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CONSENT FOR PROCESSING CHILDREN'S PERSONAL DATA IN KENYA

New Dawn in Kenya Privacy Laws

Joshua Kiilu* and Linda Kiendi**

Abstract

The advent and progressive usage of technology have had tremendous effects on the privacy, collection, storage and processing of individuals' data. This poses a significant threat to vulnerable individuals such as children on their privacy and security as they use and interact with technology more so on the internet. This paper seeks to analyse the threat and dangers posed to vulnerable individuals on the internet platform and provides a way forward to Children's rights in relation to data protection. Using a comparative analysis in different jurisdictions, the findings of this paper shall provide incentives on the importance of protecting vulnerable individuals on the internet by providing recommendations for improvement and advancement of Children's Data protection in the Kenyan Privacy Laws.

1. Introduction

For a long time, personal and critical data and information have been stored in physical storage and localised in specific secured rooms for protection. Time has since changed, and technological advancement has necessitated how data is collected, stored, used, and secured. The turn of the 21st century has seen the explosion of data collected by both government and private entities for various purposes. The advent of the internet has been one of the most transformative inventions by humans, especially, social media which has merged personalised experience and connection by people who wish to learn and share information, for entertainment and shopping[1].

It is not therefore surprising to see that most profitable companies are in the technology sphere and prioritise the use of Artificial Intelligence in analysing data to predict market trends, and customer preferences and utilise the information for targeted and tailor-made marketing and product specification[2]. This trend has also been effectively, sustainably, and conveniently used by companies to push their products, especially consumer goods and has seen the mushrooming of online markets in Kenya such as Jumia, and Majid Al Futtaim, the Dubai-based conglomerate that operates the Carrefour grocery in Kenya and other parts of the world.

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1 M Evans 'Why Data Is The Most Important Currency Used In Commerce Tod' (Forbes March 12, 2018) https://www.forbes.com/sites/michelleevans1/2018/03/12/why-data-is-the-most-important-currency-used-in-commerce-today/?sh=7ca254bf54 accessed October 21, 2022.

2 R Kumari '10 Companies That Uses Big Data' (*Analytics Steps* March 10, 2021) https://www.analyticssteps.com/blogs/companies-uses-big-data accessed October 21, 2022.

It has become a necessity in today's interaction that individuals are required to provide their personal data or give consent to the collection of their data before being allowed to access services. The data collected is, in most cases, used by these organisations for profitable causes, and these benefits are normally hidden from the data subjects. With this, comes the major issues associated with data collection, storage and use which are mainly the ownership and use of the data collected by various actors. While it is theorised that individuals have the right to access, and control how their data is used, the same is not practical in a world where everyone is collecting data, and the data subject has no idea who is collecting and using their data[5]. Arguably, personal data held by government and private entities can be used to identify a person, their preferences, and interests to allow for targeted and tailor-made communications that are classified as an asset, resource, or property.

The collection, storage, analysis, use and exploitation of personal data represent an emerging and contemporary class of asset and resource which has been adequately and effectively used by most big technology companies such as Apple, Alphabet, Meta, Microsoft, and Amazon. Data is used to analyse consumer trends, behaviour and predict future trends to enable companies to anticipate and cater for their consumer needs and improve their revenue streams and retain a competitive edge[6].

The immense importance in business placed on personal data is to market and advertise their products. Companies use both passive and aggressive tactics to accumulate personal data and have come up with smart ideas to get the information they want with minimal resistance through clever incentives such as free services which only require some information about the user before accessing them. Consumers find themselves giving consent to the collection and use of their personal information in exchange for "free services". This tactic works every time as research has shown that the majority, more than 90% of internet users never bother reading the terms and conditions when visiting online sites[7] and normally click accept to get to their seemingly free services. This was truly echoed by Harold Finch and John Reese's conversation in a fictional series, the person of interest, where John wonders why people share their information on online sites and Harold chips in that people are always happy to volunteer their information and business make a kill out of it[8].

Personal Data in itself, is used as a means to an end. The data is used to analyse each individual online presence and trends to able monetise the user through specific and targeted marketing which fits their profile[9]. Data analysis and optimization means that tech companies or any other company can predict market behaviour and target consumers in a unique and specific way to increase their chances of making sales.

5 n2 p2.

6 K Birch, DT Cochrane and C Ward 'Data as Asset? The Measurement, Governance, and Valuation of Digital Personal Data by Big Tech' 8(2021) SAGE *Journals.*

7 J Guynn J 'What You Need to Know Before Clicking 'I Agree' on That Terms of Service Agreement or Privacy Policy" *(USA TODAY* January 28, 2020) <*https://www.usatoday.com/story/tech/2020/01/28/not-reading-the-small-print-is-privacy-policy-fail/4565274002/* > accessed October 21, 2022.

8 See the Person of Interest (TV Series), Identity Crisis (2012) <https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1796&context=facultypub> accessed October 26, 2022.

9 C Lieber "Big Tech Has Your Kid's Data — and You Probably Gave It to Them' (Vox 5AD) <https://www.vox.com/the-goods/2018/12/5/18128066/children-data-surveillance-amazon-facebook-google-apple> accessed October 21, 2022

2. Targeted and Vulnerable Data Subjects

Companies will go to any length to collect information about their consumers, whether openly or discreetly. The major way the companies collect data is by requiring data subjects to consent to collect their information before accessing the service they are after. The companies by design make sure the process of giving consent is simple, while the process of withdrawing the consent is convoluted and buried in long legal jargon that an average person does not bother to read. Invariably, people unknowingly give companies the right to their data information and the right to use that information for commercial purposes, including selling the data to third parties.

The advent of data capitalization has led to ethical discussions on the right to collect and use personal data of vulnerable groups such as children who do not possess the right knowledge to give informed consent. The saddening fact is that most of the children's data is shared by their parents, who do not bother to read the terms and conditions before clicking "accept". As much as children's online security and privacy is left to their parents, the same Parents willingly and freely share information about their children, some even before being born, and technology companies, or any other entity interested, harvest and store this data[10]. The innocuous sharing of happy moments such as birthdays, the first day in school, and children's names can hurt a child in their later days, such as through identity theft, tracking, abduction, or cyberbullying[11].

The global community and governments have identified the threat the avalanche of unchecked children's information pose to the children and have been playing a catch-up game with technology which is ahead through curative legislation and policies. The United States was one of the firsts countries to pass legislation specifically for the protection of children's privacy in online space through The Children's Online Privacy Protection Act of 1998 (COPPA). The European Union recognised the impact on data protection and privacy presented by emerging technologies and commercialization and passed General Data Protection Regulation (GDPR) in 2018. Unlike the United States Act, the GDPR is a comprehensive piece of legislation that protects the data rights of all European citizens and sometimes extends to territories beyond the European Union[12].

While most data protection laws are focused on the protection of the data collected, they do not adequately address the issue of the collection and use of children's data. The inadequacy in addressing the issue of the collection of children's data has created a loophole which is being exploited by corporations to discreetly collect and use children's data. It, therefore, becomes important for the country to come up with comprehensive guidelines on how children's data issues are handled, issues of obtaining consent to collect and store children's data and accountability issues.

Most commercial enterprises understand the influence children consumers have in terms of making decisions on purchasing children's consumables such as toys, children's foods and children's games. The deliberate harvesting of children's data which is used to analyse children's preferences and consumption patterns are employed and used to make targeted advertisements for children.

10 S Steinberg 'Children's Privacy in the Age of Social Media' 66 (2017) *Emory LJ* 839 <https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1796&context=facultypub>

11 M Macenaite & E Kosta 'Consent for Processing Children's Personal Data in the EU: following in US Footsteps?' 26(2017) 2 *Information & Communications Technology Law*, 26:2, 146-197, DOI: 10.1080/13600834.2017.1321096.

12 General Data Protection Regulation (GDPR) art 5.

Children are exploited for their vulnerability and psychological immaturity to influence their preferences through well-calculated advertisements[13].

3. The Kenyan Paradigm Shift Towards Data Protection and Children's Rights

Children are the most vulnerable targeted group with their exposure to the internet making them easy targets of cybercrimes such as cyberbullying and pornography. With the enactment of The Data Protection Act, 2019[14] and subsequently the enactment of the Children Act 2022, [15]Kenya has moved towards a progressive realisation of Data Protection rights and children's rights *vis* a *vis* the best interests of children.

The Data Protection Act, 2019 gives prominence to parental consent before a data controller and processor can collect and process children's data[16] as a mechanism to protect children, especially in the online environment. According to Sonia, children have an undeniable presence on the internet, with one out of every three internet users globally being a person aged below 18 years. [17]The online presence of children presents the risk of them sharing their personal data with unscrupulous data collectors through enticement and their data being used for commercial or exploitation purposes.

It is a trite principle that the child, because of his or her physical and mental immaturity, needs special safeguards and care including legal protection before as well as after birth.[18] With the advancement of technology and children being exposed to the internet at an early age, it behoves the government through legislation of legal parameters and policies as well as parental guidance in monitoring the children's presence on the internet and protecting their personal data from being mishandled. The office of data commissioner bears the duty to investigate entities and enforce compliance with data protection Act to promote the interests of children as it has been the case with UK's equivalent body, information commissioner's office.

For example, in September 2022 the information commissioner's office of the United Kingdom issued a notice of intent to TikTok Inc and TikTok Information Technologies UK Limited ('TikTok') after investigations indicated that the Company had breached UK's data protection laws by failing to protect children's data privacy when using Tiktok platform. The information commissioner's office preliminary investigates found the company had processed the data of children below age of 13 without requisite parental consent, failed to provide proper information to its users in a concise, transparent and easily understood way, and processed special category data without legal grounds to do so[19].

13 I Grad 'Ethical Considerations on Advertising to Children. Postmodern Openings', 6(2), 43-57.Doi: http://dx.doi.org/10.18662/po/2015.0602.04

14 Act no. 24 of 2019.

15 ibid.

16 n 12 s33 (1) (a).

17 S Livingstone, J Car and J Byrne 'One in Three: Internet Governance and Children's Rights' (2015) *Global Commission on Internet Governance Paper Series* No. 22. <https://www.unicef-irc.org/publications/pdf/idp_2016_01.pdf>

18 United Nations Convention on the Right of the Child (adopted on 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (UN CRC) 'Preamble'

19 Information Commissioner's Office- ICO could impose multi-million pound fine on TikTok for failing to protect children's privacy < https://ico.org.uk/about-the-ico/media-centre/news-and-blogs/2022/09/ico-could-impose-multi-million-pound-fine-on-tiktok-for-failing-to-protect-children-s-privacy/>

The changing digital dynamics mean that most social, educational, cultural, and entertainment activities concerning children are available online. Accordingly, there is an argument that participation in online activities by children is essential and crucial for the development of their playing, learning experience, and self-discovery and affords them a chance to express themselves[20]. The increased data collection levels on everyone using the internet, including children, presents heightened risks to children's privacy such as the collection and exploitation of children's data for commercial purposes, use of children's data for targeted marketing, use of children for profiling and other online exploitation activities.

Owing to the vulnerability of children, online risk concerts and a matter of public concern, stakeholders have been calling on the government and other policymakers to provide legal mechanisms to protect children's privacy, especially on online platforms. The United Nations recognises the right of children to be protected from arbitrary invasion and interference with their privacy under Article 16 of the Convention on the Rights of a Child[21]. However, the provision of the Convention on the Rights of a Child is generic in nature and does not specifically deal with the processing of children's data.

Kenya Data Protection has made immense progress in identifying and limiting the processing of children's data as a proactive mechanism to protect children's data and privacy. To protect the interests of the children, the Data Protection Act introduces safeguards against processing children's data unless consent is obtained from their guardians and the processing is carried out in a manner that protects the rights and advances the best interest of the child[22]. However, the Act does not give detailed guidelines on consent or age-specific competence and threshold for a child to give limited consent.

Kenya's approach seems to be all-encompassing and proceeds from the position that all children lack the requisite capacity to consent to the process of their data. Kenya recognises any person under the age of eighteen years as a child[23] and the principle of the best interest of the child takes precedence. The operative guidelines in Kenya have been to protect children's data from unnecessary exposure[24] or exploitative purposes. The concept of parental consent, though not a novel issue, continues to raise issues, especially when the law requires parental consent in the processing of a child's data, and the consent to be in the best interest of the child.

3.1 Consent as a Concept in Dealing with Children's Issues

The issue of consent is not a straightforward one when it comes to children's matters and in many cases, different approaches are taken depending on the prevailing circumstances. For instance, some laws hold children to a higher standard in terms of providing consent or being held accountable for their actions. The Children Act as a starting point posits that children should be protected,

20 VM Schönberger and KN Cukier, *Big Data: A Revolution That Will Transform How We Live, Work, and Think* (Houghton Mifflin Harcourt, 2013)

21 n16

22 n12 s33 .

23 n 13 s2

24 The concept of data minimization and anonymization takes a central part in the justice system in Kenya where cases involving children are normally heard in camera, information which could identify a minor is usually redacted from reported cases and in the reporting of cases initials are used instead of the children name.

and their interests are always advanced. At the same time, the Kenyan Penal Code sets the age of criminal culpability of a minor in the Kenyan jurisdiction between the age of eight and twelve depending on the offence in question[25]. The Act, however as a measure, put a condition that it must be proved that a child was aware or ought to have been aware that he or she should not have committed the act of making the omission.

The concept of consent does not follow the path of one shoe fits all. The concept of consent in processing children's data becomes much more complicated in the face of competing interests of the children and the parents who bear the responsibility to grant and/or deny consent. Consent forms part of the basis of processing personal data to protect the data from unnecessary requirements or disclosure[26]. The Data Protection Act retains consent as one of the immutable concepts of processing data, save for justifiable circumstances.

The Court has also weighed in on the issue of what amounts to consent and whether a child can grant informed consent. A high level of responsibility is vested in anyone who asserts the position that they obtained or processed a child's data after obtaining consent and the consent should be from the parent, not the child. In essence, the actions of the child cannot be interpreted as giving consent regardless of the circumstances. In the case of *NWR*,[27] the court found that using child photos for advertisement without parental consent amounts to a breach of their privacy. The Court, stated as follows:

> […]From the material before me, there is absolutely nothing to demonstrate that the first Respondent sought and obtained the consent of the parents. By voluntarily posing for the photos, the children cannot be said to have consented for the simple reason that they lacked the requisite capacity to grant the consent on account of being minors.

The Data Protection Act elevates the status of parents/guardians when it comes to the issue of processing minors' data to that of a gatekeeper [28] and the parents are expected to exercise prudence in their decisions. While children are considered as lacking the requisite capacity and mental maturity to make informed consent to processing their data, the law delegates that duty to their parents. The issue of consent as provided under the Act gives a narrow definition of who can give consent to the processing of a child's data. The Act fails to recognise that some parents lack the technical skills, knowledge and competence to exercise this right, especially when it concerns technical and technological subjects. It is argued that the expansion of people who can give consent to processing children's data should be expanded to incorporate stakeholders who are engaged with children's affairs such as education or are acting in the best interest of the child[29].

The issue of unjustifiable refusal by a parent to grant consent to process a child's data when the processing is in the best interest of the child is seen as a potential outcome of giving parents the veto power in deciding how, who, what, and when a child's data can be processed. There is a

25 CAP 63 (Laws of Kenya) s14

26 Constitution of Kenya, 2010 art 31

27 NWR v Green Sports Africa Ltd [2017] eKLR.

28 n 12, s33 (1) (a).

29 Some national laws afford such flexibility, for example, the Irish data protection law allows a grandparent, uncle, aunt, brother or sister of the data subject to consent on their behalf when the giving of such consent is not prohibited by law.

potential danger of parents not understanding the subject matter for which the data is required[30]. The provision presents a dilemma in issues where a parent refuses to grant consent when it is in the best interest of the child. The same is true in instances when a parent exercises their power to give consent for their gain and against the best interest of the child whether intentionally or because of a lack of information on the issue[31].

It is arguable that the Act foresaw such cases and gives an exception to obtaining parental consent if a person is offering counselling services to the child or providing child protection services. However, there is doubt whether this exemption can work where the child is under the care and custody of the parent which might make it difficult for people offering those services to access the child[32].

In this regard, therefore, there should be a balance between granting parents absolute autonomy when it comes to processing Children's data. The evolving capabilities and capacity of a child should be considered when consent is required during the collection and subsequent processing of children's data. Some jurisdictions like the UK have adopted this approach and restricted parental consent in the context of preventive or counselling services offered directly to the child[33]. The wording of the Data Protection Act, unlike other Acts, explicitly provides that a child below the age of eighteen years cannot grant binding consent to process their data and parental consent is mandatory. This is stack different to the objective bright-line rule applied in some European countries which provides that minors who have attained a certain age threshold are treated as competent to act in deciding issues of processing their data[34]. For instance, Article 13 of the Spanish Personal Data Protection Law allows minors over the age of 14 years to grant consent to processing their data, unless in cases where the law requires parental guidance.

The reading of the Data Protection Act on the issue of providing consent by a parent or a guardian is seen as a double edge sword with some foreseeable negative implications on children's right to access information[35]. It can be argued that the default age of 18 as prescribed under Kenyan laws limits the right of children to access information as some parents may withhold consent to them accessing certain sites. There is therefore a call to find a way to strike a balance between protecting children's rights without unnecessarily infringing on their right to access information. The internet is a rich source of material for education, information, culture, and positive interaction which could be seriously curtailed if the provisions of the Data Protection Act are enforced without accounting for the special interests and circumstances of children and their right to access information.

30 L Magid 'Europe Could Kick Majority of Teens off of Social Media and That Would Be Tragic' (*ConnectSafely* December 10, 2015) <https://www.connectsafely.org/europe-could-kick-majority-of-teens-off-of-social-media-and-that-would-be-tragic/> accessed October 28, 2022

31 The sad reality is that some parents are not interested in the well-being of their children or are abusive and would make a deliberate effort to conceal that and would restrict children from accessing platforms from which they can raise an alarm or seek assistance.

32 n 12, s33(4).

33 n16 'Recital 38' <https://gdpr-info.eu/recitals/no-38/ > accessed October 29, 2022.

34 L Jasmontaite and P de Hert, 'The EU, Children under 13 Years, and Parental Consent: a Human Rights Analysis of a New, Age-Based Bright-Line for the Protection of Children on the Internet 5(2015)1 *International Data Privacy Law* 20.

35 n16 art 7

3.2 Parental Consent to Process Children's Data in the Context of The Data Protection Act 2019.

Kenya seems to prioritise the best interest of a child when it comes to data processing and leaves the obligation of consent to the parents who are expected to evaluate the specific circumstances of the data required, the reason for requiring the data and the consequences of granting or refusing to grant permission to process a child's data. The Act seems to suggest that permission to process a child's data should be contextualised and applied in a subject-specific manner and evaluated on a case to cases basis rather than using a universal approach. The justification and reason for processing a child's data in Kenya inform whether it is reasonable for a parent to grant permission to process a child's data.

The Data Protection explicitly provide that in processing children's data parental or guardian consent must be obtained and the processing of the data should protect the child's rights and advance their best interest[36]. The Act's wording is mandatory and does not in any way provide for obtaining consent from a child. This automatically rules out any purported attempt to process children's data under the guise of the child as it was held in the case of *NWR*[37]. The High Court held that consent is not given by children to process their data just because they posed for photos which were subsequently used for commercial purposes.

The Data Protection Act is seen as overprotective and may limit children's rights to access some services that offer them education and entertainment opportunities. The Act does not even provide for flexibility or elasticity to allow for consent to be granted by relevant and competent individuals who have some "parental responsibility" over the children. Though it could be argued that the inclusion of a parent or a guardian is aimed at curing instances where there is no parent to grant permission and the consent of a person who has/should assume the parental responsibility could step in as the guardian as provided under the Act[38]. The Act provides a specific instance when children's data can be processed without the consent of their parents for service providers who exclusively deal with children's protective services or persons offering counselling services.

The protection to children afforded by the Data Protection Act, 2019 has been lauded as a necessary evil. There are arguments that dangers are lurking in every corner, especially online, which children should be protected from. The Act does not curtail the children's right to learn and acquire knowledge online but provides a controlled environment for their safety. The Communication Authority of Kenya adopted a Child Online Protection guide to help children have a healthy internet experience and require telecommunication service providers to have in place mechanisms to verify and ensure sim cards registered to minors are compliant with the law[39]. Parents are therefore required to register sim cars for their children[40].

36 n12 s33 (1) (a) and (b).

37 n25

38 The broad interpretation of the word "parent or guardian" can be used to broaden the purview of who can give permission to process children's data especially by people who are acting in loco parentis such as elder siblings, uncles, aunts provide the consent is given to serve the best interest of the child and necessary in the prevailing circumstances.

39 Kenya Information and Communications (Registration of SIM cards) Regulations

40 F Sunday 'Parents to Register SIM Cards Bought for Minors in New Regulations' & IT <https://www.standardmedia.co.ke/business/news/article/2001441093/parents-to-register-sim-cards-bought-for-minors-in-new-regulations> accessed October 29, 2022

The notion of parental responsibility and who can consent in certain circumstances has left some grey areas which need redress. This is true because in some circumstances the collection and processing of children's data seem to be necessary notwithstanding the parental consent alluded to under the Act. Kenya Ministry of Education's National Education Management Information System (NEMIS) is one public platform which performs mandatory collection, processing and sharing of children's data. Parents and guardians do not have the option of refusing consent to process their children's data and school administrators are obliged to collect the required data from parents and upload them. This seems to be a perfect example of when the principle of the best interest of a child can be used to justify the mandatory collection and processing of children's data[41].

3.3 Verification of Age and Parental Consent.

Data Protection requires the verification of age and parental consent before children's data is processed[42]. The Act requires Data processors and Controllers to have in place mechanisms to verify age and parental consent before processing data[43]. Authentication of children's age online to protect their data rights, prevent them from being exploited and monitor their online activity is a key objective of the Data Protection Act. The Act leaves the responsibility to come up with the actual mechanisms to verify age and parental consent to the Data Controllers and Processors. The Act does not specify what will be required to prove that age and parental consent were adequately obtained which could expose data controllers to hefty fines if the Data Commissioner finds them to have breached the Act and regulations by collecting or processing children's data without verifying the age of and obtaining parental consent[44].

The Office of the Data Commissioner should advise on the possible methods of verifying age and providing parental consent to process children's data depending on the circumstances. In absence of standard guidelines on verification of age and parental consent, different data controllers and processors are prone to apply different mechanisms and methods. The Act only gives data processors and controllers a list of factors they ought to consider when fashioning their age verification and parental consent mechanisms such as technology, the volume of data to be processed, the proportion of data that is of a child, and the possibility of harm to the child if their data is processed[45]. The Act gives the Data Commissioner the discretion to specify other factors[46].

While parental consent may be an easy feat, the process of age verification of a child for services offered online presents a challenge especially when it comes to services that target the general population. The issue of age verification of age only provides a problem as some people would prefer anonymity or the information used in the process of age verification could be used for other purposes such as targeted marketing. The idea that general online users may be asked to verify their age may lead to data harvesting which would defeat the purpose of the Data Protection Act and Consent hence the method of asking all people to verify their age in order to identify and protect children online does look like a good approach.

41 School administrators in sharing children's data can be said to be performing their official duty in the public interest and advancement of the children's education interests.

42 n 12 s33 (2).

43 n12 s33 (3).

44 ibid s63 of the Act prescribes a fine of up to five million shillings, or in the case of an undertaking, up to one per centum of its annual turnover of the preceding financial year, whichever is lower.

45 ibid s33 (3) (a)(b)(c) and (d).

46 ibid s33 (e).

Arguably, age verification has never been an adequate method to ascertain the age of a person, more so the age of a child when there exist methods to circumvent the verification process as seen in sectors where age verification is key to accessing services and products such as gambling and alcoholic beverages[47]. The current generation is adept in technology matters and would easily bypass system mechanisms put in place to weed out children from accessing certain services and both the parent and service provider will not notice as the children would lie about their age and pass off as their parents. For example, most websites use a simple verification method of asking a user to provide their date of birth before accessing their services. Children are aware of that, and they would deliberately give a false date which identifies them as adults hence they are allowed to access the services.

Some organisations have been able to find a way to solve the problem of age verification, this is possible because it's in person and no online verification is used. Telecommunication service providers have incorporated the verification mechanism in the registration of sim cards[48] to be able to differentiate adults and children following directives from the communication Authority to comply with Kenya Information and Communication (Registration of SIM -Cards) Regulations, 2015. The Regulations requires that a minor who wishes to register a sim card must visit the offices of agents of the relevant telecommunication company accompanied by their parent with the relevant documents[49]. The documents serve two purposes, to verify that the intended use of the sim card is a minor by producing a birth certificate[50], and to prove that the person accompanying the minor is their parent and they consent to the registration of the sim card to be used by the minor[51]. The Parent is required to provide the child's original birth certificate and the parent's original identification document before registration is effected.

While the provisions of the Kenya Information and Communication (Registration of SIM -Cards) Regulations, 2015 provide a good solution to verification and consent for data collected offline, it cannot be presented as the panacea to the teething issue of verification and obtaining consent to process children data. The underlying principle is that consent should be freely given under the context that the same is based on an informed decision based on the extent and the purpose of the data being collected. However, in instances of imbalance of power, consent can be used as a powerful tool of manipulation and may be given even in cases where the best interest of a child is not being promoted.

4. Best Practices in Processing Children's Data in Compliance with Data Protection Laws.

The Kenyan law calls for a delicate balance between the protection of children's rights and the advancement of their best interests. The principle of the best interest of the child is entrenched in Kenya's Children Act, 2022[52]. Data Controllers and Data Processors are legally bound to take into

47 V Nash *Effective Age Verification Techniques: Lessons to be learnt from the Online Gambling Industry - Final Report* (Oxford Internet Institute, University of Oxford 2014).

48 R Okenye 'Parents Now Required To Register Children Using SIM Cards or Face KES 300, 000 Fine' *Cascets Africa* (April 5, 2022) <https://gadgets-africa.com/2022/04/05/parents-to-register-children-using-sim-cards-or-face-jail-time/&gt > accessed October 29, 2022.

49 n37 Reg 8 (1).

50 ibid Reg 5.

51 ibid Reg 6(1).

52 n13.

consideration the best interests of children when making decisions on the processing of children's data. The decision on whether and how to process children data should be made depending on the nature of the data being processed and the potential harm and inherent risk of processing children's data, the rights of the children and the children's interests advanced by the processing of their data. It is therefore advisable that any organization that processes children's data should carry out their activities in a manner that protects children's data rights.

Organizations that process or foresee potential instances where they will process children's data during their business should incorporate automatic mechanisms to advance data protection by default and design. Data protection by design and default requires data controllers and data processors to incorporate and integrate data protection mechanisms that kick in automatically that operate throughout the data cycle. Protection by Default and Design ensures that data protection is guaranteed and that Data Controllers and Data Processors do not deliberately, or otherwise, process children data in a manner that exposes them to harmful processing practices. For example, Data Controllers and Processors can have their system's default as "not to share" mode and require stringent processes and consent when activating "sharing mode".

The system should have a mechanism of notifying the children and their parents, where appropriate when data sharing mode has been activated. The system should give adequate notice of the intention to share children's data and require consent before sharing children's data. If there is no communication from the child or their parent, the system should automatically treat this as a decline to consent and activate the do not share mode. However, this should be done depending on the prevailing circumstances, and Data Controllers and Processors, under limited circumstances are legally allowed or mandated to share data even when consent has been withheld. This is in line with the principle of the best interests of the child involved.

Data Controllers and Processors should take note that they bear the burden of proving the legitimate and legal basis of processing or sharing children's data with or without consent.

The principle of the cautious and risk approach of data processing should form the core of an organization's data processing activities, especially when the intention is to deter children subjects. Data Controllers and Processors should implement upfront age verification mechanisms. The aim of upfront age verification mechanisms is to keep away children from submitting their data when it is restrictive to adults only. The system should atomically detect and deny access to children's users. Upfront age verification mechanisms work on the principle that Data Controllers and Processors should not just ask for age but verify it. For instance, Data Controllers should design systems that require a combination of information and documents to verify the age of the data subjected. Such documents may include copies of identification documents, Tax information, and email address and combine them with real-time face or fingerprint scans to compare with the submitted documents. The system will extract the information from the documents provided rather than requiring the data subject to provide the information. Children will not be able to decipher what verification information the system is targeting hence it becomes difficult to falsify information on age.

