalf of their clients can be construed as acts constituting an arrangement to assist in the acquisition, retention, use or control of criminal property. These include the various steps undertaken towards securing a client's rights.[77] This is contrary to the rationale why legal professionals undertake various actions on behalf of clients. Their main intention is to assist in securing or determining client's legal rights, not engaging in criminality. Nonetheless, in determining if money laundering has occurred in situations involving legal professionals, the facts in each specific circumstance have to be studied carefully and viewed within the relevant context.

71 R v Geary [2011] 2 All E R 198; R. v G & Another [2013] EWCA Crim 2237.
72 [2015] 4 All E R 274.
73 Ibid p40.
74 n73
75 Under the preventative regime a reporting institution means a financial institution and designated non-financial business and profession, n23 s2
76 n 71
77 Ibid pp 83 -84, 95 -97, 106, 109 -110.

The main physical elements of money laundering, discussed above, can be undertaken with three main objectives according to POCAMLA. First, the intention of concealing or disguising the nature, source, location, disposition or movement or ownership or any interest of the said property. Second, enabling and assisting someone to evade prosecution. This specifically deals with doing something that makes it possible for someone to elude prosecution. This would target intermediaries such as legal professionals, accountants and other individuals who act in the prescribed manner. Third, to facilitate the removal or diminishing of criminal property. The first and third aspects will be considered in turn.

Disguising is defined as the 'act of concealment or misrepresentation'.[78] Whereas concealment 'is an affirmative act intended or known to be likely to keep another from learning of a fact of which he would otherwise have learned.'[79] It is intended to prevent the discovery of the true origin or the owner of the funds. Simply, it involves acting in a manner to prevent the discovery of the criminal origin or nature of the money. A person can commit this act in relation to the proceeds of their own crime, or those of someone else.

Concealment and disguise may be considered synonymous terms and in some jurisdictions the application lends credence to this. For example, in the United States of America the two terms are used together.[80] However, there are scholars of the view that there is some slight difference. By undertaking any of the acts with the aim of concealment, the person who commits the predicate offence, intends to prevent the discovery of the true origin of the funds or that they are the owner of the money.[81] Disguising involves a third party who did not participate in the predicate offence but acts in a manner to prevent the discovery of the criminal origin or nature of the money.[82] Despite this distinction, the unifying aspect for both terms is that they involve acting in a certain manner with the intention to prevent discovery of the criminal origin or nature of property.

Concealment does not necessarily encompass many transactions. It could be specific conduct but which when viewed within the relevant context, it can be discerned that it was intended to hide the true source or nature of property.[83] Specifically, 'a design to conceal in respect of a particular transaction may be imputed if the transaction, while innocent on its face, is part of a larger money-laundering scheme.'[84] Evidence of concealment can be imputed from a range of actions such as communicating in a coded manner, unusual secrecy, use of false documentation, use of overseas accounts and unnecessary transactions.[85] The act(s) of concealment undertaken need not be effective, that is, successful in producing the intended result.

The attributes that can be concealed or disguised are many. In listing them, POCAMLA starts in a specific manner (source, location, disposition, movement) but finally gives more general attributes that can be concealed or disguised (ownership, any interest). These characteristics can be categorised into three.

78 n65
79 Ibid.
80 E Bell 'Concealing And Disguising Criminal Property' 12(2009)3 Journal of Money Laundering Control 268.
81 n 1 p 246.
82 Ibid.
83 n 81 p275.
84 Ibid.
85 Ibid p 276 for a comprehensive list of concealment practices.

First, the essential quality of the assets captured by the term 'nature' that is, the property is derived from an illegal source. Second, the physical origin is captured by the words 'source', 'location', 'disposition' or 'movement'. Third, legal nature indicated by the terms 'ownership' or 'any interest'. Ownership is the 'bundle of rights allowing one to use, manage, and enjoy property, including the right to convey it to others.'[86] Whereas 'interest' is a legal share in something. [87] Collectively, 'interest' includes any aggregation of rights, privileges, powers, and immunities; distributively, it refers to any one right, privilege, power, or immunity.[88] Hence, the word 'interest' captures a broad set of attributes compared to 'ownership' which is more specific.

The four main physical acts of money laundering, entering into an agreement or; engaging in a transaction or; engaging in an arrangement or; performing any other act, can also be undertaken with the intention of removing or diminishing criminal property or to assist in acquiring, using, possession of criminal property. Removing concerns the transfer or shifting of a person or thing from one location, position to another.[89] Hence, removing or diminishingproceeds of crime is achieved through the transfer or physical movement of property from one location or position to another. Acquiring necessitates gaining possession or control of property or obtaining whereas to use requires one to utilise the proceeds of crime.[90] Possession involves exercising some form of control, be it actual or constructive.[91] For the *acti rei* of acquiring, possession and use, it is imperative that the individual 'receives' or 'obtains' criminal proceeds. Receiving entails 'taking, getting or coming into possession of criminal proceeds offered, given, sent, from some outside source'. [92] Whereas an individual legally 'obtains' criminal proceeds if the property is brought into one's possession. [93] Comparably both 'receiving' and 'obtaining' infer the act of gaining possession.

The third money laundering offence under POCAMLA involves transporting, transmitting, transferring or receiving criminal proceeds. Transporting involves carrying or conveying a thing from one place to another.[94] Likewise, transmit is to send or transfer a thing from one person or place to another.[95] Transfer may also include the conveying or changing over the possession or control of property from one person to another by either selling or gifting the property.[96] The unifying element of these *acti rei* is that it involves the movement, physical or otherwise of a thing from one person or place to another. Accordingly, self or third party launderers who engage in these acts can be charged with a money laundering offence.

8. Money Laundering is a Distinct and Autonomous Offence

Money laundering is at times considered a continuation of the predicate offence. Since the subsequent act of laundering is necessitated by the prior behaviour of committing the predicate

86 n65
87 Ibid.
88 Ibid.
89 n65
90 n65
91 Ibid.
92 Ibid.
93 Ibid.
94 Ibid.
95 Ibid.
96 Ibid.

offence. [97] Indeed this presumption establishes an undeniable link between the predicate offence and money laundering; as the predicate offence generates the illegal proceeds that require laundering. For this reason money laundering has been termed as a 'parasitic offence'.[98] Nonetheless, despite this link, money laundering should be considered an entirely separate and autonomous offence distinct from the predicate offence.

The legal justification for money laundering as an autonomous offence is evidenced by considering the criminalised acts that constitute the offence. The acts (*acti rei*) that form the elements of money laundering are distinct from those of the predicate offence.[99] The proscribed acts for money laundering include concealing, transferring, disguising, and conversion. These are different from those of a predicate offence such as drug trafficking which include supplying and manufacturing. Additionally, the sociological justification that money laundering is an autonomous crime rests on the claim that it safeguards social values and interests different from the predicate offence.

A crime is considered an autonomous criminal offence, that is, a different or other crime if it safeguards social values or interests that are different from those protected by another crime.[100] By criminalising money laundering, independent social values of socio-economic order and fair competition are provided additional protection.[101] Through the laundering process, the criminals are able to construct and consolidate their economic power by concealing and investing the illegal proceeds in a legitimate economy. In addition they harm free and fair competition processes in a specific legal market. In doing so, they cause direct and irreversible harm to the socio-economic system.[102]

Thus, money laundering should be considered an autonomous criminal offence as its criminalisation protects the values of social–economic order and fair competition in society over and above those values protected by criminalising the predicate offence. Moreover, by considering money laundering an autonomous offence it is possible to prosecute without having to prove the commission of the predicate offence that generated the funds. Thereby eliminating the difficulties that may arise in proving the predicate offence and hence increasing the probability of conviction for the money laundering offence.

Although money laundering is an autonomous offence there is an undeniable link between the predicate offence and money laundering. Consequently, it has been suggested that money laundering can be used as a surrogate charge [103] for the predicate offence when the predicate offence cannot be proved.[104] In most cases the predicate offence will lead to instigation of the money laundering

97 n 1 p 228; n 16 pp 288-289.
98 n 73 p37.
99 See De Vries v The State [2012] 1 ALL SA 13 (SCA) at 48.
100 n1 p 231.
101 n1 pp 191-238, 230; A Safdari, M S Nurani, K Aghajani and F Abdollahian 'Social Impact of Money Laundering' 5(2015)8 Asian Journal of Research in Social Sciences and Humanities 173.
102 n1 p 231; See also D Masciandaro 'Money Laundering: The Economics of Regulation' 7(1999) 3 European Journal of Law and Economics 225, 225 & R Pinto & O Chevalier Money Laundering as an Autonomous Offence: Analysis of the Consequences of the Autonomy of Money Laundering Offence (Inter-American Drug Control Commission, 2006) at <www.cicad.oas.org/Lavado_Activos/eng/Documents/EnglishVersionACrime.doc > accessed 22 August 2014 for a discussion on money laundering as an autonomous offence.
103 N Abrams 'The New Ancillary Offences' 1(1989) 1 Criminal Law Forum 1, at 2.
104 Ibid p 3.

investigation and both crimes will be enquired into in tandem. The investigation may show there is sufficient nexus between the underlying offence(s) and money laundering. Consequently, the separate charges may be stated in the same charge sheet. The choice of which offence to prosecute will be based on the evidence collected. This will assist in deciding the appropriate charge to prefer. Ideally, the higher of the two will be prosecuted. Nonetheless, the prosecution must ensure that the money laundering offence(s) accurately fit the facts of the case and the available evidence.

In deciding if to charge with the predicate offence or a money laundering offence consideration should be given to the following aspects as enunciated by the Crown Prosecution Service.[105] First, consider the penalty involved for the money laundering and the predicate offence. Preferably, one will have a higher penalty. Second, the underlying offence ought normally to be proceeded with, as it represents the conduct which gives rise to the criminal proceedings. Third, a money laundering charge should be preferred where the criminal proceeds involved are substantial. In a case involving self-laundering and third party laundering, it may be appropriate to charge the self-launderer with the predicate offence and the third parties with the money laundering offence.

9. Evidence Needed to Prove Criminality in Money Laundering Offences

As in other criminal matters, for money laundering offences, the burden of proof lies with the prosecution and the standard required is beyond reasonable doubt. Consequently the prosecution has to adduce sufficient evidence in-order to convince the court. The prosecution has to prove the following elements. First, the property involved represents a benefit from criminal conduct (criminal property) either directly or indirectly, in whole or in part. Essentially, prove the criminal origin of proceeds. This requires adducing different types of evidence.

Direct evidence is better because it is stronger as it does not require an inference to be drawn to arrive at a conclusion.[106] However, considering the hidden nature of laundering, circumstantial evidence is most likely to be the available evidence. Indirect/circumstantial evidence is 'the facts or circumstances from which the existence of other facts or circumstances can be deduced through a process of logical interpretation.'[107] This type of evidence can be useful in various ways. For example, by showing a link between the predicate offender and the defendant as launderer, this involves the use of accomplice evidence. Also, by exposing that the property is derived from a specific crime. Besides, circumstantial evidence can be used to show the unlikelihood of the property being of legitimate origin. Through presenting such evidence which leads the court to conclude that from the circumstances the inference drawn is, the property can only be derived from crime. For example, accounting experts can be used as witnesses to demonstrate that from reviewing complex audit trails, the plausible conclusion is the transactions indicate the property came from proceeds of crime. Various jurisdictions have endorsed the use of circumstantial evidence from which inferences are drawn to prove the criminal origin of property.[108]

105 Crown Prosecution Service, Legal Guidance, Proceeds of crime: Money Laundering Offences (CPS, 2018) at < https://www.cps.gov.uk/legal-guidance/proceeds-crime-act-2002-part-7-money-laundering-offences > accessed 17 January 2020.

106 R Ratliff, 'Third-party money laundering: Problems of proof and prosecutorial discretion' 7(1996)2 Stanford Law & Policy Review 173 at 174.

107 n2 p327; See also E Bell 'Proving the Criminal Origin of Property in Money Laundering Prosecutions' 4(2000)1 Journal of Money Laundering Control 12 at 13.

108 R v Anwoir [2008] 4 All E R 582 at 21; Serious Organised Crime Agency v Hakki Yaman Namli & Another [2013] EWHC 1200 (QB) at 45-49; National Crime Agency v Amir Azam & Others [2014] EWHC 3573 (QB) at 26; R v Lonnie Augustus Smith n 50 above at 7-12.

Importantly, there is no need to prove the predicate offence that is show specific criminal conduct that is the source of the benefit.[109] What is required is to identify and show a direct cause and effect connection between a particular crime and the property.[110] Specifically, to provide information showing the crime(s) leading to the targeted criminal proceeds. Description of the conduct in relatively general terms should suffice. For example, 'manufacturing and supplying controlled drugs' or 'brothel keeping'. As long as the conduct is unlawful under Kenyan law. Moreover, the court has stated that the use of the words 'irrespective of the identity of the offender' in defining 'proceeds of crime' negates the need to prove a predicate offence.[111]

Second, show that the conduct giving rise to the criminal proceeds is unlawful under the criminal law of Kenya. The evidence adduced should be sufficient enough to enable the court decide whether the conduct described was illegal under the criminal law of Kenya. Third, the prosecution will also need to prove the defendant knew or suspected that the proceeds constituted or represented such a benefit. This entails showing the alleged offender had the relevant mens rea; they knew or ought reasonably to have known that the property or part of it, is the proceeds of crime. Four, demonstrate that the accused undertook to conceal or disguise the illegal origin of the proceeds by undertaking any of the relevant *acti rei* discussed above.

In terms of the rules of evidence, the court is primarily to be guided by the criminal rules of evidence as per the Evidence Act.[112] However, to facilitate admissibility of particular evidence, certain provisions under the Evidence Act have been altered in terms of their application to matters instituted under POCAMLA. The amendments made, permit easier admission of electronic evidence [113] and allow the use of hearsay evidence.[114] This includes admission of statements or documents made by persons who are dead, cannot be traced or their attendance would lead to delay or unreasonable expense.

This is beneficial because applying the strict rules on admissibility of such evidence would make it difficult to utilise. [115] For example, it permits the evidence of an accomplice, although it is hearsay, to be admissible. Such evidence is a key component of circumstantial evidence that the court can use to draw inferences. Therefore, limiting the strict application of the Evidence Act in POCAMLA proceedings is favourable as it allows for the use of evidence that would otherwise be unusable but crucial in proving money laundering.

Overall, to prove criminality in money laundering offences an array of evidence is needed that helps to establish a nexus between the criminal property to criminal activities or to an offence committed by the offender. Hence, it is necessary to identify and trace the property and establish a link with the criminal activity. This can be done through an investigation of the predicate offence and a financial investigation. In a financial investigation financial expertise is used to gather, check, refine, process

109 Republic v Director of Public Prosecutions n 44 at 150. n50 p[8]; R v Craig [2007] EWCA (Crim) 2913.
110 n44 p143.
111 n44 pp 151 – 153.
112 n23s 56(2) and s 81(2).
113 Ibids 128 permits the admission of electronic evidence. In this regard, POCAMLA alters the onerous provisions provided under the Evidence Act; s 106A – 106D relating to the admissibility of such evidence.
114 Ibids 129.
115 Similarly other jurisdictions such as the United Kingdom and South Africa have also permitted the use of hearsay evidence in certain instances. See n33 p2; Horncastle and others v United Kingdom (App. No. 4184/10).

and analyse financial information. [116]The objective being to gather evidence, identify accomplices, determine and trace criminal property of an individual or identifying the scale of criminality.[117] This evidence is then presented in court to substantiate the money laundering offence.

10. Conclusion

The exposition examined the elements that constitute the offence of money laundering under Kenyan law. The features identified are; being in possession of property derived from an illegal activity, having the required *mens rea* as to the illegal origin of the property, which in turn motivates undertaking the *actus reus,* to hide the origin with the ultimate aim of utilising these funds. This lays the basis for the autonomous process of money laundering.

Further, the discussion indicates that the definition of money laundering under POCAMLA has a wide scope of application in terms of capturing criminal proceeds, potential offenders and geographical application. The offence targets not only the original funds laundered but also subsequent property into which it is converted. Neither do the provisions set a geographical limitation, rather it is cognisant of the extraterritoriality of money laundering offences. This is because the definition of a predicate offence encompasses crimes proscribed under Kenyan law as well as those committed in a different jurisdiction as long as the dual criminality requirement is fulfilled.

Consideration of the mental and physical elements involved in money laundering indicate that it is an autonomous and standalone offence. Primarily because the *mens rea* and *acti rei* components are different from those of other offences. Additionally, these factors are broad and can apply to both a self or a third party launderer. Nonetheless, despite being broad it is possible from the wording of the statute to establish the aspects that should be proved in order to demonstrate commission of the money laundering offence. Hence, the provisions do set an ascertainable standard of guilt and in so doing protect against arbitrary enforcement. Additionally, the exploration of English jurisprudence is of persuasive value and provides guidance on how various issues arising consequent to the application of the money laundering provisions may be addressed. This would be beneficial in assisting Kenya develop its jurisprudence in this area considering that presently it has limited jurisprudence.

Overall, the discussion shows that the money laundering provisions in Kenya are not vague, imprecise or unclear by reason of abstractness. Indeed, they are broad but that does not mean that they are overreaching. Consequently, the provisions cannot be said to be self-defeating in trying to ensure accountability of money launderers. On the contrary there is the potential of generally using anti-money laundering laws to deal with other crimes. In principle this may be possible for any crime for which a profit is gained and thereafter laundering is undertaken so as to "cleanse" the profit and facilitate its consumption or re-investment. Primarily because money laundering may also be termed as a surrogate offence. In relation to crime prevention this would be advantageous, since it increases the measures available to pursue offenders. Appropriately anti-money laundering laws can be used individually or in conjunction with laws dealing with a particular offence. This would essentially reinforce crime prevention strategies.

116 M Pheijffer, 'Financial Investigations and Criminal Money' 2(1998)1 Journal of Money Laundering Control 33 at 35.

117 H Wood, Every Transaction Leaves a Trace: The Role of Financial Investigation in Serious and Organised Crime Policing (Royal United Services Institute for Defence and Security Studies (RUSI), Occasional Paper, 2017).*56(2)*

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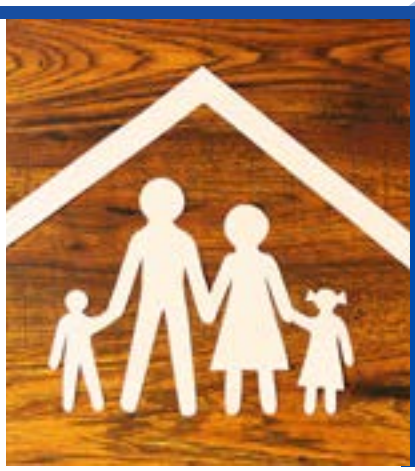

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THE ILLUSIONARY RIGHT TO PROTECTION OF PROPERTY UNDER ARTICLE 40 OF THE CONSTITUTION:
An essay on recent jurisprudence regarding indefeasibility of title in Kenya

Wilson Mwihuri*

1. Introduction

In the case of *Dodhia v National & Grindlays Bank Limited*,[1] Duffus, V.P. pronounced himself as follows:

> The adherence to the principle of judicial precedent or *stare decisis* is of utmost importance in the administration of justice in the Courts in East Africa and thus to the conduct of the everyday affairs of its inhabitants, it provides a degree of certainty as to what is the law of the country and is a basis on which individuals can regulate their behaviour and transactions as between themselves and also with the State.

For courts to follow precedent, there has to be certainty in the state of the law. In the event of uncertainty, it may result in courts '[picking and choosing] which of the Supreme Court or Court of Appeal decisions to follow'[2] exacerbating an already bad situation by creating more uncertainty, and by not providing a solid basis on which individuals can regulate their behaviour and transactions.

This article will discuss some decisions by Kenyan Courts regarding the fundamental issue of indefeasibility of title. It will seek to demonstrate that there are conflicting decisions of the Court of Appeal on this issue. The article will also shed light on the current state of the law to determine if it is unclear, and if there is urgent need for the apex court in the land to provide clarity and answer certain fundamental questions, among them, (i) whether an official search obtained from the ministry of lands is conclusive as to the proprietorship of the particular parcel of land, and also, (ii) whether the title of a *bona fide* purchaser of land, for value without notice, is indefeasible regardless of the infirmity of title of previous registered proprietors. This article will also highlight how the courts have answered these questions.

2. Background

When discussing indefeasibility of title, the genesis, more often than not, involves an inquiry into the Torrens system that was introduced in Australia in the mid-19th Century 'to provide an efficient system for transferring interest in land'[3] without 'the expense and difficulty experienced under the

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1 [1970] EA 195

2 E Essien, 'Conflicting Rationes Decidendi: The Dilemma of the lower Courts in Nigeria' 12(2000) 1 , African Journal of International and Comparative Law 23.

3 PJ Carruthers 'The Australian Torrens System principle of immediate indefeasibility: Is it 'fit for purpose' for the 21st Century?' (PhD Thesis, The University of Western Australia 2018) <https://api.research-repository.uwa.edu.au/portalfiles/portal/34721286/THESIS_DOCTOR_OF_PHILOSOPHY_CARRUTHERS_Penelope_Jane_2018.pdf> accessed 20th August 2020, 19.

old system of title.'[4] t was held in *Gibbs v Messer*,[5] arguably the *locus classicus* on this issue, that:

> The main object of the Act, and the legislative scheme for the attainment of that object, appear to them to be equally plain. *The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity.* That end is accomplished by providing that everyone who purchases, in *bona fide* and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title. *(emphasis added)*

Indefeasibility of title has been described as 'the heart and foundation of land registration statutes that are modelled on the Torrens System.'[6] Therefore, and as held in *Gibbs v Messer,* upon purchasing land from the registered proprietor for value and without notice, a *bona fide* purchaser is entered into the register and acquires, or rather should acquire, an indefeasible right, notwithstanding the infirmity of the registered vendor's title.

In Kenya, the Torrens system was localized through the passage of the Registration of Titles Act Cap 281 (RTA). Section 23 of the RTA (now repealed) provided as follows:

> 23. (1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.

The interpretation of this section has been the subject of numerous court decisions. In the often-cited case of *Dr. Joseph Arap Ngok v Justice Moijo Ole Keiwua,*[7] the Court of Appeal held as follows:

> Section 23 (1) of the Act (RTA) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to *which the owner is proved to be a party.* Such is the sanctity of title bestowed upon the title-holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. *In fact, the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy. (emphasis added)*

It would appear that the Torrens system was wholeheartedly adopted in Kenya and *bona fide,* duly registered titleholders, if not involved in fraud or mis-representation in the acquisition of the property, would be entitled to protection from the courts by simply relying on the contents of the register, and the fact of their registration. In the cases discussed below, it will be demonstrated that adherence to such indefeasibility has not been uniformly followed.

4 S Christensen and D Bill, 'Aligning sustainability and the Torrens register: Challenges and recommendations for reform' (2012) Australian Property Law Journal <https://eprints.qut.edu.au/49803/> accessed 20th August 2020, 3.

5 (1891) AC 247.

6 S Scott, 'Indefeasibility of Title And The Registrar's 'Unwelcome' S81 Powers' (1999) Canterbury Law Review <http://www.nzlii.org/nz/journals/CanterLawRw/1999/2.html> accessed 22nd January 2021.