This system may seem invasive and cumbersome but will work perfectly to deter children from submitting their data, and or accessing restricted sites. Chances are that children, as much as they can have some information such as email, will not have copies of identity documents or Tax information and will ordinarily give up and avoid such sites.

It should be noted the aim of data protection is to protect children's data, and not to curtail their right to access, impact and interact with age-appropriate information. The United Nations Children's Fund recommends that organizations should involve children in the decision-making process by seeking their views according to their evolving capacities[53]. Children, when given adequate information can make choices, feedback and preferences on various issues which can assist data processors in making children-friendly data processing processes.

A good example where children involvement has produced excellent results is Scotland where children were involved in coming up with children's principles guidelines[54].

Finally, it is advisable that the organization should consider carrying out Data Protection Impact Assessment (DPIA) to assess and mitigate data protection risks to the child[55]. It should be assumed that children's data is sensitive data that requires impact assessment before processing. This works as an assurance and safeguards that children's rights are at the forefront of the organization's activities.

The office of data commissioner, in collaboration with children's stakeholders, should come up with guidelines for the processing of children's data. In addition, the office of data commissioner should be at the forefront in initiating policy change to incorporate child friendly data processing activities. This can be achieved through various means such as public sensitization, continues education, sector and stakeholders' engagements, advisories and compliance directives. The Kenyan authorities can learn and borrow a lot from the United Kingdom's information commissioner's office approach on data protection compliance approach. For instance, the information commissioner's office notice to Tiktok led to change in Tiktok's change of policy to safeguard children data rights in compliance with GDPR. This should provide proper procedures for dealing with children's data to promote children's interests and protect children's data rights.

5. Conclusion

The Data Protection Act presents a new dawn in the arena of the competing interests of children's right to access information and the right to be protected from invasive tendencies to collect their data. There is a well-founded fear that children's data could find its way to people who could manipulate it for commercial or other illegal and exploitative purposes to the detriment of the children. The Act has been touted as the first comprehensive domestic piece of legislation which directly deals with the issue of privacy and children's data rights in Kenya giving effect to Article 31 of the Constitution and Article 16 of the United Nations Convention on the Rights of a Child. However, the Act has its teething problems which could prove a thorny issue in terms of balancing the provisions of the Act and the rights of the children to fully participate in societal activities, especially in learning and expressing their ideas. The implementation of the provisions of the Data Protection Act *vis-à-vis* the children's data and privacy rights is still in its inception stage in the country and we can only hope that most of the arising issues will be dealt with as time goes by. The Office of the Data Commissioner has a huge role in providing guidelines and policy framework on dealing with children's data-related issues, especially consent and permissions to access and process children's data.

53 UNICEF – Stakeholder Engagement on Children's Rights, Part III : How to Consult Children Directly

54 Children in Scotland - The Participation and engagement of Children and Young People: Our principles and guidelines

55 Information Commissioner's Office - What should our general approach to processing children's personal data be?

THE CONUNDRUM OF LOCUS AND CHOICE OF FORUM IN TRADE REMEDIES CASES UNDER THE COMESA TREATY

Daniel O. Achach*

Abstract

The COMESA Court of Justice as created under the COMESA treaty gives locus standi to natural persons, legal persons, member states and the secretary general. The treaty demarcates and preserves the nature and type of challenges that each group can bring before the court. The treaty further provides for two possible jurisdictions of the court in handling trade remedy cases; either as the first instance court exercising original jurisdiction or through the arbitration procedure in exercise of appellate jurisdiction from the decisions by panels of experts. This paper exposes the inbuilt challenges in applying and interpreting these provisions in the context of trade remedy disputes. It suggests a need to relook and possibly review certain provisions of the agreement as well as the necessity by the court to adopt a bold and purposive interpretation as a first among equals in building African jurisprudence on trade remedies.

Introduction

The history of the Common Market for Eastern and Southern Africa (COMESA) can be traced back to 1965 when the United Nations Economic Commission for Africa (ECA) convened a ministerial meeting of the then newly independent States of Eastern and Southern Africa to consider the proposal for the establishment of a mechanism to promote sub-regional economic integration.[1] A proposal for the creation of a regional trading bloc was mooted in 1978 at a meeting of Ministers of Trade, Finance and Planning in Lusaka, starting with a sub-regional preferential trade area which would be progressively upgraded over a ten-year period to a common market until the community had been established.[2] The treaty establishing preferential trade area (PTA) was accordingly signed on 21st December 1981 in Lusaka. The PTA treaty envisaged its transformation into a Common Market and, in conformity with this, the COMESA treaty.[3]

Trade remedies refer to application by member states of anti-dumping duties in cases of dumping, countervailing measures in cases of subsidies and safeguard measures in cases of surge in imports. Articles 51, 52 and 61 of the COMESA treaty as read with the COMESA regulations on trade remedy measures establish the trade remedies regime for the common market.[4] This paper looks at the dispute resolution process established under the COMESA trade remedies regime and posits that it in-builds practical difficulties both in its architecture and design. The paper postulates that by opening possibilities of challenging trade remedies decisions to individuals, legal persons, member states and the secretary general of the common market, and further by creating two possible routes

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1 SG Tadesse and HA Endale, 'COMESA: Prospects and Challenges for Regional Trade Integration' (2019) 76 *JIAGS* 2224.

2 ibid

3 Adopted 5 November 1993, entered into force 08 December 1994) (COMESA treaty). The regional bloc currently has a membership of 21 countries.

4 COMESA 'COMESA Regulations on Trade Remedy Measures' (2002) <https://comesacourt.org/wp-content/uploads/2020/01/COMESA-Regulations-on-Trade-Remedy-Measures-October-2002.pdf > accessed 9 June 2022.

for such challenges, the regime is riddled with practical difficulties and it may befall the COMESA court of justice to proffer reprieve through interpretative jurisprudence.

The first section of this paper gives a brief overview of the trade remedies regime under the COMESA treaty covering the three trade remedy instruments to wit dumping and anti-dumping measures, Subsidies and countervailing measures, and subsidies. The second section delves into the establishment of the COMESA court of justice and discusses its jurisdiction in the context of the two thematic areas; choice of forum and *locus standi* in trade remedy disputes. In light of the exposition made in the second part, the third and final part discusses the author's recommendations and concluding remarks.

1. Trade Remedies Regime Under the Comesa Treaty

The desirability and legality of trade remedies in regional trade agreements has been a subject of controversy among many scholars.[5] On the one side of the spectrum are scholars who argue that contingent protection measures are kept in agreements as a device to optimize liberalization due to the mechanics of trade negotiations and incomplete information on the political costs involved in liberalizing trade.[6] One explanation for the retention of trade remedy provisions in regional trade agreements, they suggest, is the political economy of protectionism to the effect that trade remedies assist governments in administering protection in a manner which appears impartial, automatic and rule-based.[7]

On the other hand, it has been argued that the legality of trade remedy measures in regional trade agreements is doubtful in light of Article XXIV of the World Trade Organization's (WTO) General Agreement on Tariffs and Trade (GATT). [8]Proponents of this view suggest that the omission of Articles VI, XVI and XIX, the Articles that provide for the trade remedies from the exceptions to Article XXIV (8) (b) shows that the drafters of the GATT considered trade remedies to be among the *'duties and other restrictive regulations of commerce'* that a free trade area was intended to eliminate.[9] To them, trade remedy provisions in regional trade agreements should be regarded as trade restrictive in the GATT jurisprudence and should be eliminated.

The tension exhibited between the advocates and adversaries of trade remedies provisions in regional trade agreements is discernible in the regime established under COMESA. Whereas there is an elaborate trade remedies framework, there is an attempt to restrict and discipline its application through regulations. The treaty contains provisions that allow legal and natural persons access to the COMESA court of justice to challenge the legality of acts, regulations, directives or decisions

5 The term 'legality' is used in a loose sense in this context to denote compliance with article XXIV of the General Agreement on Tariffs and Trade (GATT) 1994 and the enabling clause.

6 P Kohler 'The role of Contingent Protection in WTO Agreements' (2001)

< http://www.karyiuwong.com/confer/germ02/papers/> accessed 5 June 2022.

7 R Teh, TJ Prussa and M Budetta 'Trade Remedy Provisions in Regional Trade Agreements' in A Estevadeordal, K Suominen and R Teh (eds) Regional Rules in the Global Trading System (CUP 2011) 166

8 GATT 1994 Art. XXIV allows for the formation of such regional trade agreements notwithstanding other provisions of the GATT, namely Article I which contains the Most Favoured Nation (MFN) principle.

9 CE Emerson 'Trade Remedy Provisions in Regional Trade Agreements' (Asia Pacific Forum News July 2008); R McGee and Y Yoon, 'Anti-Dumping Rules Should be Consigned to the History Books' Financial Times (London England 3 July 2009); n8 art VI of the GATT deals with Anti-dumping and Countervailing Duties, article XVI with subsidies and article XIX with Emergency Action on Imports of Particular Products.

of the COMESA council or member states[10] on the one hand and on the other hand has provisions that attempt to safeguard any challenge to the fulfilment of obligations of member states. The latter can only be made by either the member states or the secretary general of the common market only.[11]

1.1 Dumping under Comesa Treaty

The right to levy anti-dumping duties by COMESA member states is founded under Article 51 of the COMESA treaty. This article defines dumping as the introduction of products into the commerce of another member state at less than its normal value.[12] Dumping is considered to be:

> [...] in general, a situation of international price discrimination, where the price of a product when sold in the importing country is less than the price of that product in the market of the exporting country. Thus, in the simplest of cases, one identifies dumping simply by comparing prices in two markets. However, the situation is rarely, if ever, that simple, and in most cases, it is necessary to undertake a series of complex analytical steps in order to determine the appropriate price in the market of the exporting country (known as the "normal value") and the appropriate price in the market of the importing country (known as the "export price") so as to be able to undertake an appropriate comparison.

Thus, a member state may not impose an anti-dumping measure unless it determines, pursuant to an investigation conducted in conformity with the provisions of the COMESA trade remedy regulations, that there are dumped imports, material injury to a domestic industry, and a causal link between the dumped imports and the injury.[13] In essence therefore, dumping is not prohibited ex facie, but only in instances where it causes or threatens to cause material injury to an established domestic industry of another member state or it materially retards the development of such an industry.[14]

The COMESA treaty follows the WTO model by providing for three approaches to determining the normal value of a product for purposes of comparison with the export price, with the most preferred one being the price of a like product in the ordinary course of trade[15] when destined for consumption in the exporting country.[16] However, there is a recognition in article 51(2) of the COMESA treaty that there could be cases of products whose prices may not be available in the domestic market of the exporting member in the ordinary course of trade. The WTO panel

10 n 3 art 26.

11 n 3 arts 24 & 25.

12 DE Weinstein 'Competition and Unilateral Dumping' (1992) 32 JIE 379–388, 379.

13 In 2001, at the 12th meeting of the COMESA Council of Ministers, Regulations on Trade Remedy Measures were adopted to ensure there was uniformity among Members of COMESA in the conduct of trade remedy investigations. See also article 51 (4) of the COMESA treaty.

14 n 3 art 51 (1)

15 DS184 *United States — Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan (US – Hot-Rolled Steel case)* - the Appellate Body confirmed that the Anti-Dumping Agreement does not define the term 'in the ordinary course of trade'. In this dispute, Japan, the complainant, had agreed with the definition of this term given by the United States authorities, namely: "[g]enerally, sales are in the ordinary course of trade if made under conditions and practices that, for a reasonable period of time prior to the date of sale of the subject merchandise, have been normal for sales of the foreign like product."

16 n 3 art 51 (2) (a).

in the *Korea Paper Case*[17] identified a number of circumstances in which there may be no sales of the like product in the ordinary course of trade in the domestic market of the exporting country, justifying the resort to an alternative method of calculating the normal value. First, there may be no domestic sales at all. This may happen if a company only makes and produces goods for export. Second, there may be domestic sales that are not in the ordinary course of trade. This may occur, for example, if the goods were sold at a loss or where there are no verifiable sales data. In such cases, the investigating member state may resort to either the highest comparable price for the like product for export to any third country in the ordinary course of trade or the construction of the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.[18]

In terms of the application of an anti-dumping measure, the approach taken by COMESA is the WTO's minimalist approach where member states are encouraged to apply an anti-dumping duty not greater in amount than the margin of dumping in respect of such a product.[19] The treaty further allows levying of antidumping duties against products from third party non-member states into the commerce of a member state, and provides that all investigation proceedings should be guided by the COMESA regulations on trade remedies.[20]

1.2 Subsidies under COMESA Treaty

At the centre of the debate on subsidies regulation is the attempt at drawing a line between 'good' and 'bad' subsidies.[21] This challenge came to bear in the earliest days of attempts at subsidies regulation as was evidenced in the discussions of the issue of subsidies during the League of Nations economic conferences in the 1920s and 1930s.[22] At a 1933 conference, the German delegation explained the distinction as being between 'natural' and 'artificial and unnatural' measures:

> The Sub-Commission must, therefore, exclude from its deliberations all measures which without directly affecting the interests of other countries, sub-serve the natural reconstruction of the national economic system, and should only consider measures of support which give to production an artificial and unnatural advantage at the expense of foreign competitors.[23]

The COMESA approach to subsidies again mirrors that of the WTO by defining subsidies to include any financial or other commercial benefit that has accrued or will accrue, directly or indirectly, to persons engaged in the production, manufacture, growth, processing, purchase, distribution, transportation, sale, export, or import of goods, as a result of any scheme, program, practice, or thing done, provided, or implemented by a foreign government.[24] Any subsidy which distorts or

17 DS312: *Korea-antidumping duties on imports of certain paper from Indonesia*

18 n3 art 51(2) (b).e.

19 The margin of dumping is the difference in price between the normal value and the export price. See COMESA treaty art. 51(3) as compared to WTO anti-dumping agreement art.8(3).

20 n3 art 51(5), (6)..

21 S Lester, 'The Problem of Subsidies as a Means of Protectionism: Lesson from the WTO EC-Aircraft Case" 12 ISSN 1444–1806 *MJIL* 97.

22 n21 p21

23 League of Nations, 'Monetary and Economic Conference: Reports Approved by the Conference on July 27th 1933, and Resolutions Adopted by the Bureau and the Executive Committee'(17 July 1933) 34

24 COMESA Trade Remedy Regulations reg 5. See also the WTO definition in article 1.1 of the WTO Agreement on Subsidies and Countervailing Measures

threatens to distort competition among member states is to be held as being incompatible with the COMESA treaty.[25] A member state is therefore allowed to apply countervailing duties for purposes of offsetting the effects of subsidization.[26]

Like in the case of anti-dumping duties, countervailing duties should be applied only equal to or less than the amount of subsidy determined to have been granted directly or indirectly.[27] A distinct feature in the COMESA regime for both anti-dumping and subsidies is the attempt to regulate products and practices from third countries non-members of COMESA by allowing application of both anti-dumping duties and countervailing duties against products from third party countries.[28]

1.3 Safeguards under the COMESA Treaty

The legal regime for application of safeguard measures under the WTO is a fairly stringent one, possibly so as to ensure that WTO members do not abuse this escape clause mechanism. The GATT Article XIX permits a WTO member to use a safeguard only in situations where:

> As a result of unforeseen developments and the effect of the obligations incurred by a contracting party under this Agreement, [a] product [..]. is being imported into the territory of a contracting party in such increased quantities and under such conditions as to threaten serious injury to domestic producers in that territory of like or directly competitive products.

At its inception, the concept of a safeguard was designed to provide countries with a temporary reprieve from the trade concessions that they had made at the multilateral level. This however changed with the proliferation of preferential trade agreements whereby safeguards have also found their way into bilateral and plurilateral preferential trade agreements. Today, a WTO member that is a party to a preferential trade agreement like COMESA remains subject to the safeguard obligations stipulated at the multilateral level in GATT Article XIX and the Agreement on Safeguards.[29]

The COMESA regime on Safeguards is anchored on Article 61 of the COMESA treaty as read with the COMESA regulations on trade remedies. Article 61 is couched more as a notification obligation on the member states requiring a member state with serious disturbances occurring in its economy to inform other members before taking the necessary safeguard measure.[30] Regulation 7 (1) of the COMESA regulations on trade remedies on the other hand adopts the WTO definition by providing that:

> A Member may apply a safeguard Measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production,

25 n3 art 52(1).

26 ibid art 52 (2).

27 ibid art 23.

28 ibid arts 51(5) & 52 (3). -4).

29 CP Bown and M Wu, 'Safeguards and the Perils of Preferential Trade Agreements: Dominican Republic–Safeguard Measures' 13 (2014) 2 WTR 179 (183)

30 n 3 art 61(1).

> and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.[31]

Instructive in this definition is the use of the phrase "serious disturbances" in article 61 of the COMESA treaty and "such increased quantities" in the regulations. The question these phrases raise is whether one is a definition of the other, or whether "serious disturbances" is a higher standard than that of "such increased quantities" in the regulations.[32] The phrase "such increased quantities" has however received considerable attention and developed some jurisprudence under the WTO regime.[33] This muddle in characterization becomes even more potent when considering the issues of jurisdiction of the court in trade remedies under article 26 of the COMESA treaty discussed below.

2. The Comesa Court of Justice

Established as one of the eight organs of COMESA, the COMESA Court of Justice is the pivotal institution that deals with dispute resolution under the COMESA treaty.[34] It is bestowed with the powers to ensure adherence to law in the interpretation and application of the treaty. The Court was established in 1998 at the third summit of the COMESA authority in Kinshasa, Democratic Republic of Congo.[35] The Court has jurisdiction to adjudicate upon all matters which may be referred to it pursuant to the COMESA treaty.[36]

The Court was bifurcated into a first instance and appellate division at the seventh summit of the COMESA Authority held between 23–24 May 2002 in Addis Ababa.[37] The first instance division functions as a trial court with seven judges whereas the appellate division, on which five judges sit, serves as an appellate court over decisions of the first instance division.[38]

2.1 Jurisdiction and Choice of Forum in Trade Remedy Cases

Although clothed with a wide jurisdiction to handle and adjudicate upon all cases related to interpretation and application of the treaty, the court has not handled many trade related cases.[39] A major proportion of the cases handled by the court relate to employment disputes between employees and various organs of COMESA.[40] The court has however in recent times been called

31 COMESA regulations reg. 7(1) borrows word for word the definition in Article 2(1) of the WTO Safeguard Agreement.

32 Notably, at the time of writing this paper no case had been decided before the COMESA court of justice that deals with this definition paradox and that would offer guidance on the issue.

33 US – *Line Pipe Case*

34 n 3 art 7.

35 COMESA 'Reports and Decisions: Seventeenth Meeting of the COMESA Council of Ministers Report' 4-5 June 2004, Nile International Conference Centre, Kampala, Uganda.

36 n 3 art 23.

37 COMESA 'Report and Decisions: Fifteenth Meeting of the COMESA Council of Ministers' 13-15 March 2003, Friendship Hall, Khartoum, Sudan.

38 n 3 art 7.

39 The cases handled by the court are available at https://comesacourt.org/court-decisions/

40 JT Gathii 'The COMESA court of justice' in R Howse, H Ruiz-Fabri, G Ulfstein and M Zang (eds) *The Legitimacy of International Trade Courts and Tribunals* (CUP 2018) 313 - criticizes this court for converting itself into an administrative tribunal through its handling of employment matters only.

upon to adjudicate on cases of trade remedies and to interpret its jurisdiction in light of article 26 of the COMESA treaty in trade remedies cases.[41]

The design of the court's jurisdiction in trade remedy disputes under the treaty as read with the COMESA trade remedy regulations seems to create two parallel and somewhat conflicting jurisdictions. To the extent that article 23 of the COMESA treaty clothes the court with the jurisdiction to adjudicate upon all matters referred to it pursuant to the treaty, as read with the provisions of article 19 of the treaty that mandates the court to ensure adherence to the law in the interpretation and application of the treaty, that the court has jurisdiction to handle trade remedies disputes cannot be gainsaid.[42] Since the trade remedy provisions form part of the treaty and create obligations on the member states, one surmises that the COMESA court of justice has original jurisdiction to hear and determine any trade remedy dispute filed before it by any person, as long as that person has locus under article 26 of the treaty so to file.

The COMESA regulations on trade remedies however seem to create a parallel mechanism for resolution of trade remedy disputes. Regulation 41 provides to this end thus, 'these Regulations shall apply to disputes concerning interpretation, application or violation of any provision of the regulations on safeguards, anti-dumping and subsidies and countervailing duties among COMESA member States.'

The regulations create a dispute resolution mechanism that reflects that of the WTO by emphasising on the use of consultations and good offices between member states in cases of disputes on trade remedies.[43] Should the consultations and good offices fail, a trade remedies dispute under this mechanism is referred to a dispute panel of trade experts established by the secretary general of COMESA within 21 days from the date a party requests for such establishment.[44] Pursuant to COMESA regulation 43.1, the panel is to be composed of three trade experts who shall be neutral and with sufficient background and experience in trade remedies.[45] What amounts to 'sufficient background and experience in trade remedies' is not defined, leaving it to the whims of the council given the dearth of trade remedies practice in the whole of Africa. The decision of the panel is appealable to the court of justice for arbitration under article 28 of the COMESA treaty.[46] The court has developed and adopted the COMESA court of justice arbitration rules (2019) that would guide the court in such proceedings.[47]

The architecture and design of the dispute settlement mechanism created under the regulations generates curiosity to the extent that it appears, on the face of it, to take away the original jurisdiction of the court to deal with trade remedy disputes under article 19 as read with article 23

41 *Agiliss Ltd v The Government of Mauritius & 4 others,* Reference No.1 of 2019 (unreported).

42 ibid

43 n 31 reg 42 (1-3), on trade remedies and compare the same with the provisions of WTO antidumping agreement art15

44 n 24 reg 42 (3-4)

45 The COMESA secretariat is required to maintain a roster of experts in trade remedies. See Reg. 43.2, 43.3 and 43.4 of the COMESA regulations on trade remedies.

46 n 3 art 28 gives jurisdiction to the court to hear and determine any matter arising from a dispute between member states if the dispute is submitted to it under a special agreement between the member states concerned.

47 Adopted November 2018 (COMESA arbitration rules); See COMESA, 'Arbitration Rules of the COMESA Court of Justice (2018)' <https://comesacourt.org/wp-content/uploads/2019/11/COMESA-COURT-ARBITRATION-RULES-2018.pdf> accessed 5 July 2022.

of the COMESA treaty. It is instructive to note that under rule 7(1) of the COMESA arbitration rules (2019), the assigning authority appoints an arbitral tribunal from among the sitting Judges of the Court.[48] The bifurcation of the court into a first instance and appellate divisions is therefore lost since by this rule a tribunal can be composed of judges from both the first instance and appellate division alike.

Arguably therefore the jurisdiction of the court sitting on a trade remedies dispute under article 28 of the COMESA treaty is appellate, not original. The question thus is whether the dispute settlement mechanism under the COMESA regulations on trade remedies is supplementary to the original jurisdiction of the court or whether it ousts the original jurisdiction of the court, in which case its legality would then be called into question.[49] In other words, is a party to a trade remedies dispute required to first process such a dispute under the mechanism established under the regulations before invoking the jurisdiction of the court under article 28 of the treaty?[50]

A similar issue arose before the East African Court of Justice (EACJ) where the legality of the dispute settlement mechanism created under the East African Customs Union Protocol for trade remedies was challenged on the grounds that it attempted to take away the original jurisdiction of the court.[51] The EACJ in determining this question held as follows:

> Article 24(1) of the Customs Union Protocol establishes a mechanism for dispute resolution. The mechanism consists of a possibility for an amicable settlement through good offices, conciliation and mediation to be arranged by the parties themselves. Pursuant to Regulation 6(7) of Annex IX of the Customs Union Protocol, decisions emanating from these mechanisms are final. It is thus clear that when parties submit themselves to a particular dispute resolution mechanism, they also undertake that the decision emanating therefrom will be final except in a case where any party wishes to challenge the decision of the Committee on grounds of fraud, lack of jurisdiction and other illegality. This mechanism, in our view, represents a pragmatic approach to Customs Union dispute resolution, is an alternative to the long and often tedious court litigation approach. Much as we appreciate and support it, however, we do not think it takes away, directly or by implication, the interpretative jurisdiction of this Court.[52]

If the supplementary approach adopted by the EACJ is applied to the mechanism under the COMESA treaty and regulations thereto, then a party has a choice to make at the point of filing a dispute, whether to approach the court under articles 19 as read with article 23 of the COMESA treaty or invoke the mechanism under the regulations. In other words, would a court faced with a trade remedy case under articles 19 and 23 of the treaty dismiss such a case for failure to comply with the procedure established under the regulations? Conversely, can a party dissatisfied with the determination of the panel of experts invoke the original jurisdiction of the court pursuant to

48 The assigning authority is defined under the arbitration rules as the judge president, and in her absence the presiding judge.

49 It is noteworthy that a similar situation arises in the World Trade Organisation (WTO) dispute resolution mechanism see WTO-DSU, 'Understanding on Rules and Procedures Governing the Settlement of Disputes' https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm accessed 9 June 2022.

50 This contention has not been tested in any case before the court at the time of writing this article and as such lacks the interpretative jurisprudence of the court.

51 *The East African Law Society v The Secretary General of the East African Community*(2011)Reference No. 1 of 2011.

52 n 3 art 28.

articles 19 and 23 of the treaty instead of article 28?

Clearly, there are two parallel procedures created by the treaty and the regulations. One that acknowledges the original jurisdiction of the court and the other that only bestows upon the court an appellate jurisdiction. In the jurisprudence of the EACJ above, one jurisdiction does not take away the other, but is only supplemental. But unlike the EACJ situation, the COMESA architecture is such that once a party takes the route of the panel of experts, the original jurisdiction of the court seems to be obliterated. The other obvious disadvantage of the supplementary procedure lies in the disability to develop uniform jurisprudence on trade remedy disputes by the courts. The centrality of uniform jurisprudence to an international tribunal was aptly captured by *Katharina Diel-Gligor* as follows:

> The principle that like cases should receive like treatment is one of the most fundamental principles of any liberal theory of justice – indeed, some philosophers are of the view that it is the most fundamental principle. And, without jurisprudence, it is completely impossible for that principle to be respected. Without jurisprudence, losing parties do not know and cannot find out if other parties with like cases have received the same treatment. Moreover, the tribunal members themselves cannot find out if their planned decision in a particular case is in conformance with that principle, since they too cannot access the like cases which their colleagues have previously decided.[53]

It would behove the court exercising its interpretative jurisdiction to settle on an approach that enhances clarity and uniformity of jurisprudence.

2.2 *Locus standi* in Trade Remedy Disputes

Another critical feature of the COMESA court is the issue of *locus standi* when exercising jurisdiction over trade remedy disputes, and particularly addressing the question of access to the court by private individuals in such cases.[54] Article 26 of the COMESA treaty allows references to be filed before the court by legal and natural persons to challenge the legality of any act, regulation, directive or decision of the council or a member state.[55] This should be juxtaposed with the locus of member states and the secretary general who are allowed to file challenges on fulfilment of obligations under the treaty by members.[56] This has been the interpretation adopted by the COMESA Court in the case of *Polytol Paints & Adhesives Manufacturers Co. Ltd vs The Republic of Mauritius* where the court stated as follows:

> Thus, a legal or natural person is only permitted to bring to Court matters relating to conduct or measures that are unlawful or an infringement of the Treaty but not for the non- fulfilment of a Treaty obligation by a Member State. The Responsibility of bringing a matter relating to non- fulfilment of the Treaty is reserved for the Member States and the Secretary General.[57]

53 KD Gligor 'Towards Consistency in International Investment Jurisprudence 7 NIILS 21.

54 H Onoria, 'Locus Standi of Individuals and Non-state Entities before Regional Economic Integration Judicial Bodies in Africa' 18 (2010)2 AJICL 143 indicates that the role of individuals and non-State entities in integration has been greatly enhanced, including the grant of locus standi before the Courts and Tribunals.

55 The challenge on legality under article 26 is further limited to the grounds of unlawfulness or infringement of the provisions of the treaty only.

56 n3 arts 24 and 25.

57 Polytol Paints & Adhesives Manufacturers C. Ltd v Republic of Mauritius CCJ (2012) Unreported.

The court in this case further emphasised the importance of giving residents of COMESA member states the right, and therefore locus to challenge acts of member states on grounds of unlawfulness or infringement of the treaty. The court stated at page 17 of the judgement thus:

> The Content of this rule shows the extent the signatories of the COMESA Treaty have committed themselves to give some space in the COMESA Territory not only for the Member States but also for individuals. By giving residents of any member State the right to challenge the acts thereof on grounds of unlawfulness or infringement of the Treaty, the Member States have in some areas limited their sovereignty. The proper functioning of the Common Market therefore, not only concerns the Member States but also that of the residents. The Treaty is more than an agreement which merely creates obligations between the Member States. It also gives enforceable rights to citizens residing in the Member States.

Evidently, the grounds under which a legal and natural person can present a case before the court are more limited compared to that of member states and the secretary general.[58] This boundary however becomes more difficult to demarcate when it comes to trade remedy cases. To what extent would a challenge on application of a trade remedy measure become a challenge on infringement of the treaty and not non-fulfilment of obligations by a member state? With the interpretation by the COMESA court in *Polytol Case* above, it is not at once clear whether and to what extent the court can entertain a reference filed by a legal or natural person pursuant to article 26 of the COMESA treaty when it challenges a decision to impose a trade remedy measure by a member state. Invariably the court cannot dismiss such a case in *limine* if the applicant fulfils the test of exhaustion of local remedies and found that the case was within the confines of article 26 COMESA.[59] Trade remedies are often imposed as government decisions and as such their legality can be questioned under article 26 of the COMESA treaty.[60]

Two aspects come to bear in trying to address this concern. Firstly, given the nature of trade remedies investigations and the threshold of evidence required, it is doubtful that a legal or natural person would successfully challenge a trade remedy measure imposed by their own country by meeting this threshold.[61] This possibility is even more unlikely given that such an applicant stands almost in the same shoes as an applicant before an investigation authority and may not have access to evidence that would meet the threshold set by the law. Secondly, to what extent should the court interpret its jurisdiction to encompass only the question of legality under article 26 and at what point does this jurisdiction begin to touch on the fulfilment of obligations by a member state?

It is hereby suggested that the jurisprudence of the WTO should be adopted for guidance in adjudicating trade remedies disputes under COMESA in light of the provisions of articles 24, 25 and 26 of the treaty. The WTO has provided a model approach in the case of Safeguards that would be very useful in the COMESA situation. The appellate body in *US – Line Pipe case* considered the existence of a natural tension between, on the one hand, defining the appropriate and legitimate scope of the right to apply safeguard measures and, on the other hand, ensuring that safeguard measures are not applied against 'fair trade' beyond what is necessary to provide extraordinary and temporary relief and held as follows:

58 n3 art 26 reduces this jurisdiction. See also *Government of the Republic of Malawi v Malawi Mobile Limited* (2016)

59 n 57

60 n 3 art 61 allows a member state to impose a safeguard measure in the event of serious disturbances occurring in the economy of a member state following the uptake of concessions made under the treaty.

61 n 24 regs 18.4 &18.5

> There are two basic inquiries that are conducted in interpreting the Agreement on Safeguards. These two basic inquiries are: first, is there a right to apply a safeguard measure? And, second, if so, has that right been exercised, through the application of such a measure, within the limits set out in the treaty? These two inquiries are separate and distinct. They must not be confused by the treaty interpreter. One necessarily precedes and leads to the other… Thus, the right to apply a safeguard measure—even where it has been found to exist in a particular case and thus can be exercised—is not unlimited. Even when a Member has fulfilled the treaty requirements that establish the right to apply a safeguard measure in a particular case, it must do so only to the extent necessary.[62]

The above interpretation has been adopted by the WTO panels and appellate body in several other cases and has formed the basis for analysing the rights and obligations of member states in safeguard cases.[63] From the foregoing jurisprudence, it is hereby suggested that an examination on the rights and obligations arising from a trade remedy provision by the COMESA Court in order to distinguish the jurisdictions under articles 24 and 25 of the COMESA treaty on the one hand and article 26 of the COMESA treaty on the other must necessarily involves a two tiered process: firstly, an examination if there is a right to apply the trade remedy and if so, whether the application of the trade remedy infringes on any other provision of the treaty. Secondly, an examination as to the extent of the investigations carried out by the investigating authority and extent of the application of the resultant measure. The second part of this examination necessarily entails whether the investigation process, the evidence produced and the measure ultimately applied are in conformity with the set threshold and the law under the COMESA treaty as read with the COMESA regulations on trade remedies.

It is further suggested that with this approach, the first tier of examination will fit within the definition of legality under article 26 of the COMESA treaty whereas the second tier goes into the obligations of the member states under the treaty and should be the preserve of the jurisdiction under articles 24 and 25 of the COMESA treaty. Not only does this approach enable the court to overcome the quagmire of drawing a line between questioning the legality of a trade measure and fulfilment of obligations by member states as presented in the COMESA treaty, but it also assists overcome the practical hurdles and difficulties in adjudicating a trade remedy case pitting a citizen against its own government.[64]

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62 DS202 WTO *United Sates-Definitive Safeguard Measure on Imports of Circular Welded Carbon Quality Line Pipes from Korea*

63 DS252 WTO *United Sates-Definitive Safeguard Measure on Imports of Certain Steel Products*': and the appellate body in DS 121 WTO *Argentina-Safeguard Measures on Imports of Footwear*

64 This was the situation in the Agiliss Case where Agiliss Ltd, a company duly incorporated under the laws of Mauritius and engaged in the business, inter alia, of importing and distributing edible oil within Mauritius, being aggrieved by the decision of its government to impose a safeguard measure under article 61 of the COMESA treaty against imports of edible oil from COMESA challenged that measure before the COMESA court of justice. Although the case was dismissed on a preliminary objection on non-exhaustion of the local remedies requirement, it presented a classic scenario of a quagmire where had it proceeded to full hearing, the court would have to define what aspects of the case fell under article 26 COMESA treaty and which ones were the preserve of articles 24 and 25 of the COMESA treaty. At the time of writing this paper, there is an appeal pending before the appellate division of the court against the dismissal.

3. Conclusion and Recommendations

This paper has brought to fore the challenges that the COMESA court of justice would face in dealing with the issues of jurisdiction and *locus standi* in cases challenging application of trade remedy measures. It is hereby recommended that on the issue of parallel jurisdictions created under the treaty and the regulations, there is need to review and possibly amend the COMESA trade remedy regulations so as to retain the original jurisdiction of the court under articles 24, 25 and 26 instead of referring them to an *appellate arbitration* under article 28 of the COMESA treaty. This will help to keep the procedure under the regulations as supplemental to the original jurisdiction of the court and give concerned parties a choice as to whether they want their dispute first adjudicated by experts or directly by the court. A review and possible amendment of regulation 45 of the COMESA trade remedy regulations is therefore proposed.

On the issue of *locus standi* in trade remedy cases, this paper recommends that the court should adopt the WTO two-tiered approach. In so doing, the court should limit cases filed by individuals to the first tier only so as to question whether there is a right to apply a trade remedy measure and whether such an application infringes on a provision of the COMESA treaty. This paper proposes that any case that touches on the second tier of this approach must be a preserve of member states and the secretary general.

As more member states of COMESA adopt the use of trade remedy measures as policy tools to protect their domestic industries against unfair trade practices, more disputes are likely to be filed before the court. Issues of jurisdiction touching on *locus standi* and choice of forum will unavoidably bedevil the court while adjudicating such disputes. As a regional court and without much jurisprudence from the continent in the area of trade remedies, the court will often find itself groping in the dark as a first among equals in terms of setting the jurisprudential path not only for itself but also for others to follow. The court must therefore take up the mantle and be the repository of African jurisprudence on trade remedies as and when called upon to do so. Straightening the bends in interpretation of the treaty such as the one suggested in this paper must be boldly undertaken by the court in this jurisprudential sojourn.

REGULATION OF GENETICALLY MODIFIED ORGANISMS IN KENYA

Fridah Lotuiya*

Abstract

Genetically modified crops have been approved for open cultivation in Kenyan farms. KALRO has been given a go-ahead by Biosafety Authority following the lifting of the ban on GMOs by the government. However, the consumption or otherwise of GMOs has been marred by speculations by the members of the public on whether it is safe to consume or not, despite the fact that the production and consumption are growing worldwide due to the increasing need for food for humans and feeds for animals. Owing to the social contract, the government has a responsibility of shielding its people from the effects of anything that can harm them, especially one that can be taken advantage of by entrepreneurs and produced in mass. Accordingly, there is an international legal framework and a corresponding national legal framework for the regulation of GMOs in Kenya. In this paper, the author conducted desktop research on the law that governs GMOs in Kenya, both nationally and internationally. The author found out that there is a rich legal framework on the regulation of GMOs in Kenya, which is drawn mostly from the Cartagena Protocol. However, the courts have not developed much jurisprudence in decided cases, probably owing to the over 10-year ban on GMOs in Kenya.

Introduction

Genetic modification of organisms is not a novel phenomenon. It is traced almost to the existence of mankind, when mankind tries to improve the quality and the quality of their production, both animal and plant products.[1] Genetic modifications were mainly done on animals, and this was done using selective breeding of the parent stock. Males with desirable characteristics were allowed to breed on, while males with less desirable characteristics like small body build, were castrated hence putting a halt to their genes. Indigenous communities were and are still very selective on the seeds to keep for propagation in the subsequent planting seasons. This process was considered safe and acceptable and even encouraged. However, the current genetically modified organisms are made in the labs through the altering of the existing DNA of the organism, by the introduction of a foreign genetic material, and this is hoped to bring about a desired characteristic in the resulting organism.[2] The introduction of the foreign genetic material has brought a lot of controversies owing to the unknown effects of such an artificial alteration.[3] The controversy has been deepened by the false reports and rumors on the negative effects of genetic organisms.[4]

The Government of Kenya on 8th November 2012 through a Cabinet decision instituted a ban on the importation of Genetically Modified food into the country. The then Cabinet Minister

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1 New World Encyclopedia, 'History of Agriculture' <http://www.newworldencyclopedia.org/entry/History_of_agriculture> accessed 22 October 2022.

2 S Kolehmainen, 'Precaution Before Profits: An Overview of Issues in Genetically Engineered Food and Crops' 20(2001) *ENVTL* 267.

3 SH Yoshida, 'The Safety of Genetically Modified Soybeans: Evidence and Regulation' 5(2000) *FDLJ* 193, 205.

4 M Vilella-Vila and J Costa-Font 'Press Media Reporting Effects on Risk Perceptions and Attitudes Towards Genetically Modified (GM) Food' 35(2008) 5 *JSE* 2095.

for Health pushed for the ban after a journal report that was done by the French Scientist Gilles Eric Seralini[5] claimed that Genetically Modified Organisms (GMOs) were a threat to health after a mouse that was used to test the Herbicide tolerant (Roundup ready) maize was found to have developed cancer.[6] The journal was however later retracted by the publisher because the research was termed as inconclusive on the matter. This followed the findings of three studies GMO Risk Assessment and Communication of Evidence (GRACE)[7] and GMP Two Year Safety Testing (G-TwYST)[8] funded by the European Union and GMO90+ ((Genetic Modified Organisms 90-day rodent trial extended to 180-day)[9] was funded by France which led to the conclusion that there was no associated toxicity on the genetically modified maize variety.[10]

However, even after the retraction of the journal that was the basis of the cabinet ban on GMOs, the ban continued to be in place for a further eight years until the ban was lifted by the Kenyan Cabinet on 3rd of October 2022. The cabinet Memo that lifted the ban on the white GMO maize varieties was done after the cabinet of Kenya received a report on a taskforce that was formed to review the same. Amongst the recommendations of the taskforce, was that the GMO maize variety is drought resistant and high yielding hence very suitable for cultivation in Kenya.

The history of GMOs regulation in Kenya can be traced to 2009 when the Biodiversity Act was enacted into law by the parliament and the subsequent establishment of the National Biodiversity Authority in 2010.[11] National Biodiversity Authority is an institution that is formed pursuant to section 5 of the Biodiversity Act. Before the Law was passed, there was an online petition by 53 Civil Society Organizations in Kenya including the GAIA Foundation. The Civil Society Organizations were opposed to the Biosafety legislation because they believed that the production and use of the genetically modified plants and animals would negatively affect indigenous farming. They also feared that Kenya's small farmers would be grappled with the patents and licensing fees making farming unsustainable for many.[12]

Regionally, the issue of GMO in Africa was resisted by the African Union in 2006 when it adopted a resolution against the same. However, the union has since softened its stand on the GMOs in the hope that it will resolve food insecurity in Africa and is currently drafting guidelines to be followed by the member states when dealing with the GMOs. Amongst the resolutions of the AU joint Conference of Ministers of Agriculture, Rural Development, Fisheries and Aquaculture held in Addis Ababa in May 2014, was resolution 4(c) that sought Member States to undertake a study to

5 Eric Seralini is a Professor of Molecular Biology at the University of Caen.

6 GE Séralini, D Cellier D and JS de Vendomois 'New Analysis of a Rat Feeding Study with a Genetically Modified Maize Reveals Signs of Hepatorenal Toxicity' 52 (2017) 4 *PMID*.

7 — 'GMO Risk Assessment and Communication of Evidence'<https://cordis.europa.eu/project/id/311957> accessed 7 October2022.

8 — 'Final Report Summary - G-TWYST (GMP Two Year Safety Testing)' at <https://cordis.europa.eu/project/id/632165/reporting> accessed on October, 7 2022.

9 X Coumoul et al 'The GMO90+ Project: Absence of Evidence for Biologically Meaningful Effects of Genetically Modified Maize-based Diets on Wistar Rats After 6-Months Feeding Comparative Trial, 168(2019) 2 Toxicological Sciences 315 <https://academic.oup.com/toxsci/article/168/2/315/5236972> accessed 7 October2022.

10 DB Resnik 'Retracting InconclusiveResearch: Lessons from the Séralini GM Maize Feeding Study' 28(2015) 4 *JAEE* 621.

11 Kenya was the fourth African country to develop a legal framework for Biosafety regulations after Burkina Faso, South Africa and Egypt.

12 D Njagi and C Scott 'Kenya Prepares to Approve Biosafety Legislation' (2008)<<https://www.scidev.net/global/news/kenya-prepares-to-approve-biosafety-legislation/ > accessed 7 October 2022.

explore the possibility of developing an African position on GMOs with a view to taking advantage of the opportunities that this may present.[13]

1.2 Legal Framework on Genetically Modified Organisms in Kenya

Article 43 of the Kenyan constitution, on economic and social rights, provides that every person has a right to be free from hunger, and to have adequate food of acceptable quality.[14] Article 46 on Consumer rights provides among other things that consumers have a right to access goods and services of reasonable quality, to the information necessary for them to gain full benefit from goods and services and to the protection of their health, safety, and economic interests.[15] Kenya Vision 2030, which was a government flagship initiative proposes that the government make use of the advancement in Science, Technology and Innovation to raise productivity and efficiency for accelerated economic growth. The vision 2030 does not directly mention the propagation and consumption of GMOs.[16]

1.2.1 International Legal Instruments

Internationally, the issue of GMO has equally received mixed reactions. However, there is a clear legal framework that guides the member states that subscribe to the conventions.

Convention on Biological Diversity (CBD)

The Convention on Biological Diversity (CBD) is an international treaty that entered into force in 1993.[17] The CBD has its secretariat in Montreal, Canada, that helps governments in the implementation of the treaty and its protocols. The CBD has three main objectives namely;

> The objectives of this Convention, to be pursued in accordance with its relevant provisions, are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding.[18]

The CBD literally aims to protect human health and life, as well as the environment from the effects of modern biotechnological inventions, while also realizing that these inventions can help revolutionize agriculture and healthcare leading to a better fight against disease and hunger. The CBD vests obligations on member states who are party to the treaty. On Genetically Modified Organisms, the CBD requires the member states to establish or maintain means to regulate, manage or control the risks associated with the use and release of living-modified organisms

13 AU 'Resolutions of the AU Joint Conference of Ministers of Agriculture, Rural Development, Fisheries and Aquaculture' <https://au.int/sites/default/files/documents/31007-doc-resolutions-joint_conference_of_ministers_designed_final.pdf> accessed 7 October2022.

14 Constitution of Kenya, 2010

15 ibid.

16 Republic of Kenya 'Kenya Vision 2030' <https://nairobi.aics.gov.it/wp-content/uploads/2019/01/Kenya-Vision-2030.pdf> accessed 7 October 2022.

17 Kenya ratified the CBD on 26 July 1994

18 CBD art 1 < https://www.cbd.int/convention/articles/?a=cbd-01> accessed 20 October 2022.

resulting from biotechnology which are likely to have adverse environmental impacts that could affect the conservation and sustainable use of biological diversity, taking also into account the risks to human health.[19]

The CBD also requires that the contracting parties who provide the genetic organisms for development by other contracting parties, be given priority to access such results and benefits arising from the biotechnological inventions. This is, however, to be agreed upon on a mutual basis by the concerned contracting parties. This means that if one country, whether developed or otherwise, provides the organisms for modification, that country should have priority of access to the benefits obtained from such modification.[20] Further, the convention requires that the contracting parties have a framework, legal, institutional or policy-wise that details appropriate procedures, including, in particular, advance informed agreement, in the field of the safe transfer, handling and use of any living modified organism resulting from biotechnology that may have adverse effect on the conservation and sustainable use of biological diversity.[21] It also requires the contracting parties to share information about the use and safety regulations required by that Contracting Party in handling such organisms, as well as any available information on the potential adverse impact of the specific organisms concerned to the Contracting Party into which those organisms are to be introduced.[22]

These objectives are further operationalized through two protocols, the Nagoya Protocol on access to Genetic Resources and the Cartagena Protocol on Biological Diversity. The Nagoya protocol deals with access and benefit sharing between the community and the users of the biological diversity within the community. In the development of both the Protocols, the member states agreed that there is a need to assist and cooperate with Least Developing Countries (LCDs), Small Island Developing States (SIDS), and other countries that may be having transitional economies.[23] The focus of this article is on the Cartagena Protocol on Biological Diversity.

Cartagena Protocol on Biological Diversity

Cartagena Protocol on Biological Diversity was adopted in the year 2000 as a complementary to the CBD[24] and it came into force in 2003. The protocol binds the parties to the protocol with no reservations. When parties are dealing with non-parties concerning genetically modified organisms, the protocol allows them to come up bilateral agreements on how to deal with the genetically modified organisms, but encourages them as much as possible to follow the requirements of the protocol.[25] The four critical components of the CPBD are the risk management of the genetically modified organisms, the issue of the advanced informed consent of member states that are party to the treaties, the precautionary approach, and the establishment of a BioSafety clearing house. The protocol focuses on modified living organisms and its scope applies to "the transboundary movement, transit, handling and use of all living modified organisms that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to

19 ibid art 8(g).

20 n18 art 19.

21 ibid art 19(3).

22 ibid art 19(4).

23 ibid art 20(5); Nagoya Protocol arts 22 ,23, 25; Cartagena Protocol arts 22, 28.

24 n18.

25 n 23 (Cartagena Protocol) art 24.

human health."[26] However, this scope is limited when the parties come up with regulations on transit and risk assessment to be followed in that particular territory. It also does not apply to pharmaceutical-modified living organisms.[27]

The protocol requires that the country of export notify the country of import on the issues specified regarding the modified living organism.[28] The notifications of the modified living organisms intended for direct use as food or as animal feed has additional requirements, like the approved uses of the organisms, details of the applicant and the body responsible for the decision of domestic uses among others.[29] The export country or the exporter is required to come up with a law that makes it mandatory for an exporter to do so. The information that is exchanged between the parties can be confidential or free for public consumption as the parties may agree between themselves. However, the protocol prevents the contracting parties from treating confidential information regarding the name and address of the notifier, general description of the living modified organism or organisms, a summary of the risk assessment of the effects on the conservation and sustainable use of biological diversity and any methods and plans for emergency response. This is important so as to ensure that the consumers have access to the information they require to make decisions regarding the GMOs.[30] All consumers regardless of their status in the society have a right to access the information that will enable them to make the right decision regarding the consumption or otherwise of GMOs.

There is a special consideration to be taken into account by parties who have indigenous communities within their boundaries.[31] This is because the propagation and use of genetically modified organisms threaten biodiversity on the planet, and further threaten the existence and culture of many indigenous communities around the world.[32]

1.2.1. Biosafety Clearing House (BCH)

Availability and access to information in an emerging concept such as the GMOs is very crucial. It is for this reason that a biosafety clearing house has been established under the protocol.[33] Clearing houses have existed for a very long time especially in the banking industry where cheques and bills were exchanged and compared amongst the member banks and the balance was settled by the owing bank. Biosafety clearing house works on the same concept of information sharing and access by all the members to the clearing house, but with regards to information on genetic organisms.[34] A BCH creates a framework in which parties are able to access and share crucial information about genetic

26 ibid art 4.

27 ibid art5 ;Section of the Biosafety Act of Kenya on the scope of the Act.

28 Contained in Annex 1 of the protocol and includes, the identity of the exporter and the importer, the identity, the origin, and the destination of the modified living organism, quantity to be transported, existing risk assessment report on the same, regulatory status of the modified living organism in the country of origin, suggested method of safe handling, intended use among other requirements. A declaration of the correctness of the description should also be there.

29 n23 (Cartagena Protocol) Annex II of the protocol art 11,

30 n23 (Cartagena Protocol) art 21.

31 ibid art 26.

32 C Bellevue 'GMOs, International Law and Indigenous Peoples' 1(2017) PILR <https://digitalcommons.pace.edu/pilr/vol30/iss1/1> ccessed 22 October 2022.

33 n 23 (Cartagena Protocol) art 20.

34 UNEP 'Introduction to BioSafety Clearing House' <https://bch.cbd.int/help/trainingmaterials/En/03)%20Training%20Modules/MO02En.pdf> accessed 30 October 2022.

organisms. The information that is to be availed through the BCH includes relevant laws and regulations, contacts of member states, decisions and declarations, risk assessments, etc. However, since the information available at the BCH is deemed to be public information, parties should not submit information deemed confidential to the clearing house. The parties are tasked with an obligation of updating the information they submit to the BCH. In Kenya, the National Biosafety Authority[35] is the body tasked with the establishment of a national BCH and the coordination of information with the Biosafety Clearing House in Montreal Canada.

However, the concept of a BCH has received a number of criticisms. The first criticism of BCH is equity in access to the BCH database. Most developing countries are still grappling with the achievement of basic needs and might not have the cost and personnel infrastructure to enable them to access all the material posted in the BCH.[36] The irony in this is that it is the LDCs and SIDs that would need the genetically modified organisms to solve the perennial need for adequate food in their territories. Most LDCs and SIDs are faced with the problem of hunger, disease and poverty.[37] It has previously been suggested that this problem of access can be solved by using paper or CD versions of the available information in the system. However, the comparability and the adequacy of such a framework is still in question owing to the fact that it may not be possible to convert all the information on the system to CDs and paper versions. Some information would get lost in this conversion. The most suitable solution to this challenge would be to create a fund by member states that will assist LDCs and SIDs develop the requisite infrastructure to allow for access. The parties that have access challenges should also be allowed to disallow such use of GMOs in their territories and be allowed access to the requisite information to make a decision. Reliability, transparency and the security of the information in the BCH database has also been subject to question. Some parties believe that what the parties post on their BCH is summaries and it may hamper the reliability of such information to the end user. The information can also be a target of cyber-attacks and other internet crimes such as hacking. Every party should have a sufficient back-up to the information they submit to the BCH so that the same can be replaced as soon as it is tampered with. The parties should also review the information frequently as possible to enhance the reliability of such data.[38]

However, it is accepted that these are teething challenges to emerging areas of law. Overall, the BCH is beneficial to the parties in enabling sharing and access of useful information that is needed to make a decision regarding the genetic organisms in the country. Every country should have a vibrant BCH.

2. Legal Framework in Kenya

This section looks at the prevailing legal framework nationally. This consists of the Biosafety Act, and the regulations that operationalize the Act. This law is heavily borrowed from the Cartagena Protocol, which is the guiding international legislation.

35 Established by the Biosafety Act , 2009 of the Laws of Kenya.

36 R Paarlberg Starved for science: How biotechnology is being kept out of Africa(Cambridge, MA Harvard University)

37 NJ Tonukari and DG Omotor 'Biotechnology and Food Security in Developing Countries' (2010) 5(1) BMBR <http://www.academicjournals.org/BMBR >

38 Biosafety Information Centre, 'A Critique of the Biosafety Clearing House' <https://biosafety-info.net/articles/key-regulatory-issues/information-disclosure/a-critique-of-the-biosafety-clearing-house/> accessed 30 October 2022.

2.1 The Biosafety Act of 2009

The Biosafety Act was enacted in 2009 in Kenya to effect the Cartagena Protocol on the need for parties to the treaty to have a domestic legal framework to effect the handling and use of genetic organisms. The objects of the Act are:

> To facilitate responsible research into, and .minimize the risks that may be posed by, genetically modified organisms; to ensure an adequate level of protection for the safe transfer, handling and use of genetically modified organisms that may have an adverse effect on the health of the people and the environment; and to establish a transparent, science-based and predictable process for reviewing and making decisions on the transfer, handling and use of genetically modified organisms and related activities.[39]

The Act achieves its object by establishing the Biosafety Authority in Kenya[40] (the Authority) whose purpose is to 'exercise general supervision and control over the transfer, handling and use of genetically modified organisms with a view to ensuring- the safety of human and animal health and provision of an adequate level of protection of the environment.[41]'

The authority approves applications with regards to the experimentation and the use of genetically modified organisms. It is the body the oversees the operationalization of the Biosafety Act in Kenya. The Authority invites, analyses and considers six types of applications in the determination of its mandate. The first application is the application for contained use of the genetically modified organisms.[42] Contained use has been defined as the creation of physical barriers to prevent the interaction of the genetically modified organism from interacting with the environment.[43] The second application is the application to introduce a genetically modified organism into the environment.[44] The third application is the application to import genetically modified organisms into the country. The fourth application is the application to transport the genetically modified organisms within the territory, the fifth application is to export the genetically modified organisms outside Kenya, and the final application is the application to introduce them into the market. The authority receives and considers these applications taking into consideration the available legal framework, and the potential effects of such approvals. The Authority has come up with regulations on how each of the above applications is to be done and approved. In dealing with these applications, the authority may treat with confidentiality the information supplied by the applicants only on the application of confidentiality by the applicant, and on approval by the authority that such information can be kept confidential without any detriment to the public. The authority is, however, compelled to keep such information confidential, should the applicant withdraw their application.[45]

39 Biosafety Act 2009 s 4

40 ibid s 5.

41 ibid s 7.

42 n 39

43 Biosafety (Contained Use) Regulations, 2011 s2

44 n 39 s 19

45 ibid s 25

2.2. The Biosafety (Contained Use) Regulations, 2011

This regulation made pursuant to the Biosafety Act, regulates the approval of applications for contained use.[46] The regulations require that every institution that undertakes research with genetic organisms have an institutional Biosafety committee that will act as a liaison between the institution and the authority in matters of regulation.[47] When a research institution wants to undertake contained experiments with genetic organisms, the institution's biosafety committee is tasked with the application for approval with the authority. Only research institutions can apply for the contained use of GMOs. Once the application has been made, the authority will consider the same for completeness, level of containment, and suitability of containment.[48] The authority may require further information before making its decision, or further modification of the containment area or for the research institution to reduce the days of the intended research. Once the authority is satisfied on the application, it will approve the application between 90-150 days from the day the application was made.[49] The justification of the contained use approval, especially for scientific research, is to protect humans and the environment from the unforeseen consequences of such a research.[50] This is to ensure that any adverse effects noted will be contained as contingency measures are applied. The authority, after approval, is to monitor the research through the institutional biosafety committee and if the research is being undertaken according to the approved guidelines. The authority can revoke its approval at any time when it notes that a research institution has revoked a condition of research.

Between August 2010 and May 2022, a total number of 15 applications for contained use were made to the Authority. Of the 15, 9 were made by the Kenya Agricultural Research Institute (KARI), 1 were made by Kenya Agricultural and Livestock Research Organization (KARLO), one each by International Livestock Research Institute (ILRI) and Masinde Muliro University of Science and Technology. All the 15 applications were approved risk assessment. Most of the applications were for cassava, maize and sorghum.[51]

2.3 The Biosafety (Import, Export and Transit) Regulations, 2011

These regulations are intended to ensure safe movement of genetically modified organisms into and out of Kenya while protecting human health and the environment.[52] These regulations are exercised in conjunction with the Biosafety (Contained Use) Regulations, 2011, or the Regulations on Environmental Release, depending on the intended use of the genetically modified organisms. The application for import should indicate the quantity, the use, and the proposed port of entry of the genetic organisms.[53] For export, in addition, the exporting entity should have approval for import

46 The regulations do not cover research on pharmaceuticals, in vitro fertilization, bacterial conjugation, transformation, transduction and similar natural processes; and polyploidy and haploidy induction.