7 Civil Appeal No. 60 of 1997 (UR).

3. The *Arthi Highway Developers* Case

To provide context to this critique, it is necessary to begin with the High Court decision in *West End Butchery Limited v Arthi Highway Developers Limited*. [8] In this case, the suit property was initially owned by West End Butchery Limited ('West End'). The property was fraudulently transferred from West End to the 1st defendant, Arthi Highway Developers Limited ('Arthi Highway'). Arthi Highway then proceeded to subdivide the property into several parcels, which were then sold and transferred to, *inter alia,* the 5th, 6th and 7th defendants (Kenya Medical Association Housing Cooperative Society Limited (KMAH), Yamin Construction Company Limited, and Gachoni Enterprises Limited) who were *bona fide* purchasers who acquired the land from the registered proprietor (Arthi Highway). At this juncture, it is apposite to quote, verbatim, what Nyamweya J held in the High Court judgment that was delivered on 20 December 2012:

> The last question to be answered is the effects of the fraudulent transfer of the suit property … to the 1st Defendant [Arthi Highway]…..I concur with the 1st Defendant that the principle of n*emo dat quod non habet* is only applicable to the transfer of interests in moveable property, and not to immoveable property which is governed by different set of rules and principles. Section 23 of the RTA (since repealed) is the applicable rule on transfer of interests in the suit property […] It cannot be said that the transfer of the suit property to the 1st Defendant [Arthi Highway] was by the proprietor [West End] of the suit property within the meaning of section 23(1) of the RTA […] *It is in my view unjust and inequitable that an innocent proprietor [West End] can be dispossessed of his or her legal title to land through the acts of a fraudster, and this cannot have been the intention of section 23 of the RTA. (emphasis added)*

Nyamweya J cited with approval the case of *Gacie v Attorney General* [9] where Onyancha J stated as follows:

> Cursed should be the day when any crook in the streets of Nairobi or any town in this jurisdiction, using forgery, deceit or any kind of fraud, would acquire a legal and valid title deceitfully snatched from a legal registered innocent proprietor. *Indeed, cursed would be the day when such a crook would have the legal capability or competence to pass to a third party, innocent or otherwise, a land interest that he does not have even if it were for valuable consideration. For my part, I would want to think that such a time when this court would be called upon to defend such crooks, has not come and shall never come […].*

The learned Judge(in the West End case) concluded as follows:

> *It therefore follows that the 1st Defendant [Arthi Highway] had no interest or title to the suit property that it could lawfully pass on to the 5th, 6th and 7th Defendants, and it was therefore not a proprietor of the suit property within the meaning of section 23(1) of the RTA.* It is therefore the finding of this Court that for these reasons, the 5th Defendant cannot invoke the principle of indefeasibility of title with respect to the titles transferred to it by the 1st Defendant (Arthi Highway) […] neither was any interest in the suit property or sub-divisions thereof passed on to the 6th and 7th Defendants pursuant to the sale agreements entered into with the 1st Defendant. *(emphasis added)*

8 (2012) eKLR.
9 (2006) eKLR.

Being aggrieved, Arthi Highway challenged the decision of Nyamweya J in the Court of Appeal. In its judgment delivered on 30th January 2015,[10] the Court of Appeal held, *inter alia,* as follows:

> It is our finding that as between West End and Arthi, no valid Title passed and the one exhibited by Arthi before the trial court was an irredeemable fake. *It follows that Arthi had no title to pass to subsequent purchasers,* and therefore KMAH, Yamin and Gachoni [the 5th, 6th and 7th defendants in the high court] cannot purport to have purchased the disputed land or portions thereof. *(emphasis added)*

The importance of the *Arthi Highway* decision is that, despite being bona fide purchasers for value without notice, the "genuine" titles that had been issued to the 5th, 6th and 7th defendants by the registrar of titles were declared null and void because the 1st defendant, (Arthi Highway) who had sold the properties to them, had obtained its title fraudulently. It was common ground that the 5th, 6th and 7th defendants were not aware of and neither were they involved in the fraud carried out by *Arthi Highway*. Despite this, and notwithstanding their *bona fides,* their titles were nullified.

4. The *Charles Karaithe Kiarie* Case

This case involved protracted sale transactions of one parcel of land to different parties. The aggrieved parties, who the High Court had found were not innocent purchasers for value without notice, challenged the decision of the High Court in the Court of Appeal, where the appeal was dismissed on 26 April 2013. [11] Still aggrieved, an application was filed seeking leave to appeal to the Supreme Court. In its ruling delivered on 8 November 2013, the Court of Appeal held as follows:

> It follows from what we have said that there has never been any controversy with regard to the application of Section 23 of the RTA and even though the phrase *"Torrens system"* may not have been expressly used, there are numerous decisions in this country where it has been applied [...] *that even where it is shown that past registrations were obtained illegally, the title of the last bona fide purchaser for value was indefeasible under Section 23 (1) of the RTA.* This position was restated by the Court in *Dr. Joseph Arap Ngok V. Justice Moijo ole Keiwua & 5 others*. The question intended to be raised in the Supreme Court, in our view, does not constitute a matter of general public importance […]. *There is no uncertainty in the law as regards what would constitute fraud and indefeasibility of title…(emphasis added)*

This Court of Appeal decision in the *Kiarie* case was referred to by the Court of Appeal, differently constituted, in its decision in the *Arthi Highway* case discussed above. It is important to note that, despite the very clear finding in the *Kiarie* case that the title of the last *bona fide* purchaser was indefeasible, the Court of Appeal in the *Arthi Highway* case appears to misinterpret the holding in the Kiarie case. This is because the Kiarie case agrees with the decision in the Arap Ngok case which had held that the title of a registered owner can only be subject to challenge on the grounds of fraud or misinterpretation to which the owner is proved to be a party. The Court of Appeal in the Arthi Highway case misinterprets the *Arap Ngok* decision by holding that the original registered genuine owner of land cannot be dispossessed by a fraudster. The finding of the Court of Appeal in the *Arthi Highway* case is as follows:

10 *Arthi Highway Developers Limited v West End Butchery Limited* [2015] eKLR.

11 *Kiarie v Administrators of the Estate of John Wallace Mathare (Deceased)* [2013] eKLR.

> We have found already, on evaluation of the recorded evidence, that fraud was committed both at the registry of companies as well as the Lands office. *The consequence is that West End did not divest its registered interest in the disputed land which was not an equitable one.* It was the proprietor of the legal interest in the disputed land and did not part with it, as alleged or at all. The trial court held, following previous court decisions, that an innocent holder of legal Title to land cannot be dispossessed of that interest by a fraudster, and that *Section* 23 protects 'Title issued to a purchaser upon the transfer or transmission by the proprietor thereof'. Those decisions are the *Alberta Mae Gacie* case (supra) and the *Iqbal Singh Rai* case (supra) which emanated from the High Court. With respect, we are persuaded by the reasoning in those cases as it accords with the law. *(emphasis added)*

It is accepted that if it is proved that the registered owner engaged in fraud or misrepresentation to acquire the land, his title can be nullified. However, in the Arthi Highway case, the issue was whether the titles of subsequent *bona fide* purchasers were indefeasible. In the *Arthi Highway* case, the Court of Appeal merely focuses on the initial registered owner who has been defrauded, and does not focus on the plight of the subsequent *bona fide* purchasers who were not involved in any fraud to acquire the land, and herein lies the problem.

A final attempt was made in the Kiarie case to persuade the Supreme Court that indeed, its intervention was necessary to settle the law on this area as it involved a matter of general public importance. In its ruling delivered on 16 October 2015,[12] the Supreme Court held as follows:

> On the basis of the record before us, we are left with no option but to find that *the applicants have not demonstrated any inconsistency in the state of the law regarding the doctrine of indefeasibility of registered title to land, occasioned by contradictory decisions by either the High Court or the Court of Appeal.* We are, thus, in agreement with the Court of Appeal's conclusions on this question.

Thereafter, the Supreme Court declined to certify the *Kiarie* appeal as raising a matter of general public importance and dismissed the application.

5. Indefeasibility of Title in the Land Registration Act, 2012

The RTA was repealed when a new set of land laws were passed in 2012. Section 26 of the Land Registration Act, Act No 3 of 2012 (LRA) provides as follows:

> 26. Certificate of title to be held as conclusive evidence of proprietorship
>
> (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
>
> (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
>
> (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

12 *Kiarie v Administrators of the Estate of John Wallace Mathare* (Deceased) [2015] eKLR.

Section 26 of the LRA is substantially similar to Section 23 of the repealed RTA. Previous decisions relating to section 23 of the RTA will undoubtedly be cited and applied by the courts when discussing the issue of indefeasibility of title under the LRA.

In Tarabana Company Limited v Sehmi & 7 others,[13] the Court of Appeal held as follows:

> With due respect to the learned trial Judge, the means of determining whether the Appellant's title was indefeasible and not subject to challenge is spelt out under Section 26 of the LRA. What was required was to determine whether the Appellant was in any way involved in the process through which the 4th Respondent obtained title, which the learned Judge found was irregular and with which we agree. There was no evidence adduced before the trial court to show that the Appellant played any role, or was involved in any way in the said process. *If title was acquired by fraud, or misrepresentation, illegal, unprocedural or corrupt scheme, the same was before the Appellant came into the picture. We therefore find that the appellant was a bona fide innocent purchaser for value for these reasons, and its title could not and cannot be challenged. (emphasis added)*

Tarabana is consistent with the *Arap Ngok* and *Kiarie* decisions of the Court of Appeal. However, there is a possibility that a different bench of the Court of Appeal or lower courts may rely on the Arthi Highway decision that upheld the nullification of titles issued to bona fide purchasers, presenting a complication and uncertainty on whether, in actual fact, titles issued by the registrar to *bona fide* purchasers are indefeasible in Kenya's land law regime.

6. The Mirror and the Curtain Principles

The mirror principle of the Torrens System provides that the register reflects all material facts and it is deemed to be a 'complete and accurate reflection of title.'[14] The person named as the registered proprietor of title is said to have an 'indefeasible title that is absolute, conclusive and unimpeachable.'[15]

In a decision of the Court of Appeal in *Githinji v Kenya Urban Roads Authority*[16] delivered on 7 June 2019, the Court held that:

> It would be contrary to the intent of law and wholly unnecessary for a party seeking to acquire interest in land to go beyond the register to establish ownership and the history of the past transactions involving that land. (emphasis added)

This is the ideal situation. However, this finding assumes that the Kenyan land registry is beyond reproach, and that fraud and corruption are non-existent in land transactions. Certainly, it is judicially noticed that transacting in the land market is Kenya in rife with fraudulent deals and corrupt practices. In the Arthi Highway case, the Court of Appeal held that '[i]t was common knowledge, and well documented at the time, that the land market in Kenya was a minefield and

13 (Civil Appeal 463 of 2019) [2021] KECA 76 (KLR) (Environment and Land) (8 October 2021).
14 n 120 p20.
15 n120
16 (2019) eKLR.

only a foolhardy investor would purchase land with the alacrity of a potato dealer in Wakulima market'.[17]

Indeed, in *National Land Commission,*[18] a three judge bench of the Environment and Land Court held as follows in a judgment delivered on 28 June 2019:

> 183. The two searches were done in the same year, emanated from the same registry and are in respect of the same piece of land. It is inconceivable that one search done in January 2018 would show that there were no encumbrances and yet another one done in August 2018 shows that there were two mortgages dated 29/12/1981 and 11/7/1986 respectively. *The two contradictory searches show that a search and the records held at the lands registry can be manipulated to achieve certain objectives which in most cases are intended to deceive those relying on the search to transact on the land in question.*
>
> *184. Based on the inherent danger of the search system which is based on the Torrens System of registration, it is necessary for one to take further steps to ascertain the authenticity of the search and ownership of the land. If the Applicant had bothered to delve into the history of the title, it would have discovered that the title had two mortgages besides other entries in the register and the other transactions in respect of L.R. No. 7879/4 which were not noted on the register.* We appreciate the fact that searches are generated by the Registrar of Titles but the Applicant being the National Land Commission which works closely with the Ministry of Lands under which the Registrar falls, should have, in the spirit of the Advisory Opinion of the Supreme Court in *In the matter of National Land Commission [2015*] eKLR gone a step further to ascertain the true status of the title to the land in question..... *In undertaking due diligence, one must go further and ascertain if there are any overriding interests affecting the land they wish to transact on. In light of the foregoing, our finding is that a search is not conclusive evidence of ownership. One needs to go further than a mere search. (emphasis added)*

If the National Land Commission, a constitutional commission with, inter alia, the mandate of managing public land on behalf of the national government, was misled into relying on an official search which showed that the land it was dealing with had no encumbrances, then what hope does the ordinary investor on the street have that the register reflects all material facts, and that the register is a 'complete and accurate reflection of title?'[19]

Perhaps as a realisation of the enormity of the problem, the report of the Building Bridges Initiative discusses the finding of the Court of Appeal in the *Elizabeth Wambui Githinji*[20] case discussed above regarding indefeasibility of title and notes as follows:

> The said dissenting views are in accord with several other Court of Appeal decisions where the same court has stated that one can only pass as good a title as they have and that the *concept of indefeasibility or conclusive nature of title is inapplicable to the extent that title to the property was unlawfully acquired.* In order to give real meaning to the security of land rights established

17 n8
18 *National Land Commission v Afrison Export Import Limited (2019) eKLR.*
19 n3 p20.
20 n 16.

> under Articles 40 and 60(1)(a) of the Constitution of Kenya and re-establish integrity in our land registry records, it is clear to the committee that the issue must now proceed to the Supreme Court for authoritative interpretation as a matter of urgency.[21]

This recommendation by the BBI, despite its eventual nullification in the courts,[22] is important given the fact that the Court of Appeal in the Elizabeth Wambui Githinji case had held that a party seeking to transact in land should only rely on the register to establish ownership and history of the past transactions of the land. In delivering the majority opinion in this case, Ouko JA (as he then was) held as follows:

> In exercising due diligence, the appellants confirmed from the lands registry and were satisfied that the vendors were the registered owners; and that no restrictions wereregistered against the title. There was no indication at all in the register that the Government had acquired the properties. Likewise, there were no signs or marks that the properties belonged to the Government or any other person apart from the vendors. *The appellants were not expected, as I have stated earlier, to inspect documents held by the Kenya National Highway Authority. Ordinarily, and in law by the force of section 31 of the Registered Land Act, it is sufficient for a purchaser of land to conduct official search at the lands registry only. (emphasis added)*

This finding by Ouko JA has been described as being the curtain principle which provides that, 'the register is the sole source of information and that a purchaser need not look behind it.'[23]

The judgment of the Court of Appeal in *Elizabeth Wambui Githinji* was delivered on 7 June 2019 while the decision of the Environment and Land Court in the *National Land Commission* case was delivered on 28 June 2019. The Court of Appeal was categorical that a search is sufficient, while the three judge bench of the Environmental and Land Court held that a search is not conclusive proof of ownership and that one needs to go further than a mere search. Of course, in such a case, the Court of Appeal decision would take precedence, but the finding of the three judge bench of the Environment and Land Court demonstrates the varying interpretations regarding this area of law.

Sole reliance on the register can have drastic consequences as it has been demonstrated in this article that Kenya's land register does not comply with the mirror principle of land registration.

It is conceded that at times, it would be almost impossible to ascertain the entire transactional history of a parcel of land. For instance, in the Arthi Highway case, it would have been almost impossible for the 5th, 6th and 7th defendants to have known that *Arthi Highway* was involved in fraud in acquiring the suit property. Similarly, in the *National Land Commission* case, it is inconceivable how the *National Land Commission* (NLC) would have known that there were two mortgages registered against the title if the encumbrances did not appear on the search.

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21 Steering Committee on the Implementation of the Building Bridges to a United Kenya, 'Report of the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report' (2020) <https://e4abc214-6079-4128-bc62-d6e0d 196f772.filesusr.com/ugd/00daf8_bedbb584077f4a9586a25c60e4ebd68a.pdf> accessed 22nd January 2021, 39.

22 The Star Newspaper, 'BBI is dead, Supreme Court judges affirm' <https://www.the-star.co.ke/news/2022-03-31-bbi-is-dead-supreme-court-judges-affirm/> accessed 17th September 2022. See also *Attorney-General v Ndii;* Prof. Rosalind Dixon & 7 others (Amicus Curiae) (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) (with dissent).

23 n 3 p 35.

For the Environment and Land Court to condemn the NLC for failing to go behind the curtain to ascertain the entire transactional history of the parcel of land is to place an almost impossible burden on an individual wishing to transact in land. In the NLC case, it is clear that the register was not a complete and accurate reflection of title, a mandate and an obligation that is placed solely on the office of the registrar of titles.

7. Migration of Titles to the New Land Registration Regime

On 12 January 2021, the Cabinet Secretary for Lands and Physical Planning released a press statement regarding the process of land title conversion.[24] In this statement, the Cabinet Secretary informed the general public that due to the different land registers that existed under the repealed land laws,[25] the confusion that arose from these multiple registries became a breeding ground for fraud and threats to the right to property. Therefore, the Ministry of Lands 'embarked on a process of conversion of all parcels from the ambit of the repealed statutes … to the Land Registration Act.'[26] This process began with the Ministry issuing a gazette notice for conversion of properties within Nairobi,[27] and which conversion process will continue to the rest of the country in due course.

As correctly stated by Prof Tom Ojienda, 'the process of conversion and migration of titles to the new land regime is a cause for concern owing to the historical injustices and fraud in land transactions that has plagued land administration in Kenya for a long time.'[28] This concern is well grounded as the migration will result in titles being migrated and re-issued which may have been acquired fraudulently under the old regime.

It has been demonstrated that Kenya's land registry does not comply with the mirror principle. It is abundantly clear that the register may not reflect all material facts, and neither is it a complete and accurate reflection of title. With this knowledge, the conversion process should be carried out with utmost caution to avoid migrating fraud from the old regime to the new land register.

8. The Place of an Official Search in Due Diligence: Is it Adequate?

A related issue to the discussion at hand, and which issue requires clarification, is whether an official search from the registrar of titles is sufficient, or whether an individual needs to go behind the 'curtain and carry out further due diligence on the history of a title.' It is indeed arguable how far a purchaser should look behind the curtain and it is unclear what level of due diligence was contemplated by the three judge bench in the *National Land Commission* case when they advised purchasers not to rely solely on an official search. This advice from the bench negates the very essence of the curtain principle and places uncertainty in the protection offered by the repealed section 23 of the RTA, where applicable, and the current section 26 of the LRA.

24 Press Statement, Land Title Conversion under the Land Registration Act, (No 6 of 2012) and the Land Registration (Registration Units) Order, 2017.

25 Indian Transfer of Property Act, 1881, the Government Lands Act (Cap 280), the Registration of Titles Act (Cap 281), the Land Titles Act (Cap 282), and the Registered Lands Act (Cap 300), all of which were repealed by the Land Registration Act which was enacted in 2012. This was in compliance with Article 68 of the Constitution which mandated Parliament to 'revise, consolidate and rationalise existing land laws.'

26 Press statement (n 141).

27 On 31 December 2020, the Cabinet Secretary for Lands and Physical Planning published Gazette Notice No. 11348 of 2020 in respect of conversion of the land reference numbers of properties in Nairobi to new LR numbers.

28 T Ojienda, 'Land Conversion and Migration of Titles to the New Lanbd Regime' (2021) https://www.proftomojiendaandassociates.com/download/land-conversion-and-migration-of-titles-to-the-new-land-regime_by-prof-tom-ojienda-sc_18-january-2021/ accessed 26th January 2021, 6.

Pursuant to the doctrine of stare decisis, the decision of the Court of Appeal in Elizabeth Wambui that a search was sufficient would take precedence as settling the law on the issue. However, having demonstrated that Kenya's land registry does not comply with the mirror principle, and the divergent views which the courts have taken on the issue, clarity is required on this issue from the highest court in the land.

9. Indemnity from the Government?

The unfortunate consequence of the existing quagmire arising from conflicting court decisions is that economic activity in Kenya is being severely hampered by the lack of certainty in dealing with land. An argument may be made that an individual who relies on the register to transact in land can, subject to certain conditions, sue the Government for indemnity for the loss suffered, relying on the so-called insurance principle.[29]

However, such an endeavour in Kenya is arguably a fool's errand as, despite obtaining a decree from a court of competent jurisdiction, the relevant ministry and/or the Attorney General's office have shown utmost disinterest in settling a majority of decrees. On its official website, the State Law Office proudly proclaims that it '…facilitates the settlement of court judgments and decrees by requesting for settlement funds from Ministries and Agencies held liable by the Courts.'[30] The State Law Office continues to put a disclaimer that settlement will happen 'once the funds are transmitted to the Attorney General's Office'[31] by the relevant ministry.

It will be remembered that on 8 June 2020, the then Chief Justice of the Republic of Kenya, Maraga CJ, issued a public statement regarding a number of issues, among them the failure of the executive to settle dozens of court decrees amounting to more than Kshs 1 billion. [32] In addition, the then Chief Justice also decried the failure to appoint judges which situation was exacerbating the huge backlog of cases in the courts. [33] Statistics show that it will take a number of years before a litigant can have their case heard and determined [34] and if they are successful, secure a decree that would also take a number of years to be settled.

This may be the fate that awaits individuals who solely rely on searches and records from the ministry of lands, who may unfortunately fall victim to the fraud prevalent at the lands registry, and who then seek indemnity from the same ministry of lands for the losses suffered. The natural consequence of facing such daunting challenges in having decrees settled may lead investors to shun away from transacting in land, which would have devastating consequences on the entire economy of the country.

29 n120 p35.

30 Office of The Attorney General and Department of Justice, 'Settlement of Judgment and Decrees' (2020) <https://statelaw.go.ke/government-services/civil-litigation/settlement-of-judgments-and-decrees/> accessed 26th January 2021.

31 Ibid.

32 P Ogemba, 'You are out of order sir, furious Maraga tells Uhuru' (2020) https://www.standardmedia.co.ke/nairobi/article/2001374486/you-are-out-of-order-sir-furious-maraga-tells-uhuru#_=_> accessed 26th January 2021.

33 Ibid.

34 P Alushula, 'Agony as half of lawsuits in Kenya drag on past three years' (2019) <https://www.businessdailyafrica.com/bd/data-hub/agony-as-half-of-lawsuits-in-kenya-drag-on-past-three-years-2242918 > accessed 27th January 2021.

10. Conclusion

The tragic consequence of the repealed section 23 of the RTA, which is now captured in section 26 of the LRA, is that a fraudster can 'pass' genuine title to land to a *bona fide* purchaser for value without notice. This was the essence of the decisions in the cases of *Dr. Joseph Arap Ngok* as well as *Charles Karathe* and *Tarabana.*

In the *Arthi Highway case,* it was held by Nyamweya J that *Arthi Highway* could not pass a good title to the 5th, 6th and 7th defendants as it had fraudulently acquired the property, and her finding was upheld on appeal by the Court of Appeal. A differently constituted Court of Appeal in the *Tarabana* case upheld the title of a *bona fide* purchaser, regardless of the previous fraudulent transactions relating to the same title.

The existence of conflicting decisions on the question of whether a title to a *bona fide* purchaser is defeasible on account of fraud by previous owners will surely cause great confusion in cases that will touch on the interpretation of Section 23 of the repealed RTA and Section 26 of the LRA which is now in force. It may result in the undesirable outcome where courts pick and choose which decisions to follow [35] making a bad situation even worse.

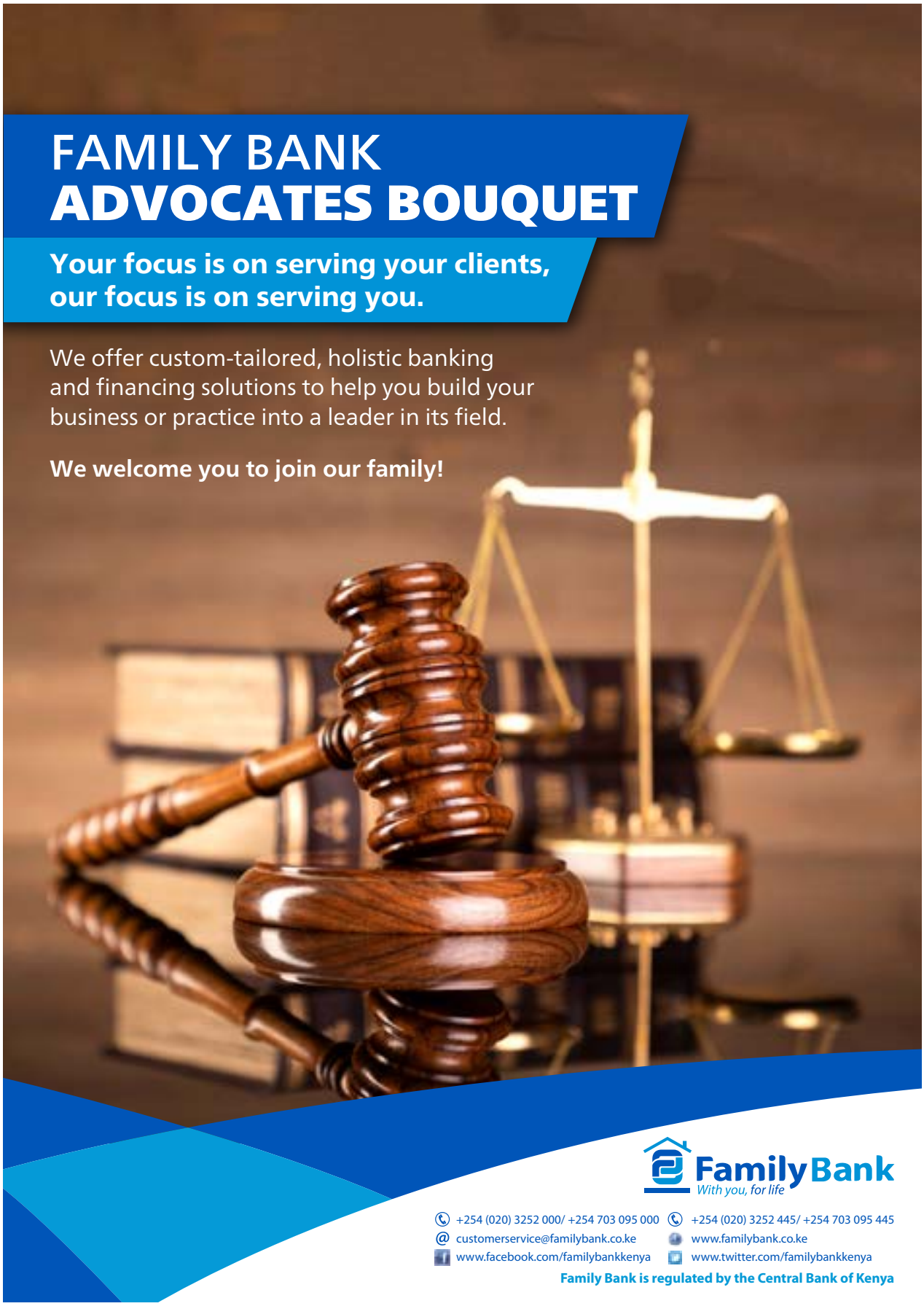
In *Karanja v Republic*, [36] it was held that 'the issue of land ownership is volatile, it is for this reason that holders of valid titles to land must be protected by the law, the government and this court.'[37] The purpose of the *Torrens system* was to ensure 'a market for land and in turn, economic stability …without the expense and difficulty experienced under the old system of titles.' [38] It has been demonstrated that the *Torrens system* in Kenya has failed to achieve its purpose and the mirror and curtain principles are merely illusory.

Given the conflicting decisions, it remains to be seen what interpretation will be given by other courts on whether a fraudster can pass a good title, or whether a genuine owner of property can be dispossessed merely because the property has been transferred by the fraudster to an innocent purchaser for value without notice. The Supreme Court missed a golden opportunity to settle this question with finality when it declined to grant leave to *Charles Karaithe* to pursue his appeal in the Supreme Court.

Article 40 (6) of the Constitution is abundantly clear that the rights under Article 40 do not extend to any property that is found to have been unlawfully acquired. From the discussion on the A*rthi Highway* case above, the constitutional protections which KMAH, Yamin Construction Company Limited, and Gachoni Enterprises Limited expected would be extended to their 'lawfully' acquired titles proved to be but an illusion. Undoubtedly, this situation is not unique to these 3 parties.

The prevailing jurisprudence regarding the question of indefeasibility of title is that there are conflicting decisions on the issue. The situation is indeed dire and clarity is needed from the highest court in the land so that individuals can conduct their affairs with a high degree of certainty as to what the law is. It is hoped that the Supreme Court will rise to the occasion to resolve this controversy when the question presents, or rather, re-presents itself.

35 n2.
36 (2003) eKLR.
37 Ibid.
38 S Christensen and W Duncan, 'Aligning Sustainability and the Torrens Register–Challenges and Recommendations for Reform' (2012) <https://eprints.qut.edu.au/49803/15/Harmonising_Torrens_and_sustainability.pdf> accessed 26th January 2021, 3.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THE CONSTITUTIONAL AMENDMENTS BILL, 2020: A Basic Structure Doctrine Critique

Joseph Lutta*

"If the President does it, it's not illegal." Richard Nixon [1]

Background to the Study

Can a constitutional amendment be 'unconstitutional'? This legal conundrum continues to beset judges, legal scholars and practitioners across the world.[2] Closer home, the Building Bridges Initiative (BBI) report recommended a raft of radical constitutional changes as a panacea to the perennial ills of electoral fraud, ethnic clashes, socio-economic marginalisation, endemic corruption and historical injustices that continue to bedevil the country close to six decades after independence.

Subsequent to the BBI report parliament enacted the *Constitution Amendment Bill, 2020* (hereinafter the bill) as the vehicle for engineering constitutional change in Kenya.[3] This omnibus legislation contains provisions that will fundamentally change the structure of executive, legislature, judiciary and devolution.

However, this paper will revolve around the recommendations pertaining to the Executive. More specifically, I will argue the said changes are inherently unconstitutional even if they are supported by a majority of the people. Legally speaking, the power to amend the constitution is not unfettered since there are certain fundamental values and principles that are intrinsically permanent in nature.[4]

By and large, there is legitimate concern that incorporating such changes erodes the principles of constitutionalism, rule of law, checks and balances by creating an imperial president contrary to the intentions of the framers of the Constitution. Subsequently, I shall draw a comparative study of the Doctrine of Basic Structure of the Constitution as framed by the Supreme Court of India.[5] This legal doctrine emanated after a series of stellar decisions by the Court which nullified a series of constitutional amendments that destroyed the 'Basic structure' of India as parliamentary democracy.[6]

The other legal issue is "can a court strike down/nullify a constitutional amendment for being 'unconstitutional' despite being supported by the majority of the electorate without invoking a counter-majoritarian difficulty."[7] A closer reading of article 1 (3) (c) of the Constitution recognises the judiciary as a custodian of the sovereign will of the people hence it has the obligation to protect the Constitution for purposes of posterity.

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1 Former US President.

2 R Albert, M Nakashidze and T Olcay 'The Formalist Resistance to Unconstitutional Constitutional Amendments 70 (2019) Hastings Law Journal.

3 Presidential Taskforce on Building Bridges to Unity Advisory. Kenyatta International Convention Centre, Nairobi 'A Report on the Presidential Task Force on Building Bridges to Unity Advisory October 2019.

4 G Skinner 'Intrinsic Limitations to Constitutional Amendments' 18(1920)3 Michigan Law Review 215.

5 Shankari Prasad vs. India AIR SC 1951; Singh vs. Rajasthan AIR SC 1965; Golaknath vs. State of Punjab AIR 1967 SC 1643; Kesavananda Bharati vs. State of Kerala AIR 1973 SC 1461; Indira Nehru Gandhi vs. Raj Narain AIR 1975 SC 2299; Minerva Mills vs. Union of India AIR 1980 SC 1789.

6 N Samanta & S Basu 'Test of the Basic Structure: An Analysis' I (2008) NUJS Law Review 500.

7 AM Graber 'The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order' 4 (2008) Annual Review of Law & Social Sciences, 361.

These legal issues form the linchpin of this paper. Firstly, it seeks to critique the constitutionality of the proposed amendments for violating the underlying values and spirit of the Constitution of Kenya. Secondly, it recognises the role of the Judiciary in taming unconstitutional amendments for purposes of protecting the letter and spirit of the Constitution.

Structurally speaking, this paper is divided into four major parts. The first part is introductory. It seeks to give an overview of general legal principles surrounding the amendments of the Constitution. In addition, it will give a study of unconstitutional constitutional amendment. The second part will give a comprehensive study of the BBI report and the Constitutional Amendment, 2020. The third part entails a comparative study on the "unconstitutional constitutional amendments" from various jurisdictions. Nonetheless, the portion will give an extensive discussion of the doctrine of 'Basic Structure" as promoted by the Supreme Court of India.[8]

The fourth part will discuss the role of the court in nullifying unconstitutional amendments. The last part shall contain the recommendations and concluding remarks from the author.

Introduction to the General Principles of Amending the Constitution

On a more abstract level, constitutional amendments entails incorporating changes for purposes of improving the document. Furthermore, this process may fundamentally differ from jurisdiction to jurisdiction but the underlying objective is to refine the document.

Similar to any other process, constitutional amendment is neither cast in stone nor unfettered in nature because it is governed by a set of legal principles.[9]

Firstly, the proposed amendments should conform to the limits and rules within the Constitution. [10] This principle is further subdivided into two aspects; procedural limits and substantive limits. Procedural limits imply the amendment process should comply with the laid down procedures while substantive limits means the changes should not destroy the basic values, norms, principle and spirit of the Constitution. [11]

Secondly, constitutional amendments should be inextricably connected to judicial interpretations. [12]In essence, the role of judicial interpretation is to map out the possible terrains for amending the document.

Thirdly, the principal objective of constitutional change is to improve and not dismember the letter and spirit of the document. This principle is propounded by Richard Albert in his insightful paper, *Constitutional amendments and dismemberment*. [13] He further classifies constitutional change into *corrective* and *elaborative* change.[14]

8 S Krishnaswamy Democracy and Constitutionalism in India, A Study of the Basic Structure Doctrine, (2009), Oxford University Press.

9 R Albert 'The Structure of Constitutional Amendment Rules' 49(2014) Wake Forest Law Review 914.

10 Y Roznai 'Towards a Theory of Constitutional Unamendability: On the Nature and Scope of the Constitutional Amendment Powers' 22.

11 Ibid.

12 R Dixon 'Constitutional Amendment Rules: A Comparative Perspective' University of Chicago Public Law & Legal Theory Working Paper Number 347 (2011) 98.

13 R Albert 'Constitutional Amendments and Dismemberment' 43(2018) Yale Journal of International Law

14 Ibid.

Corrective change is supposed to rectify a pre-existing problem or fill a lacuna within the Constitution while elaborative change is supposed to correct an existing mistake by laying down the foundation for future amendments.

He further defines constitutional dismemberment as change which seeks to alter the fundamental core or identity of the Constitution. More often than not, this change is usually engineered by political actors to achieve a specific objective that is either inconsistent or beyond the scope of the framers of the Constitution.[15]

Fifthly, constitutional change should seek to expound and not repress the underlying national values. [16] This means the proposed changes should preserve or amplify the guiding spirit and principles that were envisaged by the framers at the time of the promulgation. In the Kenyan context, this principle is enshrined in Article 10 of the Constitution which outlines a comprehensive list of our national values.

Constitutional Amendment Process in Kenya

By and large, the Constitution recognises two modes of amendments. Firstly, Article 256 provides for constitutional change by way of parliamentary initiative. More specifically, this amendment can be promulgated by either house of parliament provided the bill is supported by more than two thirds of the members. [17] Upon approval, the speakers of both houses shall submit the bill to the President for assent and subsequent publication into law. [18]

In contradistinction, Article 257 recognises constitutional amendment by way of popular initiative. [19] In essence, this change requires the stamp of approval from the people by way of a referendum. Unlike amendment through parliamentary initiative this is a more circuitous and laborious procedure that involves the county assemblies, houses of senate, the President and the electorate.

Firstly, this amendment requires the support of at least one million signatures from duly registered voters.[20] Moreover, this mode of change may either be in the form of a general suggestion or a draft bill. Nonetheless, the general suggestion must be condensed into a draft bill before embarking on the amendment process.[21] Thereafter the proponents of the amendment shall submit the draft bill together with the one million signatures from the electorate to the Independent & Electoral Boundaries Commission (IEBC) for verification.[22] Upon verification of the signatures and analysing the contents of the draft bill, the IEBC shall within three months from the date of receipt shall submit the draft amendment bill to the county assemblies for further consideration.[23]

Thereafter, the County Assemblies shall be granted three months to debate and consider the draft amendment bill and upon approval the same shall be sealed with certificates of approval from the respective assemblies. After approval by the County Assembly the County Speaker shall submit

15 n10
16 R Albert, 'The Expressive Functions of Constitutional Amendment Rules' Curitiba 1 January [2015], 12.
17 Constitution of Kenya, 2010 256 (1).
18 Ibid., art 256 (2).
19 Ibid.
20 n17 art 257 (1).
21 Ibid., art 257 (3).
22 Ibid., art 257 (4).
23 Ibid., art 257 (5).

the approved bill to the Speakers of both houses who shall thereafter introduce it to parliament for debate without undue delay.[24] Upon debating the bill shall pass by a simple majority vote and thereafter it shall be submitted to the President for assent in accordance with Article 256 (4) and (5) thereby paving the way for parliamentary approval.[25] If either of the houses fails to pass the bill or the amendment pertains to matters outlined in Article 255 of the Constitution then the bill shall be submitted for approval by the people through a referendum.[26]

Another pivotal clause is Article 255 which outlines the explicit provisions of the Constitution which can only be amended by way of referendum. These specific clauses pertain to; Supremacy of the Constitution, territory of Kenya, sovereignty of the people, national values and principles of governance under Article 10 (2) (a) to (d) of the Constitution, Bill of Rights, the term of the office of the President, Independence of the Judiciary and the commissions and independent offices to which chapter fifteen applies, functions of parliament, objects, principles and structure of the devolved government and provisions of the Chapter Four.[27]

In the same vein, this amendment is subject to approval by at least twenty percent (20%) of the registered voters in at least half of the counties that vote in the referendum in tandem with a simple majority vote in the referendum.[28] The overriding objective of this futuristic provision is to prevent myopic, pernicious and political amendments by engraving the principle of consultation, negotiations and deliberation between the people and the various arms and layers of government.

This legal viewpoint is well brought out by Kithure Kindiki who gives a comprehensive analysis on how the architecture and design of the Independence Constitution was mutilated by a series of changes that neutered the checks and balances on the executive.[29] The pinnacle of this culture of political amendments resulted in the enactment of the ominous Section 2A of the Constitution which predicated the single party dictatorship that would haunt the country for years.[30]

Constitutional Amendment Bill, 2020

This omnibus piece of legislation contains a series of changes as proposed in the BBI Report. The most salient feature is the fact that it proposes constitutional amendment by popular amendment pursuant to Articles 255 and 257 of the Constitution.[31]

Section 10 of the bill seeks to amend Article 89 (1) of the Constitution by increasing the number of Constituencies from two hundred and ninety to three hundred and sixty.[32]

Furthermore, it intends to amend Article 97 (1) of the Constitution by recognising the Leader of Official Opposition, Attorney General and unelected Cabinet Ministers as ex-officio members of the National Assembly.[33]

24 Ibid., art 257 (6) and (7).
25 Ibid., art 257 (8) and (9).
26 Ibid., art 257 (10).
27 n17 art 255 (1).
28 Ibid., art 255 (2).
29 K Kindiki 'The Emerging Jurisprudence on Kenya's Constitutional Review Law'1(2007) *Kenya Law Review* 153.
30 L Gustafson 'Kenya: The Struggle to Create a Democracy' (1965) *Bringham Young University Law Review* 660.
31 n17.
32 n17
33 Constitution Amendment Bill, 2020 s13 (iv).

Section 107A outlines the qualification for the Leader of Official Opposition as the contender who attains the second greatest votes in a presidential election coupled with at least 25% of all members of the National Assembly.[34]

Section 17 seeks to repeal Article 108 of the Constitution and replace it with a new clause outlining the legislative pecking order as follows; The Speaker, Prime Minister and Leader of Official Opposition.[35]

Similarly, the Bill intends to repeal Article 108 and replace it with Article 108A by providing for the majority and minority party leaders of the Senate.[36] It further recognises the order of precedence of the Senate as follows; Speaker of the Senate, majority party leader and minority party leader.

Other distinctive clauses of the bill are sections 22 and 23 which intend to change Articles 130 & 131 of the Constitution by expanding the Executive to include; Prime Minister and Deputy Prime Ministers. In addition, this clause seeks to substitute the title of Cabinet Secretary with Cabinet Minister.[37] The primary objective of section 27 is to raise the maximum threshold for Cabinet Ministers from 14 to 30.[38]

Another radical provision of this bill is provided for under section 28 which intends to amend Article 151 by establishing the Office of the Prime Minister who shall be leader of government business in parliament, supervise ministries and departments, assign duties to the Deputy Prime Ministers and handle any duties assigned by either President or legislature.[39]

This clause also introduces Article 151C which states that a person may cease to hold the office of Prime Minister through dismissal by the President, resignation as Member of Parliament under Article 103 of the Constitution, resignation from office by writing to the President and by being impeached by parliament.[40]

Furthermore, Article 152D provides for the two offices of the Deputy Premier who shall perform the obligations assigned to them by the Prime Minister. Similarly, the Deputy Premiers shall cease to hold office after being dismissed by the President, if they cease to be a members of the Cabinet, impeachment by parliament or resignation from office.[41]

Section 35 will amend Article 157 (3) of the Constitution by increasing the years of professional experience from ten to fifteen years equivalent to that of the Court of Appeal Judge.[42]

Section 36 of the bill repeals Article 158 which provides for the circumstances under which the Director of Public Prosecution should be removed from office.[43]

34 Ibid s 16.
35 Ibid.
36 Ibid.
37 n33
38 Ibid
39 n33
40 Ibid.
41 Ibid.
42 Ibid.
43 Ibid.

Section 37 restricts the appeals pertaining to election petitions to the Court of Appeal. Needless to say, this may be a strategic mechanism to decongest the Supreme Court that has been constrained to adjudicate appeals from other competitive public offices like the Governor and Senate.[44]

Section 39 amends Article 166 (3) of the Constitution by raising the minimum qualification for the Chief Justice and Associate Justices of the Supreme Court from fifteen years professional experience to at least twenty years by amending while on the other hand the minimum requirement for Court of Appeal Justice from ten to fifteen years.[45]

Section 40 extrapolates to the Deputy Chief Justice the circumstances under which the Chief Justice may leave office as provided under Article 168 of the Constitution.[46] The current constitution is silent on the matter of the Deputy Chief Justice.

Section 42 stipulates that a Judge may be removed from office upon recommendation or motion by the Judicial Ombudsman Commission. This provision intends to offer parallel avenues of lodging complaints against judicial officers since the ombudsman shall also be a member of the Judicial Service Commission.

This provision is intricately connected to section 44 which intends to amend Articles 172A of the Constitution by establishing the Office of the Judiciary Ombudsman.[47] The primary obligation of this office will be to receive and determine complaints against the judicial officers and other staff within the Judiciary.[48]

Finally, section 50 (b) of the bill intends to amend Article 203 (2) of the Constitution by increasing the revenue allocated to counties from 15% to 35%.

Legal Issues Emerging from the Proposed Amendments

A cursory glance of the Constitutional Bill, 2020 raises serious legal issues that warrants public interrogation. The most striking provisions are section 22 and 33 of the Bill which provides for an expanded executive that comprises the President, Prime Minister, Deputy Prime Ministers and not less than thirty Cabinet Ministers.

Broadly speaking, this clause is couched in loose terms which grants the President the power to dismiss the Prime Minister and his deputies at his pleasure. This precarious position is an evil reincarnation of the imperial presidency that haunted the country since independence.

The term imperial presidency was framed by the famous American historian Arthur Schlesinger Jnr as a scathing criticism of President Richard Nixon after the Watergate Scandal.[49] He defined an imperial president as an out-of-control executive whose actions went beyond the purview of the prescribed constitutional mandate.[50]

44 Ibid
45 n33
46 Ibid
47 Ibid.
48 Ibid.
49 A Schlesinger Jnr The Imperial Presidency (Houghton Mifflin, Boston, 1973).
50 R D Sloane 'The Scope of Executive Power in the Twenty Century: An Introduction' 88(2008) Boston University Law Review 346.

Within the Kenyan context, the Independence Constitution was a radical and progressive legal document that provided for reasonable checks and balances of public power.[51] However, the same was neutered by a series of political and perilous amendments that led to the foundation for the imperial presidency.[52] The hideous effects of these amendments outlived the re-introduction of multiparty politics and the ultimate downfall of the KANU regime in 2003.

The most cardinal feature was the post elections carnage of 2007 that was partly attributed to the lack of faith in the judicial system which was largely perceived as an extension of the imperial executive.[53]

Going by these timelines, it is cogent to argue the principal objective behind the quest of constitutional change in Kenya was to promulgate a robust document with multiple checks and balances and the rule of law.

However, it appears the BBI proposal is the perfect Trojan horse for an omnipotent President who enjoys arbitrary authority to allocate obligations and dismiss the Prime Minister. By extension, this lopsided framework creates a problematic situation in terms of maintaining proper checks and balances because the President controls parliament through the Prime Minister who operates at his pleasure despite being the leader of the largest party/coalition of parties.

Against the backdrop of this legitimate concern, it is apparent the BBI constitutional amendment negates the intentions of the framers of the Constitution who envisioned constitutionalism and rule of law in Kenya. Therefore, any form of amendment that intends to engender impunity violates the basic structure and design of the Constitution of Kenya which is more or less an unconstitutional constitutional change.

This legal standpoint is amplified by David A Strauss who notes in liberal democratic society constitutions should be amended at the edges and not core of the document.[54] This mechanism is instrumental in preventing the dismemberment of the constitutional body through myopic and politically motivated changes similar to those proposed by this bill.

What is the Role of the Judiciary in Checking Unconstitutional Amendments?

By and large, the judiciary is perceived as the weakest arm of the government. As we shall see later, this false myth was demystified by the Supreme Court of India which nullified several constitutional changes that were perceived to destroy the Constitution.[55]

According to Richard Albert courts have the powers to interrogate the substance of the amendment. Specifically speaking, the courts should juxtapose the contents of the amendment[56] against the

51 G K Kuria 'The Rule of Law in Kenya and the Status of Human Rights' 16(1991) *Yale Journal of International* Law 17.

52 B Sihanya 'Reconstruction the Kenyan Constitution and State, 1963-2010: Lessons from Germanic and American Constitutionalism 6 (1) *Law Society of Kenya* 11.

53 EO Abuya 'Can African States Conduct Free and Fair Elections' 8 (2010) 2 *Northwestern Journal of International Human Rights.*

54 DA Strauss 'The Irrelevance of Constitutional Amendments' 114(2001) *Harvard Law Review* 1401.

55 SP Sathe 'Limitations on Constitutional Amendment: Basic Structure Principle Re-examined' in D Rajeev & A Jacob (eds) *Indian Constitution Trends* and Issues (Indian Law Institute, New Delhi at 180).

56 R Albert 'How a Court Becomes Supreme: Defending the Constitution from Unconstitutional Amendments'77 (2017) 1 *Maryland Law Review* 181.

principles, values, spirit and text of the pre-existing Constitution through three distinct lines of defences.

The first mechanism is by nullifying any amendment that controverts any principles within the Constitution.[57] The second technique is adopting a progressive interpretation that captures any change or principle that was unforeseeable when the Constitution was promulgated. This legal reasoning is usually practiced by liberal judges who perceive the Constitution as a living and breathing document that should conform to deal with emerging challenges.[58]

The third means defined as the 'content based approach' which argues for the interpretation of unconstitutional constitutional amendments as a 'new' Constitution in disguise.[59] Professor White notes that this legal theory fits neatly with the Indian basic structure doctrine which epitomises that Constitutions have internal architecture and design which outline the parameters of amendments.[60] In stark contrast, there is another school of thought which advocates for the *doctrine of covert unamendability*.[61] Moreso, courts strike down unconstitutional constitutional amendments by refusing to enforce amendments thereby frustrating the expected changes. This a novel approach that is gaining ground in continental Europe especially when dealing with the gross violation of human rights.

Can the Court Exercise its Jurisdiction in the Event the Amendment is Approved by the Kenyan People Without Raising the Counter-Majoritarian Concern?

The principal drawbacks in the amendment clause of the Kenyan Constitution is the wanton lack of a comprehensive list of unamendable clauses. In stark contrast, Article 79 (3) of the German Constitution also known as the Basic Law *(Grundgesetz)* prohibits constitutional amendment that alters basic human rights, sovereignty of the people and the devolution of power between the federal government *(Bundesrepublik)* and the States *(Landers).*[62] This pivotal clause is essential in safeguarding against abuse of public power and violation of human rights reminiscent of Adolf Hitler's Third *Reich*.[63]

Conversely, there is legitimate concern of counter-majoritarian problems when a bench of unelected judges overrules a decision that is endorsed by the majority of the people. This doctrine was coined by the American jurist Alexander Bickel in his book *The Least Dangerous Branch.*[64] He warned the Supreme Court against needless striking down of laws that are passed and endorsed by the duly elected representatives.[65] In some sense, he was concerned about the courts morphing into some sort of super legislature that overrides the people's decision.

58 A Coan 'Living Constitution Doctrine' 66 (2017) *Duke Online Law Journal* available at https://dlj.law.duke.edu/2017/06/living-constitutional-theory/

59 Ibid.

60 Ibid.

61 GJ Geertjes & J Uzman 'Convention of Unamendability Covert Constitutional Unamendability in (TWO) Politically Enforced Constitutions' in R Albert and BE Oder (eds) *An Unamendable Constitution? Unamendability in Constitutional Democracies* (Spring International Publishing AG, 2018) 89-91.

62 German Constitution arts 1 and 20.

63 DP Currie, 'Republication - Separation of Powers in the Federal Republic of Germany' 9(2008) 12 *German Law Journal* 2116.