47 n43 s 6.

48 The regulations provide for four levels of containment levels, starting with activities with no or negligible risk of adverse effects to activities with a high level of adverse effects.

49 n 43 s 8

50 M Kramkowska , T Grzelak and K Czyżewska, 'Benefits and Risks Associated with Genetically Modified Food Products' 20(2013)3 AAEM 413<https://www.aaem.pl/pdf-71952-9179?filename=Benefits%20and%20risks.pdf>

51 National Biosafety Authority Website <http://ke.biosafetyclearinghouse.net/approvedcft.shtm >l (Accessed 11 March 2023)

52 Biosafety (Import, Export and Transit) Regulations, 2011 s3.

53 ibid s 4.

from the responsible authority in the destination country. The authority can dispense with risk assessment requirements if the authority had previously dealt with approval of the same commodity and it is satisfied that there is no need of further risk assessment.[54] For transit, the transiting body should inform the authority on the quantity being transported, the means of packaging, and the means of transport. The transporter is to bear all the risk of transporting the commodity, and to inform the authority immediately if an accident occurred and some of the genetic organisms escape to the environment.[55] In case of such an accident, the Authority is to take immediate measures to prevent harm to humans and the environment caused by such an escape.

Most of the applications to the Biosafety Authority for import, export and transit were made between 2011 and 2012, and most were made by the World Food Programme (WFP). The WFP makes the applications for transit of goods containing GMO through Kenya, and some for importation into the country for humanitarian assistance. All the approvals were accepted, after a thorough risk assessment by the Biosafety Authority.[56] The applications were basically for maize, corn meal and corn-soya blend, for human consumption either in Kenya, or in the destination country for those under transit.

2.4 Biosafety (Labeling) Regulations, 2012

These regulations are to ensure that consumers are informed that certain food contain genetically modified organisms, and to enable them to make informed decisions. The objectives of the regulations are '(a) to ensure that consumers are made aware that food, feed or a product is genetically modified so that they can make informed choices; and (b) to facilitate the traceability of genetically modified organism products to assist in the implementation of appropriate risk management measures where necessary.[57]'

Every producer is required to label products that consist of GMO or feed that have been prepared using GMOs. This requirement will not apply to food cooked and served by vendors, to goods that have negligible GMOs of less than 1% in composition, highly refined goods where the refining gets rid of the genetic modification and in certain food additives and processing aids.

2.5. The Biosafety (Environmental Release) Regulations, 2011

These regulations guide the release of a GMO to the environment. Release has been defined as the introduction of a GMO into the environment without attaching the release to any containment measures and it includes making GMOs available to the wider public.[58] A person intending to make an environmental release pertaining to a GMO is required to make an application to the authority indicating what is to be released, and a risk assessment of the potential effects of such release on human beings and the environment. The Authority is to consider each application on its own merit, and if satisfied on the safety of the environmental release, the authority shall grant an approval. The approval can cover several releases of the same product in various places. The person releasing is under an obligation to report to the authority any new information that may be

54 n 52 s 6

55 n 52 s 7.

56 n 51

57 Biosafety (Labeling) Regulations, 2012 s 3

58 Biosafety (Environmental Release) Regulations, 2011 s 2

received after such a release, and the authority will take necessary measures, including the revoking of the approval in order to minimize the negative effects of such new information.[59]

These regulations also introduce the concept of a decision paper. A decision document is a document that proposes the manner of the use, risk management and proposed requirements for monitoring of GMO after its release to the environment. The authority is mandated to come up with a decision document for every approval it considers.[60]

On 22 June 2021, the Authority approved an environmental release application by KALRO to do field experiments on the genetically modified cassava event 4046. This cassava has been found to be resistant to the brown streak disease, a disease that can lead to total loss to cassava farmers. The environmental release is for a period of five years, and then after this, the cassava can be made available to farmers.[61] Other approvals for environmental release apart from the Virus resistant cassava (Event 4046), are Bt maize (MON 810), and Bt cotton (MON 15985). It is to be noted that the Authority approved the environmental release, open cultivation and commercialization of the maize and cotton.

2.7 Public Participation and GMOs in Kenya

Public participation is a process whereby a government agency engages the people, to find out their views before they roll out a decision. It is an important aspect of a democratic society, where the government belongs to the people. In Kenya, article 1 of the constitution stipulates that sovereign power belongs to the people, and thus people should be involved in any activity that affects their lives. Such activities include legislative and policy-making processes, monetary spending, and allocation and division of resources.

With regards to GMOs, public participation is an interesting aspect because as much as it is a decision that affects the people, the people might not have enough knowledge to make an objective decision of such a scientific nature. Section 54 of the Biosafety Act provides for public awareness and participation in a way that the Authority takes the lead. The law mandates the Authority to promote public awareness through publication of relevant materials for the consumption of the public. This is indeed evidenced by the literature that has been posted by the authority through its website.[62] One the part of the public, any person can write a submission to the Authority regarding an application to place a GMO in the market.[63] However, it is noted that the Authority does not have to invite the public for submission on any aspect. In the case of *Kenya Small Scale Farmers Forum*[64] many issues arose and amongst them was public participation on a speculated introduction of GMO in the market. In this case, the petitioner filed an application for conservatory orders under Article 23(3) and Rules 23(1) & 24 of the Constitution of Kenya, following a statement by the then deputy president that GMOs will be allowed in the country. The petitioner argued that GMOs was an issue of public importance and it was important that the public was consulted before the lifting of the ban that was then in place was lifted. However, the court held that that

59 n 58 s14.

60 n 57 s13

61 ISAAA 'Kenya National Biosafety Authority Approves Genetically Modified Cassava' (2021)< https://www.isaaa.org/kc/cropbiotechupdate/article/default.asp?ID=18860> accessed 31 October 2022.

62 n 51

63 n 39 s 54 (4).

64 *Kenya Small Scale Farmers Forum v Cabinet Secretary Ministry of Education, Science and Technology [2015] eKLR*

the petition was premature because there was no gazette notice on lifting of the ban yet, and that the petitioner was relying on a statement verbally made by the Deputy President. It would be interesting to see how the court would have thought had the petition not been premature.

Conclusion

The legal framework analyzed above on GMOs is mainly objective or procedural. At this point of implementation of the GMO legal framework, it is impossible to determine whether the framework is sufficient or not because the sufficiency or otherwise of the legal framework will be seen from the ability of the law to handle emerging issues after wide public use of the GMOs. The situation in Kenya currently is mostly confined to trials, and in these confined experiments, the Authority has the power to stop the experiment if something undesirable is noted. There is also an obligation on the party testing to report to the Authority as soon as they note that issues are coming up that were not envisaged from the risk assessment.

There are also very minimal or no cases in Kenyan courts where the above law on GMOs is put to test. This means that jurisprudence is mainly from legislation and written works, which are also very scanty. The lack of case law on this could mean that the Authority does a good job on the risk assessment that is mandatory before any approvals by the Authority. It could also mean that the experiments are so controlled that nothing out of the ordinary can happen. It could also mean that the fear in which the public has had of GMOs is unfounded, and that all GMOs are safe for public release. Whatever the case, the lifting of the ban on GMOs by the Kenyan Cabinet on the 3rd of October 2022, will lead to increased environmental release of the GMOs, and thereafter, positive or negative effects will be experienced. This might further result in the enrichment of the existing jurisprudence on the GMOs. The recommendation that the author makes here is that even as the country is expecting an increase in environmental release, the Authority should increase its efficiency in risk assessment and monitoring of the environmental release. Indigenous communities should also be encouraged and taught how to preserve the indigenous seeds to provide a fallback should the increased environmental release lead to undesirable outcomes

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EXPLORING THE INTERSECTION BETWEEN THE STATE AND CORPORATES IN MEGA-PROJECTS:
An Analysis of State-Corporate Crimes and Rem Corruption

Edwin Onyango*

Abstract

Corruption is a pervasive issue in Kenya, viewed differently in various fields of study. Corruption occurs at all levels, but high-level corruption, such as those involving the state and corporations have the most devastating effects. These are known as state-corporate crimes. This paper examines the intersection of government and corporate power, with a focus on state-corporate crimes and corruption. Drawing on a range of case studies and theoretical perspectives, the paper analyzes the ways in which government officials and corporate actors collude to commit crimes and engage in corrupt practices that undermine the public interest and thus threaten the fabric of a state and its people. The paper argues that state-corporate crimes and corruption are endemic to contemporary capitalist societies, and are facilitated by a range of factors including regulatory capture, campaign financing and the revolving door between government and industry. The paper concludes by discussing the implications of state-corporate crimes and corruption for democracy, the rule of law, and public trust in government and business. The paper suggests that addressing these issues will require fundamental reforms to the political and economic systems that enable state-corporate crimes and corruption to persist.

1. Introduction

Suffice it to say that corruption is an issue akin to every Kenyan, both the young and elderly alike. It follows that corruption varies from one context or setting to another, and is viewed differently in politics, economy, sociology and law.[1] Accordingly, the definition of corruption 'evolves in every age, civilization and jurisdiction'.[2] Be that as it may, corruption is described in the Black's Law Dictionary as, 'the act of an official or fiduciary person who unlawfully and wrongfully uses his station or character to procure some benefit for himself or for another person, contrary to duty and the rights of others'.[3]

This takes us to the everyday conundrum: Is it possible to have a corrupt-free Mega Project in Kenya? Absolutely yes. Is it probable? Highly improbable. Corruption occurs at all levels, however, it is high-level corruption which has great devastating effects as shall be discussed below. The highest possible level of corruption involves the state, and big corporations, thus the term state-corporate crimes. This paper aims to explain what state-corporate crime is and paint a clear picture of its manifestation.

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1 at<https://eprints.walisongo.ac.id/3920/3/094211050_Bab2.pdf >accessed on 12 September 2022.

2 ibid.

3 BA Garner (ed-in-chief) *Black's Law Dictionary* (10th edn, St Paul, MN: Thompson Reuters 2014) at <https://thelawdictionary.org/corruption/ > accessed on 12 September 2022.

One may be forgiven for having an irresistible urge of using the words mega-project and mega-corruption interchangeably. Unfortunately, that's what Kenya's Mega-projects perpetuate, mega-corruption. We have become so accustomed to corruption, at different levels, that different government regimes get to power on an anti-corruption platform, the perfect platform, but somehow always get sucked into it. Obviously, there is always some imaginary 'fight' against and 'castigation' of corruption, and so it would be a little extreme to say that corruption is part and parcel of our DNA, perhaps it is less extreme to say that it is part and parcel of our culture, rather than DNA.

Accordingly, from the definition of corruption above, it is clear that its manifestation is ubiquitous, and the term State-Corporate Crime is just another sophisticated name for corruption. This paper, therefore, focuses on corruption in the form of State-Corporate crimes, arguably, the worst form of corruption, whose ramifications can be so dire, as to even threaten the very existence of a State. To this end, the paper takes a closer look at the Mega-projects because of their sheer magnitude, which simply cannot be neglected.

It is also worth noting from the onset that the notion of State-corporate crime broadly refers to how public institutions collaborate with commercial entities to do social harm. Additionally, State-corporate crimes are those that are illegitimate or socially harmful and are the consequence of two parties sharing blame, either through their actions or inaction.[4]

This paper, further, endeavours to analyse how glaring State-corporate crime is, the drive behind commission of State-corporate crime, the various ways State-corporate crime is committed, and concludes by stating that all we need is political good-will to defeat the threat that is State-corporate crime. In discussing instances which come out as clear-cut State-corporate crimes, this paper also uses the Nairobi Expressway, which traverses across Nairobi City, as a great and recent example of the consequences of State-Corporate crime. However, this example is made without much consideration of dependent variables such as construction costs, as they can be affected by many other different factors such as topography, availability of materials and so on, and these are outside the purview of this paper. Even without going into those finer details, the picture drawn of the State-corporate crime or simply corruption trails left behind should be clear.

It follows that State-Corporate crime envisages the State as the main actor. This owes heavily to the fact that the State, albeit conferred with the protector role, negates this duty and either becomes the instigator of such crimes or appears to be a 'by-stander'. In essence, these are crimes that, in one way or another, need the involvement of the State. Therefore, companies can only engage in these crimes when specifically asked to do so or with the express or implied consent of public institutions. Simply put, the State is ultimately responsible.

The aforementioned interaction takes place when governmental institutions fail to stop, appropriately and proportionately respond to, or conspire with companies in perpetrating this type of corruption.[5] Having seen how important the State's function is, we must also recognize the two ways through which the State participates in the said crimes. The two types of crimes can succinctly be stated as follows; those that the State starts, and those that it facilitates. Therefore, it

4 R Michalowski and R Kramer, *State-Corporate Crime: Wrongdoing at the Intersection of Business and Government* (Rutgers University Press 2006) p 78.

5 ibid

is safe to claim that there is undoubtedly some amount of implicit or explicit States-corporations cooperation involved in all State-corporate crimes.[6]

1.1 The inter-play of the State in State-Corporate Crimes

1.1.1 State initiated State-corporate crime[7]

It is argued that the State is the one which starts the Mega-project crimes, more so when public institutions follow proactive measures that are essential to the State-corporate criminal syndicate. This is made possible through a number of ways and generally occurs when the State is positively involved in organization. For instance, this may be seen where the State engages in sabotage of its key functions such as ensuring that adequate regulations are in place or by positively failing to execute the regulations that are already in place.

1.1.2 State-Facilitated State-Corporate Crimes[8]

The State facilitates crime through their negligence or inactivity, by regulatory agencies' collusion and cumulative facilitation of corporations that commit State-corporate crime. In essence, mere failure by the State to provide the required controls on corporate activities in situations where it seems that if the controls were in place, the subsequent effects could have been avoided. This is however done passively, almost in a manner suggesting that the State is oblivious of its duties, as opposed to active initiation where the State knows but fails to do anything about it.

It is interesting to note that the opposite of what was said above is also correct. Undoubtedly, companies can potentially start these offences by using their economic clout (considering the "major players" have significant financial clout) to persuade States to take immoral activities. (However, as corporate-State crime, these are outside the purview of this study.)

It follows that corporate complacency or failure to caution the appropriate community (regional or international) of details which have relevance to the State's criminality or the State's own complacency result in corporate-facilitated State crime. This is the case when corporations either provide the means for the State's criminality, for instance by means of arms sales, complacency, or by failing to alert the appropriate community of those details, for the simple reason that those details' cumulative effects are beneficial to their activities, either directly or indirectly.[9]

2. Understanding the State and Corporation in View of Their *Sine Qua Non* Roles

2.1 State: The Prompter or Facilitator

The State has about equal relationships with both transnational corporations and international organizations. Over the years, this relationship has developed to the point where, with the proper context, the terms; State, international organization, and multinational company can all be used

6 D Friedrichs, 'Occupational crime, occupational deviance, and workplace crime: Sorting out the difference' 3(2002) *Criminal Justice* 243-256.

7 ibid.

8 n 6

9 K Lasslett, *Crime or social harm? A dialectical perspective* (2010) <https://www.researchgate.net/publication/225474493_Crime_or_social_harm_A_dialectical_perspective> accessed on 12 September 2022.

interchangeably. Therefore, the definition of the term State must always be contextualized for accurate understanding. When the State becomes a quasi-institution like the traditional institutions, its role will metamorphosize, and that's the importance of context.

Should we, therefore, be worried about the government, the population, or just a few people in light of that quick overview of a State? Or are all of these interchangeable as well? It goes without saying that international law has traditionally defined a State, a well-built legal organization of a territorial political community, such that it makes it possible for the State to unite with the international community and engage in formal contracts with other similarly organized communities. The government, which is essentially a political machine and runs the State, should be legitimate in some way. (Legitimacy is recognition, so it cannot be something like a junta.)

This paper simply places the State in context as a participant in State-corporate crime rather than delving deeply into Statehood, a topic that belongs to international law. Therefore, in this context, a State is represented by those who have been given authority and who exercise it[10] In light of this contextual definition, the word "State" can be used to refer to a variety of government departments and organizations (i.e. the specific people wielding the said power). This group of people frequently breaks both domestic and international law for the sake of their own personal interests.[11] As a result, their deeds and/or omissions have a negative impact on society, the economy, and even individuals.

This paper moves forward on the premise that in contrast to other motivations like religious, ethnic, or political power, which may all be underlying motivations, the primary motivation in State-corporate crimes is personal interests, noting that it is natural people who are behind the State.[12]

2.2 Corporate: The Executor

Suffice it to say that any incorporated entity that has been registered at the Companies Registry is considered a corporation under corporate law. A corporate body must, therefore, be legally established, be distinct from the individual or individuals who make it up, and be able to continue existing even after the original person or people who sought incorporation have died.[13] It also goes without saying that a company is essentially a person, a synthetic one, theoretically capable of having the same rights and privileges as a real person, given the appropriate modifications. This idea comes from the well-known case of *Salomon v Salomon*.[14] Accordingly, there are numerous types of corporations, including public and private ones. As used in this article, the term "corporation" refers to major industrial conglomerates or businesses that manufacture, distribute, or offer essential services such as transportation, food, oil and gas, automobiles, pharmaceuticals, and other such goods.

The controversial association of the State and corporations is examined in more detail below, with special focus on the circumstances that encourage State-corporate crimes, instances of such crimes, and how a distinct corporate personality appears to make it easier to commit such crimes.

10 D Rothe, State Criminality: The Crime of All Crimes (Lexington Books 2009) p23 at <https://digitalcommons.odu.edu/sociology_criminaljustice_books/20/ > accessed on 11 September 2022.

11 n10

12 CW Mullins & DL Rothe Blood, Power, and Bedlam: Violations of International Criminal Law in Post-Colonial Africa (New York: Peter Lang 2008) p357

13 SH Gifis Law Dictionary (Woodbury: Barron's Educational Series 1975)

14 [1897] A.C. 22 H.L.

3. Factors Promoting State-Corporate Crime

3.1 Conspiracy

A key point that needs to be addressed in cases of regulatory lapses (non-existence and/or non-enforcement) is why the lapse arose in the first place. Government is regarded to have largely failed when errors occur. These specifically include failing to implement more efficient legal systems, efficiently enforce the numerous laws already in place, and appropriately respond to violations of the existing rules and regulations.

It is true that humans are permitted to make mistakes, even mistakes that result from omission, and there is room for that. Nevertheless, grouping errors together as simple human mistakes brought on by omission, for example, prevents us from recognizing these "lapses" for what they really are: State-corporate crimes in which the State is deftly the perpetrator or an accessory. The term "lapse" is obviously useful in situations where liability is being avoided or transferred to another party.

Accordingly, Steve Tombs Stated in 'State-corporate symbiosis in the production of crime and harm' that such errors do not just occur.[15] From a study, his results, which he labels "regulatory surrender" on the side of the organization charged with enforcing health and safety law, the Health and Safety Executive, are based on a quick survey he conducted on the implementation data of occupational safety in the UK (HSE). His findings, in brief, were a 29% decrease in the total number of enforcement letters issued over the preceding ten years, a 30% decrease in improvement notices, a 26% decrease in prohibition notices, and a 48% decrease in HSE prosecutions.

It is also worthy to note that Steve Tombs' two-pronged conclusion is based on the following research. First, there are incredibly low absolute levels of enforcement hiding behind the percentage improvements. The second is that HSE's enforcement efforts are decreasing.[16] These errors are routine and very well planned according to him.

From Tombs' survey and conclusion, terming these lapses as conspiracy may seem far-fetched. However, if enforcement guidelines are in place, yet enforcement is greatly and progressively reducing, it is hard to disagree with him.

3.2 Personal Interests

This factor becomes clearer later in the paper, during a discussion of how the autonomous nature of Corporations is exploited.

The notion of State-corporate crime as discussed in this paper is basically about how the State (individuals) use (or misuse) their power. The phrases "State" and "corporation" are all-inclusive, meaning that they include people at both the top and bottom of the "pyramid." However, only a small number of people conceptualize and carry out State-corporate crimes. As a result, neither the corporation as a separate entity nor the State as a whole benefit from them; rather, only a small number of people in the State and firms that conceptualized them do. The results are typically

15 S Tombs, 'State-Corporate Symbiosis in the Production of Harm' 2(2012) *Pluto Journals* at <https://www.jstor.org/stable/41937906?seq=1 > accessed 12 September 2022.

16 ibid

impossible to link back to the people who conceptualized and carried out (attributing liability to corporations yet it is a few individuals who commit the crimes and are the beneficiaries of the illegal profits).[17]

4. Examples of State-Corporate Crimes

4.1 The Ford Pinto Case[18]

On 10 August 1978, three young women were killed when a vehicle struck their 1973 Pinto automobile from behind. The Indiana grand jury indicted Ford (the automaker) for reckless murder as a result of their deaths. Ford was accused by the government of being aware that the gasoline tanks on Pintos were faulty and prone to catching fire when struck from behind. Ford was unable to solve the issue or alert the public since it did not make financial sense for them to do so. Later on, it was learnt that a report on the risk-benefit ratio of correcting the defect versus the value of human life was allegedly among the documents that were not presented at trial. Basically, the exclusion of that report meant that losing human life was preferable to solving the issue which did not make financial sense at that moment.

It is interesting to note that the motor vehicle designs apparently complied with all applicable regulations (meaning people were definitely compromised along the way). In essence, Ford had not broken any laws. For the simple reason that the paperwork that would have shown Ford's obvious liability was not in court, they claimed in court that they had met the necessary safety requirements and that no liability had been determined against Ford. If the rules on Motor Vehicle designs had been strictly enforced, perhaps the accident might not have been fatal. The absence of evidence that would have allowed a court to hold Ford accountable for the accident's fatality further aggravates that lapse in law enforcement.

4.2 Toxic Waste Dumping in Abidjan, Ivory Coast[19]

In the Ivory Coast's seaside city of Abidjan, more than 100 litres of toxic garbage were dumped on the night of 19 August 2006. The following morning, there was a foul smell in the air. Complications with people's health came next. At the beginning, no one could connect the health issues with the hazardous waste or the odour.

Large international commodities trading Company Trafigura had rented the ship Probo Koala. It anchored off the coast of Abidjan before leaving right away and dumping waste — waste that was a by-product of a prohibited substance — in that brief period of time. Due to the danger it posed, its damping had been prohibited.[20] Trafigura initially attempted to dispose of the waste in Europe, but due to the material's extremely hazardous nature and the hefty prices requested for disposal, the company withdrew, eventually making its way to Abidjan. Tommy Company, a small business in Ivory Coast, dumped it. It lacked the equipment and skill set necessary to handle that

17 *ibid*

18 M Lee, 'The Ford Pinto Case and the Development of Auto Safety Regulations' 1893—1978 27 (1998)2 *Cambridge Journals* <https://www.jstor.org/stable/23703151> accessed on 14 September 2022.

19 T MacManus 'Civil Society and State- Corporate Crime: A case study of Ivory Coast' 3(2014) 2 *Pluto Journals* at < https://www.jstor.org/stable/10.13169/Statecrime.3.2.0200#metadata_info_tab_contents> accessed 14 September 2022.

20 Emails surfaced later on showing that the extreme hazardous nature of the substance and the ban were known by the corporation.

chemical. While the Ivorian Ministry of Transport, Customs, the Port Authority, and the Governor of Abidjan were all accused of participation and/or lack of duty in these terrible occurrences, some research indicted the Ivory Coast's Customs office as follows.

Tommy was given a temporary license by Customs Services to work as a "maritime chandler specialized in refuelling and maintaining ships at the Port of Abidjan" (NCI 2006: 58). Tommy applied for a maritime chandler's license on 7 June 2006, and on 12 July 2006, it was approved. Whereas this might not prove anything and might even be a case of pure coincidence, it is still a serious indictment on the Customs services that they granted the company a license and then not long after that, the company began engaging in unauthorised activities.

4.3 Nairobi Expressway

The Nairobi Expressway is evaluated with the notion that State-corporate crime refers to illegitimate or socially harmful events that come from the interplay of shared duty, either through action or inaction of a State and a corporation. It is noteworthy that the Nairobi Expressway has received approval and disapproval in almost equal measure. Consequently, it is the great disapproval that this paper is interested in.

It follows that the idea behind the Nairobi Expressway was brilliant, being largely to decongest the traffic associated with the city,[21] highly viewed as Nairobi's Achilles heels. However, this has been at the expense of displacement of people, and felling of trees (said to exasperate an already bad climatic condition).

According to transport experts, building the Expressway does not necessarily decongest a city.[22] Was it really a worthwhile investment, or was it an investment that had to be made at any cost, given that the relief of the traffic problem is simply a facade and that around 60% of Nairobi residents walk to work, roughly 35% use public transportation, and only approximately 5% use private cars?[23] From the people who are expected to use the said road (*around the said* 5%), a majority of them are unable to afford the tolls that come with it, which have been set between $1 to $15.[24]

Cumulatively, the demerits occasioned by the project such as felling of trees, displacing people (exasperating an already bad climate), seem to outweigh the merits of the Project. With such insights, even before the incidence of the Chinese to start construction of the Project, its construction obviously had all the blessings from the State. In hindsight, we can now look back with almost certainty that the Project was done at the expense of the things and the people who truly matter. According to Amnesty International Kenya, 13,000 homes occupied by a whopping 40,000 people, spread across nearly 100 acres of the Mukuru Kwa Njenga, had to be cleared so as to give way to

21 N Wangari & R Wanjohi, 'Kenya's controversial Expressway speeds past budget while displacing thousands' (2022) <Kenya's controversial Expressway speeds past budget while displacing thousands | LaptrinhX / News> accessed on 12 September 2022.

22 Global Site Plans, Nairobi, 'Kenya Heading Wrong Way to Solve Traffic Congestion' <Nairobi, Kenya Heading Wrong Way to Solve Traffic Congestion | Smart Cities Dive>accessed on 12 September 2022.

23 T Watim 'Posh Nairobians wrong on Expressway' <Posh Nairobians wrong on Expressway - Business Daily (businessdailyafrica.com)> accessed on 12 September 2022.

24 Ed Ram,'How Nairobi's road for the rich' resulted in thousands of homes reduced to rubble'(2021) How Nairobi's 'road for the rich' resulted in thousands of homes reduced to rubble | Global development | The Guardian accessed 12 September 2022.

the Nairobi Expressway.[25] This clearing had dire ramifications, as people lost personal belongings, and slept in makeshift tents and had to contend with seasonal rains and open sewage. Others went days without eating as they lacked means of generating income, seeing as these are people who live a day at a time, literally.[26]

According to a report by Centric Africa Ltd., indigenous trees like Grevillea robusta, Filicium decipiens, Jacaranda mimosifolia, Vitex keniensis, Terminalia mantale, Cassia siamae, Harisonia decapetala, Eucalyptus spp., Phoenix reclinata, Zanthoxylum gilleti, and Markamia lutea would be among the more than 4,000 young and mature trees to be cut down.[27] This shows that these physical actions have environmental consequences too. According to the said report, implementation of the project means that:

a) Greenhouse gases are released.

b) By raising temperatures and altering annual rainfall, humidity, wind patterns, and pressure cycles, improved road infrastructure leads to considerable climate change.

c) These changes are gradual and may cause severe weather events that indicate climate change. This entails changing the microclimate and isolating isolated ecosystem regions. Variations in solar radiation, interruptions of the biogeochemical cycle, localized wind patterns, water flux, and effects on nutrient availability are examples of microclimate changes. The ecosystem's structure and function may alter as a result of this.[28]

Cumulatively, one is therefore left to wonder just whose development this is. Whereas we may not be able to answer that question, the State's role is clear. If the data available and all expert-commentaries are anything to go by (basically stating that the project is not very useful, as it was and has been billed to be), then the Nairobi Expressway can be truly viewed as a typical State-Corporate Crime, as discussed in this paper.

5. Exploitation of The Company as a Different Legal Entity

While still on the Nairobi Expressway example, the Project was financed by China Constructions Construction Company Ltd (CCCC). To recoup its investments, the said CCCC incorporated a further Company known as Moja Expressway Group. Behind all these Companies, there are ultimate beneficiaries who are natural persons.

Even though the idea of the company as a juristic person is fantastic, it has undoubtedly resulted in impunity, and a great deal at that. The common law theory of independent legal personality for corporations, as established in the seminal case of *Salomon & Co. ltd v. Salomon*, gives corporations the capacity to bring and defend lawsuits, as well as buy and sell property interests in their own names.[29]

25 Ed (n24).

26 ibid.