64 A Bickel *The Least Dangerous Branch* (Bobs-Merill, 1962).

65 B Friedman 'The History of Counter majoritarian Difficulty, Part 4: Law's Politics' 148(2000) 4 *University of Pennsylvania* 986.

Within the Kenyan context, Githu Muigai rightly argues, the Constitution being the supreme legal text should be interpreted in order to strike an intricate balance between the will of the majority and counter-majoritarian concern.[66]

However, when dealing with constitutional amendments the legal threshold of counter-majoritarianism is elevated a notch higher due to the gravity of the implications. Unlike legislations or executive orders, the Constitution is the supreme law of the land which defines the fundamental rights and freedoms of the people. Ironically speaking, the amendments proposed by the BBI intend to empower the Presidency by purporting to disperse power to the Prime Minister and his Deputies thereby destroying the basic architecture and design of constitutionalism in Kenya.

Therefore, courts bear the obligation to strike down any amendments that are bound to trigger a foreseeable constitutional crisis or pose an existential threat to the rule of law, democracy and human rights. Professor Makau Mutua gives a comprehensive historical account of how a timid and debilitated judiciary was complicit to the pernicious constitutional changes that regressed Kenya into a near totalitarian state controlled by an imperial presidency.[67]

Undeniably, this judicial responsibility is scattered across various provisions of the Constitution. Firstly, Article 1 (3) (c) expressly delegates the sovereign power of the people to the judiciary as an independent arm of government.[68] Secondly, Article 10 (2) (c) recognises good governance, integrity, transparency and accountability as one of the national values. Article 159 (2) (e) stipulates one of the principles of exercising judicial authority shall be to promote and protect the principles and purpose of the Constitution. This clause operates in tandem with Article 259 (1) which stipulates that the Constitution shall be interpreted in a manner that promotes its values, the rule of law and good governance.[69]

In terms of the court, Articles 165 (3) (d) (ii) grants the High Court the jurisdiction to determine whether any law is inconsistent or contravenes the Constitution.[70] By the same token, the court is empowered to question whether public power or authority is exercised within the precepts of the Constitution.[71]

Generally speaking, one of the canons of constitutional interpretations is that the clauses should be interpreted in a harmonious manner in order to bring out the underlying objectives. This legal position was affirmed by Justice G.V. Odunga (as he then was) who stated:

> A Constitution is a living instrument with several provisions that should be read as an integrated, reading one provision alongside others so that they are seen as supporting one another and not contradicting or destroying each other.[72]

66 G Muigai 'Political Jurisprudence or Neutral Principles; Another look at the problem of Constitutional Interpretation' (2003) *East African Law Journal* 2.

67 M Mutua 'Justice under Siege: The Rule of Law and Judicial Subservience in Kenya' *Human Rights Quarterly* 23 (2001).

68 n17.

69 Ibid.

70 n17

71 Ibid art 165 (3) (d) (ii).

72 *Okoiti v The Honourable Attorney General* Petition Number 385 of 2018 [23]

Secondly, one of the hallmarks of a liberal democracy is embracing constitutional values that protect the interests of posterity.[73] Therefore, when courts strike down unconstitutional amendments, they are protecting the welfare and interests of future generations who cannot participate in the amendment process but will bear the material consequences of these changes. This legal position is encapsulated in the preamble of the Constitution through which states; 'Adopt, enact and give this Constitution to ourselves and to future generations'[74] This practice has gained credence in the field of Green Constitutionalism which is an aspect of environmental law that fights against the constitutional changes that engender climate change thereby threatening the welfare and interests of future generations.[75] In extrapolating this argument to the discourse on public power, it is fair to argue that any constitutional amendment that poses an existential threat to the welfare and interests of the future generations of Kenya is unconstitutional *ab initio.*

(i) The Theory of Basic Structure of the Constitution

This doctrine was enunciated by the Supreme Court of India after a series of futuristic decisions that pierced the veil on parliamentary immunity to amend the Constitution.[76]

By and large, India is a Federal Constitutional Republic comprising various states and union territories coupled with a rich history of democracy and rule of law.[77] In addition, it is a parliamentary system of government with a split executive system consisting of the Prime Minister as the leader of the largest party or coalition of parties and the Executive President as the Head of State.[78] Thirdly, the Constitution provides for a bicameral legislature that comprises a Council of States as the upper house which is made up of state representatives, and House of the People being the lower house for the representatives of the territorial constituencies.[79]

Chapter four of the Constitution provides for the Union Supreme Court as the highest judicial organ. This court comprises the Chief Justice and not more than seven other associate Justices who are appointed by the President and approved by parliament.[80] This court has the unfettered and exclusive original jurisdiction to determine disputes between the union government and states or disputes between states.[81]

In terms of constitutional amendment, Article 368 grants parliament the mandate to amend the Constitution in accordance with the laid down procedure. More specifically, this amendment is promulgated by a bill that should garner majority support of the house and two-thirds of the members of that House who are present and voting.[82]

Noteworthy, if the amendment pertains to the election of the President, executive power of the

73 RB Martin 'Posterity in the Preamble and a Positivist Pro-Life Position' 38(19930 *American Journal of Jurisprudence* 276.
74 n17
75 KS Ekeli 'Green Constitutionalism: The Constitutional Protection of Future Generations' 3(2007) *Ratio Juris* 378.
76 AP Datar 'Our Constitution and Its Self-Inflicted Wounds' 1(2007)1 *The Indian Journal of Constitutional Law* 96.
77 R Vakil 'Constitutionalising administrative law in the Indian Supreme Court: Natural Justice and Fundamental Rights' 16 (2018) 2 *International Journal of Constitutional Law* 480. See also Part VII & VIII of the Indian Constitution.
78 n17 arts 52, 53 & 74
79 n17 Chapter II
80 Ibid art124
81 Ibid art131
82 n17 art 362 (2).

Union, extent of executive power on the state High Courts of union territories, representation of States in parliament, States, the union judiciary and the amendment process then it shall require at least one-half of the support by the state legislatures before Presidential assent. Another distinguishing feature of the Indian Constitution is Article 13 which prohibits any law that abridges the rights and freedoms recognised in the Constitution.[83] As we shall see the Supreme Court has adopted a purposive and liberal interpretation of this clause in nullifying constitutional amendments that are deemed to controvert the bill of rights.

Basic Structure Theory Cases

The foundation of this theory was laid down in a case in which the court was confronted with the legal dilemma as to whether the 17th constitutional amendment could infringe upon the fundamental rights and freedoms.[84] In a majority decision, it was held that amendments could violate the bill of rights. Needless to say, this was a revolutionary verdict that defined the parameters of constitutional amendments within the context of respecting the fundamental rights and freedoms. This decision was reiterated two years later where the same Supreme Court invoked Article 13 of the constitution in holding that no Constitutional amendments shall abridge the bill of rights.[85]

As Yavin Roznai has opined, this decision fell short of nullifying the amendment but it empowered the court to nullify constitutional amendments in spite of the prospective institutional battle of supremacy between the judiciary and parliament.[86]

This battle for supremacy emerged in 1971 after Premier Indira Gandhi and her Indian Congress Party secured a landslide victory by winning close to two-thirds of the parliamentary seats. This supermajority control prompted parliament to pass the controversial 24th and 25th amendments to the Constitution. The 24th amendment granted parliament the power to amend or repeal any provision of the Constitution including those protecting the fundamental rights and freedoms. Conversely, the 25th amendment outlined a series of legal changes to prevailing private property rights.

Expectedly, these constitutional changes were challenged by activist politicians who considered them as a threat to democracy and rule of law.[87] In a slender majority verdict of 7-6, the court held that the power to 'amend does not extend to altering the basic structure of the Constitution, or the framework so as to change its' intrinsic identity.' This landmark judgement is considered the core of the basic structure theory that recognises the role of courts in nullifying unlawful changes to that decimate the Constitution.

In 1975 the High Court of Allahabad nullified the 1971 election of Prime Minister Gandhi due to massive electoral malpractices and penalised her with a six year ban from active politics.[88] In response, Mrs. Gandhi declared a state of emergency and parliament passed the 38th and 39th amendments which intended to protect her victory. The 38th amendment purported to protect the laws and executive orders issued by the President during the state of emergence from judicial review.

83 Ibid.
84 *Sajjan Singh v State of Rajasthan* AIR 1965 SC 845.
85 *LC Golankath vs. State of Punjab* AIR 1967 1643.
86 Y Roznai 'Unconstitutional Constitutional Amendments: A Study of the Limits of Constitutional Amendment Powers' *London School of Economics*, London February 2014
87 *Kesavananda Bharati & Others vs. State of Kerala & Others* AIR 1973 SC 1461.
88 *State of Uttar Pradesh v Raj Narrain 1975* AIR 1965.

In stark contrast, the 39th amendment sanitised her electoral victory retroactively by nullifying all the laws under that were applied in convicting the Prime Minister.

Subsequently, Gandhi appealed the decision all the way to the Supreme Court in the landmark case known as *Indira Nehru Gandhi vs Raj Nahrain* where the appeal was allowed and her victory was validated.[89] Nonetheless, the court held that omitting the 39th amendment from judicial scrutiny was invalid for violating three essential features of the Constitution; fair and democratic elections, equality and separation of powers.

In retaliation to this verdict, parliament reinstated its supremacy by enacting the 42nd amendment which granted the legislature unfettered and unlimited jurisdiction to amend the Constitution. However, in 1977 Gandhi lost power and the new Janati party regime failed to repeal the 42nd amendment, a precarious position that was exacerbated by Gandhi's regaining power in 1981.

Subsequently, the only recourse was to challenge the validity of the 42nd amendment for offending the basic structure doctrine. I*n Minerva Mills* case in a unanimous decision the Judges concurred section 59 of the 42nd amendment violated the basic structure of the Constitution since it was beyond parliament to remove the limitations on constitutional amendments. In one of its poignant and profound dictums the court affirmed that: -

> Since the Constitution had conferred parliament a limited amendment power on the Parliament, the Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power […] If by the constitutional amendment, Parliament were granted unlimited power of amendment, it would cease to be an authority under the Constitution, but would become Supreme over it, because it would have power to alter the entire Constitution including its basic structure and even to put an end to it by totally changing its identity.[90]

Despite its futuristic nature, this doctrine has been assailed as 'vague and idealistic' for failing to outline the specific aspects of the 'basic structure' of the Constitution.[91] This nebulous position leaves room for power struggle between the judiciary and the executive/legislature since Judges enjoy unfettered discretion in determining the validity of constitutional changes.

Subsequent to these decisions, it is fair to surmise the basic structure doctrine is a viable tool for fighting against politically instigated changes that intend to weaken the Constitution.[92] Furthermore, this legal doctrine is instrumental in distinguishing between constitutional change and 'constitutional replacement' through changing the essential features of the constitution under the guise of amendments.[93]

89 *Minerva Mills vs Union of India* AIR 1975 SC 2299.

90 n87 [1824].

91 A Raz 'The Doctrine of Basic Structure in the Indian Constitution: A Critique SSRN Electronic Journal June 2015 pg. 28.

92 Y Roznai & TH Brandes 'Democratic Erosion, Populist Constitutionalism, and the Unconstitutional Constitutional Amendment Doctrine' 5.

93 DS Law & H Hsie 'Judicial Review of Constitutional Amendments: Taiwan' *Washington University School of Law, Legal Studies Research Paper Series,* Research Paper 19-02-01, March 2019, p27.

Conclusion

In summary, amending the Constitution for purposes of protecting vested interest is a risky scientific experiment that is fraught with serious and permanent consequences. Just like the celebrated Horror film franchise *Halloween* starring award winning American actress Jamie Lee Curtis. The fictional town of Haddonfield, Illinois is repeatedly haunted by the villain Michael Myers who returns to cause carnage

and havoc after the residents failed to act when they realised, he was a psychologically damaged teenager. The moral of this story applies to a people who tolerate constitutional amendments that will return to haunt them several generations later.

Nonetheless, it is apparent the *Constitution Amendment Bill*, 2020 intends to create an omnipotent and imperious President whose tentacles stretch all the way to the legislature and judiciary. Doubtless, this hideous and myopic objective controverts the intention of the framers of our Constitution who wanted to create a republic pillared on rule of law, and constitutionalism.

Nonetheless, the Indian Supreme Court has set a near perfect precedent through the basic structure doctrine which demonstrates how courts can control unconstitutional constitutional amendments. The Judges exerted their authority by nullifying the constitutional amendments that were sponsored by the powerful Premier Indira Gandhi and her influential Indian Congress Party.

Similar strands of thought apply to the Kenyan context where the Judiciary has the mandate to strike down any unconstitutional amendment whose objective is to disremember the rule of law, checks and balances. Therefore, the BBI debate offers the judiciary a new window of opportunity for the courts to define the legal parameters for constitutional amendments

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ANTIQUATED YET ASYMMETRICAL: Sino-Afro Bilateral Investment Treaties in a Comparative Context

Allan Wanjohi Ngengi*

1. Introduction

Incontrovertibly, Bilateral investment Treaties (BITs) have become the principal international avenue through which foreign investment is regulated.[1] Imperatively, they are currently considered as one of the chief international instruments for the protection and promotion of Foreign Direct Investments (FDIs).[2] Out of about 5,600 existing International Investment Agreements (IIAs), over 3000 are BITs[3] with the rest being other regional and interregional agreements governing disparate aspects of investments.[4] Majority of these BITs were concluded from 1990's since between 1959-1989, only 386 agreements were concluded.[5] Exceptionally, China has already concluded 129 (BITs) second only to Germany with 135[6] but BITs are also popular in Latin America, a region which had previously challenged the application of international law to foreign investment.[7] The proliferation of the BITs especially in the 21st century has often been christened as an 'explosion' or 'revolution' in international investment law and has had a direct effect on the upsurge on the number of investment cases referred to international investment tribunals.

Pundits have expatiated that signing of BITs between countries routinely carries itself with appurtenant utility.[8] In particular, BITs are at the center of investments' promotion,[9] are crucial in strengthening relationships between different countries,[10] enhance economic liberalization,[11] wield the potential of encouraging domestic investments[12] and are also crucial tools for strengthening good governance and the rule of law especially in the host states.[14] Nonetheless, the most crucial role played by BITs is investments' protection. By signing a BIT, parties principally consent to afford protections for the other country's foreign investments that they would not otherwise have[15]

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1 A T Guzman 'Why LDC's Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' 38(1998) VJIL 640.
2 A Kaushal 'Revisiting History: How Past Matters for the Present Backlash Against Foreign Investment Regime' 50(2009) HILJ 496.
3 SP Subedi *International Investment Law: Reconciling Policy and Principle* (3rd edn, Hart Publishing Ltd 2016) 1.
4 D Collins, *An introduction to International Investment Law* (Cambridge University Press, New York, 2017) 40-45.
5 KJ Vandevelde 'A Brief History of International Investment Agreements' 12(2005) *University of California Davis Journal of International Law and Policy* 12 2005 p172.
6 n4 p37.
7 Ibid.
8 Subedi (n 3)1.
9 For example, MW Sheffer 'Bilateral Investment Treaties: A Friend or Foe to Human Rights?' (2011) DJILP 484.
10 G Gallins, 'Bilateral Investment Protection Treaties' (1984) 2 JENRL J 82.
11 AS Chilton 'Reconsidering the Motivations of US Bilateral Treaty Program' 108(2014) *ASP American Society Proceedings* 374.
12 J Lang 'Keynote Address' 31(1998) CILJ 457.
13 JW Salacuse, 'Treatification of International Investment Laws' 8 (2007) *International Financial Economic and Technology Law* 246.
14 G Van Harten 'Five Justifications for Investment Treaties: A critical Discussion' (2010) 2 *Trade Law and Development* 35.
15 The US- China Business Council, 'Bilateral Investment Treaties: What they Are and What They Matter' (June 2014).

by protecting an investor from arbitrary legislative or administrative action of the host state.[16] By their nature, BITs make provisions for a mechanism by which a potential investor and a potential host can establish a contract that is binding under international law.[17] They establish minimum standards of treatment of investments and mechanisms for enforcement of rights arising under them.[18] Essentially, they promulgate terms that shield the foreign investor against a contractual infringement by the host by affording an investor access, in the event of an infringement, to a binding arbitration thus creating enforcement machinery that is much more effective hence ensuring compliance by the host.[19] Indeed, the dispute settlement procedures afforded by BITs are most propitious as they offer an investor a disinterested forum to ventilate its grievances and whose decisions bind the host.[20] Arguably, the type of arbitration mechanisms guaranteed under a majority of BITs allows 'investors to manage risk associated with investing in a foreign country'[21] and in the event of a dispute between an investor and the host, the latter can neither thwart the legal proceedings from moving forward nor control the ultimate decision of an arbitral tribunal.[22] Vitally, the host's snub to make payment may provoke reputational consequences such as raising inferences that the subject government is an unreliable economic partner.[23]

Since the Chinese government promulgated the 'Go Global Initiative' in early 2000,[24] Chinese FDIs have proliferated abroad, especially into Africa. The FDI inflows into Africa surged from US $ 75 million in the year 2000 to US $ 3.2 billion in the year 2014[25] and expected to rise to over US $ 100 billion by the end of 2020.[26] They are of diverse manners and nature;[27] ranging from extractive sector investments [including oils and minerals] at 29.2%, manufacturing at 22%, construction at 15.8%, financing at 13.9%, commercial services at 5.4%, wholesale and retail at 4.0%, scientific research, technological services and geological prospecting at 3.2%, agriculture forestry, animal husbandry and fishery at 3.1% and others at 3.4%.[28] Patently, investments in the extractive sector take the lion's share [29] while the concentration of the Chinese investments appears to tower in the resource rich African countries.[30]

16 AR Perera 'The Role and Implications of Bilateral Investment Treaties' 26(2000) *Commonwealth Law Bulletin* 607.
17 n1 p 658.
18 KJ Vandevelde 'The Bilateral Investment Treaty Program of the United States' (1988) 21 CILJ 202.
19 n1 642.
20 Ibid 658.
21 CE Anderer 'Bilateral Investment Treaties and the EU Legal Order: Implications of the Lisbon Treaty' 35(2010) *Brook Journal of International Law* 861.
22 ZElkins ATGuzman and BA Simmons 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000' (2006) *International Organization* 812.
23 n22
24 X Han 'Environmental Regulation of Chinese Overseas Investments from the Perspective of China' (2010) 11 *Journal of World Investment and Trade* 376.
25 Y *Zheng China's Aid and Investment in Africa: A Viable Solution to International Development?* (Fudan University 2016) 2.
26 T Ludwig 'Recommendations for Addressing Environmental Impacts of African Development Projects Funded by Chinese Banks' 15(2015) *Sustainable Development Law and Policy* 11.
27 M Manalula and K Matilda 'Chinese Foreign Direct Investment in Africa Natural Resources and the Impact on Local Communities (A Focus on Extractive Industries): Review of Literature' (2016) *World Journal of Social Sciences and Humanities* 103.
28 H Edinger and CPistorious 'Aspects of Chinese Investments in the African Resource Sector' 111(2011) *Journal of the Southern African Institute of Mining and Metallurgy* 504.
29 K Adisu Thomas Sharkey and Sam C. Okoroafo, 'Impact of Chinese Investments in Africa' 5(2010) *International Journal of Business Management* 3.
30 C Tung 'The Influence of Chinese Climate Policy and Law in Africa' 4(2010) *Carbon and Climate Law Review* 336.

Despite the upsurge, questions as to whether extant Sino-Afro BITs are suitable for flourishing Sino-Afro investment engagements abound. Appreciably, China has concluded BITs with about 35 out of 54 African countries[31] out of which only 17 are in force. Dissatisfaction is rife in that while the BITs are generally protective of the Chinese investments in Africa,[32] they, on the other hand, contain clauses with asymmetrical characteristics, imposing restrictions on host states but with no corresponding duties on investors.[33] Moreover, most of them are antiquated having failed to keep up with the transformational pace witnessed in other IIAs and therefore inapt to fully protect investments. Moreover, provisions therein do not mirror trends presently favoured by arbitral tribunals while adjudicating upon investment related disputes.

This paper therefore delves into these BITs, seeking first to highlight the core of the existing pitfalls. To ameliorate the situation, the paper opines *inter alia* that negotiation and renegotiation of the Sino- Afro BITs is critical towards creating a balanced relationship between Chinese investors and the host African states, while concurrently propping up investors' and investments' protection.

2. The Porous Side of the Sino-Afro Bits

Akin to other BITs, Sino- Afro BITs demonstrate considerable uniformity compared to other BITs and IIAs thereby covering areas such as (1)definitions and scope of application, (2) investment promotion and conditions for the entry of foreign investments and investors, (3) general standards for the treatment of foreign investors and investments, (4) expropriation and dispossession, (5) operational and other conditions, (6) losses from armed conflict or internal disorder, (7) treaty exceptions, modifications, and terminations, and (9) dispute settlement.[34] Dissimilar to the contemporary BITs however, Sino-Afro BITs lag behind, in the following facets.

2.1 Qualified Investments

Determination of the existence of an 'investment' is purely a jurisdictional issue and where there is no investment, the subject investment tribunal lacks jurisdiction to entertain a dispute.[35] The ICSID Convention provides that its jurisdiction can only extend to any legal dispute arising directly out of an investment.[36] However, the convention does not provide for the definition of investment[37] and equally, there remains no definition of the term in the international law thus leaving states to assert their own definitions in their individual investment agreements thereby setting the scope of the protections in the rest of the instruments.[38] Consequently, only those types of commercial engagements which fall within the listed definition, as interpreted by an arbitration tribunal in case of a dispute, will enjoy the benefits of the subject treaty.[39]

31 W Kidane 'China Bilateral Investment Treaties with African States in Context' 49(2016) *Cornell International Law Journal* 177.
32 UU Ofodile 'Africa- China BITs: A Critique' 35(2013-14) *Michigan Journal of International Law* 35 206.
33 Ibid 147.
34 C Elkemann and OC Ruppel 'Chinese Foreign Direct Investments into Africa in the Context of BRICS and Sino-African Bilateral Investment Treaties' 13 (2015) *Richmond Journals of Global Business and Law* 606.
35 KN Schefer, *International Investment Law: Text Cases and Materials* (EEP Ltd 2013) 59.
36 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (4 I.L.M. 524, 1965), Article 25.
37 QT Xie, 'The Protection of China's Investments in Africa under the International Investment Law' (2012-13) 22 CITLJ 35.
38 n4 p74.
39 n4 75.

Sino- Afro BITs offer a broad asset-based definition of investments thus defining the same as to 'cover every kind of asset'[40] thus offering non exhaustive lists of illustrations of the nature such investments may take.[41] Investments under these BITs include 'movable and immovable property and other rights[42] for example mortgages, pledges,[43] claims to money or to any other performance having an economic value associated with an investment',[44] shares, debentures, stock and any other kind of participation in companies,[45] business concessions conferred by law or under contract permitted by law,[46] including concessions to search for, cultivate, extract or exploit natural resources and intellectual property rights.[47] The BITs also cover intellectual property with some covering only the main types of intellectual rights[48] and others adopt a liberal approach thus covering every type of intellectual and industrial property.[49]

The ambiguity of the term 'investment' is often a source of investment disputes in the international arena.[50] In the context of the Sino-Afro BITs, the broad definition of the term is a concern. Need exists to avoid an overly broad concept of investment to ensure that only those investments that are of economic benefit are allowed while excluding those which may not be for business purpose and those arising solely from commercial contracts like sale of goods and services. Certainly, investment tribunals[51] have opined that a venture may be termed as an 'investment' only if there is contribution by an investor in terms of financial outlay, material shipment, technical transfer or personnel involvement by the investor, has operated in the host country for a duration of time, investor must have assumed risks in investing in the host country and that investment has had some contribution to economic development of the host country. An example worth emulation is the China- Tanzania BIT[52] by enumerating what may constitute an investment. It however excludes 'claims to money that arise solely from commercial contracts for sale of goods or services by a national or enterprise in the territory of the other contracting party or claims to money that arise from marriage or inheritance with no characteristics of an investment' and 'bonds, debentures and loans with an original maturity of less than 3 years.[53]

2.2 Temporal Scope and Duration of the Sino-Afro BITs

Some of the Sino-Afro BITs apply to the pre-existing investments thereby having a retroactive effect. [54] This raises concern since under the Vienna Conventions; treaties generally have no

40 Agreement Between The Government of The People's Republic of China and Government of The Republic of Djibouti on Promotion and Protection of Investments (18 August 2003) Article 1.
41 Ibid 1 (a) – (e).
42 Agreement Between The Government of The People's Republic of China and Government of The Republic of Ghana Concerning The Encouragement and Reciprocal Protection of Investments (12 October 1989) Article 1(i).
43 China – Djibouti BIT (n 40) Article 1(a) (i).
44 Ibid., art 1(a) (iii).
45 China – Djibouti BIT (n 40) Article 1(a) (ii).
46 Agreement Between The Government of The People's Republic of China and Government of The Republic of Tunisia Concerning The Reciprocal Encouragement and Protection of Investments (21June 2004) Article 1(1) (e).
47 Ibid.
48 Agreement Between The Government of The People's Republic of China and Government of The United Republic of Tanzania Concerning The Promotion and Reciprocal Protection of Investments (24 March 2013).
49 China – Tunisia BIT (n 46) Article 1(1) (d).
50 G Wang 'China's Practice in International Investment Law: From Participation to Leadership in the World Economy' 34(2009) *Yale Journal of International Law* 575, 578.
51 *S Costruttori SPA and Italstrade SPA v. The Kingdom of Morocco,* ICSID Case No. ARB/00/4 Decision on Jurisdiction 23 July 2001, Par. 53-57.
52 n48 art 1.
53 Ibid.
54 For example, China BITs with Ghana art 8, Benin Article 11, Ethiopia art 11 and Tunisia art 12.

retrospective effect.[55] Factually, future BITs should be clear on whether or not they apply to pre-existing investments and should also declare whether they apply only to investments made after they enter into force.[56] Appreciably, some of these BITs provide for a duration of ten years[57] period but do not envisage circumstances under which they may be terminated before the expiry of the period especially on account of being invalid. Notably, the Vienna Convention on the Law of Treaties[58] allows termination of a treaty if it is procured through fraud,[59] corruption,[60] coercion [61]and contradicts *jus cogens*.[62] Moreover, a treaty may be terminated in case of a material breach,[63] supervening impossibility of performance[64] and fundamental change of circumstances *(rebus sic stantibus).*[65] It would be very important for the future Sino- Afro BITs to envisage such.