27 Centric Africa Ltd, 'Environmental and Social Impact Assessment for the Proposed Nairobi Expressway Project'(2020)<https://naturaljustice.org/wp-content/uploads/2020/02/Nairobi-Expressway-NEMA-Submission-for-printing_centric_Jan-15-2020-FINAL-2.pdf> accessed on 12 September 2022.

28 n27

29 n 14.1.

In this instance, Aaron Salomon was a prosperous leather trader who produced leather boots as a specialty. He operated his company as a lone proprietor for a long time. Later on, his sons started showing interest in joining the company. As a result, Salomon decided to establish a limited company *Salomon & Co. Ltd*.

At the time, in order for a company to be incorporated, at least seven individuals had to subscribe as members of the company (as shareholders), in which case Mr. Salomon served as the managing director. Of the company's 20,007 shares, Mr. Salomon owned 20,001; the remaining six were held jointly by the remaining six stockholders (wife, daughter and four sons). The new corporation purchased Mr. Salomon's company for roughly £39,000, of which £10,000 was owed to him. He was the company's biggest shareholder and biggest creditor at the same time. The liquidator later claimed that the debentures utilized by Mr. Salomon as security for the debt were invalid due to fraud when the company went into liquidation.

Both the High Court and the Court of Appeal rendered decisions against Mr. Salomon on the basis that he had formed the corporation primarily to transfer his business to it, that the corporation was really only his agent, and that he was responsible for the debts to unsecured creditors as principal. He had misused the limited liability and incorporation powers, so the business he had established was a fraud.

The House of Lords eventually reversed its earlier judgement rejecting the claims of agency and fraud and took a completely different tack. The notion that the company is at law a separate entity was confirmed and entrenched.

Recently, this position was echoed by Sergon J. at *para* 12 in *Ong'au v Mukunya*,[30] where the learned judge restated the following paragraph from *Kolaba Enterprise Ltd v Varvani*[31]:

> It should be appreciated that the separate corporate personality is the best legal innovation ever in company law. See the famous case of SALOMON & CO LTD v SALOMON [1897] A.C. 22 H.L that a company is a different person altogether from its subscribers and directors. Although it is a fiction of the law, it still is as important for all purposes and intents and purposes in any proceedings where a company is involved.

Needless to say, that separate legal personality of a company can never be departed from except in instances where the statute or the law provides for the lifting or piercing of the corporate veil, say when the directors or members of the company are using the company as a vehicle to commit fraud or other criminal activities. And that development has been informed by the realization by the courts that over time, promoters and members of companies have formulated and executed fraudulent and mischievous schemes using the corporate vehicle. And that has impelled the courts, in the interest of justice or in public interest to identify and punish the persons who misuse the medium of corporate personality.[32]

30 [2015] eKLR.

31 [2014] eKLR.

32 Ndemo (n 30).

Whereas the legal innovation of the Company as a separate entity has been brilliant, that idea seems to now be outdated and outmoded given the modern operation of the people behind these companies, which is increasingly becoming predictable, and that is to hide behind the corporate veil to perpetuate illegalities, even as they remain to be the ultimate beneficiaries. The highly celebrated doctrine of independent corporate thus only shields these people from liability. This has posed great challenges to courts which despite doing a commendable job in ensuring proper application of the doctrine, there are circumvention mechanisms now well crafted, and getting individuals behind companies who perpetrate State-corporate crimes is difficult.

6. Actors in the State-Corporate Wavelength

6.1 Government Sponsored Enterprises (Gse)[33]

In the State-corporate crime duality, there are also immensely strong actors who operate covertly, yet their acts could have just as disastrous results. To understand this, the paper has yielded to focus on the position in the United States of America as regards State-corporate crime.

In the US, Fannie Mae and Freddie Mac, which finance mortgages and were established by Franklin D. Roosevelt while he served as president, can pass for GSEs despite not being either State or corporate institutions and having penalties that are on par with crimes committed by both.

In the midst of the Great Depression, Fannie Mae was founded in 1938 with the goal of supporting the increasingly collapsing housing market. It was specifically entrusted with assuming bank-held home loans. To protect banks and release more capital, which would then be put back into the economy, was the plan. Fannie Mae's potential to establish a complete monopoly in that market led to the creation of Freddie Mac, which offered competition.

The American dream was on track when middle-class people could simply and quickly obtain mortgage loans. The GSEs lowered their credit requirements while purchasing a significant number of subprime mortgages that were in default as a result of the affordable housing policy that the US Congress established in the 1990s.[34] Therefore, it is argued that the GSE's operations, which were meant to offer answers, had a significant impact on the financial crisis of 2008.

This is what took place. Politically, the two opposing parties (the Republican and Democratic parties) both supported policies that would be compatible with home ownership (which had proven elusive for many). GSEs recognized a genuine opportunity during this time to increase their earnings (Politicians and regulators would enable this possibility of making profit). This was accomplished, among other things, by serving as the GSEs' financial guarantees. The public increased its purchasing, and as a result of the State's promises, risk also increased.

The bubble burst, though, because the GSEs' senior executives were being paid based on the astronomical short-term statistics they were reporting rather than the long-term Return on Investments (ROI) generated. Both Fannie Mae and Freddie Mac were accused of engaging in dishonest behaviour.

33 Salmon (n 14).

34 S Tully, H Harshfield and T Meyvis 'Seeking Lasting Enjoyment with limited Money: Financial Constraints increase Preference for Material Goods over experiences' (2015) Journal of Consumer Research <https://www.researchgate.net/publication/271764225_Seeking_Lasting_Enjoyment_with_Limited_Money_Financial_Constraints_Increase_Preference_for_Material_Goods_Over_Experiences> accessed 14 September 2022.

Following the 2008 financial crisis, the government put GSEs under "conservatorship," under the direction of the Federal Housing Finance Agency, with the intention of gradually removing them from the economy.[35] But they only got stronger, securing 80% of all new mortgages in the US, totalling trillions of dollars, and eventually driving out private lenders. Even so, it is obvious that the risk continued, was widespread, and its pervasiveness was maintained through the collaboration of participants in the public and commercial sectors.

6.2 International Financial Institutions (IFI's)[36]

The World Bank and the IMF are the institutions of interest in this case. It should be noted right that IFIs are neither nations nor enterprises. However, they also cause great harm and make a significant contribution to State-corporate crime.

These have included the sinking of the Le Joola[37] and the Pak Mun Dam project by the World Bank, which both had an effect on the local ecosystem and the native inhabitants.[38]

Despite not falling into the category of crimes committed by States or corporations, many actions still have terrible repercussions.[39]

7. Tackling State-Corporate Crimes

The costs that we pay because of State-corporate crime (corruption) is quite high, and arguably the highest price that we pay is the inhibition of economic growth. The way of tackling State-corporate is provided for, as we have laws governing the issue, which in addition to being adequate, may also be lethal if properly implemented. One would therefore think that implementing these laws and regulations is a no-brainer. Unfortunately, it seems that curing State-corporate crime may need more than just implementing the various laws that are available, because why is State-corporate crime still an issue when all these laws are in full-glare?

7.1 Political Good-will[40]

State-corporate crimes cannot occur or be sustainable without acquiescence of the Government of the day. It is thus imperative that the people in Government should be committed to pursuing and consolidating a Country's integrity, regardless of how unpopular that may be, disregarding obvious repulsion and being ready to suffer consequences of this dangerous commitment, seeing as State-corporate crime is perpetrated by the big players, who may be willing to go to great lengths to secure their deals. However, political good-will must not always be dangerous. In his assertion that political will can be clever, Robert Rotberg defines political will as the use of political leadership to direct, influence, or change the results of public choices in a given environment. Therefore, whether

35 n 34

36 *ibid*

37 D Rothe, C Mullins and S Muzzatti, 'Crime on the High Seas: Crimes of Globalization and the Sinking of the Senegalese Ferry' Le Joola 2006 <https://link.springer.com/article/10.1007/s10612-006-9003-3> accessed 14 September 2022.

38 D Friedrichs and J Friedrichs, 'The World Bank and the Crimes of Globalization: A case study' Social Justice (2002) 29(1) <https://www.jstor.org/stable/29768116> accessed 14 September 2022.

39 D Rothe and Friedrichs Crimes of Globalization (1st edn, Routledge 2015) at p 78.

40 R Rotberg The Corruption Cure: How Citizens and Leaders Can Combat Graft (Princeton University Press 2019) pp 46-47.

ingenious or dangerous, it seems that political good-will is a key ingredient in the fight against State-corporate crimes.

8. Conclusion

This article examines how a string of actions and inactions by government and corporate officials — who share overlapping goals and frequently conflicting interests — lead to grave harm to the public. As previously mentioned, the co-operation of a select few people are responsible for these State-corporate crimes. For instance, the displacement of 40,000 people in Mukuru Kwa Njenga to give way for the Nairobi Expressway, was the result of a few public policy makers. Such projects occasionally have far-reaching consequences, but the policy makers, or executors face no consequences. Both sets of people normally bear no personal responsibility.

The solutions fronted suggest that this should change and the individuals should start being personally responsible. However, challenges abound. State Officials will fall-back on the assertion that they were discharging their duties, Constitutional, Statutory or otherwise. Company officials on the other hand will assert that the company is a different personality capable of being sued. With these now repetitive and generic arguments, the solution may lie with taming our insatiable appetite after all. A painful resignation to corruption. However, if individuals are hell-bent on eating, can they please not eat the fruits plus the seeds? While painfully resigning to the fact that people in these positions will be corrupt, perhaps they plant the seeds for tomorrow.

CHALLENGES OF PROSECUTING INCHOATE CRIMES IN KENYA
The Case of Preparation to Commit a Felony

Felix Odhiambo* and Nelson Otieno**

Abstract

This paper assesses challenges faced in prosecuting the offence of preparation to commit a felony. It flags four major challenges including: delineating the offence of 'preparation' from that of ''attempt'; proof of an overt act; determining the correct subsection of section 398 of the Penal Code to prefer; and determination of the criteria for and proof of what is dangerous and offensive. The paper recommends for adoption of definition provided in P v Murray and also embracing statutory delimitation of the offence under Chapter XXIX of the Kenyan Penal Code. It also underscores the importance of providing a clear statement of the name of the felony to be staged by suspects; considering proximity of weapons to suspects; appreciating the criteria for determining what weapon is dangerous or offensive; adducing evidence of common intention for jointly accused persons; and adducing evidence of danger in the case of articles that are not dangerous or offensive per se. Lastly, it places a premium on proof of overt act with the necessary element of intention of the accused. Consequently, it recommends for adoption of best practices in investigations and prosecutions.

Keywords: Preparation, Crime, Felony, Overt act, Offence, Actus reus, Mens rea.

Introduction

Preparation to commit a felony is recognised as an offence in Kenya under the provisions of section 308 of the Penal Code.[1] It is an inchoate or anticipatory offence which is an offence committed as a preliminary step towards the commission of another crime.[2] As an inchoate offence, its proscription and punishment aim at serving an intermediate purpose to achieve the ends of justice. Not much Kenyan literature, however, has been written about the experience of prosecution of the offence of preparation to commit a felony. That notwithstanding, there have been a lot of court decisions relating to the prosecution of this offence. An analysis of some of these decisions reveals that prosecution of this offence is often susceptible to certain common mistakes. Such mistakes are principally concentrated around two areas namely, the practical prosecution challenges regarding what amounts to 'preparation'; and the consequential challenge of choice of the most appropriate evidence to support the charge. Of the two challenges, the determination by the prosecution of the value proposition of 'preparation' remains a more intriguing challenge.

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1 Penal Code, Cap. 63, s 308.

2 B Garner, Black's Law Dictionary (8th edn, Thomson West Publishers 2004) 1111.

The impact of these challenges partially explains the findings of past research studies touching on the offence that indicate a low rate of translation of arrests into court charges on the offence of preparation to commit a felony. Specifically, audit statistics by the National Council on the Administration of Justice (NCAJ) from 15 police stations, randomly selected from across the country between 2013 and 2014, show that the rates of arrests on the offence were below 2%. The rate is low when compared to assault, property, traffic, and immigration offences which were all rated above 10%.[3] Even when there are arrests, such rarely translate into charges before the court. According to the NCAJ's audit statistics, out of 1,723 arrests for the offence, only 176 were converted into charges, which is barely 10% of all charges.[4]

Based on the above premise, this paper seeks to achieve its objective of unmasking the real challenges through an analysis of court proceedings and providing practical recommendations. Part one of the paper provides a brief background of the offence, its nature, and legislative history in Kenya. Part two provides the legislative basis and analyses of the offence's different forms, elements, and punishments. Part three provides an exposition of the prosecutorial challenges and common mistakes in the prosecution of the offence. Part four provides best practices regarding delineation of the offence, and procedural, and substantive considerations when charging and prosecuting the offence. The fifth part addresses requirements relating to proof of an overt act. Part six discusses some emerging issues worthy of consideration by Kenyan judicial officers. Part seven provides the authors' concluding remarks that are relevant to the persons exercising prosecutorial, police, and judicial powers in matters related to the offence in Kenya.

I. Background, Nature and Legislative History of the Offence

An Overview of the Nature and Scope of the Offence of Preparation to Commit a Felony

Ordinarily, a charge is preferred when it is completed through the action and there is presence of the required status of mind for its commission. However, preparation to commit a felony is an exceptional offence because a person found to be preparing but is not yet ready to execute a felony would, nonetheless, still be charged with the offence. Simply put, it is an offence that has just begun and has not been completed. The incomplete nature was well espoused by the Court of Appeal at Mombasa in the case of *Legasiani & Others v Republic*.[5] In this case, the court asserted that the word 'preparation' used in reference to the offence is not a term of art but bears a legal meaning and a consequence to it. Instructively, when the court considered the import of the word, it resorted to the Oxford Dictionary which accords it an ordinary meaning as 'as an act or an instance of preparing or the process of being prepared.'

Before embarking on the substantive analysis of the law and cases, a discussion in the history is relevant. The discussion is necessary since it not only aids in understanding the legislative context of current provisions but also forms the basis of comprehension of the subsequent analysis of cases that have been decided by judges at different times in Kenya's history.

3 National Council on the Administration of Justice, Criminal Justice System in Kenya: An Audit (National Council on the Administration of Justice 2006) 86.

4 Ibid, p 104.

5 *Legasiani v Republic* [2000] eKLR (Criminal Appeal 302 of 2005).

Brief Outline of Legal Development of the Offence in Kenya

The provision for the offence of preparation to commit a felony in Kenya has undergone a series of legislative facelifts over the past five decades with significant changes being made in 1969, 1993, and 2003. In 1969, Parliament amended section 308 of the Penal Code through the enactment of the Criminal Law Amendment Act 1969.[6] The Act recognised that the offence takes different forms. It specifically provided that the first form of the offence attracts a term between ten to fourteen years of imprisonment together with hard labour and corporal punishment.[7]

Later in 1993, Parliament, through the Statute Law (Miscellaneous Amendments) Act 1993[8] amended section 308 of the Penal Code. Particularly, section 2 of the 1993 Act increased the punishment through imprisonment to a term ranging between seven and fifteen years.[9]

A decade later, Parliament further initiated two changes to the Penal Code through the Criminal Law (Amendment) Act.[10] *Vide* section 56 of the Act, Parliament did away with the provision for corporal punishment. Secondly, it reduced the imprisonment term from between ten and fifteen to between seven and ten years.[11]

This brief historical analysis is indicative of two key issues. First, the legislative debate on the offence of preparation to commit a felony has been geared towards achieving the most effective punishment to be meted on the various forms or manifestations of the offence. No changes have, however, been made regarding the substantive provisions on *actus reus* and *mens rea* of the various forms of the offence. Secondly, the history points to the fact that Kenyan law has maintained the Common Law requirements of need to prove an overt act, among others, when establishing the offence of preparation to commit a felony.

II. Current Legislative Context, Basis, Forms, and Elements

Legislative Context

The Penal Code generally differentiates offences depending on the victims of an offence. The crimes are generally categorized in respect to crimes on currency, and against persons, public order, lawful authority, and the public in general. Division V of the Penal Code specifically provides for the offences relating to property. Specifically, Chapter XXIX of the Division V of the Penal Code provides for offences of burglary, housebreaking, and similar offences. Preparation to commit a felony is one such an offence under Chapter XXIX of the Penal Code.

The legislative context set out above highlights two main points. First, the Penal Code makes it clear that the preparation must be to commit a felony and not any other offence.[12] In order to comprehend the intention of the drafters regarding the scope of offence of preparation to commit a felony, it is imperative to note that section 4 of the Penal Code defines a felony. A felony is defined

6 Criminal Law Amendment Act (No. 3 of 1969).

7 Ibid, s 4.

8 Statute Law (Miscellaneous Amendments) Act (No 11 of 1993).

9 Ibid, s 2.

10 Criminal Law (Amendment) Act (No 5 of 2003).

11 Ibid, s 56.

12 n 1, s 308

to mean an offence declared as such by law or if not declared to be a misdemeanor, is punishable, without proof of previous conviction, with death, or with imprisonment for a term of at least three years. Secondly, its delimitation compellingly suggests that the offence cannot be prosecuted in respect of the other categories of offences in the other Divisions of the Penal Code such as forgery, coining and counterfeiting,[13] offences against persons,[14] public order,[15] lawful authority,[16] and the public in general[17]

Forms of the offence

Besides the above contextual background, section 308 of the Penal Code provides for the definition and punishments of the offence. The section recognises that the offence can take different forms. The first form is the one represented in section 308(1) which provides that

> Any person found armed with any dangerous or offensive weapon in circumstances that indicate that he was so armed with intent to commit any felony is guilty of a felony and is liable to imprisonment of not less than seven years and not more than fifteen years.

The definition envisages an *actus reus* of being found armed with any dangerous or offensive weapon. Further, the *mens rea* must be an intention to commit a felony. The *mens rea* is supposed to be deducible from circumstances of each event as was underscored by the High Court in Paul *Ngugi Ng'ang'a & 3 others v Republic.*[18]

Regarding the second form of the offence, subsection (2) is instructive on the evidential requirements. It particularly provides that:

> Any person who, when not at his place of abode, has with him any article for use in the course of or in connection with any burglary, theft or cheating is guilty of a felony, and where any person is charged with an offence under this subsection proof that he had with him any article made or adapted for use in committing a burglary, theft or cheating shall be evidence that he had it with him for such use.

The distinction between the first and second form of the offence lies in the 'dangerous effect' of the articles or weapons used by the accused persons and to which the prosecution must pay attention. This point was underscored by the Court of Appeal in the case of *Njore v Republic*.[19] The Court noted that the accused persons, who had helmets and gunny bags, which are not dangerous weapons, ought to have been charged under section 308(2) of the Penal Code and not 308(1) of the Penal Code.

Additionally, section 308(3) of the Penal Code offers other possible forms of the offence. These are instances where a person is face-masked or blackened or being otherwise disguised, or being in any building at night, or being in a building during the day and having taken precautions to conceal

13 *Ibid*, Division VII.

14 *Ibid,* Division IV.

15 *Ibid,* Division I.

16 *Ibid,* Division II.

17 *Ibid,* Division III.

18 *Ng'ang'a v Republic* [2006] eKLR (Criminal Appeal 763, 764, 765, & 790 of 2003).

19 *Njore v Republic* [2014] eKLR (Criminal Appeal 221 of 2011).

their presence, all with an intention to commit a felony.[20] The categories of offences in subsections 2 and 3 attract different sentencing requirements from the first one. For instance, a convicted offender for the other possible forms is liable to an imprisonment with hard labour for five years for first offenders. The punishment may be enhanced to imprisonment for a term of ten years if the offender has previously been convicted for a felony relating to property.[21]

III. Exposition of Challenges in Prosecution of the Offence

Challenges in Delineation of Preparation from Attempt

Other than the consideration of an appropriate choice of subsection under which to charge accused persons, a second related challenge is the possible inherent mischief in the unity between preparation to commit a felony and the offence of attempt. There have been debates on whether and how the offence of preparation is similar to attempt. This stems from the fact that attempt is also a common inchoate offence. The difficulty is further exacerbated by the fact that section 308 of the Penal Code does not define the term 'preparation'. This challenge is also evidenced in debates in the existing literature on the preparation to commit a felony that largely classifies the offence as a crime of attempt. For instance, the challenge is illustrated by Keedy who notes that the preparation of the offence ought to have a specific intent.[22] According to him, preparation to commit an offence can only be proved if a person starts to do something towards the ultimate achievement of the felony, which appears to be similar to an attempt.

Challenges Related to Proof of an Overt Act

Another related challenge regards proof of existence of an overt act. As noted by the Supreme Court of California in *P v Murray,*[23] the requirement of an overt act does not mean that acts constituting preparation should be too remote. This explains why courts have developed the need for proof of 'an overt act' by appropriate evidence to prevent the obvious danger of prosecuting even the remotest of cases. Despite the test in *P v Murray* having been developed in 1859, the delimitation of what amounts to an overt act is still unsettled. This challenge is aggravated by the fact that the tenor of judgments in most cases, such as *Sakuye v Republic*,[24] where the unsuccessful appellant's were only smoking bhang under a tree initially before being found with a rifle, does not comprehensively resolve the problem of what amounts to an overt act despite it being a principal *actus reus* of the crime.

Challenges Related to Evidence

Also related to the challenges of proof of overt act is the challenge of adducing evidence. The main challenge being certainty of the determining the exact time when the overt act occurred. That is so considering that a mere hint such as smoking bhang has been shown to be able to lead to a search that makes police later discover a dangerous weapon which may be used to commit a felony.[25]

20 n 1, s 308 (a)-(c).

21 Ibid, s 208(4).

22 E. Keedy, 'Criminal Attempts at Common Law' (1954) 102(2) UPLR, pp. 464, 467.

23 P v Murray [1859] 14 Cal 159.

24 [2004] eKLR (Criminal Appeal 361 of 2002).

25 *Ibid.*

IV. Best Practices on Overcoming Common Mistakes and Challenges

It is noted that in trying to solve the above challenges which relate to delineation, proof of overt act, and adduction of evidence, an analysis of select cases decided between 1984 to 2018 shows that the prosecution of this offence has further been riddled with other common mistakes. This next part identifies these mistakes and provides steps that must be taken to avoid the common mistakes.

Choice of Charge to be Preferred: Preparation or Attempt

As noted above, the decision to charge a person with preparation to commit a felony and not the offence of attempt poses a serious challenge. Courts have attempted to make the differentiation simpler, albeit not without inherent challenges. Notably, the court in *Re. T. Munirathinam Reddi*[26] attempted a definitive test besides the dictionary meaning to delineate the two inchoate offenses. The court noted that there is a notable, albeit thin, difference between the two inchoate offences in many cases. The court aptly stated that an act is an 'attempt' if it would otherwise amount to the offence but is uninterrupted by extraneous circumstances. This means that an attempt involves a higher degree of action than the preparation towards the commission of an envisaged offence. Even so, the delineation set in *Munirathinam case* [27] may still be convoluted since it still falls short of a clear demarcation of the realms of the two inchoate offences.

The challenge in delineation is heightened by the decision of Holmes CJ in the case of *Commonwealth v Peaslee*. [28] The judge noted that in some cases, preparation may be an 'attempt' where the preparatory act is so close to accomplishing the act that it makes the offence probable. If the position in *Commonwealth v Peaslee* [29] were to be the case, then it means that the value judgments of what is 'close' and whether an offence would be 'probable' are issues that the prosecution ought to be conceptually clear when determining the charges to be preferred against a suspect. Given these challenges, the definitive approach taken, about a century ago before the decision in *Peaslee*, by the court in *P v Murray* [30] appears to be more robust. Particularly, the court in this case, defined preparation to mean an act aimed to 'devise and arrange means or measures for committing crime'. On the other hand, the court defined an attempt to mean 'a direct movement towards the commission of the crime after the preparations is made'. Regarding the transformation of preparation into an 'attempt', the court asserted that the same occurs when an accused begins to put his intention into execution in a way as to fulfil the intention to commit the crime.[31]

V. General Procedural Requirements

Express provision that an accused was armed

From a review of the cases, the charge sheet must state that the accused person was armed.[32] To be armed means to be found with the weapons on a person's body.[33] Even in cases where the weapons

26 [1955] AIR Prad 118.

27 Ibid.

28 Commonwealth v Peaslee [1901] 177 Mass 267.

29 Ibid.

30 n. 23, p. 159.

31 See P v Murray [1859] 14 Cal 159. See also the discussions about it in the Kenyan case of Muema v Republic [2018] eKLR (Criminal Appeal 171 of 2014 & 25 of 2018).

32 Njore v Republic [2014] eKLR (Criminal Appeal 221 of 2011)

33 Ibid.

are recovered on the scene after a fracas, it could still be inferred that the accused person was armed. [34] However, such an inference cannot be made when a weapon is far away from the reach of the accused person. This position was best illustrated in the case of *Ng'ang'a v Republic*,[35] where the court held that a rifle recovered from the boot of their car was out of the appellants' reach. As such, the appellants could not be said to be armed.

Consideration of arming in cases of jointly accused persons

Instances where accused persons are charged jointly with the offence of preparation to commit a crime present a unique challenge. Such a scenario is best illustrated by the case of *Legasiani v Republic*,[36] where the complainant saw the third appellant with what 'looked like' a pistol, in the company of three other unknown assailants. However, it is only a torch and knife that were later found on the ground near the accused persons. Though the court did not analyse it, it is evident that the issue of lack of commonality of intention could have been a possible ground of appeal. This issue was brought to the fore six years after the *Legasiani* case by counsel for the appellants in the case of *Ng'ang'a v Republic*.[37] In this case, counsel pointed out that no common intention had been proved by the prosecution. The prosecution had led evidence showing that only the first accused person had been seen carrying the bag. The only evidence linking the other co-accused persons was that they had boarded the same *matatu* alongside the first accused person and that their bus fare was paid by the first accused person. This evidence was dismissed and the court stated that being together was not irrebuttable evidence of common intention. The prosecution must therefore lead compelling evidence of a common intention in case of joint charges.[38]

Provision of a clear statement of the name of the felony

In addition to the above, it is pivotal for the prosecution to include the name of the offence contemplated or staged in order to create an incontrovertible case on a charge of preparation to commit a felony. This explains why the appeal in *Ng'ang'a* [39] succeeded after the court noted that the prosecution had failed to lead any evidence of what crime the accused persons were contemplating or staging. The best practice, therefore, is evidenced by the particulars of the charge sheet drafted in 2010, in the case of *Njore* [40] that specified the crime as 'kiosk-breaking and theft'. The recognisable thread of the rationale here is that the judicial officer should not be left guessing or speculating the felony since doing so would be taking an unsafe route of basing conviction on mere suspicion only.

VI. Specific Evidential Requirements

Salient Jurisprudential Expositions

The most common evidential mistake in the first form of this offence is that regarding the proof of a dangerous and an offensive weapon. As mentioned earlier, sustaining a conviction on the first form of the offence of preparation to commit a felony requires that an accused person must be

34 Ibid.

35 n18

36 n5.

37 n18.

38 Ibid.

39 Ibid.

40 n32.

armed with dangerous and offensive weapons. The first challenge for the prosecution arises from the fact that there lacks an express legislative provision regarding the criteria for what amounts to a dangerous and offensive weapon.

Criteria for Assessing what Weapon or Article is 'Dangerous and Offensive'

Owing to the lacuna set out above, the prosecution must turn to the judicial interpretation of these words which are, apparently, not terms of art. Notably, *Mwaura v Republic*[41] the court defined a dangerous and offensive weapon to include an article that may be adapted for use for causing injury to the person. The Court of Appeal attempted a judicial definition of these terms in 1989 in its determination in *Nyadenga v Republic*.[42] The learned judges noted that the phrase 'dangerous or offensive weapon' as used in the operative section contemplates the 'weapon being used to cause peril: or intended for or used in attack.'[43] Eleven years after the *Nyandenga case*, a similar criterion, albeit couched in different words, was affirmed in the case of *Legasiani v Republic.*[44] In this case, the Court of Appeal defined a dangerous weapon as one which 'could have caused an injury'.

When the three cases are taken in totality, it can be observed that the *Nyandenga* and *Legasiani* cases are concerned with a danger that arises from the making and ordinary use of the weapon. The *Mwaura case*, on its part, adds onto this perspective that other than the danger that may either arise from making, an article not ordinarily meant to be dangerous may still be adapted to be such. This last position expands avenues for which a person can be charged by the offence.