2.3 Promotion of Investments

One of the main objectives of BITs is to promote investments.[66] Accordingly, majority of the Sino- Afro BITs have promotion of investment provisions embedded either in the preamble[67] or in the main body clauses.[68] Nevertheless, the language is hortatory by not stipulating the promotional activities that ought to be taken to promote investments.[69] Only a handful of them enjoin states to provide assistance in issuance of visa and work permits.[70] It is instructive that future BITs make provisions for strengthened investment promotion clauses which would in addition require state parties to exchange information on investments and provide for incentives to promote investments.

2.4 Qualified Investors

Tribunals' decisions in cases such as *Hussein Nuaman Soufraki v United Arab Emirates,*[71] *Champion Trading v Egypt,*[72] *Autopista v Venezuela*[73] *and Tokios Tokeles v Ukraine*[74] underscore the essence of framing 'qualified investors' clauses in BITs in a manner that neither jeopardises investors nor encourages nationality[74] shopping. Expressively, some Sino – Afro BITs lag behind in this aspect. For example, they do not expressly preclude investors with dual nationality thereby putting Chinese investors who acquire a third-party nationality in a precarious position since Article 3 and 9 of Nationality law of China does not recognize dual nationality.

55 Ofodile (n32) 181.
56 Ibid.
57 China BITs with Uganda art 16, Ghana art 14(1) and (2) and Tanzania art 18 (2).
58 Vienna Convention on the Law of Treaties, No. 18232, 23 May 1969 <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf > Accessed 20 March 2020.
59 Ibid art 49.
60 n58 art 50.
61 Ibid Art 51.
62 FX *Njenga International law and World Order Problems* (MUP , Eldoret 2001) 196.
63 n58 art60(3).
64 Ibid art 61 (1).
65 n62 p199.
66 n10.
67 Preambles of China's BITs with Zimbabwe (1996) and Cape Verde (1998).
68 China- Ethiopia BIT Art 2.
69 n32 p163.
70 Ibid.
71 *Hussein Nuaman Soufraki v. United Arab Emirates* ICSID Case NO. ARB/02/7, Award 7 July 2004.
72 *Champion Trading Company, Ameritrade International,Inc., James T. Wahba, John B. Wahba, Timothy T Wahba v. Arab Republic of Egypt,* ICSID Case No. ARB/02/9, Decision on Jurisdiction 21 October 2003 section 3.4.1.
73 *Autopista Concesionada De Venezuela, CA v. Bolivarian Republic of Venezuela* ICSID Case No. ARB/00/5 Decision on Jurisdiction, 27 September 2001 Par. 107.
74 *Tokios Tokeles v. Ukraine* ICSID Case NO. ARB/02/18 Decision on Jurisdiction 29 April 2004 Par. 53-55.
75 For example, Ghana.

Consequently, they may be unable to claim the benefits under these BITs unlike their African counterparts whose laws recognize dual nationality.[75] Some[76] set a very low threshold only requiring a company or an entity to be incorporated in accordance with the law of the contracting party.

This forms a fertile ground for nationality shopping[77] by permitting shell companies that are incorporated in the contracting parties but carry little or no business therein to benefit from these BITs. Some like China's BITs with Ghana, Cape Verde, Ethiopia, Egypt and Zimbabwe require the entities to be 'domiciled' in China and yet the term has not been defined either in the BITs or interpreted through case law.[78] Therefore, it is not clear whether domicile means the company's management residence or its place of registration for tax purposes. Moreover, Sino-Afro BITs are, unlike the contemporary BITs,[79] narrowly worded by not extending coverage to cover entities that though not incorporated in accordance with the laws of the contracting parties; they are nevertheless directly or indirectly controlled by the nationals of the contracting parties. Similarly, they do not address the fate of entities incorporated in the host state yet owned or controlled by the nationals of the contracting party. To protect such investors, contracting parties may incorporate a provision that '…a company or an entity constituted in accordance with the laws of one contracting party and which, before any dispute arise, is controlled by an investor of the other contracting party, shall be treated as a legal person of the other contracting party…'[80] To stem nationality shopping, Sino-Afro BITs may incorporate denial of benefit clauses[81] or consider using multiple grounds to prove nationality as a substitute for denial of benefits clauses.[82]

2.5 Standards of Protection

Standards of protection under IIAs consist of two types: absolute and relative.[83] Absolute standards are those which are not contingent upon specified factors, happenings or government behaviours towards investors or persons while relative standards are those that are dependent upon hosts' government treatment of other investments or investors.[84] Therefore, standards such as full protection and security, fair and equitable treatment or treatment in accordance with minimum standard of law fall under absolute standards category while standards such as most favoured nation treatment and national treatment are relative standards.[85]

2.5.1 Fair and Equitable Treatment

Though common to most BITs and IIAs, FET has no single frozen version[86] and its interpretation depends on the wording of the specific instrument. Nevertheless, some instruments provide for FET according to the customary international law standard[87] while others just adopt a liberal

75 For example, Ghana.
76 n 46 art 1(2).
77 n74.
78 n37 p34.
79 Netherlands – Venezuela BIT (1991) Article 1 (b).
80 Sweden-Romania BIT (2002) Art 1 (2) (b).
81 Energy Charter Treaty art 17(1).
82 Switzerland – China BIT (2009) Art 1(2) (b).
83 JW Salacause, *Law of Investment Treaties* (2nd edn, OUP 2015) 229.
84 Ibid.
85 JW Salacause, *The Three Laws of International Investment: National, Contractual and International Framework for Foreign Capital* (1st Edition, Oxford University Press 2013) 337.
86 RDolzer and C Schreuer, *Principles of International Investment Law* (2nd edn, OUP2012) 132.
87 For example, the NAFTA Art 1105 (1).

approach that does not attach reference to customary international law. This latter approach ultimately affords a tribunal an opportunity to take a plain meaning approach thereby looking at the treaty-based FET obligation as standard on its own.[88] The approach ordinarily presumes a higher standard for host state conduct than does the customary approach.[89]

In *Glamis Gold Ltd v United States of America*[90] the tribunal explained FET in the context of customary international law minimum standard treatment stating thus:

> The fundamentals of the Neer standard thus apply today: to violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA, an act must be sufficiently egregious and shocking – a gross denial justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons- so as to fall below accepted international standard makes and constitute a breach of Article 1105 (1) […].

Equally, where a BIT or an IIA does not make reference to international minimum standard, tribunals have opined that the precise meaning of FET must be established on a case by case basis and requires an action or omission by state which violates a certain threshold of propriety, causing harm to the investor and with a causal link between action or omission and harm.[91] Therefore an act by the host state may violate FET if for example it stifles investor's legitimate expectation,[92] by failing to offer a stable and predictable legal framework,[93] absence of transparency in the legal procedure or in the actions of state,[94] procedural impropriety and denial of due process,[95] actions based on bad faith,[96] acts of coercion and harassment [97] and further, failure by the host government to comply with contractual obligations.[98]

Accordingly, most of the Sino-Afro BITs provide for FET for investments, although in a spartan manner. They provide that the investments shall be accorded 'equitable treatment'[99] and shall 'be accorded fair and equitable treatment in the territory of the other contracting party'.[100] Some extend protection to the 'activities associated with the investments of investors' in addition to the protection accorded to the investments.[101]

88 Schefer (n 35) 339.
89 Ibid.
90 *Glamis Gold, Ltd v United States of America,* UNCITRAL (NAFTA), Award 8 June 2009 Par. 616 <https://www.italaw.com/sites/default/files/case-documents/ita0378.pdf> Accessed 28 February 2020.
91 *Joseph Charles Lemire Ukraine*, ICSID Case No. ARB/06/ 18, Decision on Jurisdiction and Liability 14 January 2010 Par.284.
92 n86 p145.
93 *CMS Gas Transmission Company v. Argentine Republic,* ICSID Case No. ARB/01/8 Award 12 May 2005 Paras. 274-276.
94 Emilio Augustin Maffezini v. Kingdom of Spain, ICSID Case Number ARB /97/7 Award on Merits, 13 November 2003 Par. 83.
95 *Middle East Cement Shipping and Handling Co. S.A v. Arab Republic of Egypt* ICSID Case No. ARB /99/6, Award 12 April 2002 Par. 143.
96 *Frontier Petroleum Services V Czech Republic,* Permanent Court of Arbitration, Final Award 12 November 2010, Par. 300 < https://www.italaw.com/sites/default/files/case-documents/ita0342.pdf > accessed 28 February 2020.
97 *Total SA v The Argentine Republic,* ICSID Case No. ARB/04/01 Decision on Liability, 27 December 2010 Par. 338.
98 *Societe Generale de Surveillance S. =A v. The Republic of Paraguay* ICSID Case No. ARB/07/29, Decision on Jurisdiction 12 February 2010 Par.146.
99 n42 art 3(1).
100 n46 art 3(1).
101 China BITs with Egypt, Zimbabwe, Ethiopia and Cape Verde at Art 3(1).

The structure of the FET provisions in these BITs may however be thumped on account of vagueness. They neither delineate the nature and the scope of the treatment nor do they indicate whether or not it is contingent on customary international law. Consequently, lack of clarity on the criteria for determining the true scope invites subjectivity that may lead to overly broad definitions and interpretations of the FET in the event of a dispute. It is therefore prudent that reference is made in the BITs as to international law or some other criteria as standard for establishing the meaning and scope of the FET.[102] Indeed, other Sino-Afro BITs may borrow from the China-Tanzania BIT[103] which attempts to demarcate the scope of the FET by providing that "Fair and equitable treatment" means that investors of one Contracting Party shall not be denied fair judicial proceedings by the other Contracting Party or be treated with obvious discriminatory or arbitrary measures'.

2.5.2 Full Protection and Security

FPS is a standard that affords foreign investors protection from both the state power and third-party interference with the investment.[104] Questions as to whether or not the standard extends to 'legal protection' however linger. *In Siemens AG vs The Argentine Republic*[105] the tribunal held the view that FPS extends beyond physical security and covers legal protection but in *Suez vs Argentina* ,[106] the tribunal denied that the concept of FPS extended to legal protection. In addition, some authors[107] have questioned whether it is useful to distinguish 'FPS' from just 'PS' and to suppose that the nonexistence of the word 'full' means that the standard must be accorded a narrower meaning which extends to physical security only.

Most of the Sino-Afro BITs have made provisions for this standard with a number of them providing that '…investments and activities shall enjoy protection in the territory of the other contracting party…'[108] The guaranteed 'protection' however is not defined and only a few of them talk of full protection and security.[109] Therefore, questions abound as to the nature of protection guaranteed by some of these BITs which do not even mention the term 'security' and do not also use the term 'full' in guaranteeing protection. Given the wide discretion accorded to arbitral tribunals in interpreting provisions of BITs in case of a dispute, it is imperative that these BITs are worded with clarity as to meaning of protection, whether it also includes 'security' of investments and whether it is full or otherwise. Moreover, the BITs should explicate whether the protection extends to legal protection. For example, the China-Tanzania BIT has defined the scope of the FPS standard by providing:[110]

> Full protection and security require that Contracting Parties take reasonable and necessary police measures when performing the duty of ensuring investment protection and security. However, it does not mean, under any circumstances, that investors shall be accorded treatment more favourable than nationals of the Contracting Party in whose territory the investment has been made.

102 n32 p183.
103 n 48 art 5(2).
104 *Wena Hotels Limited v Arab Republic of Egypt,* ICSID Case No. ARB/98/4, Award 8 December 2000 Par. 84-95.
105 *Siemens AG v The Argentine Republic,* ICSID Case No. ARB/02/8, Award 6 February 2007.
106 *Suez, Sociedad General de Aguas De Barcelona, SA and Vivendi Universal SA v Argentine Republic,* ICSID Case No. ARB/03/19 and Argentine Republic and AWG Group v Argentine Republic (2010)(179).
107 n84 p165.
108 See, China's BITs with Ghana art 3(2), Zimbabwe art 3(1) and Ethiopia art 3(1).
109 See, China's BITs with Tunisia, art 2(1) and Tanzania, Article 5(1). China's BITs with Egypt, art 2(2), and Cape Verde BIT, and art 2(2) 'provide for constant protection and security'.
110 n48 art 5(3).

Additionally, the draft of the TTIP[111] clarifies the scope of FPS by stipulating that 'for greater certainty, "full protection and security" refers to the party's obligations relating to physical security of investors and covered investments'.

Useful lesson may also be learnt from the Germany-Argentina BIT[112] which explicitly recognizes that FPS covers legal protection by stating that 'Investments by nationals or companies of either Contracting Party, shall enjoy full protection as well as juridical security in the territory of the other Contracting Party'.

2.5.3 National Treatment

NT is one of the two basic forms of the non-discrimination obligations found in IIAs and places duty on host states to treat foreign investors –and their investments no less favorably than the host treats its national investors-and their investments.[113] To determine nationality based discrimination, it is instructive to compare the treatment of foreign investors to the treatment accorded to a domestic investors in similar circumstances.[114] What is a 'like' situation and what is not depends on the nature of investment.[115]Apparently, some tribunals have interpreted the term 'like situations' narrowly[116] while others have adopted a broad approach.[116]

A large number of the Sino-Afro BITs do not contain national treatment at all[117] although they make a provision that a contracting party will admit such investments in accordance with its laws and regulations.[119] This conservative approach leaves the final say to the host country to even promulgate laws and regulations that may at times be discriminatory towards foreign investors compared to local investors. The upshot is that China and these African countries alike may not be in a position to protect investments of their investors overseas and should therefore consider a more liberal approach. In this context, the China-Tanzania BIT offers an example by stating thus:[120]

> Without prejudice to its applicable laws and regulations, with respect to the operation, management, maintenance, use, enjoyment, sale or disposition of the investments in its territory, each Contracting Party shall accord to investors of the other Contracting Party and their associated investments treatment no less favorable than that accorded to its own investors and associated investments in like circumstances […].

In order to further liberalise investments China and African states may also consider including provisions on pre-entry national treatment in their BITs - borrowing from the NAFTA's National

111 Transatlantic Trade and Investment Partnership: Trade in Services, Investment and E-commerce, Chapter II art 3(5).
112 Germany-Argentine Republic BIT (1991) Article 4(1).
113 n35 p303.
114 n3 p94.
115 Ibid.
116 *Methanex Corporation v United States of America,* UNCITRAL (NAFTA)(2005). See also, *Feldman v Mexico,* ICSID and *Loewen v. United States,* ICSID Case No. ARB (AF)/98/3, Award 26 June 2003.
117 For example, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador,* LCIA (2004) (UNCITRAL), Award 1 July 2004.
118 n37 p36.
119 See, China's BITs with Ghana art 2(1), Mauritius Art 2(1) (a) (b), Zimbabwe Article 2(1) and Ethiopia, Art 2(1), Tunisia, art 2(1) and Cape Verde, art 2(1).
120 n48 art 5 (1).

Treatment clause which provides that[121] 'each party shall accord to investors of another party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.'

2.5.4 Most Favoured Nation Treatment

From the NT, the obligation of MFN treatment is the succeeding form of non –discrimination obligation contained in many IIAs.[122] Unlike the NT however, it looks at the host's treatment of third-party investors in comparison with the foreign investor bringing the claim[123] and ensures equality of competitive opportunities between investors from different foreign countries.[124]

By concluding MFN clauses, states undertake to ensure that the relevant parties treat each other in a manner at least as favourable as they treat state third parties[125] Some BITs[126] are perceptibly liberal by implicitly permitting a foreign investor to choose the regime of treatment it aspires to be subjected to; either that enjoyed by local investors or by investors from third party nations should it turn out that they enjoy better treatment than the locals. Others[127] limit the scope of an MFN clause thereby making it apply only to particular provisions under the BIT. Moreover, MFN clauses in IIAs may or may not apply to pre-establishment duration and where they lack reference to establishment, they undoubtedly restrict coverage to investments that have already been admitted.[128] Furthermore, it ought to be appreciated that just like the NT, an aggrieved investor will only benefit from an MFN clause upon demonstrating that he/she/it is in 'like circumstances' as the third-party state investor.[129]

A number of Sino-Afro BITs provide for MFN treatment with the clauses being worded in similar manner. Most of them[130] ape the China-Cape Verde BIT by providing thus:[131]

> (2). The treatment and protection referred to in Paragraph 1 of this Article shall not be less favourable than that accorded to investments and activities associated with such investments of investors of a third State. (3). The treatment and protection as mentioned in Paragraph 1 and 2 of this Article shall not include any preferential treatment accorded by the other Contracting Party to investments of investors of a third State based on customs union, free trade zone, economic union, free trade zone, economic union, agreement relating to avoidance of double taxation or for facilitating frontier trade….

Some[132] however provide for considerably more exceptions to the applicability of the MFN treatment by providing that in addition to the foregoing exceptions the BIT shall:

121 NAFTA (1994) Art 1102 (1).
122 n35 p304.
123 Ibid.
124 n3 p92.
125 n86 p 207.
126 Germany Model BIT (2008) Art 3(1).
127 For example, US- Rwanda BIT (2008) Art 4 (1) and (2).
128 For example, Energy Charter Treaty (1994) Art 10(7).
129 n 6 p114.
130 China's BITs with Ghana Art 3(2) (3), Zimbabwe Art 2(1), Ethiopia BIT Art 3(2) (3), Tunisia Art 3(2), Cape Verde, art 2(1), Egypt art 3(3).
131 art 3(2) (3).

> Not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests, or to the protection of public health or the prevention of diseases and pests in animals or plants or the protection of its environment….

Additionally, the China-Tanzania BIT while only affording MFN treatment to selected activities of investors and associated with investments[133] also explicitly provide that the treatment does not apply to dispute settlement.[134]

MFN treatment clauses in the majority of the Sino-Afro BITs are broadly drafted by providing that investments and investors of the other contracting party shall be accorded treatment no less favourable than that accorded to investments and investors of any third state and thereafter prescribing just a few exceptions. This broad coverage by MFN treatment clauses is sometimes perilous by creating a fertile ground for 'treaty shopping' by allowing investors of either contracting parties to shop for treaties with more favourable terms from amongst those concluded between a contracting party with the third parties. Danger looms in that a contracting party may be made liable under terms that it may not have envisaged or intended while negotiating and concluding the subject BIT as exhibited in *Maffezini v Kingdom of Spain*[135] and *Siemens v Argentina.*[136] China and African countries should thus embrace the practice of specifying the scope of the MFN clauses and importantly, indicate whether or not they apply to dispute settlement. The approach adopted in the US- Rwanda BIT and the China-Tanzania BIT in this regard offers an unmatched example.

2.6 War Clauses

Political and economic volatility at times engulfs some African countries.[137] It is therefore welcome that some BITs have provisions aimed at protecting investors in the event of damage resulting from war or other civil strife. Some[138] accord an MFN treatment to investors who may suffer losses as a result of war in the territory of either of the contracting parties while others afford both the MFN and NT.[139] Additionally, China-Cote d'Ivoire BIT affords coverage in case of investments' requisition by the forces or authorities of either party.[140]

Some of the BITs[141] are however not in force while some, like the China-Ghana BIT, do not have a war clause and therefore do not afford investors any protection at all. Further, the BITs do not define the scope of 'state of national emergency'[142] despite mentioning it as a causative event and therefore remains a hazy statement. Moreover, they do not provide the strictures for determining how the compensation will be made; whether will be determined through a domestic legislation or whether the host will be enjoined to make a prompt, adequate and effective compensation premised on market value or otherwise.[143] All the Sino-Afro BITs should, for better protection,

132 China-Mauritius BIT art 11.
133 China-Tanzania BIT Art 4(1).
134 Ibid art 4(3).
135 *Emilio Augustin Maffezini v Kingdom of Spain* (2002) ICSID
136 *Siemens AG v. The Argentine Republic* ICSID Case No. ARB/ARB/02/8, Award 6 February 2008 Par.109.
137 MT Simpson, *Mitigating Volatility: Protecting Chinese Investment in Post Conflict Regions 9* (2008) *Journal of World Trade and Investment* p317.
138 SChina's BITs with Ethiopia Art 5, South Africa Art 5(1), Zimbabwe Art 5 and Egypt Art 5.
139 China's BITs with Benin Art 5 (1), Botswana Art 5, Djibouti Art 5, Nigeria Art 5 and Uganda Art 5.
140 art 5 (1).
141 For example, China's BITs with Kenya, Uganda, Djibouti and Botswana.
142 n32 p186.

provide for both the NT and MFN treatment with regard to restitution, indemnification and compensation in the event of war. It would also be vital for the Sino-Afro BITs that do not make provisions on requisition to consider such as it would go along with broadening the scope of protection to foreign investments.

2.7 Expropriation Clauses

Apart from violence towards the person of the investor, expropriation is the most egregious infringement of an investor's right that a state can complete.[144] It refers to state's taking away the investors legal title to the investment, rights to use or even the profits from the investment.[145] Expropriation may involve taking of title (direct expropriation) or taking of value or control (indirect expropriation)[146] and whereas the right to expropriate is reiterated in numerous international law instruments including IIAs,[147] it is not absolute and may be termed legal only if undertaken for a public purpose,[148] in accordance with the principles of due process,[149] in a non-discriminatory manner[150] and upon compensating the investor.[151] Appreciably, direct expropriations of foreign property have become rare[152] and many disputes currently revolve around indirect expropriation. [153] Remarkably, indirect expropriation is intricate to determine given that a government measure may effortlessly be classified as an indirect expropriation rather than as merely a governmental regulation.

The constitution of indirect expropriation is vague[154] though, it is opined[155] that a tribunal could take into account several factors in deciding on whether a governmental measure is an indirect expropriation. Such factors include interference with the investors' use, enjoyment or management of the property, whose upshot is loss of control by the investor and/or dramatic diminution of profitability.[156] The interference must be severe, amounting to substantial deprivation to be compensable.[157] Moreover, a measure would need to divest the investor of its control, use or enjoyment of the property either permanently or if not, for a relatively long period.[158] Notably, where a state takes measures meant to promote public welfare, a state may not be held responsible for compensating the investor[159] but some tribunals have not exempted from compensation, a state that has put up environmental and health promoting regulations for public welfare.[160]

143 Ibid.
144 n86 p98.
145 Schefer (n 35) 168.
146 p3 p99.
147 G Wang, *International Investment Law: Chinese Perspectiv*e (Routledge 2015) 390-391.
148 ADC *Affliate Limited and ADC & ADMC Management Limited v.The Republic of Hungary* (2004) ICSID Case No. ARB/03/16, Award, 2 October 2006, Par. 432. See also, *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case No. ARB/05/18 and ARB/07/15 Award 3 March 2010 Par.391-392).
149 ADC *Affliate Limited Case,* ibid *Par.* 435.
150 n6 170.
151 n 86 p100.
152 Ibid 203.
153 C Schreuer, 'The Concept of Expropriation under the ETC and Other Investment Protection Treaties' (2005) at <http://www.univie.ac.at/intlaw/pdf/csunpublpaper_3.pdf> accessed 6 February 2020.
154 PD Isakoff, 'Defining the Scope of Indirect Expropriation for International Investments' (2013) 3 196.
155 n35 205- 218.
156 Ibid 206.
157 *Pope & Talbot In. v The Government of Canada* (2006) UNCITRAL (NAFTA), Interim Award, 26 June 2000 Par. 96-102.
158 *S.D Myer Inc v. Government of Canada, UNCITRAL* (NAFTA), First Partial Award 13 November 2000 par 284-288).

Sino-Afro BITs recognize the right of host nations to expropriate foreign investments although numerous variations in terms of scope and content exist.[161] Provisions however are archaic and lack some critical features that are prominent in the contemporary BITs. For example, while majority of the Sino- Afro BITs proscribe 'expropriation, nationalization or other similar measures' contemporary BITs have cast the net wider thus also proscribing 'measures having effects equivalent to expropriation or nationalization'.[162] Additionally, the BITs do not exhibit standard details regarding payment of compensation. Some provide for payment 'without unreasonable delay'[163] while others provide for payment 'without delay'.[164] Contestably, the contemporary trend in BITs and other IIAs is prompt, adequate and effective compensation and it would be prudent for the Sino- Afro BITs to mirror this trend.[165] Moreover, some of the BITs do not make provision for payment interest on expropriation[166] and while some even if they do, they nevertheless do not specify the period within which the interest is payable.[167] The tribunal in *AAPL v Sri Lanka* [168] has previously indicated that 'interest is an integral part of compensation' and it is therefore imperative that all the Sino- Afro BITs make provision for the same. Fair enough, where some of the BITs have made provision for interest, they have not also been diffident in proclaiming that the same is payable at a 'commercial rate from the date of expropriation until the date of payment'.[169]

Unlike modern BITs,[170] the Sino-Afro BITs also lack provisions indicative of the occurrence of an indirect expropriation. Including such provisions in these BITs would be a suitable way of taking away a significant portion of tribunals' discretion–in determining an indirect expropriation–which at times holds far reaching and deleterious effects on states-investor interactions. Like the present-day IIA's and BITs,[171] it is equally astute for the BITs to consider terming measures taken by the host state and designed to protect public welfare objectives such as health, safety and environment as not amounting to indirect expropriation.

2.8 Free Transfer of Capital and Returns

Friendly controls of currency transfer are indispensable in enhancing attractiveness to foreign investors as it minimises the 'tying up' of profits in foreign bank accounts and enables investors to return profits back to their shareholders in the home state or elsewhere.[172] Indeed, internationalisation serves no premeditated viable purpose if the capital it generates cannot be successfully transferred across borders.[173] In this context, the tribunal in *Continental Casualty Company v Argentine Republic* [174] has opined that 'the right of transfer is fundamental to the freedom to make foreign investment and an essential element to the promotional role of BITs'.

159 *Suez, Sociedad General de Aguas de Barcelona SA, and InterAgua Servisios Integrales del Agua SA v. The Argentine Republic,* ICSID Case No. ARB/03/17, Decision on Liability 30 July 2010 Par.128.
160 *Compania del Desarrollo de Santa Elena SA v. The Republic of Costa Rica,* ICSID Case No. ARB/96/1 Final Award 17 February 2000 Par.71.
161 n32 p168.
162 Germany-Egypt BIT.
163 China's BITs with Egypt, Cape Verde, Ghana and Nigeria Art 4.
164 China's BITs with Botswana, Kenya and South Africa Art 4.
165 US-Rwanda BIT art 6 (1).
166 For example, China's BITs with Tunisia and Ghana.
167 China-Nigeria BIT art 4(2).
168 *Asian Agriculture Products Limited v Democratic Socialist Republic of Sri Lanka* ICSID Case No. ARB/87/3, Final Award, 27 June 1990 Par. 114.
169 China-Botswana BIT art 4 (2).
170 Canada-China BIT (2012), Annex B.10 and US Model BIT (2012) Annex B. 4(a).
171 China-Tanzania BIT, Art 6 (3) and China New Zealand FTA (2008) Annex 13, 5.
172 n6 149.

Like many other IIAs and BITs, the Sino-Afro BITs provide that investors will be able to repatriate profits that they make from their investments abroad back to their home state.[175] Unlike contemporary BITs[176] however, majority[177] may be scolded owing to the dearth of provisions that may permit a justifiable limitation to such transfers especially in circumstances related to bankruptcy, other domestic liabilities such as unsettled civil or criminal judgments, economic emergencies and maintaining balance of payments equilibrium. Notably, such exceptions are reflective of situations where it is appropriate for a host state to retain an investor's money in its jurisdiction. Sino-Afro BITs should thus embrace them since apart from cushioning a country from domestic financial market instabilities;[178] they are also broadly in keeping with commitments that are made regarding currency exchange among members of the IMF. [179]

2.9 Settlement of Disputes

In international investments law and practice, dispute settlement provisions are considered central as they 'increase the level of certainty and predictability that investors need and constitute one of the key elements in diminishing the country's risk.' Moreover, investment adjudications are essential and play a key role in determining investment relations and balancing of rights between host countries and investors. A majority of the Sino-Afro BITs have adopted a two pronged approach in the provisions dealing with the settlement investment disputes thereby paving way for both the state to state dispute resolution[180] and the state- investor dispute resolution.[181] Despite the existence of these two avenues, investors nevertheless prefer the investor- state arbitration as the investor does not need to petition his government to take up the case, can shape his claim and can eventually collect full damages personally in the event he is successful. However, it is also a daunting task as it requires inter alia, the host state's consent to be sued in the manner set out in the complaint before it can be allowed.[182]

2.9.1 Consent to Investor–State Arbitration

Some of the Sino-Afro BITs offer an unequivocal consent to arbitration by expostulating that the dispute 'shall be submitted' to arbitration.[183] Majority of the BITs do not however guarantee an axiomatic consent to arbitration in the event of a dispute.[184] Consequently, an investor will be obliged to request for consent from the host before submitting the dispute to an arbitral tribunal [185] which may, desolately, be denied. Apart from denying an axiomatic access to an arbitral tribunal,

173 n6 150.

174 Continental Casualty Company v Argentine Republic, ICSID Case No.ARB/03/9, Award, 5 September 2008 Par. 239

175 China's BITs with, Benin, Botswana, Cape Verde, Cote d'Ivoire, Djibouti, Egypt, Ethiopia, Kenya, Nigeria, South Africa and Zimbabwe, Art 6.

176 Australia- Mexico BIT (2005) Art 9(3) and Art 20(1) of the Us Model BIT (2012).

177 Except China's BITs with Uganda, Art7 (4) (5) and Tanzania, Art 8 (3) (4).

178 N86 p212.

179 The International Monetary Fund, Articles of Agreement of the International Monetary Fund, (Washington DC: Adopted 22 July 1944 revised 26 January 2016) Articles VIII and XXX (d) <http://www.imf.org/external/pubs/ft/aa/pdf/aa.pdf> accessed 13 February 2020.

180 China BITs with Benin, Cape Verde, Cote d'Ivoire, South Africa, Djibouti, Egypt, Ethiopia, Nigeria, Zimbabwe and Tunisia at Article 8 and China-Uganda BIT, at Article 9. See also, China –Tanzania BIT, Article 12.

181 China BITs with Benin, Cape Verde, Cote d'Ivoire, South Africa, Djibouti, Egypt, Ethiopia, Kenya, Nigeria, Zimbabwe and Tunisia at art 9 and China BIT with Uganda, at art 8. See also, China –Tanzania BIT art 13.

182 n35 p368.

183 China's BITs with Tunisia and Benin art 9(2).

majority of the BITs also require 'exhaustion of local remedies' as a condition precedent to making a request for submitting the dispute to an arbitral tribunal.[186]

Sino-Afro BITs should emulate contemporary BITs[187] by providing for explicit consent to arbitration. Such a move would be cost effective by saving time and resources expended by investors in pursuing consent and by tribunals in determining whether or not consent to arbitration exists in the subject BIT. It would also magnetise investors from the contracting parties since an express guarantee for accessing an arbitral tribunal does not require a request to the host before submitting to arbitration. Appreciably, one of the reasons behind the invention of the investor- state arbitration was to avoid the vagaries of proceedings in the host state's courts.[188] Thus, it is absolutely specious to retain, in the Sino- Afro BITs, provisions demanding for exhaustion of local remedies before submitting to arbitration. Actually, the utility of such prerequisites is questionable by increasing burden to the party seeking arbitration with minimal chance of advancing the settlement of the dispute.[189] Therefore, China and African countries should consider expunging such provisions because they also 'tend to be rare in modern IIAs'.[190]

2.9.2 The Scope of Consent

The scope of consent to arbitration offered in the Sino-Afro BITs varies, with some adopting a liberal approach and providing for 'any dispute between an investor of one Contracting Party and the other Contracting Party in connection with an investment'.[191] In others, the[192] scope is narrowly confined with the expressions of consent being limited to disputes 'involving the amount of compensation for expropriation.' Very broad consent clauses operate as waiver of sovereign immunity and therefore, a contracting state loses its right not to have its sovereign acts challenged by a tribunal outside its own jurisdiction.[193] Some broader policy issues such as those touching on safety, environment and health are best handled at national level since international arbitrators may not be able to interpret provisions of a certain BIT in a manner that fully balances the interests of investors against the state's declared policy objectives.[194] Consequently, China-Afro BITs may consider excluding disputes that touch on such afore mentioned policy areas from the adjudication of an international tribunal. This kind of prudence may be sponged from the Trans Pacific Partnership Agreement[195] which for example excludes from investor-state dispute settlement; 'tobacco control measures' taken by a state.

Moreover, the overly protective consent clauses that allows submission to, arbitral tribunals, of disputes 'involving the amount of compensation for expropriations' only are unsuitable by defeating the raison d'etre for the investor-state arbitration which has been to 'avoid the vagaries

184 China's BITs with Cote d'Ivoire, Djibouti art 9(2), Botswana and Egypt art 9(3).
185 See, China- Nigeria BIT art 9 (3).
186 China's BIT with Kenya, Cote d'Ivoire and Botswana, art 9 (3).
187 See, China- Switzerland BIT (2009) art 11.
188 n86 p264.
189 n86 p266.
190 n 6 p225.
191 For example, China-Benin BIT Art 9 (1).
192 China BITs with Egypt art 9(3), Ethiopia, Cape Verde, Zimbabwe and Art 10 (1) of the China- Ghana BIT.
193 n6 p222.
194 n32 p190.
195 Comprehensive and Progressive Agreement for Transpacific Partnership, Chapter 29, Art 29.5 http://wtocenter.vn/tpp/full-text-comprehensive-and-progressive-agreement-trans-pacific-partnership-cptpp <Accessed 18 March 2020>.

of proceedings in the host state's courts'[196] thus subjecting an investor to a forum whereby his foreignness would not be a handicap in accessing justice.[197] Sino-Afro BITs should therefore consider consent clauses that permit submission to international arbitration any legal disputes save for those that may touch on broader policy issues such as safety, environment and health or those that may be considered very sensitive to be evaluated by an international tribunal.

2.9.3 The Fork in the Road Provisions

Contemporary BITs deal with what is known as 'the fork in the road' clause, thus obliging an investor to choose between the domestic courts or international arbitration as the avenue for ventilating his grievances. [198]Upon making a choice and commencement of proceedings, the investor is bound to stick with the forum he has chosen. [199]*In Pantechniki v Albania*,[200] the ICSID tribunal declined to take jurisdiction in a matter where the investor, having lost in the domestic forum, tried again in international arbitration.

The claims were of the same substance, brought by the same parties and arising from the same cause of action. Apart from a few,[201] many Sino- Afro BITs[202] lack the fork in the road provisions. Such provisions serve the same purpose as the res sub judice doctrine commonly used in numerous domestic jurisdictions and prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits between the same parties but relating to the same matter in issue.[203] Secondly they obviate conflicting decisions of two competent courts over the same matter and save the court's time by preventing a subsequent suit over the same matter from being instituted.[204] Sino-Afro BITs should, undoubtedly, embrace the fork in the road provisions to shield host states from the agony of unnecessarily incurring costs in defending multiple suits involving same parties and same issues but in different forums.

2.9.4 Sino-Afro BITs and Limitation Periods

To exclude claims that are submitted to arbitration long after the dispute arose, some IIAs wittingly make provisions that bar an investor from submitting a claim after the lapse of a considerably lengthy period after the emergence of a dispute. Such provisions are critical as by guarding against problems caused by delay such as changes in government or decay of evidence.[205] Accordingly, the provisions may also demand that the claim be submitted within a certain period of time from the date at which the investor knew or should have known about the alleged breach.[206]

196 CSchreuer, 'Interaction of International Tribunals and domestic Courts in International Law' in AW Rovine (ed) *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* 2010 (Brill and Martinus Nijhoff Publishers 2011) 71-72.

197 n35 p363.

198 n145 p235.

199 n194 p78.

200 *Pantechniki SA Contractors & Engineers (Greece) v The Republic of Albania,* ICSID Case NO. ARB/07/21, Award 30 July 2009.

201 See, China's BITs with Benin Art 9(4), Uganda, Art 8(2) and Tanzania, Art 13(3).

202 Including China BITs with Botswana, Cape Verde, Cote d'Ivoire, Djibouti, Egypt, Ethiopia, Ghana, Kenya, Nigeria, South Africa and Zimbabwe.

203 J Woodroffe and A Ali's, *Code of Civil Procedure Revised By Justice M.H. Beg and Justice Gyanendra Kumar* (3rd edn, Allahabad 1988)172.

204 Ibid.

205 n6 p231.

Sino-Afro BITs with the exception of China-Tanzania BIT [207] do not have provisions on limitation periods. Such provisions are important as they also guard a host from incurring costs borne out of antiquated claims some of which it may have lost interest in on account of evidence decay. Borrowing from other BITs,[208] China and African states should adopt similar provisions.

2.9.5 Consolidation of Claims

At times, a measure imposed by a host state's government may affect more than one investor, the upshot being multiple investors bringing the same claim against the host with the penchant of piling undue pressure on the host as well as raising costs. To circumvent these parallel proceedings, some IIAs[209] have ingeniously made provisions that provide for consolidation of claims. This would be if the claims raise the same questions of facts or law and if consolidation would serve the interests of fairness and efficiency. Notably, the Sino-Afro BITs do not make provisions for consolidation of claims despite its known benefits. Over and above saving on litigation costs, consolidation of claims improves efficiency in resolution of disputes. Certainly, it is an avenue that is worth exploration by the Sino-Afro BITs. Indubitably, consolidation of claims in investments' law has become a common trend as evinced in contemporary BITs.[210] No justification stopping China and African states from emulating this valuable trend exists.

2.9.6 Finality and Enforcement of Awards

Fair enough, majority of the Sino- Afro BITs provide that an arbitral decision in a claim between the host state and an investor shall be final and binding. For example, the China–Benin BIT is explicit that 'the arbitral award shall be final and binding upon both parties to the dispute'[211] and indeed, a host of other Sino-Afro BITs make similar provisions.[212] Similarly, the BITs have made reference regarding the enforcement of the arbitral awards. Some BITs provide that 'both contracting parties shall commit themselves to enforcement of the award'[213] while others state that the contracting parties 'shall commit themselves to the enforcement of the decision with their respective domestic law' [214]yet others postulate that parties shall ensure the recognition and enforcement of the award in accordance with the relevant laws and regulations'.[215]

While these provisions may be said to be suitable, they are nevertheless encumbered by some limitations in that unlike the contemporary IIAs,[216] they do not require the contracting party to expedite in carrying out the award. Moreover, they do not give a hint on the nature of remedies

206 Canada Model BIT (2004) art 22.2.
207 n48 art 13 (4).
208 China-Canada BIT (2012) art 21 (2) (f).
209 Japan–Mexico FTA (2004) art 83 (1).
210 US- Rwanda BIT Art 33(1), Canada Model BIT Art 32(2) and Canada–China BIT Art 26(1).
211 China- Benin BIT art 9(6).
212 China BITs with Botswana, Cape Verde, Djibouti, Egypt, Ethiopia, Kenya and Zimbabwe, Art 9(6) Also China-Cote d'Ivoire BIT art 9(4), China-Ghana BIT art 10(4) China–Tanzania BIT art 13 (8) and the China- Uganda BIT, art 8(4).
213 China BITs with Benin, Botswana, Djibouti, Kenya and Nigeria Art 9(6). See also, China- Cote d'Ivoire BIT Art 9(4) and the China- Uganda BIT art 8(4).
214 For example, China BITs with Cape Verde, Egypt, Ethiopia and Zimbabwe Art 9 (6). See also, China-Ghana BIT art 10(4).
215 n48 art 13(8).
216 Canada - China BIT art 32 (2).

that a tribunal may award. Notably, modern IIAs[217] and BITs[218] tend to limit remedies to monetary compensation or restitution of property but much preference is accorded to monetary remedies. Consequently, nothing bars China and African countries from adopting this trend to ensure an expeditious settlement of awards and to embed certainty as to the nature of remedy that an award holder may anticipate.

3. Sino-Afro Investment Engagements: The way forward

In light of the foregoing, questions remain as to what could be the way out for China and African states. Markedly, Sino-Afro engagements are largely symbiotic.[219] China endeavours to become the world's largest economy by the year 2025 thus craving for resources and opportunities that Africa is generously endowed. African states equally pine for capital from a dependable partner such as China to spur infrastructural development. To guard this relationship, both sides should seriously mull over negotiating modern BITs. Only about 17 out of about 54 African countries have operational BITs with China.[220] Thus, negotiation of BITs to extend appurtenant utility to the remaining states and investors remains decisive. Moreover, given the need to rid off pitfalls in the extant antiquated BITs, a mutual renegotiation is a necessity. For transparency, however, the renegotiation process should create room for participation by the citizens, the civil society, stakeholders and the legislative branches of these countries. The renegotiated BITs should also make provisions for greater public access to arbitral tribunals proceedings especially by those affected or interested in the process.[221]

In addition, African countries should mull over creating an independent and credible body charged with a noble duty of confirming whether the BITs adhere to a standard checklist of national laws and policies before they are enforced. African countries should also consider adopting a common position on Afro-Sino BITs in order to discourage unhealthy competition between states, avert a race to the bottom by investors and fortify the negotiation position of African countries.

4. Conclusion

The foregoing discussion highlights drawbacks bedevilling Sino-Afro BITs. Provisions therein are not only asymmetrical but also antiquated. In appreciating that a stable legal and policy environment is auspicious for thriving FDIs, China and African states should negotiate modern BITs and renegotiate the existing antiquated ones so as to mirror the current global trends. This would secure states' interests, afford better investors' protection and encourage FDIs' flow.

217 The Energy Charter Treaty (1994) art 26 (8).

218 Canada-China BIT, art 31(2).

219 D Haroz 'China in Africa: Symbiosis or Exploitation?' 35(2011) *The Fletcher Forum of World Affairs* 84.

220 UNCTAD, Investment Policy Hub, <*https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china*> accessed 15 July 2020.

221 For an exposition see, AW Ngengi, 'Embedding Sustainable Development into the Sino-Afro Foreign Direct Investments: Suggestions for China and African States' 7(2019) 2 KLR 49,60.

THE BURDEN OF PROOF IN EMPLOYMENT LAW IN KENYA:

Charting a Divergent Pathway?

Bernard Odongo Matanga Manani*

1. Introduction

In matters litigation, the law usually imposes an obligation on a litigant to lay bare the facts upon which she desires an inquirer of fact to return a decision in her favour. This, in legal parlance, is what is usually referred to as the burden of proof. Section 107 of the Evidence Act of Kenya, succinctly captures this obligation by stating that '[w]hoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.'

The above provision places the legal obligation to prove disputed facts in litigation on the proponent of the facts and not the respondent. It establishes what is sometimes expressed as the 'he who asserts must prove' principle.[1]

Ordinarily, this understanding of the law of evidence influences the general direction of trials by courts. However, in some instances, exceptions may arise. In all such instances, a trier of fact may be entitled to assume the validity or truth of certain contested facts if a particular rule of the law of evidence permits it. These include: the taking of judicial notice of certain facts;[2] or the acknowledging of an admission in relation to facts that may be in issue;[3] or the determination of contested facts based on particular presumptions of law or fact.[4]

Similarly, a rule of law may permit the operation of certain legal doctrines whose effect is to waive, at least in the interim, the legal duty on a party asserting a fact from providing evidence in proof of it. These include doctrines such as res ipsa loquitor in the law of tort.[5]

Notwithstanding this generality on the concept of burden of proof, a careful examination of the concept in employment law in Kenya suggests a somewhat conflicting and even ambivalent exposition of it. But this phenomenon is not peculiar to Kenya. A number of other jurisdictions have embraced a non-conventional approach to the concept in dispute resolution in employment matters.[6] This invites the question whether this corpus of law has taken a divergent pathway on the requirement of proof on various aspects of employment disputes. This short article reflects on this confounding nature of the law on industrial disputes.

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1 *Kipkebe Limited v Tai [2016]* eKLR(HCt).

2 A Flanz 'Judicial Notice' (1980) Alberta Law Review p471 at <https://www.albertalawreview.com/index.php/ALR/article/download/2199/2188> accessed 27 January 2019.

3 S Ouma *A Commentary on the Evidence Act Cap 80* (Law Africa Publishing (K) Ltd, Nairobi, 2017), pp 217-218.

4 Ibid p149.

5 JJC 'Res Ipsa Loquitur-Burden of Proof' 5(1943)2 *Louisiana Law Review* 345 <https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?referer> accessed 28 January 2019.

6 Fair Work Act No 28 of 2009 Australia, s361

The article is structured in four parts beginning with this introduction. This is followed by a brief restatement of the general law on the burden of proof. The paper then considers the apparent divergence by employment law (with particular emphasis on Kenya) on the subject. This is followed by concluding remarks.

2. General Principles on Burden of Proof in the Law of Evidence

The concept of burden of proof in the law of evidence is, in part, understood from two viewpoints: the legal burden of proof; and the evidential burden of proof.[7]

The legal burden of proof is the obligation imposed by law on a party to establish a disputed fact.[8] Sometimes referred to as the persuasive burden of proof, it in literal terms allocates on a disputant in a suit the legal duty ''to convince the tribunal, at the end of the case, that the party concerned has proved his or her case to the required standard of proof and is entitled to the remedy sought."[9]

This burden may be imposed by a legal rule.[10] An example of this is the constitutional presumption of innocence in a criminal trial.[11] This presumption of law operates to impose the duty to establish the guilt of an accused person on the prosecution.[12]

Where it is not imposed by a legal rule, the legal burden of proof may arise by reference to the pleadings of parties to an action.[13] For example, a plea by a party in a civil action that the other is guilty of some infringement in effect imposes the legal burden of proving the alleged infringement on the party raising the plea. Consequently, reference to the pleadings introducing a claim becomes a necessary starting point in determining who bears the legal duty to establish a contested fact in the case.

As a matter of law, the legal burden of proof is fixed on the party who bears it and does not shift throughout the litigation.[14] In a criminal trial for instance, except where the law provides otherwise,[15] the obligation to prove the guilt of an accused person is fixed upon the prosecution in the entire of the trial process by the simple constitutional pronouncement that every accused person has the right "to be presumed innocent until the contrary is proved."[16]

In effect, the court will not, as a general rule, expect the respondent in litigation to justify the impugned conduct in the absence of cogent adverse evidence by the proponent. This duty generally lies with the party making a positive assertion of the fact in issue. Consequently, the proponent's case must ordinarily fail if no evidence is tendered by either side to the action.[17]

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7 J McEwan, Evidence and the Adversarial Process - The Modern Law (Hart Publishing, Oxford, UK, 1988) pp. 73-79.
8 Ibid, pp 73-78.
9 Ibid p74.
10 WY Wodage 'Burdens of Proof, Presumptions and Standards of Proof in Criminal Cases' 8(2014)1 Mizan Law Review, 224, 254 <https://opendocs.ids.ac.uk/opendocs/bitstream/handle/123456789/8779/Worku%20Yaze.pdf?sequence=1&isAllowed=y: > accessed 27 January2019.
11 Constitution of Kenya, 2010, art 50(2) (a).
12 Ibid.
13 n10 p 254.
14 P Gabriel 'Burden of Proof and Standard of Proof in Civil Litigation' 5(2013) *Singapore Academy of Law Journal* 25
15 n3 pp 67-71.
16 Ibid pp 159-161.
17 Ibid p 50.