Another relevant case in point that supports this position is *Ndemi v Republic*.[45] The appellants in this case were found with handcuffs and a knife. They, however, contested that the handcuffs were not dangerous within the meaning of section 308(1) of the Penal Code. The trial court held that even though handcuffs are not made to cause injury, they could however be wielded in such a manner as to inflict injury. Instructively, this was also the position adopted by the Court of Appeal in *Legasiani*[46] where the Court noted that a knife, though not a weapon of offence, could always be so used as such.[47]

The two scenarios of weapons that can be considered dangerous by their design, on one hand, and weapons that are adapted for such dangerous use, on the other hand, impose different evidentiary implications. Regarding the first category of weapons which are considered to be dangerous by design, recent court decisions point to the fact that what is dangerous, or offensive is both an objective test and a question of evaluation of the facts. The objective test has been affirmed in the *Ndemi case*. Conversely, the cases of *Ng'ang'a v Republic*,[48] and *Sakuye v Republic*,[49] have affirmed a subjective test of cases that involved the use of firearms which were all considered by the respective courts as meeting the criterion. In the case of *Njore,*[50] however, where the accused persons were

41 Mwaura v Republic [1973] EA 373.

42 Nyadenga v Republic [1989] eKLR (Criminal Appeal 84 of 1988).

43 ibid 2.

44 n 5.

45 Ndemi v Republic [2016] eKLR (Criminal Appeal 10 of 2016).

46 n 5.

47 ibid 3.

48 n 18.

49 n 24.

50 n 32

carrying a gunny bag and helmet near a kiosk at night, the articles were not considered as dangerous and offensive.

Regarding the second scenario which related to articles that could be adapted for dangerous use, it is necessary that the prosecution leads direct evidence that the article was so adapted or wielded. Instructively, the courts have held that a hand-made gun that could be used offensively must be supported by evidence of a firearm expert.[51] The only exemption from this rule is articles that have been considered by courts not to be dangerous *per se*. For instance, the Court of Appeal in *Legasiani*[52] considered that a torch is not a dangerous weapon per se given its design.

In both scenarios, however, courts have taken the position that the envisaged danger is that which is caused to or directed towards individual persons. Where the danger is directed to property, it would also be prudent for the prosecution to charge under section 308(2) of the Penal Code. For instance, in the case of *Birgen v Republic*,[53] the accused person, who was found bending with a kidder next to a spare wheel with no evidence of intending to harm a person, was successfully charged with the second form of the offence under section 308(2) of the Penal Code. The conviction and sentence were upheld on appeal.

Linking the Evidence to the Charge Sheet

As already stated, not all articles or weapons with which a suspect is armed at the point of arrest are offensive or dangerous per se. For instance, in *Nyadenga*,[54] the Court of Appeal noted that a *panga* and a *rungu* are in themselves not dangerous. A charge sheet must, therefore, expressly state that the weapons are dangerous or offensive. So important is this element of the crime that failure to mention or intimate, in the charge sheet, is enough to render the charge sheet as totally defective and a conviction in respect of which cannot stand.[55]

From an analysis of the decision in the *Nyadenga case*[56] above, the evidence can either be led to prove that the article is either dangerous or offensive. The two criteria need not be met all at once. This appears to be the favoured judicial interpretation despite section 308(1) of the Penal Code using the word dangerous 'and' offensive conjunctively, rather than disjunctively. It would appear, therefore, that the prosecution has to decide right from the onset on whether a weapon is either dangerous or offensive. However, since they connote a similar meaning of causing peril, at least according to the decision in the *Nyadenga case*, it would be safer for the prosecution to use both terms in a charge sheet for the avoidance of any doubt.

Providing the evidence of an overt act

As has already been set out, the offence of preparation to commit a felony must be done in circumstances that indicate that the person was so armed with intent to commit a felony.[57] The

51 n 32 p 2.

52 n 5.

53 Birgen v Republic [2008] eKLR (Criminal Appeal 55 of 2006).

54 n 42.

55 Ibid

56 Ibid.

57 Ibid.

court in *Manuel Legasiani & Others v Republic*[58] referred to this action as some overt act. The overt act must therefore be some act towards committing the offence. The court affirmed that the act must be such that a felony was about to be committed. Further, it held that 'mere possession' of a firearm that is not coupled with such an overt act is not an offence under Section 308(1) of the Penal Code. The holding was later on affirmed in the case of *Muema v Republic*[59] where the court considered the elements of inchoate offences and, more particularly, what amounts to an overt act. Particularly, Odunga J stated that an overt act is 'an act which manifests his intention; that is, the accused performs an act which is capable of being observed by another (although it may not have been) and which in itself makes clear his intention to commit the offence'.

Courts have also made analyses on what the test set out above means for the burden of proof on the part of the prosecution. In the case of *Sakuye,*[60] the High Court upheld the conviction and sentence of two years for the case of preparation to commit a felony as the main count. The High Court did not carry out an analysis of what constitutes the overt act. This was perhaps because the issue of what constitutes an overt act was not a ground of appeal. From the facts admitted in the case, it was evident that the appellant was armed, during the day, with a rifle and ammunition with intent to commit robbery. What followed was an altercation with the police where the appellant fired at the police on patrol. Both the trial and appellate courts deemed the circumstances to have amounted to an overt act. It is the happenings after the fact that informed the court's decision as to the intention of the appellant.

Cases that have since been decided after *Sakuye* have contributed to the jurisprudence in two important ways. First, they have endorsed the principle of considering the occurrences after the fact in determining the existence of an intention to commit a felony. Secondly, they have developed a principle that mere suspicion that some people are not 'good', without more, is not enough to prove the overt act in charging someone with the offence of preparation to commit a felony. The case of *Ng'ang'a* [61] decided only two years after the *Sakuye* decision is quite instructive on this issue. In this case, the preparation to commit a felony was a count for which the appellants had been originally charged and convicted while being acquitted on the main count of robbery. The four appellants looked suspicious in a public service vehicle and upon a search at a police station, they were found with a rifle in a bag. The appellants successfully challenged the elements of the offence.

However, a more promising attempt to define the concept of an 'overt act' was made over a decade later by the High Court in the Criminal Revision case of *Munene v Republic*.[62] This criminal revision was done *suo moto* by Majanja J at the Migori High Court station. The court had to deal with whether mere possession of a firearm without an overt act would not be deemed to be an offence. The prosecution's case was that the accused had been found, in Migori Stadium, in possession of a *panga*, a knife, a pair of pliers, a torch, and a hammer in circumstances that indicated he was so armed with intent to commit a felony namely theft. The accused person had pleaded guilty to the charge during the trial. The High Court moved *suo moto* and faulted the prosecution for not proving an 'overt act' capable of sustaining the charge of preparation. The overt act, according to the judge, would be present if the offence was 'about to be' committed. In his judgement, the

58 n 5.

59 Muema v Republic [2018] eKLR (Criminal Appeal 171 of 2014 & 25 of 2018).

60 n 24.

61 n 18

62 *Munene v R* [2015] eKLR.

judge, while relying on the Court of Appeal decision of *Legasiani*,[63] quashed both the conviction and sentence handed to the accused person by the trial court. These developments offer useful lessons of the prosecution and police when charging or conducting investigations on the offence of preparation to commit a felony.

VII. Emerging Issues

As stated above, section 308(1) of the Penal Code provides for a sentence of imprisonment for a term of not less than seven years upon conviction for the offence. A review of recent case law on the offence of preparation to commit a felony discloses that courts have been adhering to the minimum sentencing requirement. However, the current jurisprudence regarding sentencing generally now suggests a different path. In the case of *Muruatetu v Republic*,[64] for instance, the Supreme Court declared Section 204 of the Penal Code that provided for the mandatory death sentence for murder cases, unconstitutional to the extent that it inhibited the discretion of the judicial officers in sentencing.

Significantly, this radical shift in the sentencing policy, as set out in the *Muruatetu case*, is no longer restricted to capital offences. In the sexual offences case of *Injiri v Republic*,[65] the Court of Appeal adopted the principle laid down by the Supreme Court in the *Muruatetu case*. Consequently, the court reduced the sentence from the statutory minimum sentence of life imprisonment to 30 years' imprisonment. Several High Court decisions such as *Boith v Republic*[66] have followed suit owing to the binding nature of the Supreme Court decision. Thus, the statutory minimum imprisonment terms should also be reconsidered by courts considering the emerging jurisprudence.

VIII. Concluding Remarks

Though this article does not pretend to be an exhaustive study, it provided an opportunity for the authors to conduct a comprehensive analysis of relevant cases with the hope of raising awareness of the notorious prosecutorial mistakes made and providing advice on steps for overcoming them regarding the offence of preparation to commit a felony. In this regard, this paper makes four specific findings. First, the drafting of the operative provisions of section 308 of the Penal Code and other sections, when read as a whole, is vague on the parameters of the evidentiary requirement for the proof of offence of preparation to commit a felony. Secondly, Kenyan courts have been pivotal in developing evidentiary and procedural principles that consistently complement the understanding of the express elements of the crime of preparation to commit a felony that is set out under sections 308 of the Penal Code.

Thirdly, despite the court-made principles for the interpretation of section 308 of the Penal Code, the prosecution sometimes appears to disregard the complementary principles set out by courts. Overall, this is responsible for certain common mistakes committed by the prosecution around the areas of delineation of the offence from 'attempt' and adducing of the necessary evidence.

63 n 5.

64 [2017] eKLR (Petition 15 & 16 of 2015).

65 [2019] eKLR (Criminal Appeal 93 of 2014).

66 [2019] eKLR (Criminal Appeal 35 of 2018).

Flowing from the findings, this paper recommends that the prosecution should decisively and fully embrace best practices around the procedure of proffering charges, leading evidence, proving an overt act, and leading evidence of existence of a dangerous and offensive weapon. Arising from the highlighted challenges, therefore, it is recommended that the ODPP should re-strategize on its approach towards the prosecution of the offence of preparation to commit a felony. The DCI should also conduct more focused-approach investigations to support the prosecutions. Lastly, considering the emerging issues, courts should exercise justice depending on circumstances of each case and not feel bound by the mandatory sentencing under section 308 of the Penal Code.

SOME REALISM ABOUT WOUNDING WORDS
Comparing Nigeria's Death Penalty for Blasphemy with East African Sentencing Jurisprudence

***Dr. Charles A. Khamala**

Abstract

Some people believe that states have a duty to prohibit offensive expressions. Hence perfectionist and illiberal political systems protect religious feelings. Nigeria, like East African countries, inherited traditional common law's blasphemy laws to punish offensive expressions. Our received Penal Codes promote religious tolerance through protecting believers from wounding words. Post-independence "reasonable secular" constitutions legitimised lenient blasphemy sentences. However, in 1999 Nigeria's northern states introduced parallel Sharia law applying the mandatory capital punishment. Concurrently, regarding its blasphemy laws, conservative illiberal values coexist with lenient, perfectionist liberal ones. The global question is whether blasphemy should be prohibited in the 21st century and if so, how? Given that liberal constitutions value expressive freedoms, useful lessons may be gained from East Africa's sentencing jurisprudence to critically evaluate the justification for Nigeria punishing blasphemy with the mandatory death penalty. This paper draws an analogy from the West's use of treason law to protect political institutions and Muslim countries' use of blasphemy laws to protect religion. Both legal regimes reasonably protect values that their respective societies find sacred. There is thus moral equivalence in using criminal sanctions to protect their key institutions. Yet, even where the death penalty is legal, nonetheless in deserving circumstances, secular courts justify mitigation of capital crimes. Curiously however, departing from the modern reasonable man concept, conservative Islamic jurists interpret Sharia law as ousting judicial discretion to mitigate the death penalty. Conversely, liberal Islamic jurists accept the mitigation of blasphemy offences. They interpret the Koran as prescribing custodial imprisonment terms or fines. Is mandatory capital punishment for blasphemy fair? Globally, different Islamic countries deploy different reasonableness standards to curtail it. Kenya's emerging jurisprudence rejects mandatory sentences as being unconstitutional. Previously, in 1989 Kenya banned Indian-born, British Muslim Salman Rushdie's controversial book following Iranian Ayatollah Khomeini's bounty for blasphemy. Such *fatwas* forcing authors into hiding under police protection attract common law judicial review. Being a peaceful religion, Islam does not authorise assassinations. Despite calls for abolition of the death penalty for blasphemy, such laws remain legitimate. Applying modern reasonableness standards, lenient, deterrent punishments may be justifiable sanctions for blasphemy. Given Nigeria's secular Constitution, the mandatory death penalty seems disproportionate. Constitutional fidelity may assist plural societies to adopt fair trial procedures to innovatively balance expressive freedoms and religious feelings.

1. Introduction

In ancient societies, certain actions were likely to be condemned as sinful or wicked, and beliefs denounced as false or heretical. Blasphemy was punishable by the mandatory death penalty. Conversely, in liberal individualist societies such mandatory sentences would be considered

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'irrational'. Liberals promote uninhibited free speech. Between these extremes, a cooperative instinct demands that 'the concept of rationality cannot be extended indefinitely to resolve all problems of conduct and evaluation'.[1] Thus, to promote religious tolerance, with provisions in Penal Codes based on the Queensland Code of 1899 that originated from India, post-independent East African countries retained lenient punishments. Is criminalising blasphemy justified in the 21st century? And if so, by which sanction? Under emerging global jurisprudence,[2] mitigation of offences is justifiable, since 'constitutional adjudication is not a mechanical process. It requires an appeal to reason and discretion'.[3] Curiously however, in some Islamic states blasphemy remains punishable by the mandatory death penalty.[4] Whether Islamophobia, Christianophobia, or anti-Semitism should be punished is a cultural-relative question. Hence the need to rationalise blasphemy laws.

Religious offences intertwine with the relationship between churches, mosques, temples and states and their institutions and constitutions. Section two of what follows defines blasphemy and constructs a framework to explore deception law's regulatory role of mixing three approaches: interpretative, purposive and causal-predictive, to address the information flow between private parties.[5] Section three compares East Africa's lenient blasphemy sanctions and precedents with Nigeria's recent refusal to abolish Sharia's mandatory capital punishment.[6] As section four shows, writing or uttering words wounding religious feelings imputes criminal responsibility on accused persons not for harming, but merely for deliberately intending to insult others. This is a non consummate offence. Section five concedes that blasphemy laws reasonably protect religion in Muslim countries, just as the West uses treason laws to protect political institutions.[7] However, most Islamic jurists reject as unfair the mandatory capital punishment for blasphemy, Ayatollah Khomeini's *fatwa* calling for Salman Rushdie's assassination for writing a controversial book seems arbitrary.[8] Nonetheless, Satanic Verses precipitated numerous national bans[9] and still generates global effects. Commonwealth jurisdictions would subject the *fatwa* to judicial review. Section six thus contrasts the common law's reasonableness test for irrationality[10] to curtail administrative action, with traditional judges' use of vague, perfectionist reasonableness standards.[11] Section seven

1 B Barry and R Hardin 'Epilogue' in B Barry and R Hardin (eds) *The Rational Man and Irrational Society? An Introduction and Sourcebook* (Sage Publications, 1982), 367-386 at p 368.

2 *Wachira v Republic*, 31 August, 2022, High Court of Kenya (Mombasa) Constitutional & Judicial Review Division Petition no 97 of 2021.

3 E Meese III 'A Jurisprudence of Original Intention', in R E Diclerico and A S Hammock *Points of View: Readings in American Government and Politics* (8th edn McGraw-Hill, 2001), 216-221 at p 218.

4 M Dzirutwe et al 'Nigeria's Sharia Blasphemy Law not Unconstitutional, Court rules' *Reuters*, 17 August, 2022.<https://www.reuters.com/world/africa/nigerias-sharia-blasphemy-law-not-unconstitutional-court-rules-2022-08-17/> accessed 17 August 2022.

5 G Klass 'Meaning, Purpose and Cause in the Law of Deception' 100(2012) 2 *Georgetown Law Journal*, 449-496.

6 *Kaza v The State*, The Supreme Court of Nigeria, 15 February, 2008. http://www.nigeria-law.org/LawReporting/2008/February%202008/15th%20February%202008/Usman%20Kaza%20v%20The%20State.htm. <accessed on 3 August, 2022>

7 AA Salem, 'Ali Mazrui's Islamic Studies: Defending the Oppressed Muslims, Reforming Islamic Thought' in K Njogu and S Adem (eds) *Perspectives on Culture and Globalization: The Intellectual Legacy of Ali A Mazrui* (Twaweza Communications, Nairobi, 2017), 161-177 at p 165.

8 B Lewis *The Crisis of Islam: Holy War and Unholy Terror* (The Modern Library, New York, 2003).

9 C Gevers and P Vrancken *Jurisdiction of States*, in H Strydom (ed) International Law (Oxford University Press, South Africa, 2016), at pp 249-250.

10 *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223; [1947] 2 All ER 680.

11 M Saltman The Demise of the *Reasonable Man: A Cross-Cultural Study of a Legal Concept* (Transaction Publishers, Brunswick (US) and London (UK), 1991).

concludes that although the death penalty legitimately protects Islamic states, the procedure of its application matters. Reconciling reasonableness types can promote fair trial procedures for persons accused of blasphemy.

2. Legal Regulation of Offensive Expressions

2.1 The 'Offensive Expressions' Problem

In multicultural democracies, offensive expressions and religious feelings coexist uneasily. Although freedom of expression facilitates the search for truth, its appeal results in a 'clash of civilizations',[12] polarising Western countries and the Organization of Islamic Cooperation.[13] Its legal basis is the 1948 UN Declaration on Human Rights, concurrently positing a right to religious freedom while recognizing the freedom of expression, spawning a 'right to blaspheme'.[14] Unlike absolutist US and UK free speech values, Europe protects personal dignity, equality and democracy.[15] It rejects neutral liberalism's 'limitless tolerance towards non-harmful acts and expressions'.[16] Europeans prefer perfectionist liberalism 'which focuses on how exactly – and to what extent – illiberal-intolerant acts should be curtailed'. In restricting offensive speech, both liberal democracies and Islamic countries encounter dilemmas. Accordingly, the latter's death penalty is neither uniform nor mandatory.[17] Upon marginalisation of indigenous religion, African countries also encounter dilemmas of whether and how to regulate blasphemy.

2.2 Defining Blasphemy

Clarification of certain definitional concepts and features of faith-based, particularly Islamic law is necessary. 'The word "blasphemy", a religious syntax across all religious divides connotes any act of irreverence whether by spoken words, in print or gestures considered by a class of people of a particular religious sect as demeaning, denigrating, desecrating and contemptuous of their religion or contextually considered sacrilegious by religious sacred texts'.[18] It mocks the truth and 'could be a sacrilegious word uttered without any theological intent or counter belief'.[19] "Blasphemy laws"….prohibit forms of expression insulting or disrespecting to a religion, the religious feelings of individuals, forms of religious representation and/or religious figures or leaders'.[20] In 'the biblical context, blasphemy is an attitude of disrespect that finds expression in an act directed against the

12 SP Huntington *The Clash of Civilizations and the Remaking of World Order* (Simon & Schuster, United States, 1996).

13 M Limon, N Ghanea and H Power 'Fighting Religious Intolerance and Discrimination: The UN Account' 11(2016)1 *Religion & Human Rights* 21-65.

14 Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10 December, 1948 at the Palais de Chaillot, Paris. <https://www.knchr.org/Universal-Declaration-of-Human-Rights <accessed on 14 August, 2022> arts 19 & 20

15 JM Boland, 'Is Free Speech Compatible with Human Dignity, Equality, and Democratic Government: America, a Free Speech Island in a Sea of Censorship' 6(2013) 1 *Drexel University School of Law* 1-46.

16 Y Nehushtan 'Offensive Expression: The Limits of Neutral Balancing Tests and the need to take Sides' 16 (2016) *Human Rights Law Review* 1-28.

17 MC Bassiouni 'Principles and Values Death as a Penalty in the Shari'a' in L Arroyo, P Biglino and W Schabas (eds) T*owards Universal Abolition of the Death Penalty* (International Academic Network for the Abolition of Capital Punishment/Tirant Lo Blanch, Valencia, 2010) 315-336.

18 I Nwaogazie, 'Blasphemy and the Death Penalty under Sharia'h Law in Nigeria: A Legislative Monstrosity' 1(2021), *Madonna University, Nigeria Faculty of Law Journal*, 31-45 at p 31.

19 A Dacey *The Future of Blasphemy: Speaking of the Sacred in an Age of Human Rights* (Bloomsbury, London, 2012), at p 72.

20 n307.

character of God'.[21] Whether specific words, symbols or signs may offend religious sensibilities is a matter of interpretation, which depends on the perspective and values of the judge.

The Koran, Sharia law's principal source is supplemented by the Sunna (sayings and deeds of the Prophet Muhammad (PBUH)).[22] These two primary sources require interpretation. Substantive Sharia identifies three categories of crime: *hudud* (offences against God), *qisas* (offences against the person), and *tazir* (least serious crimes).[23] Specific mention of *hudud* in the Koran and Sunna, makes them the most serious. Interestingly, disagreements exist as to the exact number of *hudud* offences. Some scholars omit apostasy (*riddah*), the abandonment of Islam by one who professes the Islamic faith, from *hudud.*[24] It can be done by word, intention or action to indicate a rejection of Islam. Forbidden by many Koranic verses, doom in the afterlife awaits those committing it. While no earthly punishment is specified, the Sunna prescribes the death penalty.[25] However, repentance enables the offender to escape punishment.[26] Hence applicability of mandatory capital punishment is disputed.

2.3 Legal Realism: Judge-made Law

Blasphemy offences impute criminal responsibility on parties for doing everyday activities that are not harmful in themselves, unless or until another person perceives a communicative action – whether speech, sign or symbol. When the political system's judicial branch has to interpret whether or not public policies are reasonable, difficulties arise for liberal democracy. This is because the legislature is the true arbiter of reasonableness.[27]

Thus for American realists, the 'bad man' seeks advice on which actions to refrain from doing, so as to avoid punishment. Law is a prediction of what the judge will do.[28] Where meanings require contextual consideration, 'judges to a lesser degree "make law" by interpreting existing law, by judicial review, by judicial discretion and by filling in the gaps within the existing law'.[29] A judge evaluates the legality of blasphemy laws and practices restricting expressions which cause offence to religious feelings. The design of primary law must therefore answer two questions: What acts should the law target? Pertinently '[i]n virtue of what characteristics do given examples qualify as genuine instances of non consummate legislation'?[30] Second, how should the law regulate those acts? That is, what amount of condemnation, punishment or compensation is appropriate?

21 JM Henry Blasphemy, in TC Butler (ed) The Holman Bible Dictionary (Nashville: Broadman & Holman Publishers, 1991) cited in S L Cox 'A Consideration of the Gospel Accounts of the Jewish Charge of Blasphemy against Jesus' 2(2004) 2 Journal for Baptist Theology and Ministry 64-84 at p 64.

22 n 311 pp315-16.

23 PL Reichel *Comparative Criminal Justice Systems:* A Topical Approach (6th edn,Prentice Hall, 2013) p 122.

24 n 317 p123.

25 n 23

26 Koran, 3:86-89, cited in M Mumisa, *Sharia Law and the Death Penalty: Would Abolition of the Death Penalty be Unfaithful to the Message of Islam?* (Penal Reform International, 2015) p 22.

27 n 305 p131.

28 KN Llewellyn and EA Hoebel *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (WS Hein & Company, 2002).

29 D Husak *The Philosophy of Criminal Law* (Oxford University Press, 2010) p 132.

30 n 11 p 132.

2.4 Lessons from Conventional Talk: The Story Model

A normative framework is derived from applying linguistics theory to the status of testimony. Jurisprudentially, 'the assertion contained in a verdict is not an assertion of brute fact'. Rather '[a] positive verdict (of guilt) or general finding (of liability) implies specific findings and assertions of "core factual matters".[31] As regards conversational talk, Pritchard explains that, on one hand, 'there is the *inferentialist* or intellectualist claim that one cannot gain a justified belief about a proposition solely on the basis of hearing someone asserting that position (i.e. one needs independent grounds to justify that belief)'.[32] Without independent grounds, there is intuitively at least, no reason to accept testimonial evidence as being in any way indicative of the truth.[33] This is fact-scepticism. To Frank, witnesses may be unobservant, forgetful, incoherent or biased.[34] Besides '[f]or all you know, this person could be a compulsive liar, or completely delusional, or perhaps even someone having a joke at your expense'.[35] Hence a 'search process' of receiving and evaluating evidence 'should be carried out to the point at which marginal costs and marginal benefits are equated'.[36] According to Callen 'empirical studies confirm' Posner's 'story model' because fact-finders:

> Do not rely solely on case specific information to form stories: they also employ knowledge about similar events and "generic expectations" about what makes a complete story (e.g., knowledge that human actions are usually motivated by goals). Based on this knowledge and information, individual jurors construct one or more narratives that they then use in reaching a verdict.[37]

Hence 'if jurors are aware of more than one complete, consistent, and plausible story, they become uncertain or lack confidence in their conclusions, which may cause them to look for new explanations or stories'.[38] During conventional conversation, in making an assertion, one conveys – often quite intentionally – far more information than the literal content of what is asserted, and any account of the epistemology of testimony needs to be sensitive to this fact. According to Grice, if an assertion generates a *conversational implicature* that the agent making the assertion believes to be false, then even if the assertion itself is of a proposition which is true, that assertion is conversationally inappropriate.[39]

Grice's four maxims are, first, that the witness should 'try to make his communications true. That assumption is necessary for everyday communication because recipients who did not make that assumption might have to devote vast cognitive resources to each communication they receive,

31 HH Lai *The Philosophy of Evidence Law*: Justice in Search of Truth (Oxford University Press, Oxford, 2008) p 87.

32 D Pritchard 'Testimony' in RA Duff, L Farmer, Marshall and V Tadros (eds) *The Trial on Trial, Vol 1: Truth and Due Process* (Hart Publishing, Oxford and Portland, Oregon, 2004) p 101.

33 ibid p 102.

34 J Frank *Courts on Trial* (Princeton University Press, Princeton, 1949).

35 n326 p 103 citing D Hume (2nd ed) (Oxford University Press, Oxford, [1772] 1972) p 111.

36 CR Callen 'Othello Could not Optimize: Economics, Hearsay and Less Adversary Systems' in M MacCrimmon and P Tillers (eds) *The Dynamics of Judicial Proof: Common Sense, Rationality and the Legal Process* (Physica-Verlag, Heidelberg, 2002), 437-455 at p 438.

37 n 326 p 443.

38 Ny Pennington and R Hastie 'A Cognitive Theory of Juror Decision Making: The Story Model' 13(1991) C *LR* 519-557.

39 ibid 113.

making efforts to communicate onerous, if not futile'.[40] His second maxim based on the assumptions of communication would be that communicators are 'neither more nor less informative than necessary'. The third is that the information they convey relates 'to the purpose of the parties to the communication'. Fourth, 'the speaker should be orderly, brief, and clear'.[41] These maxims comprise the interpretive approach.

2.5. The Role of Regulatory Laws in Testimony

'Testimony' is strictly defined as a statement made on oath for use in court. However, in a trial situation, we cannot rely on witnesses to communicate without *conversational implicatures*. Rather, it is the responsibility of the lawyers involved to extract further information from the witness. Klass distinguishes between three methods within the law of deception that regulate informational flows between private parties.[42] First, applying Grice's 'Cooperative Principle', interpretive laws 'identify deceptive behaviour by giving legal force to everyday norms of interpretation and truth telling'. By way of such extra-legal linguistic norms, they identify a legal wrong. An objective definition of words incorporates not only dictionary meanings of syntax and semantics, but also rules that determine what a speaker means in context. There is also a moral prohibition on lying.

Second, purpose-based laws target acts done with wrong intent, such as with the aim of concealing the truth. They define 'an actor's wrongful state of mind'.[43] Third, causal-predictive laws ask about 'a transaction element's likely effects on a person's belief or knowledge'.[44] They use folk psychology, natural science methods and cognitive theory to predict informational effects. Commonsensically, advertisements may lead consumers to overestimate the value of a product or underestimate its harmful effects. Similarly, in a trial situation to prevent judges from receiving lies, witnesses should avail themselves for cross-examination of veracity of their testimonies so that an opposing party can draw out exactly what grounds are being implied as supporting an assertion in question, that is, what evidential claims are being conversationally implied by the witness's testimony.[45]

3. Blasphemy under Comparative Criminal Law

3.1 Kenya

Given Africa's triple heritage,[46] this paper explores blasphemy law's legitimacy in promoting religious tolerance through protecting believers from blasphemy under Kenya's 'reasonable secular' [47] Constitution.[48] Article 33(d)(ii) allows the prevention of advocacy of hatred based on religious discrimination.[49] Yet, article 8 prohibits the establishment of a state religion. Furthermore, article

40 n 330 pp 448-449..

41 n 326 p 113.

42 n 36 p 449.

43 ibid pp 458, 450.

44 ibid 466.

45 n 326 pp 116-7

46 AA Mazrui, *The Africans: A Triple Heritage* (BBC Publications and Little Brown & Co., London, 1986).

47 R Lutta and J Lutta, *Relationship between the State and Religion in Kenya: Epiphany of Orwellian Doublethink* 15(2019) 1 *Law Society of Kenya Journal* 111-133 at p 131.

48 Constitution of Kenya, 2010.

49 ibid art 33(d)(ii).

32 binds the state to ensure that people enjoy the freedom of religion, conscience and belief. Although everyone is entitled to article 27 equal protection, under article 24, derogation from religious rights or expressive freedoms is permissible in the public interest. Consequently, criminal jurisdiction over blasphemy is prescribed.

The Penal Code[50] imposes lenient punishments for 'insult to religion' and 'writing or uttering words with intent to wound religious feelings'. The former misdemeanour prescribes six months imprisonment under section 134 for '[a]ny person who destroys, damages or defiles any place of worship or any object which is held sacred by any class of persons with the intention of thereby insulting the religion of any class of persons or *with the knowledge that any class of persons is likely to consider* such destruction, damage or defilement as an insult to their religion'.[51] Under Klass' causal-predictive approach, the prosecution should adduce evidence to demonstrate that a class would probably be insulted by the destruction, damage or defilement and the accused knew this. This provision is punished less than section 138, although it appears more serious.[52] In 2018, police in Garissa County reportedly contemplated blasphemy charges against a primary school teacher alleged to have trampled on the Koran.[53] No charges were laid.

Section 138 punishes with up to one year in jail any person who 'with the deliberate intention of wounding religious feelings of any person, writes any word, or any person who, with the like intention, utters any word or makes any sound in the hearing of any other person or makes any gesture or places any object in the sight of any other person'.[54] This purpose-based approach is more difficult to demonstrate, requiring proof regarding an accused person's subjective state of mind, reflective of deliberate calculation.

Because these provisions are rarely enforced, comparative studies are informative. The Indian Law Commissioners observe regarding India's equivalent section 298 that 'the intention to wound must be deliberate, that is, not conceived on the sudden in the course of discussion, but premeditated'. Consequently, 'mere knowledge that the religious feelings of other persons may be wounded would not suffice nor a mere intention to wound such feelings would suffice unless that intention was deliberate.[55]

3.2 Tanzania

In the Tanzanian case of *Dibagula v R,*[56] a member of an Islamic organisation was on a mission to propagate his own religion. At a meeting with colleagues he uttered the words *"Yesu si Mwana wa Mungu, ni jina la mtu kama mtu mwingine tu"* which in English means Jesus is not the son of

50 Penal Code, Chapter 63 of the Laws of Kenya, Division III - Offences Injurious to the Public in General; Chapter XIV – Offences Relating to Religion.

51 ibid s 134 (emphasis added).

52 *Ratanlal & Dhirajlal's Law of Crimes: A Commentary on the Indian Penal Code,* 1860 (PC Puliani, New Delhi, 2009) p 1258.

53 H Barisa and K Abdullahi, *Teacher faces Blasphemy Charge for 'Trampling on Quran'* The East African Standard, 30 July, 2018) https://www.standardmedia.co.ke/business/north-eastern/article/2001289963/teacher-faces-blasphemy-charge-for-trampling-on-quran> accessed 30 July, 2022.

54 n 344 s138.

55 n 346 pp 1273-1274.

56 (2003) AHRLR 274 (TzCA 2003); [2007] 1 EA 59.

https://thrdc.or.tz/wp-content/uploads/2019/09/HAMISI-RAJABU-DIBAGULA-vs-REPUBLIC.pdf

God, it is a name like any other.[57] Without proof that the accused had a deliberate intention to wound the religious feelings of others, he was convicted for offending Christian worshipers as such. However, the Court of Appeal's purposed-based construction of a provision substantively identical to Kenya's section 138, held that:

> The provisions of section 129 of the Penal Code were not intended to, and do not, frown upon sober or temperate criticisms of other peoples' religions even if those criticisms are made in strong and powerful language; to constitute a violation of section 129, there must be a deliberate intention (*mens rea*) of the speaker to wound the feelings of those hearing him.[58]

Samatta CJ, Mroso and Munuo JJA rejected the appellant's causal-predictive suggestion that required the prosecution to 'adduce evidence from someone whose religious feelings were wounded by the alleged utterance, sound or gesture'. It 'would be doing great violence to the language of the section to hold that such proof is required'. Nonetheless, the appellate Court expressed surprise that the High Court Judge denied the appellant the opportunity to be heard yet 'even God himself did not pass sentence upon Adam before he was called upon to make his defence'.[59] In 2013, an alternative liability was introduced namely 'a fine of not less than three million shillings or imprisonment for a term of not less than one year.[60']

3.3 Uganda

Section 122 of Uganda's Penal Code Act is also identical to Kenya's section 138. Neutral liberal critics argue that it is constitutionally invalid for two reasons.[61] First, because article 28(12) of Uganda's 1995 Constitution requires laws to be clearly defined before punishment. Yet this vague blasphemy provision criminalises such conduct made within 'the hearing or sight of any other person'. Paradoxically:

> [N]on-believers gathered in a public place discussing or debating the non-existence of god with a theist can be prosecuted if a cleric, who is not part of their discussion and is within hearing distance of the discussion, dislikes the premise of the debate if there is proof that what is said is intended to hurt religious feelings. It is inconceivable how such a debate might take place without intentionally causing slight to "religious feelings" since this phrase is undefined.[62]

Since listeners may be unduly sensitive, potential blasphemers receive no fair warning. Moreover, as shall be discussed in sub-section 6.1 below, it is impermissible to delegate basic policy matters to policemen and judges for resolution on an *ad-hoc* basis with the attendant danger of arbitrary and discriminatory application.

57 n 350 p 2 para 2.

58 ibid at p 8 para 17.

59 n 350 pp 10-11 para 24.

60 Act 10 of 2013 s 47

61 N Muhumuza 'Uganda's Blasphemy Law is Unconstitutional' (AfricLaw, 19 June, 2019) <https://africlaw.com/2019/06/19/ugandas-blasphemy-law-is-unconstitutional /> accessed 31 July 2022.

62 ibid

Second, section 122 contravenes freedom of speech. In 2002, Uganda's Supreme Court – following the landmark Canadian *Zundel* decision – conferred constitutional protection upon the freedom of the press, since 'while truth and falsity are mutually exclusive, the purposes for protecting both are not'.[63] These criticisms may equally apply to comparative blasphemy laws.

3.4 Nigeria

Nigeria is a de facto religious state,[64] where inherited Western colonial legal systems coexist alongside imported Sharia law. Thus, Islam and Christianity receive unacknowledged dominance to marginalize African indigenous religions. Section 38(1) of Nigeria's 1999 Constitution contains the primary right protecting freedom of religion, while section 39 enshrines the right to freedom of expression. Section 10 provides that neither the federal government nor a government of a state shall adopt any religion as a state religion.[65] Nonetheless, in 2008 the Nigerian Supreme Court recognised that northern states operate Sharia law in parallel, applying the mandatory death penalty.[66]

In transforming Islamic law in northern Nigeria, the British colonial masters introduced English law, while supplanting many traditional religions in the south. At independence, in the north, Islamic criminal law was reduced into a Penal Code within the context of English common law. It punishes blasphemy with two years' imprisonment, with the option of a fine.[67] In 2000, Zamfara state enacted northern Nigeria's first Sharia Penal Code, followed by 11 other states. They contain *hudud* offences, including blasphemy, punishable by mandatory death. These laws are subject to the Constitution, including the fundamental human rights under Chapter four.[68]

Some examples illustrate intolerance for offensive expressions in Nigeria. In 2020, a Nigerian Kano Sharia Court sentenced to death 22 year-old singer Yahaya Sharif-Aminu for composing a song in his WhatsApp apparently praising Senegalese Islamic cleric, Ibrahim as greater than Prophet Muhammed (PBUH). Sharif, himself a Tijaniyya, and notwithstanding admitting his mistake, was condemned for 'spreading and reviving the Tijaniyya from Senegal to Sudan'.[69] Simultaneously, the same court jailed teenager Omar Farouq Bashir for 10 years over similar blasphemy charges. These judgments ignited international uproar. Hence Kano's secular High Court Chief Judge Nuraddeen Umar, freed Farouq for being a minor, but ordered a retrial for Sharif, since he was denied legal representation.[70] These judgments indicate that Sharia trials recognise criminal defences, including the defence of incapacity and the right to fair trial. However, in August 2022, dismissing Sharif's test-case challenge as 'more out of sentiment than law', Nigeria's High Court Judge Abubakar

63 *Obbo and another v Attorney General*, Constitutional Appeal No 2 of 2002 per Mulenga, JSC in citing *Zundel v Her Majesty The Queen* [1992] 2 SCR 731, 75 CCC (3d) 449.

64 ES Nwauche 'Law, Religion and Human Rights in Nigeria' 2(2008) *AHRLJ* 570.

65 ibid p 571.

66 n 300

67 CAP 42 1958 s 204 now replaced by the Criminal Code Act, Cap C38 Laws of the Federation 2004, cited in Nwaogazie (n 312) p 36.

68 n 358 p 574; see also ibid p 38.

69 A Thurston 'The Sharif-Aminu Blasphemy Case in Kano, Nigeria: Some Context' *Sahel Blog Covering Politics and Religion in the Sahel and Nigeria,* 13 August, 2020.
<https://sahelblog.wordpress.com/tag/tijaniyya/> accessed on 4 August, 2022

70 A Adesomoju 'Blasphemy: Court frees 13-Year-Old, Orders Retrial of Musician Sentenced to Death' *Premium Times,* 21 January, 2021.

Muazu Lamido held that Islamic religious law does not violate the Constitution.[71] This paper intimates that his retrial may consider whether any appropriate legal defences, such as honest and reasonable mistake or mitigating factors, apply.

In May 2022, fellow students shouting 'Allahu Akbar' stoned and clubbed Deborah Yakubu to death for 'blaspheming' Islam and Prophet Muhammad (PBUH) on a WhatsApp group.[72] She was a Christian and a Home Economics student at Shehu Shagari College of Education in Sokoto State. Her corpse was burnt beneath a heap of tyres. Apparently, without causing actual harm, words can wound religious feelings. For allegedly writing 'against sanctimonious proselytisation on what was to be a strict academic discussion group among her colleagues' she suffered extrajudicial execution. She refused to apologise and recant her statement. Her 'steely defiance was borne out of the fact that she didn't see any figment of insult or blasphemy in her innocuous statement'. [73]Instead, she 'admonished her classmates to stop posting religious and non-academic contents on the class WhatsApp platform.'[74]

4. Criminalising Blasphemous Thoughts as Endangerments

4.1 Blasphemy as a Non Consummate Offence

Notwithstanding that 'writing or uttering words with intent to wound religious feelings' has no harm requirement, monarchies criminalised blasphemy.[75] Nowadays, Anglo-American criminal intent, if taken on its own, is an incomplete crime. This is because persons lack the requisite control over their beliefs.[76] Since harm need not occur in each decision on which a given mental act is performed, the imposition of criminal liability for mental acts enlarges the scope of non consummate liability. In the absence of a physical act, how may proof 'beyond reasonable doubt' establish that an accused performed a given mental act for which liability is to be imposed? A speech-act should be *concurrent* with the thought, so that the accused is convicted *for* performing such act as representing *possessing* such thought.[77] Thus punishment 'for non-acts has enormous practical difficulties'[78] which involve non-enforcement, and invasions of privacy intolerable in a free society.

For example, to protect the state, Kenya's Penal Code expressly criminalises treason as comprising *inter alia*, 'compassing, imagining, inventing, intending or devising' the 'death, maiming, wounding, imprisonment or restraint' of the president or overthrow by unlawful means of the government'.[79] Further the law requires that the accused 'expresses, utters or declares such thoughts by publishing, any printing or writing or by any overt act or deed'. In 1990, Rev. Lawford Ndege Imunde was

71 M Dzirutwe et al 'Nigeria's Sharia Blasphemy Law not Unconstitutional, Court rules' *Reuters,* 17 August 2022 <https://www.reuters.com/world/africa/nigerias-sharia-blasphemy-law-not-unconstitutional-court-rules-2022-08-17/> accessed 4 August2022.

72 Editorial 'The Murder of Deborah Yakubu' *The Nigerian Tribune*, 23 May, 2022 <https://tribuneonlineng.com/the-murder-of-deborah-yakubu/> accessed on 4 August, 2022

73 D Afelumo 'Deborah Yakubu: Our Deja Vu' *Premium Times* 17 May, 2022

74 n 366

75 n 317.

76 D Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press, 2008), 87.

77 ibid p 68.

78 ibid p 74.

79 n 344 ss 40(1)(a) and (b).

convicted for a similar public order offence of 'printing and possessing seditious publications exciting disaffection against the President or the Government of Kenya'.[80] Although he did not publish his personal diary's contents to any other person, he noted in it that foreign minister Dr. Robert Ouko was murdered with the connivance of the government. He was sentenced to six years imprisonment. For Husak 'that statute violates the act requirement'.[81] It creates what he calls risk prevention crimes, or Duff terms endangerment crimes.[82] Section 138 of Kenya's Penal Code criminalising 'writing or uttering words with intent to wound religious feelings' is approached differently from section 134's 'destroying, damaging or defiling any place of worship or any object which is held sacred'. The former, regulated by a purposive-based norm, punishes deliberate intent. This is akin to an attempt to harm. The latter, regulated by a causal-predictive norm, punishes discrete communicative transaction elements after the transaction has broken down.

Husak concludes that liability for an attempt can only be justified if the accused makes a 'substantial step' towards attainment of a criminal objective. Only then would such steps become evidence of a criminal intention or preparation to commit a felony. The *US v Still* [83]case emphasises that criminalisation is imposed *for* intent. The US Supreme Court reversed the accused's conviction of attempted bank robbery established in his police statements after arrest. It interpreted his acts as being insufficient to constitute an attempt and he could not be convicted for thoughts. The decision fomented debate about whether or not the law should specify the actual act which should be required for liability for attempts. A similar question is: what act proves that a writer or utterer of insulting words under section 138 of Kenya's Penal Code has a deliberate intention to wound another's religious feelings?

Whether one who damages sacred objects under section 134 may be punished depends on if he understood his action as being *likely* to be blasphemous. Folk psychology, empirical evidence or cognitive theory are required to demonstrate the accused's subjective knowledge of what is considered sacred in the victim's religion according to experts. For Douglas, risk is a social construct where individuals assess the same dangers but come to different opinions of risk, based on underlying cultural biases associated with their way of life.[84] Similarly, for Wells[85] risk is a cultural thing. Different cultures place different social constructions on phenomena to decide when a risk has accrued. Assuming that suspects of blasphemy have performed a *bona fide* activity such as painting on a temple wall or uprooting foliage in its compound, this need not necessarily constitute a risk of insulting another's religion. Whether a class of persons is likely to consider acts or words as insulting depends on the judge's viewpoint. In legal pluralist societies, Husak would be concerned to discover what act the blasphemy suspects are culpable *for*, unlike Moore[86] for whom an act is a 'formal doctrinal matter' according to the sacred text. Given diverse approaches to interpreting

80 *Clergyman says Devil made him Write Seditious Material* (UPI Archives, 31 March, 1990) <https://www.upi.com/Archives/1990/03/31/Clergyman-says-devil-made-him-write-seditious-material/4911638859600/> .

81 n 370 p68.

82 RA Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart Publishing, Oxford, 2007).

83 850 F. 2d 607 (9th Circuit 1988).

84 M Douglas *Risk and Blame: Essays in Cultural Theory* (Routledge, London, 1992).

85 C Wells 'Corporate Manslaughter: A Cultural and Legal Form' 6(1995) 1 *Criminal Law Forum* 45-72.

86 M Moore *Placing Blame: A General Theory of the Criminal Law* (Oxford University Press, 1994).

meanings, this paper evaluates various blasphemy laws imposing the mandatory death penalty.[87] Which concept of the reasonable man do judges in different societies invoke to measure whether an accused's words or utterances are insulting? Does the secular liberal constitution constrain judges to recognise defences or mitigation of unintentional blasphemy? This provokes one to consider the justification of mandatory harsh punishments to deal with offensive expressions.

4.2 Blasphemy as Treason

In 1989, burnings of free expression exponent Sir Ahmed Salman Rushdie's Satanic Verses triggered Khomeini's *fatwa* spawning Islamic fundamentalism.[88] *Fatwa* is a technical term in Islamic jurisprudence for a legal opinion or ruling on a point of law'.[89] An Islamic jurisconsult authorised to issue a *fatwa* is called a *mufti*. The procedural question is whether Ayatollah's *fatwa* was issued in accordance with standard Islamic practice or if pronouncing a death sentence consciously deviated to recruit an assassin. It amounted to sanctioning extrajudicial killing. Many Many countries, Kenya included, criminalise politics through treason and allied offences. Furthermore, the peace of Westphalia's three principles for interstate relations are state sovereignty, the legal equality of states and non-intervention in the affairs of another state.[90] For peaceful coexistence, Rawls thus urges liberal countries to tolerate illiberal states.[91] And vice versa. Mazrui's substantive thesis explains that 'in doctrine Western culture favors pluralism and diversity' while in practice 'its impact on the cultures of the world has been homogenizing; it has been anti-pluralist in consequence'.[92] He justifies Muslim countries' criminalization of blasphemy to protect moral values held dear.

Second, treason can only be committed by people who owe allegiance to a state.[93] Similarly, only Muslims can commit *riddah*, although the death penalty for blasphemy may apply to non-Muslims too.[94] Third, misprision of treason is committed by any person who either 'becomes an accessory after the fact to treason' or 'knowing that any person intends to commit treason, does not give information thereof with all reasonable dispatch' to the relevant authorities, 'or use other reasonable endeavours to prevent the commission of the offence'.[95] Likewise, some Islamic jurists attribute the saying that 'if anyone insults me, then any Muslim who hears this must kill him immediately'[96] to the Prophet (PBUH). However, given that Islam is a religion of peace and forgiveness, there are other Koranic scholars who qualify that interpretation by insisting that some form of procedure or authorization is required. The procedural question is whether blasphemy executions should be summarised or preceded by a fair trial. If defences might exonerate or mitigate treason, why

87 F Bagga and K Lavery 'Apostasy, Blasphemy, and Hate Speech Laws in Africa: Implications for Freedom of Religion or Belief' (US Commission on International Religious Freedom,'December 2019)
https://www.uscirf.gov/sites/default/files/Africa%20Speech%20Laws%20FINAL_0.pdf

88 N Chakraborti and J Garland *Hate Crime: Impact, Causes and Responses* (2nd edn Sage, London, 2015).

89 n 302 p140.

90 n 303, p4.

91 J Rawls *The Law of Peoples (Harvard University Press*, Cambridge, 1999).

92 AA Mazrui 'The World of Islam: A Political Overview' 11 (1990) 2 *Journal of Muslim Minority Affairs* 218-225 at p 219.

93 n 344 ss 40(1)(a) and (b).

94 A Bibi 'Christian leaves Pakistan after Blasphemy Acquittal' *BBC*, 8 May, 2019.
<https://www.bbc.com/news/world-asia-48198340> accessed on 1 August, 2022

95 n 344 s 42.

96 n 302 p141.

not blasphemy too? Given that value pluralism can improve international relations, and since the death penalty may be disproportionate in certain circumstances, efforts may be made to strengthen religious tolerance through respecting fair trial rights for blasphemy suspects.

5. Some Realism about Words that Wound Religious Feelings: Khomeini versus Rushdie

5.1 Divergent Interpretations of Islamic Crimes

Through pious references to Islamic texts, notably the Koran and the Prophet's (PBUH) traditions, different extremist groups sanctify their actions. Each claims to be the truer, purer and more authentic version than that practised and endorsed by the vast majority of Muslims.[97] Lewis opines however, that for various reasons, the protagonists are each highly selective in their choices and interpretations of sacred texts. He cites the specific charge of Ayatollah Ruhollah Khomeni's infamous 14 February, 1989, *fatwa* against Rushdie. It informed 'all the zealous Muslims of the world that the blood of the author of this book…which has been compiled in opposition to Islam, the Prophet and the Qu'ran…is hereby deemed forfeit'.[98]Anointing anyone who is killed in this path a martyr, Ayatollah called on them 'to dispatch' also 'those involved in its publication', adding 'quickly…..so that no one will dare to insult Islamic sanctities again'. How the book constitutes *riddah* is unclear. Assuming a blasphemy legal proscription similar to those considered in section three above, this finding of fact invokes a causal-predictive approach. Prosecutors require folk psychology, empirical evidence, or cognitive theory to prove the likelihood that damage or destruction to sacred objects shall injure religious feelings of a class. A book cannot cause physical damage. To establish that written words are insulting, a purposive test should demonstrate the author's deliberate intention to insult. However the case proceeded *in absentia.* Rushdie was neither present nor heard in defence. Ayatollah apparently arrived at a guilty verdict by applying his own interpretation of Islamic law.

Thereafter, an Islamic charitable trust in Teheran offered US$ 3 million to any national for assassinating Rushdie and US$ 1 million to any foreigner. From a legal perspective, whether common law, civil law or Islamic law, such a bounty attracts an 'incitement to murder' charge. Relevantly, 'Islamic jurisprudence is a system of law and justice, not lynching and terror. It lays down procedures according to which a person accused of an offence is brought to trial', confronts his accuser, and is given an opportunity to defend himself. A judge then reaches a verdict and, if the accused is found guilty, pronounces sentence.[99] On this view, the Ayatollah's use of a *fatwa* to pronounce a death sentence and recruit an assassin deviated 'very considerably from standard Islamic practice'.[100]

Just as states punish the offence of treasonable felony with life imprisonment for foreigners who commit treasonous acts,[101] so also Islamic jurists distinguish between a non-Muslim subject of the Muslim state who insults the Prophet (PBUH) from the case of a Muslim who insults. The jurists devote much time to define offences, prescribe evidentiary rules as well as lay down appropriate punishments.[102] Blasphemy offences should not be used to achieve private vengeance. Rather,

97 n 302 p138.

98 ibid p139.

99 ibid p 141.

100 ibid p 140.

101 n 344 s 43.

102 n 8 p 140.

evidence is carefully scrutinised prior to judgement and sentencing. The majority view is that the severity of flogging and an imprisonment term suffice depending on the gravity of the offence.[103] Being tantamount to a *hudud* crime, if proven against a blasphemous Muslim, *riddah* warrants the death penalty. However, only a minority of jurists uphold the dispensing with the formalities of arraignment, trial, and conviction before execution, where a Muslim stands accused. The majority insist that some form of procedure is required, and that summary killing without such authorization is murder and should be punished as such.[104] Yet Khomeini interpreted the meaning and veracity of Rushdie's impugned book as sacrilegious without according him an opportunity to be heard in defence.

5.2 International Impacts and the Effects Doctrine

Before his September 1988 publication of the book, Rushdie said, 'I expected a few mullahs would be offended, call me names, and then I could defend myself in public... I honestly never expected anything like this'. Initially India banned importing it in October 1998. However, possession is not outlawed, unlike in Bangladesh, Sudan, and South Africa where since November 1988 it was also outlawed in Sri Lanka from December 1988. Following its 1989 US edition and Khomeini's February *fatwa*, fresh reviews precipitated Kenya's ban in March 1989 'in the interests of public order, health or morals, the security….(restriction was deemed) to be reasonably justifiable in a democratic society'.[105] Thailand, Tanzania, Indonesia, Singapore, and Malaysia followed suit, then in June 1989, Venezuela.[106]

In 1991, the book's Japanese translator Hitoshi Igarashi, died mysteriously. In 1993, its Norwegian publisher William Nygaard, survived a shooting in Oslo, while Ettore Capriolo, its Italian translator, survived an Iranian man's knife attack in Milan. In 2022, at a New York intellectual retreat, Hadi Matar attempted to kill Rushdie who had suffered decades of Islamist death threats.[107] Unsurprisingly, Teheran disowned Matar's act as a frolic of his own.[108] Aged 24, he has admittedly only read two pages of Rushdie's UK-published book. He was born and raised in the US by his mother, of a Lebanese father, who Matar hardly visits in Lebanon. Yet he confesses to detesting the 75 year-old Indian-born author enough to attempt to kill him publicly.[109] Now he faces attempted murder charges in the US.[110]

Such extrajudicial defences of religious freedom are problematic because although a single perpetrator of a violent attack may be apprehended, the issuer of a general instruction to kill may remain at large in another jurisdiction. Five issues arise regarding Ayatollah's *fatwa*. First, it was declared in Iran but creates extraterritorial effects. By the 'effect' of the conduct as opposed

103 ibid pp 140-1.

104 ibid pp 141-2.

105 n50 s52(2).

106 'The Satanic Verses Controversy' <https://en.wikipedia.org/wiki/The_Satanic_Verses_controversy> accessed 16 August 2022.

107 H Meko and L D'Avolio 'Rushdie Stabbed Roughly 10 Times in Premeditated Attack, Prosecutors Say' *New York Times,* 13 August, 2022 <https://www.nytimes.com/2022/08/13/nyregion/rushdie-video-stabbed-ny.html>

108 ibid.

109 ibid

110 FP Staff, 'Satanic' Killers: When Translators of Salman Rushdie's 'The Satanic Verses' were Attacked, Killed, Firstpost, 13 August, 2022. <https://www.firstpost.com/world/satanic-killers-when-translators-of-salman-rushdies-the-satanic-verses-were-attacked-killed-11053021.html> accessed 18 August 2022.

to the actual conduct is meant that states which experience reprisal attacks against blasphemers can exercise jurisdiction over such acts that take place on their territory through legislation and prosecution.[111] Under the 'effects doctrine', where a terrorist group in a Middle East state issues a death warrant against somebody in another state, both states can claim jurisdiction. Because the above attacks originated in Iran, it possesses subjective territoriality. Concurrently, targeted Western states can invoke objective territoriality.[112] Despite lingering anti-Rushdie sentiment, the Iranian government in 1998 distanced itself from Khomeini's *fatwa*.[113] Second, how substantial an 'effect' is necessary to support jurisdiction? Third, even if Matar was acting in isolation, under the passive protective principle,[114] the UK has concurrent jurisdiction to prosecute him since Indian-born Rushdie is its naturalised citizen. Fourth, as terrorism is a crime against humanity, all states possess quasi-universal jurisdiction, and also all states possess universal jurisdiction to extradite or prosecute terrorists.[115] Judiciaries in constitutional democracies have consequently struck down overreaching executive decisions constraining expressive freedoms.

6. Judicial Review of Overreaching Free Speech Regulations

6.1 Free Speech Proponents and Detractors

Free speech proponents contend that 'invalidating blasphemy laws is not a clarion call to incite violence and hatred towards religious people'. They diffuse claims which extremists may invoke under the belief of punishing blasphemy in self-defence. Instead, for Muhumuza '[e]very individual is guaranteed the right to inviolability of their person/body'. Conversely, 'ideas, religious or otherwise, deserve no such respect'. It is thus:

> Disingenuous for one to argue that blasphemy laws help protect religious individuals from being subjected to wanton violence for their beliefs. If anything, in Uganda, we have seen the opposite: self-righteous indignation by members of certain religious groups towards different (usually so-called traditional) belief systems has occasionally manifested itself through violence and destruction of property.[116]

Ironically, Muhumuza invokes absolute expressive freedom, to reject blasphemy laws as politically-motivated for engendering and creating 'a society that believes in absolutes; the infallibility of one's belief systems which then leads to the rejection of compromise and indifference if not opposition to alternative opinions'.[117]

This paper disagrees that non-prosecution of dormant blasphemy provisions 'forcibly silence(s) criticism of dominant religious ideas'. On the contrary, criminalising blasphemy reminds absolutists of the need for sensitivity towards religious feelings of others. Global cultural relativity reflects divergent values. Formal and informal legal systems are expressions of different legal cultures that

111 n 303 pp 249-250.

112 N Samie 'The Doctrine of 'Effects' and the Extraterritorial Application of Antitrust Laws' 14(1982) *UMIALR* 23-59 <http://repository.law.miami.edu/umialr/vol14/iss1/3> .