This burden of proof is articulated in section 108 of the Evidence Act.[18] It provides that 'the burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.'

Conversely, the evidential burden of proof is the obligation to provide sufficient evidence to raise or establish an issue during a trial.[19] By it, a litigant must convince the trier of fact through production of credible testimony that a particular issue is deserving of consideration in a case.[20]

Usually, a party who bears the legal burden of proof will simultaneously bear the evidential burden of proof.[21] This is because such a party can only discharge the former by providing evidence on the disputed fact to the standard set by law. By providing such evidence, the party discharges the evidential burden of proof contemporaneously with the legal burden of proof.[22]

In a murder trial, for example, the law proclaims an accused person as innocent until proven guilty. This in effect places the legal obligation on the prosecution who are the proponents in a criminal trial to establish the guilt of the individual charged with the crime. And this can only be overcome by the prosecution providing sufficient evidence establishing the two elements of the crime against the accused person: the act of killing another; and the mental element of malice aforethought. When the prosecution furnishes evidence on the two elements to the standard set by law, it will at the same time be discharging the statutory duty imposed on it to establish the guilt of the accused person. In this way, it discharges both the evidential and legal burdens of proof.

Unlike the legal burden of proof, the evidential burden of proof is usually not static during a trial. It may and does shift between the antagonists as the hearing progresses.[23] In a criminal trial, for example, once the prosecution provides evidence establishing the prima facie guilt of an accused person, the court must require of the accused person an explanation to dislodge the prosecution's case by placing her on her defense. When this happens, the evidential burden of proof is said to shift from the prosecution to the accused person to raise evidence (on a balance of probabilities) to cast aspersions on the prosecution's case.[24]

This latter burden of proof is implied in section 109 of the Evidence Act of Kenya. The section requires the burden of proof as to any particular fact to lie on the person who wishes the court to believe in the existence of such fact unless it is provided by any law that proof of that fact shall lie on any particular person.

Perhaps, the clearest distinction between these two burdens of proof is given by the Australian Law Reform Commission. It describes them as follows:-

> The legal burden, in relation to a matter, means the burden of proving the existence of the matter. The evidential burden, in relation to a matter, means the burden of adducing or

18 CAP 80 Laws of Kenya.
19 n7 p78.
20 Ibid.
21 n3 pp 54-55.
22 Ibid.
23 A Khatiwada *'Shifting of Burden in Criminal Cases'* pp 4-5 at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.516.148&rep=rep1&type=pdf >accessed 5 February 2019.
24 Ibid pp. 5-8.

pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.[25]

It is therefore accurate to state that while on the one hand the legal burden of proof only determines upon whom the legal duty to prove a fact is affixed, the evidential burden of proof on the other hand denotes the obligation to produce sufficient evidence in the eyes of the law to discharge the legal burden.

Associated with the foregoing is the other concept of standard of proof. This is the degree to which a litigant is ordinarily expected to establish contested facts in a case.[26] Varying standards of proof apply to different matters. While the general position is that a litigant in a civil case need only establish a fact in dispute on a balance of preponderances, the standard of proof in criminal cases is often higher; beyond reasonable doubt.[27] But the latter only applies to the prosecution. Whenever an accused person has the burden to prove a fact in a criminal trial, the standard of proof is always the one of a balance of preponderance.[28] Outside this, there are isolated instances where the law requires that a litigant establishes a disputed fact to a standard that is higher than the balance of probabilities but nonetheless not beyond reasonable doubt.[29]

As pointed out in the preceding sections, the general position in law is that the burden of proof usually rests with the party making a positive assertion of the disputed fact in litigation. This understanding of the concept finds application across all areas of law including employment law. In work injury claims for instance, it has been observed that the duty to establish that an employer's negligence occasioned harm to an employee generally lies with the employee originating the claim.[30] Similarly, in actions by employees anchored on the doctrine of constructive dismissal, the duty is on them to prove that the employer's behaviour was motivated by the desire to force the employee into resigning.[31]

3. Employment Law in Kenya and the Reversed Burden of Proof

Notwithstanding the generality alluded to in the preceding sections, a substantial portion of employment law in Kenya appears to absolve employees of this legal duty on various work related claims. This is despite the fact that they may be the ones originating these claims and are therefore, in a strict sense, the parties making a positive assertion in the action.

The law instead burdens the employer with the duty to disprove the employee's assertions. Consequently, absent a cogent explanation by the employer justifying her action, the law entitles a trier of fact to find in favour of the employee. The specific areas where employment law appears to sanction a reversal of the burden of proof include disputes as to the terms of employment contracts, claims for unlawful termination or dismissal, irregular redundancies and discriminatory treatment at work or during recruitment.

25 Australian Law Reform Commission *Burden of Proof* p313 <https://www.alrc.gov.au/publications/11-burden_of-proof.pdf >accessed 5 February 2019.
26 n10 p265.
27 n3 pp76-87.
28 Ibid pp 78-79.
29 Ibid pp 79-87.
30 *Kenya Tea Development Agency Ltd v Mokaya* [2010] eKLR (HCt) pp 6-7.
31 OD Chiruba, 'Constructive Dismissal: A Critical Analysis of its Legal Perspective inKenya' pp. 10-11 at <:https://www.academia.edu/8498556> accessed 5 February 2019.

3.1 Establishing Terms of Employment Contracts

Contracts of employment may be concluded either orally or in writing.[32] Specifically, parties to contracts of service whose aggregate duration falls below three months have the freedom to elect to either have them concluded orally or in writing.[33] However, any contract of service whose term is for three months and more must be in writing.[34] This requirement also applies to any such contract which has a term for probation irrespective of its term.[35] Importantly, whenever the law imposes a duty on parties to a contract of service to reduce it into writing, the obligation inevitably rests upon the employer to ensure compliance with the requirement.[36]

The Employment Act sets out the minimum contents of a contract of employment that has been reduced into writing.[37] These include: the name, sex, age and address of the employee; the name of the employer; job description; the date of commencing work, the term and form of the contract; the hours and place of work; rest and leave entitlements; provisions as to notice for termination; details on remuneration among others.

The law obligates the employer to maintain a record of written contracts of employment. Further, it is the employer's duty to tender in any legal proceedings evidence of such contracts in the event of any dispute.[38] Where the employer fails to produce the written instrument, the law imposes the burden on her to prove or disprove any contested term of such contract irrespective of who shall be asserting the term in dispute. In effect, where an employer fails to prove or disprove such a contested term, the court is entitled to hold this against her.[39]

3.2 Unlawful Termination

Part VI of the Employment Act deals with termination and dismissal from employment.[40] It provides for both the substantive and procedural requirements for termination of contracts of service.

Procedural strictures require that certain procedural steps be adhered to in the process leading to termination of the contract of employment. These include: provision of notice; supply of reasons for the intended termination; guarantee of the right to be heard by the party adversely affected by the intended termination; and guarantee of access to a reasoned decision to terminate.[41]

On the other hand, substantive strictures refer to the substantive grounds that justify termination of a contract of service.[42] These include: incompetence; physical incapacity to execute the assigned task; and gross misconduct.[43]

32 Employment Act, 2007 CAP 226 of the Laws of Kenya, ss 8-9
33 Ibid s *8.*
34 Ibid s *9.*
35 n32 s *2.*
36 Ibid s *9(2).*
37 Ibid s *10.*
38 Ibid.
39 *Nanyuki Water and Sewerage Company Ltd v Ntiritu (2018) eKLR (HCt)*
40 n32
41 *Gumba v Kenya Medical Supplies Authority* [2014] eKLR (HCt)[67].
42 A Camagu 'Substantive Fairness in Dismissal for Operational Requirements Cases' p5 at <https://core.ac.uk/download/pdf/145047855.pdf > accessed 13 January 2019.
43 *Jalang'o v Amicabre Travel Safaris Limited* [2014] eKLR(HCt)[15-20].

Before dismissing an employee, the employer must be certain that there exists either one or more of the three substantive grounds justifying her action and that she has observed all procedural requirements leading to the decision to terminate. A dismissal that overlooks these requirements is unlawful.[44]

What is interesting is how the law treats the requirement of proof of the lawfulness of the termination. The burden is on the employer to prove the reason(s) for termination.[45] If she fails to demonstrate sound grounds for termination, the law considers the resultant decision to terminate as unfair.

Evidently, the law does not appear to require an employee to do more than just assert that a termination has been unlawfully handed to her.[46] With the exception of termination of probationary contracts of service[47] and constructive dismissals,[48] employment law appears to transfer the burden of justifying the lawfulness of the decision to terminate the contract of service to the employer notwithstanding that it is the employee who will be challenging the validity of the dismissal.

Section 47 of the Employment Act introduces an even more interesting twist to the whole equation of burden of proof on terminations of contracts of service. Here, an employee who believes that she has been wrongfully terminated has the liberty to lodge a complaint before a Labour Officer challenging the validity of the decision. This must be lodged within three months of the impugned termination. If she makes this election, the burden of proving the unfairness of the dismissal or termination rests on the employee whilst the burden of justifying the grounds for the termination or dismissal rests on the employer.

The section is rather ambivalent on the issue of proof. It implies that this duty is a shared one with one party to the action tasked to demonstrate the wrongfulness of the decision to terminate and the other to justify the grounds for the decision.[49] This is notwithstanding that there may be only one party making a positive assertion of the contested issue. It remains unclear why the drafters of the law settled for a shared approach to the concept of burden of proof in this respect. This creates confusion as to whether the intention of the law was to create two distinct but coexistent burdens or one burden of proof. Indeed, this confusion is evident in judicial pronouncements on the effect of the provision. In some, courts have held that the purported two burdens in reality amount to the same thing suggesting that no two burdens of proof exist under the section.[50] Yet, others appear clear in their minds that the section creates two distinct burdens that co-exist.[51]

Even so the section fails to clarify at what stage in the proceedings each of the parties to the proceedings are to discharge their respective obligations to prove what they are obligated to if at all. Perhaps the intention of the drafters was to require the claimant to first present a *prima facie* case for

44 *Ochieng' v Unilever Kenya Ltd* [2018] eKLR(HCt) pp 4-5.
45 *Chege v Nairobi City Water and Sewerage Company* [2017] eKLR (HCt) [52].
46 n32 s45
47 n43[15]. It is notable though that recent court decisions appear to indicate that even for probationary contracts, an employer must justify their termination (see *Monica Munira Kibuchi v Mount Kenya University; Attorney General* [2021] eKLR (HCt)).
48 n31 pp10-11.
49 *Bamburi Cement Limited v Kilonzi* [2016] eKLR (HCt) p4.
50 n49
51 *Samsung Electronics East Africa Ltd v K M* [2017] eKLR (HCt) [29].

wrongful termination to which the respondent will then be required to answer upon the evidential burden shifting from the claimant to the respondent.

However, it is perhaps important to bear in mind that the application of section 47 is limited to complaints presented to Labour Officers.[52] These are not triers of fact in the strict sense of the phrase. As the inquiry before them is fairly informal so would the process of proof.

3.3 Discrimination at Work

Just as is the case in most other jurisdictions, employment law in Kenya proscribes all forms of negative discrimination at the workplace. The law frowns upon any action that may be construed as promoting discriminatory conduct based on attributes such as the HIV status of an individual, sex, race, religion and pregnancy among others.[53] It is the duty of the employers, relevant departments of government and other players in the labour sector to foster equity of opportunities at the workplace while at the same time eradicating all forms of discriminatory conduct not just against employees but also those seeking employment.[54]

The law only countenances positive discrimination. This may manifest in a variety of forms such as affirmative action policies designed to negate historical exclusion of certain groups from employment or preferential treatment of certain individuals based on the inherent demands of particular tasks.[55] For example, an employer seeking to hire a driver is permitted to deny a visually impaired individual the opportunity in favour of a person without visual impairment because of road safety requirements. Similarly, the law may permit the hiring of persons of a particular gender in an organization in order to bridge any gender gaps that may have been created by previously skewed hiring in favour of the dominant gender.[56]

In relation to proof, when an individual asserts that she has been subjected to negative discrimination at her workplace or in the course of recruitment, it is up to the employer to demonstrate that the conduct complained of does not violate the bar on discrimination. All the law appears to require of an employee or prospective employee is to make an assertion that there has been discrimination on one or more of the prohibited grounds.[57] The effect of such assertion is to shift the burden to justify the impugned conduct onto the employer (as a respondent in a case) except where the law requires otherwise.[58]

Although the Employment Act saddles the employer with the burden of disproving discrimination in discrimination suits under the Act, the Labour Relations Act[59] appears to take a different pathway on the subject in relation to discrimination perpetuated in respect of the various freedoms protected under the latter Act. These include: the freedom to belong or not belong to a workers' or employers' union; the freedom to form these associations; and the freedom to serve in their offices. [60] These rights are not specifically protected under section 5 of the Employment Act.

52 Notwithstanding that the section specifically indicates that it is intended to apply to disputes before Labour Officers, courts continue to apply it to resolve disputes before them.
53 n32 s 5(3).
54 Ibid s5(1) (2).
55 Ibid s5 (4).
56 n11 art 27(8)
57 n32 s5(7).
58 *GMV v Bank of Africa Kenya Ltd* [2013]eKLR [68].
59 Act No 14, 2007.
60 Ibid part II (ss 4-8).

The Labour Relations Act provides a two tier approach to the burden of proof in discrimination claims relating to these freedoms. On the one hand, the party alleging infringement of any of the freedoms has the legal duty to provide proof of the alleged violation. On the other hand, the party disputing that there has been infringement of the right must prove that the impugned conduct did not constitute a violation of the right in question.[61] In this context, the Labour Relations Act appears to raise similar challenges as section 47 of the Employment Act.

3.4 Redundancy

The Employment Act defines redundancy as the involuntary loss of employment by an employee through no fault of her own.[62] Although job loss arising from redundancy is considered involuntary some scholars have argued that to the extent the employer may allow employees to elect early retirement in the face of an intended retrenchment, one can conceptualize redundancies as both involuntary and voluntary.[63] Importantly, redundancy just like gross misconduct and incapacity provides a substantive ground for termination of employment.[64]

Redundancies normally arise from operational factors that are influenced by occurrences that lie outside the control of employees. These include: technological shifts in operations at the workplace; downsizing of enterprises; and abolition of some job descriptions.[65] The effect of these occurrences is to render the position of the employee obsolete or superfluous and therefore not required.[66]

As indicated earlier, a declaration of redundancy has the effect of terminating a contract of service. However, this form of termination is considered a lawful way of ending the employer-employee relation so long as the employer follows the procedure of release of the affected employees as envisaged in the law.[67]

In relation to the burden of proof, the law requires an employer to justify a redundancy. The Employment Act declares as unlawful any termination of a contract of service due to operational reasons if the employer cannot demonstrate the fairness of the grounds and procedure leading to the decision. [68]In effect, the duty to convince the trier of fact of the validity of a redundancy lies with the employer even though it will be the employee challenging the process.

61 Ibid s11.
62 Ibid s 2.
63 J Muller 'Voluntary and Involuntary Job Redundancy: Hope or Helplessness?' p1 at <http://web.education.unimelb.edu.au/assets/pospsych/VOLUNTARY%20AND%20INVOLUNTARY%20JOB%20REDUNDANCY_%20HOPE%20OR%20HELPLESSNESS_pdf: <accessed 13 January 2019.
64 n42 p5.
65 MM Wanjohi 'Implications of Redundancy on Surviving Employees' (Thesis UON 2007) pp 10-12 at <http://erepository.uonbi.ac.ke/bitstream/handle/11295/21281/Wanjohi_Implications%20of%20Redundancy%20on%20Surviving%20Employees-the%20Case%20of%20Telcom%20Kenya.pd?sequence=3 > accessed 7 February 2019
66 Ibid p11.
67 *Spangler v Centre for African Family Studies* (CAFS) [2017] eKLR (HCt) [104].
68 n32 s45(2)(b)(ii).

3.5 The Duty to Raise a Prima Facie Case

In the preceding sections, I have suggested that employment law in Kenya appears to have reversed the application of the concept of burden of proof in a number of instances. This is to the extent that it requires the respondent rather than the proponent of a disputed fact to shoulder the obligation of disproving such fact. If this be the case, what then is the role of the claimant (usually the employee) in establishing her claim in an industrial action? Does the law require her to only present the claim without more?

I have suggested that, on the face of it, the law appears to only require the employee in the specified claims to assert a violation in order to shift the burden of proof to the employer to disprove the impugned facts. What then must be the nature and extent of the assertion?

The general thinking is that the reversal of the burden of proof onto the employer does not render the claimant employee an idle party in the proceedings. Although the respondent (in this case the employer) bears the legal duty of proof, it nonetheless behoves the employee to raise a *prima facie* case to warrant the employer's response to the impugned conduct.[69]

Where, for instance, the employee's complaint is that she has suffered discrimination at the workplace, she must provide evidence showing that: she belongs to a protected group; and the employer's action was, on the face of it, intended to disadvantage the employee based on factors that are prohibited in relation to such group.[70] The assertion by an employee that she has been discriminated against or wrongfully dismissed or declared redundant must therefore be capable of raising a *prima facie* case against the employer without necessarily discharging the burden of proof in relation to the disputed facts as understood in the general law of evidence.

The obligation on the employee to raise a *prima facie* case in effect places the evidential burden on her to lay a factual basis that casts doubt on the lawfulness of the employer's action in order to shift the duty to justify the impugned action onto the employer.[71] Thus, while the employer bears the legal burden of proof to justify the impugned conduct, the employee shoulders the evidential burden of proof to raise sufficient evidence to cast aspersions on the employer's conduct.[72] In describing the working of these two burdens of proof in employment termination disputes D Van A.J stated as follows:-

> The [...] decisions clearly do not burden the employee with the onus in the true sense, but merely with the 'evidential burden' in the sense of a duty to adduce evidence to combat *prima facie* evidence. […] '[t]he onus proper' to prove that a dismissal is for fair reason lies with the employer.[73]

3.6 Rebuttable Presumptions of Law and the Burden of Proof in Employment Disputes

A rebuttable presumption of law can be defined as a deduction or inference which a trier of fact

69 n57[69-70]
70 Ibid.
71 Kholiwe Moses Janda v First National Bank, Case No JS 511/04 at <www.saflii.org/za/cases//ZALC//2006/84.pdf > accessed 15 January 2019.
72 Ibid pp. 13-15.
73 Ibid p13.

is required by law to draw from an existing set of facts in the absence of an explanation to the contrary. [74] Such presumption only arises where a rule of law gives directions that such inference is made.

By shifting the burden of proof from the proposer of disputed facts to the respondent in a trial, there is a sense in which employment law puts into play certain rebuttable presumptions of law in relation to the aspects in respect of which the burden is reversed. As observed in the preceding section, in most employment disputes although the burden of justifying the employer's action usually rests with the employer, the employee must nonetheless present a prima facie case suggesting some wrong on the employer's part. Only then shall the employer be obligated by law to justify her conduct. This requires the employee to provide some measure of evidence to entitle the court to entertain the preliminary view that the employer is, in the absence of cogent justification for the impugned conduct, in breach of the law.

Once an employee establishes a prima facie case, the court is entitled, in the absence of evidence to the contrary, to presume that the employer is in violation of the employee's rights in relation to the impugned dismissal, redundancy or discrimination.[75] Alluding to a scenario in which the law operates in similar manner the court in the *Southern Health Board v Mitchell* case stated as follows:

> The first requirement is that the claimant must establish facts from which it may be presumed that the principle of equal treatment has not been applied to them. This indicates that the claimant must prove on a balance of probabilities the primary facts on which they rely in seeking to raise a presumption of unlawful discrimination.[75]

The presumption that arises in all these instances is one of law. The Employment Act for instance, requires the employment court to deem as unlawful any termination for which the employer cannot render a justification. [76] In effect, the law commands the trier of fact, once the claimant establishes a *prima facie* case, to presume the unlawfulness of the termination absent cogent grounds advanced by the employer justifying it.

For the employer to prove her innocence, she must provide evidence to rebut this presumption. Thus, the effect of the presumption in the circumstances is to shift the burden of proof from the employee challenging the conduct of the employer to the employer to justify the conduct.

3.7 Facts within the Peculiar Knowledge of the Opponent

Although the duty to establish a fact in issue is, as a general rule, on the party asserting the fact, sometimes the law may require the respondent in litigation to prove or disprove such fact. This is particularly so if information on the disputed fact is especially within the respondent's knowledge.[77] For instance, the Banking Act of Kenya requires that any variations to the interest rate in a finance contract be sanctioned by the Cabinet Secretary, Finance. [78] Ordinarily, information regarding such

74 D Kaiser *Presumptions of Law and Fact* p 253 at <http://scholarship.law.marquette.edu/mulr > accessed 16 January 2019.

75 K Duffy *Anti-Discrimination Law-Shifting the Burden of Proof* p 3 at <http://www.era-comm.eu/oldoku/SNLaw/03_Burden_of_proof/DUFFY/_Burden%20of%20Proof.pdf > accessed 23 February 2019

76 n32 s 43(1)

77 n18.

78 Banking Act Laws of Kenya, s 44.

approval will be expected to be within the special knowledge of the financier as they ordinarily will be the ones to lodge a request for approval of variation of the interest rate. Therefore, in disputes where the question is whether the financier had obtained statutory approval to vary the rate in line with the law, the duty is on the financier to provide evidence of approval notwithstanding that it is the borrower who may be asserting that such approval has not issued.[79]

The effect of this provision is to relieve the party alleging the disputed fact of the burden of proving such fact. Instead, the burden shifts to the respondent to prove or disprove it. If the respondent who has special knowledge of the facts in issue elects to withhold evidence on them, the court may assume the validity or truth of the disputed fact. Indeed, section 109 of the Evidence Act of Kenya fortifies this position by providing that the law may in some instances relieve the proponent of a fact in issue of the burden of proving it.

This exception to the general rule on the burden of proof provides a sensible explanation for shifting the burden of proof in employment disputes. In these cases, the employer's decision to terminate or declare a redundancy is usually premised on considerations that are in the exclusive domain and knowledge of the employer. Therefore, when such a decision is subjected to scrutiny, the employer is best placed to justify it by providing a factual basis for it.[80]

It has been observed that shifting of the burden of proof to the employer in employment discrimination disputes plays the critical role of ensuring that the rights of employees to equal treatment at work are effectively enforced.[81] This is true for all other instances in which the reverse burden doctrine applies. If the burden were left on the employee, it will be impractical to attain this goal.

To require the employee to justify her assertion of discrimination, unlawful termination or irregular redundancy will be tantamount to requiring her to prove or disprove facts that are within the special knowledge of the employer.[82] Only the employer has the factual explanation for her action in this respect. To shift the burden of proving these facts to the employee will, in the circumstances, render inaccessible the rights employment law seeks to protect. Therefore, once an employee is able to lay a *prima facie* case of violation before the trier of fact, it appears just to require the employer to justify the conduct.

4. Conclusion

Notwithstanding that the general principles on burden of proof in the law of evidence apply to employment law, it is clear that this corpus of law leans more towards the reverse burden of proof. As has been suggested, this approach is driven by the desire to give efficacy to the law protecting worker's rights.

Imposition of the reverse onus of proof on employers finds its underpinnings in the historical development of the employer-employee relationships. Traditionally anchored on the master-servant concept, the relationship places employees in a weaker position with the balance of power titling in favour of the employer. One of the functions of employment law is to provide mechanisms for

79 *Kihara v Housing Finance Company of Kenya Ltd* [2018] eKLR (HCt) p5.
80 n70 [23].
81 n74 pp1-2.
82 n25 pp 330-331.

limiting the employer's capacity to abuse her dominant position in the arrangement. Part of this endeavour by the law is seen through introduction of strictures such as the reverse burden of proof on specific industrial disputes. This enables effective adjudication of these disputes by obligating employers to avail information within their exclusive control. Nevertheless, some sections of employment law in Kenya, on onus of proof, appear to be in a less than satisfactory state. Of specific concern are sections 47 of the Employment Act and section 11 of the Labour Relations Act. The two introduce the novel concept of shared burden of proof. The application of this concept has not been without challenge. As has been seen, it is unclear whether the law intended to introduce a dual approach to the concept on the matters the two sections address. To avoid this confusion, it is desirable that the law is amended in this respect to abandon this concept in favour of the more tested reverse burden of proof.

A REVIEW OF DOMESTIC ARBITRATION & CORPORATE CRIMINAL LIABILITY:

Lessons from Milimani Chief Magistrate Anti-Corruption Case Number 13 of 2018.

Henry K. Murigi*

Introduction

Dispute resolution and in particular Arbitration are not exempt from post facto analysis. This often occurs when an aggrieved party challenges the arbitral award in the High Court with the potential of the matter going all the way to the Supreme Court with each step being a post facto analysis. The increase of the Anti-Corruption and Economic Crime cases that is yet another emerging post facto avenue to analysis is the Arbitration process. This is very helpful since it offers important insights for future practice. One of the recent decisions by the Learned Magistrate in the Anti-Corruption Court found that a claimant committed perjury in an arbitration.

This brings to question the integrity of the outcome of Arbitration and introduces a dynamic on the options available for the Respondent, going forward. The first part of this paper seeks to show the realities of post facto analysis of domestic arbitration especially where it involves public bodies. The paper will highlight the role of the Director of Public Prosecutions in reviewing the Arbitration proceedings and the effect of such a review. The paper will also propose that Arbitrators must raise their ability to sniff, detect and deter corruption especially in proceedings involving public bodies.

The second part of this paper reflects on a paper that was published on social media and the personal website of the learned Professor Tom Ojienda who is one of the scholars who no doubt has contributed to the development of jurisprudence in this Country. The paper is titled "Criminal liability of corporate entities and public officers- revisiting the Waluke Case."[1] At the outset it is clear that Prof is with it by publishing it on social media. It is not however readily clear who the intended audience of this paper was, as it has not been disclosed. Left unchallenged, the arguments presented by the paper are dangerously flawed and greatly misleading as will be demonstrated. This paper seeks to reflect on the arguments presented by the paper by Learned Professor Tom Ojienda. This paper seeks to do three things. First, disestablish the claims made in the paper by presenting the unfounded lamentations contained in the paper. Second, deconstruct the dialectical argument made by the good professor by analysing the idiosyncrasies of the author to display the biases in the reasoning contained in the paper. Third, the paper will present a reasonable view of the proper legal perspective of the law highlighted. In the end it will be clear that the whole paper seeks to highlight what Lady Justice Mumbi Ngugi[2] refers to as 'a distinction without a difference.

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1 https://www.proftomojiendaandassociates.com/download/criminal-liability-of-corporate-entities-and-public-officers-revisiting-the-waluke-case_by-prof-tom-ojienda-sc_6th-august-2020/

2 Firstling Supplies Limited v Director of Public Prosecution Petition 3 of 2020

PART ONE: Criminal Litigation Arising from Arbitral Proceedings

Sometime in 2004 an agreement was entered into for the supply of maize to National Cereals and Produce Board (NCPB) by Erad Supplies & General Contracts Limited (Erad Ltd). Repose in the agreement was an arbitration clause that indicated that in the event of a dispute it should be referred to Arbitration. A dispute arose when letters of credit for the five firms with similar contracts was to cost Ksh 4.8 Billion but NCPB had only received Ksh 3.1 Billion.

This created a shortfall of Ksh 1.7 Billion that caused the deficit and NCPB could not open a letter of credit for the Erad Ltd. Being dissatisfied with this explanation, Erad Ltd filed an arbitration case against NCPB. The claim before the arbitral tribunal was for compensation for loss of profit, cost of storage and cost of the suit. One of the directors of the company testified on behalf of Erad Ltd in the arbitration as the only witness in support of the claim. Erad Limited were successful in the arbitration and got an award which was confirmed by the High court. Subsequently, the director who testified in the arbitration was charged in the Anti-Corruption Court for having lied on oath during her testimony in the arbitration. In particular the charges were as follows:

> **Count1: Uttering a false document contrary to section 353 as read with Section 349 of the Penal Code CAP 63, Laws of Kenya** The particulars of the offence are stated that the 1st, 2nd and 3rd accused on or about the 24th day of February 2009 being the directors of Erad Supplies and General Contractors Limited, together with Erad Supplies and General Contractors Limited within Nairobi county in the Republic of Kenya, knowingly and fraudulently uttered a false invoice No 12215-CF-ERAD for the sum of US Dollars 1,146,000 as evidence in the arbitration dispute between Erad Supplies and General Contractors Limited and National Cereals and Produce Board purporting it to be an invoice to support a claim for cost of storage of 40,000metric tonnes of white maize purportedly incurred by Chelsea Freight.
>
> **Count 2: Perjury contrary to Section 108(1) as read with Section 110 of the Penal Code CAP 63, Laws of Kenya.** The particulars of the offence are that the 1st accused on or about 24/02/2009, being a director of Erad Supplies and General Contractors Limited within Nairobi county in the Republic of Kenya while giving testimony in an arbitration dispute between Erad Supplies and General Contractors Limited and the National Cereal and Produce Board knowingly gave false evidence for decisions for cost of storage of 40,000 metric tonnes of white maize purportedly incurred by Chelsea Freight.[3]

The Accused persons appealed against the decision of the Learned Magistrate and the Appeal is pending before the High Court Anti-Corruption Division. All the same this brings to the fore several realities concerning Arbitration that ought to be examined. First, the role of investigative agencies in relying on evidence of the Arbitration. Second, the duty of the arbitrator to have corruption instincts whenever dealing with a claim where one of the parties is a public body. Third, the role of the Director of public prosecution in assessing evidence and prosecuting cases related to Arbitral proceedings. Fourth, what does the constellation of these issues do to the pending Court of Appeal proceedings touching on the Arbitration proceedings. Can the Court of Appeal hear new evidence based on the Magistrate Courts findings? These are all matters that will arise as time unfolds.

3 Judgement in Milimani Anti-Corruption Case No. 31 Of 2018

In another paper I argued that the arbitrators have a duty to tackle corruption allegations when suggested or implied when the parties seek to pursue or defend a claim in an arbitral proceeding.[4] Mwaniki Gachoka[5] has recently contributed to the issue of arbitral integrity by suggesting that corruption permeates into the inner sanctum of arbitral dispute resolution. He argues that there exists a myriad of ways that corrupt activities can be transacted by considering the players involved.

Although Paul Mwaniki Gachoka was alive to the fact that the dispute was pending before the Court of Appeal, an interesting dimension is worth mentioning. in an application to enjoin Ethics and Anti-Corruption Commission to an Appeal the Court of Appeal held *'In these circumstances, we are satisfied that the applicant is a person who is directly affected by the appeal by virtual of its mandate, and having moved this court to be joined in the appeal, it should be afforded an opportunity to be heard, whatever it is worth'.*[6] The question that arises is what the import of this issue on Appeal is, now that the Magistrate's Court has found the allegations of corruption have been proven. In my view, the Court of Appeal will have to resolve this issue in the event it is canvassed. This is a very big issue for determination and ought to be resolved in favour of the fight against corruption. The next issue is how this matter got to the present position.

Post Facto Review by the DPP

The Director of Public Prosecutions is mandated by the Constitution to conduct prosecutions once satisfied that there is sufficient evidence to charge under Article 157. In exercise of the powers of prosecutions they shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority. In addition, the DPP is obligated to have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. This includes reviewing complaints that are presented by investigative agencies.

To this end, the DPP, having the qualification equivalent to that of a judge of a High Court [7] is expected to be aware of the general principle relating to Arbitration. The general sources of laws applicable to Arbitration are Constitutions,[8] Statutes ,[9] Subsidiary legislations,[10] Conventions, Treaties, judicial decisions, customary laws, and general principles of law accepted by highly qualified publicists and scholars. The arbitration agreement and the law governing the arbitration have a symbiotic relationship with the latter filling in the gaps where there is a lacuna in the former. Judicial precedent comes in to aid determination of pure points of law that have arisen over the years have been considered, analysed and a way forward provided. An arbitration agreement is premised on a dispute(s) which have arisen, or which may arise between the parties in respect of a defined legal relationship, whether contractual or not.[11] The tribunal is granted power to determine the question such as the of existence of an agreement under the principle of "competence-competence."[12] The

4 HK Murigi 'Tacking Corruption Allegations in International Commercial Arbitration' 8(2020) 1 *Alternative Dispute Resolution* pp 89-119

5 P M Gachoka 'Corruption and Arbitral Integrity: Issues and Perspectives on Corruption and the Sanctity of Arbitral Tribunal' 8(2020)1 *Alternative Dispute Resolution* pp 77-88

6 *Ethics & Anti-Corruption Commission v National Cereals & Produce Board* (2014) eKLR (CA).

7 Constitution of Kenya,2010, art 157(3)

8 n7 art.159

9 Arbitration Act Cap 49, Laws of Kenya, Civil Procedure Act, Evidence Act

10 Civil Procedure Rules, 2010

11 n9 (Arbitration Act) s3

12 n11 s17

DPP is expected to review evidence on the basis of applicable law before arriving at a decision to charge on the basis of any Arbitration proceedings.

In the *Waluke* case the Director of Public Prosecutions, being satisfied with the evidence of malpractice in an arbitral proceeding, brought charges on allegations that the invoice was the basis of the claim for storage charges. The document in question was an invoice that was presented in the arbitration proceedings and the evidence revealed that it was not genuine hence the claim was based on fraud. The accused persons were therefore charged for the money which was paid to them from NCPB bank accounts pursuant to an alleged false claim and a fraudulent invoice. The evidence reviewed and presented by the DPP in the Prosecution of the case revealed that the director of Erad Ltd testified on oath before the arbitrator which was a judicial proceeding as envisaged in the Arbitration Act. Although this was not disputed by the parties, it gave credence to the fact that decisions of the Arbitrator will be subject to review at any stage. The Court found that the only issue to determine was whether the director made a statement which she knew to be false or she did not believe to be true in the arbitration proceedings. The Court found that the document was tailored in support of the false claim and the director of Erad Limited being the managing director who was in charge of the day to day running of the affairs of that company. To this the Court found that the director gave evidence in the arbitration with full knowledge that it was false and lied on oath about the storage claim.

Implication of the Waluke Case on Arbitration

The effect of this decision by the Magistrate, though subject to the Appellate process, is a good reminder to all arbitrators that the arbitral proceedings ought to be conducted with utmost fidelity to the law and the constitution. Second, this case provides important realities for parties who pursue arbitration to ensure that they strictly comply with the law more so since there is no limitation of time when it comes to criminal litigation. Third, whenever witnesses appear before the Arbitral tribunal, the arbitrator has a duty to ensure that they are reminded of the duty of telling the truth and the risks of perjury in arbitration. Fourth, the role of the arbitrator as an umpire comes to the fore. Should the arbitrator question the authenticity of documents presented before him in the absence of a contest by the opposing party. The lesson to learn here is that although private, arbitral proceedings must be conducted with the public good in mind and in accordance with public policy. Indeed, one of the grounds for vacating an arbitral award is when an award does not conform with public policy. Fifth, arbitral proceedings can be used to sanitise otherwise corrupt conduct calling upon Arbitrators to raise their Corruption detection index. Last and perhaps most important, there is a need to avail ethical guidelines for parties and participants in an Arbitration proceeding by way of procedural orders by the Arbitrators.

PART TWO: Reflection on Professor Tom Ojienda's Theory of Criminal Corporate Responsibility

In a characteristic prolix, the 64 pages paper by Professor Ojienda displays interesting arguments on the *Waluke case.*[13] The central thesis in that paper is that the Magistrate Court got it wrong. The paper asks the question; who should take criminal responsibility (liability) when a criminal trial against a corporation is conducted and attempts to provide a way forward on the assumption that there is a lacuna in the application of the law in this area of criminal law practice.[14]

13 *Republic v Wakhungu (the Waluke Case)*
14 n1 pp 2-3

Legal Claims

The paper commences with an introduction of the Walukhe case from the trial to the sentencing of its directors. For brevity, this appraisal will not restate the narrations made in the paper since the matter is still under litigation in the High Court. However, this paper offers an appraisal on the following claims made in the paper. First, the paper faults the reasoning of the Learned Magistrate in placing reliance on House of Lords decisions[15] as well as the application of the Penal Code.[16] The paper faults the Learned Magistrate for failing to apply these decisions since it was on the basis of these decisions that the Court acquitted the 2nd and 3rd Accused in Count one. Here the Court is faulted for failing to either find the two directors (1st and 2nd Accused) personally liable for corruption and criminal acts or alternatively have criminal liability shared between the accused persons for these acts which the paper refers to as cumulative liability. Also, the paper faults the Learned Magistrate for sentencing each accused of committing the offences solely and independent of each other. Here the argument is that the sentence was excessive in comparison to the losses incurred. However, the paper misses the obvious point that criminal responsibility against companies and corporations is not different from criminal liability against the individuals. The Court ought to treat each individual including the company on the basis of the acts conducted singularly and independent of each other.

Second, the paper claims that criminal liability on corporates is 'shrouded in confusion'[17] compared to the liability in civil cases. Here the argument is that in criminal law *mens rea* and *actus reus* must be ascertained before a verdict can be passed against a corporation or company. According to the paper, in criminal cases the directors were found to have been carrying their individual mens rea and that of the company. Here the argument is that it is possible to establish that certain crimes were committed by the directors or such other persons who had the 'controlling mind of the company'. The paper discerns that there is a dilemma in distilling where to find a corporation liable as opposed to the directors or its controlling mind. However, the paper ignores the obvious that the Prosecution is duty bound to prove the guilt of the company and the director singularly and cumulatively by ascertaining the mens rea and actus.

The better argument would be that the law has a way of ensuring that a company with two or more directors has a way of stopping an errant director who uses it to commit an offence. In other words, would a company which is a legal fiction be capable of ensuring that the directors do not commit an offence?

This is the reason why Section 23 is couched in the clear terms

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

15 *Quin and Axtens v Salmon* (1909) AC 442, *Shaw Sons Ltd V Shaw* (1935) 2 UB 113 and *Leonard's Carrying Company Ltd v Asiatic Petroleum* (1915) AC 705 HL

16 Penal Codes 23

17 Serio, n. 1., p. 101.

Once it has been established that a corporation or company has committed an offence then the persons who run the management of the affairs of the company or are concerned with the running of the company are mandatorily to be found guilty of that offence. It is then the duty of the person alleging to prove that they did not take part or did not participate when the offence was being committed and further did not take part in ensuring that the offence took place. It is therefore misleading for the paper to suggest that there is anything complex in determining the liability of the individual directors. Under this section, the ingredients that the prosecution ought to prove is that (1) the Company or corporation committed an offence and (2) the directors did not stop it or were part of it. Where the Prosecution is able to prove these two, then the issue of cumulative liability does not arise. Instead the legal threshold has been met as was in the *Waluke Case*. That can be seen in the acquittal of the 2nd and 3rd accused person on Count No 1 since there was no proof of the same.

Legal Provisions

The paper seeks to demonstrate how Section 45 of Anti-Corruption and Economic Crimes Act No. 3 of 2023 (ACECA)[18] has been applied in terms of Companies. The paper gives *the Waluke* and *Swazuri*[19] cases as examples where this section has been misapplied. The paper proceeds to compare how a recent legislation[20] has come to terms with modern day corporate realities. Here the paper merely restates what the law provides for without offering any useful analysis other than arguing that the recent legislation has distinguished between natural persons and corporations. The case of Family Bank[21] is irrelevant to the discussion in relation to Section 16 of POCAMLA as well as the distinction between directors and Corporation. The Court held, inter alia as follows:

> [20] We find the learned Judge was spot on with the above analysis of what constitutes double jeopardy. The administrative fine was imposed by the regulator for breach of regulations. We are not persuaded that the administrative action acted as a bar to criminal prosecutions for offences spelt out under sections 16, 44, 45 and 46 among others of POCAMLA. This statute created offences, the mandate to investigate criminal offences lie with the police and the decision to initiate criminal charges lie with the DPP who is required to observe the principles set out in the constitution. For the appellant to successfully freeze those powers they must demonstrate to the Judge that there was a blatant breach of the Constitution and statute which was not done in this case.

A careful analysis would reveal that Section 16 of POCAMLA has not made the distinction suggested in the paper. Even assuming that the treatment of a corporation is different from that of an individual, which is not the case really, the section doesn't resolve the question of what happens in the event of default of payment of the fine as suggested by the paper which in my view, is the better argument.

Also, the fact that Section 16 (6) indicates that both the individual and the company shall be prosecuted in accordance with the provisions of POCAMLA implies that when meting out the sentence the same logic applies that each will be punished in accordance with that section. For

18 Anti-Corruption and Economic Crimes Act No.3 of 2023
19 *Swazuri v Republic* [2018] eKLR (HCt)
20 Proceeds of Crime and Anti-Money Laundering Act, 2009 (POCAMLA)
21 *Family Bank Limited v Director of Public Prosecutions* [2018] eKLR

example, under Section 16 (1) where the individual and company are charged with the offence of money laundering[22] Acquisition, possession or use of proceeds of crime,[23] Financial promotion of an offence[24] the sentences would be as follows. The individual would be sentenced to imprisonment for a term not exceeding fourteen years, or a fine not exceeding five million shillings or the amount of the value of the property involved in the offence, whichever is the higher, or to both the fine and imprisonment. The body corporate on the other hand would be sentenced to a fine not exceeding twenty-five million shillings, or the amount of the value of the property involved in the offence, whichever is the higher. Here the paper fails to see there is no distinction really, instead the principle under Section 23 of the Penal Code is applicable under Section 16 of POCAMLA. In any event POCAMLA was enacted to provide for the offence of money laundering and to introduce measures for combating the offence, and provide for the identification, tracing, freezing, seizure and confiscation of the proceeds of crime, and for connected purpose.[25]

The paper also suggests that the general penalty under Section 177 of PPADA distinguishes between corporates and individuals. While the point made is well understood, section 177 does not obfuscate the issue of the liability of a director and that of a Corporation. It makes it clear that the Company will be sentenced separate from the individual. For example, the individual director will be charged in their individual capacity and sentenced as such and the company shall be sentenced separately. The Section does not provide for what happens in default of payment of the fine for a Company.

Identification Principle

The paper is awfully underwhelming in terms of analysis of the legal arguments around the identification principle in corporate criminal responsibility. First, this principle underscores that corporate responsibility under criminal law is not a monolith. It varies from context to context and from one jurisdiction to another. Second, the paper ignores that the foundational arguments under this principle can be traced between the normalist and realist views which are diametrically opposed to each other. The normalist view insists that corporations do not exist in the absence of its members and any blameworthiness or responsibility can only be derived from the culpability of culpable individual directors or members. The realists on the other hand take the opposite perspective to corporate criminal responsibility by insisting that the unit cannot be disentangled into manageable parts since it is a whole. Thirdly, under this principle the issue of responsibility for corporations takes three dimensions. The issue of agency comes into sharp focus in terms of who in the company is to be held liable for the wrongful acts of its employees (1). It must be appreciated that there is a hierarchy in any company, some being the brains behind the decisions of a company who must be held accountable for their transgressions (2). The operating system and culture of a company is critical in understanding the operations of the corporation so that blame can be attributed (3). The suggestion here is that a derivative form of liability must be placed on the individual as well as the anthropomorphic version of the company's decision makers.

Fourth, it is equally important to explore the dissimilarities between individual human beings and group entities. Whichever way one looks at this principle it is clear that the role of the individual

22 n20 s3
23 Ibid s4
24 Ibid s7
25 See the Long Title of the POCAMLA

employees, managers or directors of corporations cannot escape scrutiny.[26] Clever defence counsel attempts to exploit the metaphysical gap in the juristic personality of corporations may not always work. There is a need to check both the corporates as well as the directors since their propensity to commit offences with ramifications to national security and the public generally. For instance, in the Walukhe case the Learned Magistrate was able to distinguish these two competing arguments and followed the law and evidence.

The paper also faults the Magistrate for finding that a corporate entity cannot be found guilty of offences such as perjury and bigamy. This is flat wrong. The paper also suggests that punishing the Company as the Magistrate did amounts to double punishment. Here the Paper suggests that there is a gap in the law since the Company cannot commit an offence without the directors. Here the paper gets it wrong. First, there is no double punishment since the Public Procurement & Asset Disposal Act, 2015 (PPADA), POCAMLA, ACECA, and the Penal Code all envisage a situation where corporations are prosecuted together with the directors. The intent of prosecution is to ensure that justice is done and where guilt is established a suitable punishment is proffered against the guilty party. Second, the duty is always on the prosecution to establish that the individual charged, whether juristic or natural, committed the offence. Third, in jurisdictions such as United Kingdom, United States and Australia, corporates can be charged with corporate manslaughter which traditionally is known to be committed only by individuals.[27] To this end it is clear that the paper gets it all wrong on the principles of corporate criminal responsibility.

Arguments on Bail

The paper also makes an argument on the issue of bail and suggests that there is an inconsistency in the decisional law on matters touching on public officials. The ontological foundation of that argument is that elected leaders form a special category and imposition of bail terms barring elected officials from office amounts to constructively subverting the will of the people. The epistemological argument here is that the social contract between elected leaders should not be subverted by any other person other than the parties initially involved in crafting it. There is no better way to respond than to cite the thinking of their Lordships of the **Supreme Court of India that:**[28]

> (6) After filing two successive bail applications before the trial Court which ended in dismissal, the appellant moved the High Court for enlarging him on bail on 06.09.2012 by filing Criminal Petition No. 6732 of 2012. The High Court, taking note of serious nature of the offence and having regard to personal and financial clout of the appellant (A-3) and finding that it cannot be ruled out that witnesses cannot be influenced by A-3 in case he is released on bail at this stage and also taking note of the submission of the Special Public Prosecutor that the investigation of the case is still continuing even after filing of the charge sheet(s), by impugned order dated 08.10.2012, dismissed his bail application

On Appeal to the Supreme Court the Judges held as follows:

> 26) Unfortunately, in the last few years, the country has been seeing an alarming rise in white-collar crimes, which has affected the fibre of the country's economic structure. Incontrovertibly, economic offences have serious repercussions on the development of the country as a whole.

26 C Wells 'Corporate Criminal Responsibility' in S Tully (ed) *Research Handbook on Corporate Legal Responsibility* (Edward Elgar Chaltenham, UK 2005).

27 See Corporate Manslaughter and Corporate Homicide Act 2007 UK.

28 *Nimmagadda Prasad v C.B.I.,* Hyderabad AIR (SCt)

In State of Gujarat vs. Mohanlal Jitamalji Porwal and Anr. (1987) 2 SCC 364 this Court, while considering a request of the prosecution for adducing additional evidence, inter alia, observed as under: -

'5....The entire Community is aggrieved if the economic offenders who ruin the economy of the State are not brought to book. A murder may be committed in the heat of the moment upon passions being aroused. An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the Community. A disregard for the interest of the Community can be manifested only at the cost of forfeiting the trust and faith of the Community in the system to administer justice in an even-handed manner without fear of criticism from the quarters which view white collar crimes with a permissive eye unmindful of the damage done to the national economy and national interest…."

27) While granting bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/State and other similar considerations. It has also to be kept in mind that for the purpose of granting bail, the Legislature has used the words "reasonable grounds for believing" instead of "the evidence" which means the Court dealing with the grant of bail can only satisfy it as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt.

28) Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offence having deep rooted conspiracies and involving huge loss of public funds needs to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country. 29) Taking note of all these aspects, without expressing any opinion on the merits of the case and also with regard to the claim of the CBI and the defence, we are of the opinion that the appellant cannot be released at this stage, however, we direct the CBI to complete the investigation and file charge sheet(s) as early as possible preferably within a period of four months from today. Thereafter, the appellant is free to renew his prayer for bail before the trial Court and if any such petition is filed, the trial Court is free to consider the prayer for bail independently on its own merits without being influenced by dismissal of the present appeal.

The point here is that economic crimes are a special category and must attract a different approach including ensuring, as a bare minimum, that the integrity of the trial is maintained. This calls for special conditions including, in clear cases denying State officers bail or barring them from office.

Conclusion

The legal culture in Kenya should abhor ethereal companies from engaging in corporate transactions since therein is where economic crime will thrive under the guise of the Corporate veil of incorporation. The ideal corporation consists of promoters, directors, and shareholders who play a significant role in the functioning of the company and must be held to account. Those who embezzle public funds attempt to hide behind legal fictions contained in their relationship with their professional bodies, relatives, churches, corporations, companies, allies, and business

associates. Criminal law does not protect this fiction, instead it seeks to expose the fraud whenever it occurs. The Locard's exchange principle that every contact leaves a trace is applicable to the economic crime as well as arbitration. To unmask the real faces behind the economic crimes, it is therefore important to go past the names of the companies and ask who the movers and shakers are. This requires strict adherence to the rule of law and constitutionalism.

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