113 n 404

114 n 9 pp 247-248.

115 ibid p 250

116 n 355.

117 ibid

enact substantive crimes to protect what their respective societies hold as sacred. In the belief that 'the absence of any prosecution and conviction should count towards the criminal law's thorough educative function of promoting tolerance'[118] some societies value retaining mild blasphemy laws. Decisions or decrees that arbitrarily impose extreme punishments for blasphemy attract judicial review on grounds of unreasonableness.

6.2 The Limits of *Wednesbury* Reasonableness

Having been detained on the Home Secretary's mere allegation that that he was of hostile association the appellant in *Liversidge v Anderson*,[119] claimed damages against the UK Secretary of State. The Home Secretary reasonably believed that the appellant had hostile associations and it was necessary to exercise control over him. Therefore, adopting a perfectionist reasonableness standard, the House of Lords upheld the administrator's discretion saying no court could inquire into whether an executive had reasonable grounds for his belief. By contrast, since the majority were 'more executive minded than the executive', Lord Atkin's dissent has been vindicated. Because 'exclusion of effective judicial review exposes the individual to abuse of executive power',[120] the Australian High Court concurs that it is for a court to pronounce reasons for issuing the death penalty. More recently, to balance national security and individual liberty against executive detention, in *A v Secretary of State for the Home Department,*[121] the House of Lords stuck down a detention without trial scheme as disproportionate and discriminatory. Indefinite detention of foreign prisoners suspected of involvement in terrorism, contravenes the European Convention on Human Rights, and mutatis mutandis, the African Charter on Human and Peoples' Rights.[122]

Similar disproportionality arises on considering Ayatollah's unilateral decision to punish Rushdie by the mandatory death penalty, oblivious to mitigating circumstances. A deeper question is which reasonableness standard may apply to review the legality of the administrative discretion of issuers of *fatwas* directing assassins to eliminate blasphemers extrajudicially or even unconstitutionally. Have Iranian administrators or even Nigerian trial courts, regarding capital offences, acted in excess of jurisdiction under Sharia law that confer procedural safeguards on suspects? Can modern reasonableness standards under liberal constitutions be invoked to review such death warrants and capital sentences?

Associated Provincial Picture Houses Limited v Wednesbury Corporation[123] famously established the test for unreasonable administrative decisions. *Council of Civil Service Unions v Minister for the Civil Service*[124] upheld Lord Greene's double-pronged *Wednesbury* test. First, because '

> [t]he court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or conversely, have refused to take into account or neglected to take into account matters which they ought to take into account.

118 ibid

119 [1942] AC 206.

120 *George v Rockett* [1990] 170 CLR 104.

121 [2005] 2 AC 68.

122 Art 6.

123 n 304.

124 [1985] AC 374; [1984] 3 All ER 935.

If the answer favours the local authority, prong two arises. Lord Diplock redefined *Wednesbury* unreasonableness as 'irrationality' which 'applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it'.[125] As stated in this paper's introduction, the cooperative instinct limits irrational self-interest to exercise inconsiderate expression.

6.3 Two Concepts of Substantive Reasonableness

In different legal cultures, different judges apply different reasonableness criteria to distinguish whether words, signs or actions in particular contexts, are blasphemous or unintentional and excusable. The reasonableness of a judge is a key factor in his determination of reasonableness to be applied in other people's affairs.[126] Reasonableness 'exists not by virtue of legislation but by the criteria whereby culture socialises its members to recognize the principles governing life in that particular culture'.[127]Evidently, different cultures have different rationales underlying the way in which they order their legal thinking. Consequently 'a legal system is merely one form of a legal culture based on formal systematised thought processes'.[128] In the tests in English courts, the "reasonable man" is much more of a judicial fiction within the differentiated realms of the law to assess fulfilment of duty within restricted dyadic relationships'.[129] Invariably, 'judges cite standards of reasonable behaviour, required in a given situation, and if either party to the dispute demonstrates in its own position a deviation from the cited norms, this enables judges to break down that position and render judgement'.[130]

In formal legal systems, parliament enacts laws while the executive enforces them. Hence there are clear rules which empower courts to resolve disputes. Modern common law courts define the reasonable man as a 'hypothetical creature whose imaginary characteristics and conduct by way of foresight, care, precautions against harm, susceptibility to harm and the like are usually referred to as the standard for judging actual foresight, care etc. of a particular defendant'.[131] Take negligence law. A person who reasonably foresees that his act or omission is likely to harm his neighbour, has a duty of care not to engage in such act or omission. If breaching such duty causes injury to his neighbour, the defendant becomes liable to pay damages. Whether gross negligence attracts state criminal punishment depends on a judge's concept on what constitutes 'reasonable' care in particular circumstances. The problem remains: what actually is to be foreseen. To justify punishment in a particular case, modern courts strive towards objectivity by applying formal rules, precedents and texts to the facts. An objective 'reasonable' standard of what insult 'would' wound religious feelings may be associated with what is actually expected by a given class. However, in the penumbra of 'hard cases,' where the rules are unclear or there are no rules, most judges refer to principles, policies or other standards.[132]

125 S Parsons 'Wednesbury Unreasonableness: Alive & Kicking?' *Procedure & Practice Administrative Law* (14 February, 2020) 18. <www.cdjlawjournal.co.uk>; <https://www.cdjlawjournal.co.uk/content/wednesbury-unreasonableness-alive-kic>

126 n 305 p 115

127 ibid p 113

128 ibid p 3

129 M Gluckman *Ideas and Procedures in African Customary Law* (OUP 1969) pp 19-20..

130 ibid 11

131 DM *Walker The Oxford Companion to Law* (OUP, New York, 1980) p 1038.

132 RM Dworkin Taking *Rights Seriously* (Harvard University Press, Cambridge, Mass., 1977).

Alternatively in traditional societies, 'the area of law is entirely located within societal morality'.[133] They have speculative systems, without an independent authoritative source of law. Instead, traditional executives refer to a perfectionist standard to judge and enforce order. Such a perfectionist standard is the most convenient tool for breaking down a litigant's case.[134] Subjective reasonableness standards may be normative, pre-determined or a *priori*.[135] This is because 'where legal knowledge is confined solely to what may be remembered, stored, (or) retrieved from a man's brain, it is not only quantitatively different but also substantively different from what is recognized as the professional reliance on textual sources'.[136] Similarly, religious courts deploy a perfectionist expectation to punish persons accused of not complying with an ideal standard of conduct derived from moral or ethical values, irrespective of the case's particular circumstances.

The above two concepts of reasonableness are a consequence of how the accused person's action or inaction is classified. Secular judges in modern court settings classify and order reality in a very different way from Sharia courts.[137] On one hand, given its written Constitution, by emphasising direct and circumstantial evidence, US judges aspire to neutrality. On the other hand, perfectionist reasonableness and to a greater extent, illiberalism, are vague, based on social majorities or ideals. Saltman concludes that 'the reasonable man, therefore as a universal abstract concept, or even as a culturally relative concept, has somewhat dubious standing'. Whether 'judges everywhere are relying on a predetermined or perfectionist standard of behaviour or on a more limited consideration of what might be considered reasonable under the specific circumstances, or by some instinctive personal appraisal of what reasonable may mean to a particular judge',[138] remains unclear. Procedural protections of religious feelings determine fair trial and sentencing.

7. Sentencing Jurisprudence for Blasphemy

7.1 Towards Fair Trial Procedural Safeguards for Blasphemy

7.1.1 Trial

Procedural protections of religious feelings determine fair trial and sentencing. Blasphemy law punishes words or conduct not because they are demonstrably harmful, but because they violate the law. Blasphemy is a victimless crime, created by monarchs to protect the king's peace, rather than for God. 18th and 19th century European Enlightenment theories of human nature and of the state's role in providing security, shifted the modern justification for blasphemy laws to being for the legislative protection of individual dignity.[139] The crime was defined as injuring the state and punished accordingly.[140] Nowadays, judicial protection is conferred on a fictional reasonable man. In order to justify penalties, the state need only reasonably demonstrate that one person's insult

133 AN Allott *The Limits of Law* (Butterworths, London, 1980) at p 25 cited n3 05 at p 9.

134 M Gluckman *Custom and Conflict in Africa* (Basil Blackwell, Oxford, 1955), at p 153 cited in n 305 at p 7

135 A Harari, *The Place of Negligence in the Law of Torts* (Law Book Company of Australasia, 1962), at p 120 cited in n 305 at p 19.

136 n 305 at p 16.

137 ibid p 131.

138 ibid p 11.

139 JR Lilly, FT Cullen and RA Ball *Criminological Theory: Context and Consequences* (7th ed,Sage Publishers, 2018).

140 G Chartier *The Conscience of an Anarchist: Why it's time to say Goodbye to the State and Build a Free Society* (Cobden Press,United States, 2011) p 69.

deliberately intended to injure another's religious feelings.[141] Thus, deliberate free and informed consent to engage in theological discourse is no defence to it. No identifiable person is free to press or drop charges.

Nonetheless, there are possible defences to an accused's injurious utterances, for example, mistake.[142] Moreover, there is calibration of the degree of criminal intent, whether repetitive or provocative, that may aggravate or mitigate consequences for an action imposed by a legal system. Under Kenya's section 138 such factors are measured purposively, rather than by adherents of a given religion persuading the state to do his or her bidding by harassing other people for them. A judge's perception of reasonableness to deter anticipated or continuing insults may influence longer or shorter sentences. The National Cohesion Integration Commission[143] or other moral police would not only need to identify religious insults, but also to design a strategy of how to investigate and prosecute them to establish a deliberately insulting intention accompanying the perpetration of blasphemous words or utterances.

7.1.2 Punishment

Theoretically, the effectiveness of criminal punishments to deter blasphemy depends on the frequency of their enforcement. For the deterrence dividend accrues from not only the degree of punishment but also the probability of detecting, apprehending, prosecuting and punishing offenders.[144]What justifications are there for punishing blasphemers? First, retribution punishes persons for doing wrongs because they deserve to be punished.[145] Should an insult be repaid by an insult? Yet there is no need to prove that any victim is aggrieved by a section 138 insult. Second, if prevention is the aim, then should offenders be silenced by cutting off their lips and tongue? Suppose one commits an act such as burning a Holy Book? How can such an act be repaid or prevented? The amputating of arms was an ancient draconian practice. Nowadays, punishment by ordeal is universally obsolete.[146] Nowadays '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.[147]

Third, by imposing horrible punishments, including on innocent scapegoats, for purposes of the greater good in future, deterrence instrumentalizes people. Specific deterrence instils fear into an offender discouraging him from repeating his own wrongdoing, while general deterrence makes others less likely to offend.[148] Fourth, rehabilitation entails re-education.[149] How long would a re-education programme last? What tolerance level should blasphemy victims be required to adopt

141 ibid p 70.

142 ibid 71.

143 National Cohesion and Integration Act 12 of 2008.

144 C Veljanovski *The Economics of Law* (Institute of Economics Affairs Hobart Paper No 157, London, 2006 <https://ssrn.com/abstract=935952 or http://dx.doi.org/10.2139/ssrn.935952>.

145 434 p 70.

146 n 19.

147 1966 International Covenant on Civil and Political Rights art 7; n14 art 5; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984 (General Assembly resolution 39/46 25). <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading> See also n 313 arts 29(c) and 29(d)

148 n 313 at 72-73.

149 ibid 73.

so as to persevere offensive expressions in various societies? Should the state regulate personalities by teaching religiously-sensitive individuals what movies not to watch or books to avoid reading? Or are families better placed to inculcate personal freedoms? The Rabat Plan of Action promotes religious tolerance and inter-faith dialogue[150] emphasising educational approaches to reduce religious suspicions. Altogether, given that value pluralism can improve international relations, the UN recommends that efforts should be made to strengthen religious tolerance through civic education, 'ceremonial deism' and inclusivity.[151]

Fifth, punishment as censure. Sixth, by restorative justice strategies such as apologies or reparations, African traditional dispute resolution processes would seek to repair the harm done to insulted classes under section 134. The assumption is that remorseful offenders experience shame rather than guilt. Nonetheless, Kenya's blasphemy provisions give no express option of fine. Whether the complainant of insults to religion is the state or a religion is unclear. Under 134 of the Penal Code, if reconciliation is pursued, classes of aggrieved religions would need to agree on what kinds of restitution are acceptable to facilitate reconciliation. Should such fines be paid to a victimised individual or religion through its leaders or to the state?[152]

7.2 Emerging Judicial Discretion for Mandatory Punishments

Both Kenya and Nigeria are signatories to the 1948 UN Declaration on Human Rights,[153] but not the 1989 Optional Protocol on Abolition of the Death Penalty.[154] The latter treaty requires that the death penalty be limited to the most heinous crimes such as murder or treason. This problematizes the mandatory death penalty.[155] In *Muruatetu v Republic,*[156] the Supreme Court of Kenya held that sentencing of murderers should consider mitigating factors, including an offender's circumstances. Upon underscoring the need to individualise sentencing in criminal justice, it triggered an avalanche of resentencing applications.[157] Principles from that landmark decision may be applicable to interpreting mandatory provisions in Kenya's 'reasonable secular'[158] Constitution. They pertain to constitutional validity of all mandatory/minimum sentences irrespective of the offence.[159] Applying them in *Wachira v Republic*,[160] Mativo J (as he then was) declared infliction of punishment to be pre-eminently a discretionary matter for the trial court. Because mandatory

150 United Nations *Report of the United Nations High Commissioner for Human Rights on the Expert Workshops on the Prohibition of Incitement to National, Racial or Religious Hatred* (United Nations A/HRC/22/17/Add.4 General Assembly 11 January 2013) <https://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf#> accessed 14 August 2022.

151 WH Riker *Public Safety as a Public Good* in EV Rostow (ed) Is Law Dead (Simon and Schuster, New York, 1971) pp 370-385.

152 n 434 pp 73-4.

153 UDHR n 308.

154 Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty adopted 15 December, 1989 by General Assembly resolution 44/128. <https://www.ohchr.org/en/instruments-mechanisms/instruments/second-optional-protocol-international-covenant-civil-and> accessed on 14 August, 2022

155 *Attorney General v Kigula* (2009) Uganda: Supreme Court.

156 *Muruatetu v Republic* [2021] <http://kenyalaw.org/caselaw/cases/view/215422/> accessed 12 September 2022.

157 *Otuoma v Republic* [2021] eKLR.

158 n 341 p 131.

159 n 298 p 20.

160 ibid

sentences give differential treatment to a convict distinct from the kind of treatment accorded to convicts under other offences which do not impose them, he declared mandatory minimum sentences discriminatory in nature. They violate an accused's rights to equality and freedom from discrimination under article 27 of the Constitution.[161] The Court held that mandatory sentences infringe on a fair trial. Hence persons convicted and imprisoned under the the Sexual Offences Act no. 3 of 2006 are entitled to petition the High Court to be considered for a less severe sentence. If applied to the mandatory death penalty, Mativo J's reasoning may be based on the right to fair trial, rather than as recommending abolition. Only in deserving cases may convicts mitigate capital punishment. Yet in 2021, the Supreme Court issued practising directions limiting the scope of *Muruatetu* to murder cases only.[162] Remarkably, those directions introduced questions of possible discrimination against four other mandatory death penalty offences in Kenya, namely treason,[163] robbery with violence,[164] attempted robbery with violence[165] and oathing to commit capital offences.[166] However, in February, 2022, Korir J (as he then was) reiterated that, the Supreme 'Court's decision in *Muruatetu*, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the Sexual Offences Act or any other statute'.[167] Subsequently, in March, 2022, preceding Mativo J's *Wachira* decision, Odunga J (as he then was) held the opposite.[168]"

Given these contradictory decisions following *Muruatetu's* 2021 'directions', this paper applies Biblical and Koranic standards, asserting that all capital offences are mitigatable. God commanded Adam not to eat from the tree of knowledge, lest he shall certainly die that day.[169] However, in his defence Adam pleaded that Eve gave him the forbidden fruit to bite. Not only was the prohibition not directed at her, but also, in response to the charge: 'What is this that you have done?'[170] she replied that the serpent beguiled her that the fatal consequences would accrue to even *touching* the fruit.[171] Then on the serpent demonstrating that it had survived despite touching, Eve was convinced that God was bluffing. Considering mitigating factors, God became more understanding of Adam and Eve's sin.[172] Dershowiz observes that 'He decided not to punish Adam and Eve with the instant death that He had expressly threatened'. Instead Adam was condemned to pay penance upon expulsion from Eden of earning his bread from the sweat of his brow.[173] In conclusion '[o]ne of the insights Adam and Eve gained from eating from the tree is that God does not always carry out his threats – that sin (and crime) is not always followed by threatened punishment'.[174] Since

161 J Bwana 'Life Imprisonment for Sexual Offenders Unconstitutional, High Court rules' The Saturday Standard, 3 September, 2022
<https://www.standardmedia.co.ke/national/article/2001454728/life-imprisonment-for-sexual-offenders-unconstitutional-high-court-rules > accessed on 24 August, 2022

162 n 450.

163 n50 ss 40(1) and (2).

164 ibid s 296(2).

165 ibid s 297(2).

166 ibid s 61.

167 *Chesire v Republic* [2022] eKLR.

168 *MM1 v Republic* [2022] eKLR.

169 Moses, *Genesis* 2:17, The Bible KJV,<https://www.biblegateway.com/passage/?search=Genesis%203&version=KJV> .

170 ibid 3:13.

171 n 463 3:3; AM Dershowitz *The Genesis of Justice* (Warner Books, New York, 2000) p 35.

172 n 465 (Dershowitz) p 42.

173 *Genesis* 3:19.

174 n 465 (Dershowitz) p 46.

they 'did not know the difference between good and evil before eating of the tree, how could they be fairly punished for being deceived by the serpent into violating God's prohibition'?[175] Because one's capacity to distinguish wrong from right is criminal responsibility's basic tenet, eventually their punishment was justifiably 'considerably more lenient than the instant death God had threatened'.[176] Similarly, subjecting Ayatollah's *fatwa* to judicial review indicates first, that inciting extrajudicial executions for *riddah* is manifestly unfair. Second, amid legal pluralism, Nigerian Sharia courts have correctly directed Sharif's case to go for retrial for lack of fair trial. Decried here is the mandatory death penalty for blasphemy, prevalent in Nigerian Sharia states, where Islam is considered sacred.[177] Defences and mitigating factors must be accounted for.

7.3 Deterrent Effect of the Death Penalty

Harsh mandatory sentences have for long existed for the most serious crimes – usually planned and premeditated murder, or the murder of a police or a correctional officer while on duty.[178] Such measures constrain judges to impose identical punishments for different offenders, thus preventing sentences proportional to the crime and culpability of the offender.[179] Mandatory sentences can result in highly punitive and disproportionate sentences. Nonetheless, some governments believe that 'getting tough' will appeal to the punitive element of public opinion. Yet, where grave crimes have been committed, the symbolic effect of prosecution is far more important than the practical effect on an individual accused to repay their debt to society.[180] Clearly, just as it would be wrong to hold a person guilty of a crime for which he was not morally responsible, so also it would be wrong to punish him in a manner or to an extent that is out of proportion, in the sense of being excessive, to his actual culpability. This was stated by Lamer CJ in *R v M* [181] of the Supreme Court of Canada, in the following words: 'Indeed, the principle of proportionality is fundamentally connected to the general principle of criminal liability which holds that the criminal sanction may only be imposed on those actors who possess a morally culpable state of mind'.[182] This has been interpreted to mean that 'a sentence must be proportionate to the gravity of the offence and the personal circumstances of the offender'.[183] However, concepts such as fairness evolve over time.[184] At the hierarchical pinnacle of rights is the right to a broader communal interest in having offences prosecuted and alleged wrongdoers convicted.[185]

175 ibid p 37.

176 ibid pp 31-2.

177 n 311.

178 J Roberts and E Baker 'Sentencing Structure and Reform in Common Law Jurisdiction' in SG Shohan, O Beck and M Kett (eds) *International Handbook of Penology and Criminal Justice* (Taylor & Francis, London, 2008) pp 551-586.

179 POH Wikstrom 'Deterrence and Deterrence Experiences: Preventing Crime through the Threat of Punishment' in SG Shohan, O Beck and M Kett (eds) *International Handbook of Penology and Criminal Justice* (Taylor & Francis, London, 2008) pp 345-378.

180 A Bates 'Cambodia's Extraordinary Chambers: Is it the most Effective and Appropriate means of Addressing the Crimes of the Khmer Rouge?' in R Henham and P Behrens (eds) *The Criminal Law of Genocide: International, Comparative and Contextual Aspects* (Ashgate Publishing, England, 2007) pp 185-195.

181 [1996] 1 SCR 530 (CA).

182 *R v Martineau* [1990] 2 SCR 645 per Lamer CJ.

183 T O'Malley *Sentencing Law and Practice* (2nd edn) (Thompson Round Hall, Dublin, 2006)p 80.

184 ibid 81.

185 n 477 p 87.

According to O'Malley, mitigating factors should be applied to otherwise proportionate sentences as opposed to the maximum sentences, unless for some reason, the maximum sentence is considered to be proportionate in the circumstances. A two-tier sentencing approach requires, first, identifying each specific criminal act and then selecting the range of sentencing options appropriate for each crime. Second, having sentenced the accused for each individual crime, a joint sentence should be prescribed for the totality of counts for which he is convicted. Neutrality means that the state should not identify with any ideology or religion.[186] Nonetheless, briefly considering the religious origin of crime as sin is useful to understand the demand for expiation. Yet, notwithstanding the threat of capital consequences, Adam still sinned. God's mercy enabled him to sire Cain who killed his brother Abel. Abel objected to the Almighty's banishment saying 'whoever finds me will kill me'. Once again God displayed lenience. He replied: 'Not so; if anyone kills Cain, he will suffer vengeance seven times over'.[187] Christians believe that Jesus came to restore eternal life to humanity. Whether he was executed for political or religious grounds[188] is beyond this paper's scope. The point is that legal regulations of liberal perfectionist systems 'permit restrictions of blasphemous content only in extreme cases when the rights of others are violated, and instead of approaching it from God, it does so in the interests of the dignity of believers and of those who express their opinions.'[189] In the leading study on the deterrent effect of capital punishment, economist Ehrlich concluded that the strongest deterrent effects on homicides would arise from an increase in the probability of arrest, followed by an increase in the probability of conviction, and finally in the probability of execution.[190] Further, to Norrie penologists tend to explain the relative efficacy of deterrence in terms of the differences within social audience, which can be divided into three broad groups: the first group 'represents a growing number who are no longer fully anchored in the value system of the society, but who still have sufficient to lose from being caught and punished'.[191] Those amenable to rehabilitation are 'in the balance' between the second group 'those who refrain from breaking the law because they believe it to be wrong' and the third 'those who cannot be deterred because they have no "conscience." Legally, given that Adam had no knowledge of the difference between right and wrong, he lacked *mens rea*. Even if strictly culpable, he may be classified as undeterrable. Conversely, Cain's mitigation plea shows that he feared losing his life upon being caught wandering. Mercifully, his remorse earned the lesser sentences of banishment and stigma. Modern empirical studies confirm that legislating or imposing harsh penalties does not reduce serious crime. Rather, punishment's deterrence effect is attributable to the certainty of implementation, escalating from detection through to execution, and not to mere formal threats, however harsh. Therefore, extreme preventive sentencing options such as life imprisonment or the death penalty should be reserved for incorrigible offenders and not meted out on those with a stake in society's values. Given post-independent Africa's multi-cultural context and fragile judicial systems, in the Information Age remorseful blasphemers deserve sentencing discounts and proportionate sanctions.

186 B Schanda, *Religion and the Secular State in Hungary* (Servicio de Publicaciones de la Facultad de Derecho, Universidad Complutense, 2015), pp 383-394.

187 *Genesis* 4:15.

188 JW Welch 'The Legal Cause of Action Against Jesus in John 18:29-30' in TA Wayment and K J Wilson (eds) *Celebrating Easter* (Deseret Book Company Torledo, Ohio, 2006) pp 157-175.

189 A Koltay 'Blasphemy and Religious Abuse in the Hungarian Legal System' in SI Társulat (ed) *Budapest Report on Christian Persecution* (Dialóg Campus, Budapest, 2018) p 195.

190 I Ehrlich 'The Deterrent Effect of Capital Punishment: A Question of Life and Death' 65(1975) *AER* 397.

191 A Norrie *Crime, Reason and History: A Critical Introduction to Criminal Law* (Weidenfeld and Nicolson, London, 1993) p 339.

Conclusion

Ancient blasphemy law punished victimless crimes. Modern perfectionist liberal version punishes to protect the dignity of victims. Yet even perpetrators retain dignity to express their thoughts. Given Africa's triple heritage,[192] this paper compares Nigerian Sharia law's role in promoting religious tolerance through protecting believers from offensive expressions through mandatory capital punishment, with the relatively lenient penalties under East African 'reasonable secular' [193] constitutions that nonetheless effectively control blasphemy. Substantively, the story model was applied to evaluate Kenyan, Tanzanian, Ugandan and Indian blasphemy provisions of interpreting whether insulting acts and words are deliberately intended to wound religious feelings. Problematically, insults and thoughts determined by a purposive test need not be accompanied by actual harm. They differ from symbolic insults through destroying property analysed by the causal-predictive test to determine if they are *likely* to wound religious feelings of a class of persons who value the sacred object or place. By comparing religious societies to political states, this paper provides guidance to judges in plural legal systems for legitimating blasphemy offences. However, there is insufficient data specifying which wounding words elicited Ayatollah's *fatwa* on Rushdie. That edict's international effects confer concurrent jurisdiction on various states to prosecute perpetrators who implement it. Significantly, mandatory capital punishment for blasphemy is not dominant in Islamic scholarship. Arguably, Sharia judges are constrained by universal fair trial procedures to consider defences and mitigating factors so as to reserve the death penalty for only the worst or unmitigated blasphemes that are proven beyond reasonable doubt. Sentencing is universally accepted as part of fair trial rights. Using the cooperative instinct characterising African values, Nigerian Sharia Courts would do well to consult a *mufti* regarding the benefits of adopting modern reasonableness standards to mitigate blasphemy offences. After all, even Adam and Eve's lives were spared instant death, despite committing the 'Original Sin'. Clearly, notwithstanding blasphemy's legitimate retention for educational purposes, judicial discretion may deploy procedural safeguards to mitigate its culpability and reduce punishment. Globally, international courts proceed on a case-by-case basis, enforcing treaty rights and their impact on individual well-being and autonomy seems negligible. Therefore, Western calls for the abolition of blasphemy law amount to a classic case of double standards in dealing with cultural rights and responsibilities. Blasphemy law in religious societies is equated to separation of powers in political states. Both these institutions function to promote tolerance. If political offenders may possess mitigating factors, so too can some religious criminals. Importantly, not only neutral liberal constitutions, but also perfectionist liberal and even Sharia systems confer judges with discretion to distinguish offenders according to mitigating features, rather than uncritically imposing mandatory sentences. Plural legal systems must accommodate wider ideological, cultural and religious diversity and thus have more reason to exercise broader sentencing toleration.

192 n 340.

193 n 341.

GEO-POLITICS OF DATA PROTECTION AND ITS EFFECT ON DIGITAL TRADE

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Abstract

Data protection laws, have in recent years emerged as a barrier to digital trade. Ideological influence is being pursued in the guise of protecting consumers from the perils of invasion of privacy. This is in the context of the world's biggest economies, aspiring to globally orient their preferred economic models, to suit the opportunities offered by the digital economy. To achieve this, the governments have built infrastructure and business environments that favor their digital industry. They also control private entities, through their private corporate policies to achieve their economic ambitions. Their policymakers in turn protect industries that result, to preserve the economic advantages they have enjoyed. This then sets the pace for how they dominate the international market. This paper seeks to look at how data-governance laws, are being used to foster the foregoing and also undermine perceived economic adversaries. It begins with an explanation of digital trade and the importance of data in the digital economy. Then it outlines the genesis and purpose of data protection regulations. It then segues to how data protection laws have been used as a geo-political strategy, with specific reference to the experiences of the United States of America, China and the European Union. It concludes by outlining the need for countries to overcome self-seeking nationalistic impulses, to realise the benefits of digital trade.

Keywords: Big Technology, Data Protection, Digital Trade, Data, Statecraft, Geo-politics, World Trade Organization.

I. Digital Trade, The Role of Data and The Need for Data Protection.

Digital trade, a business model in which internet-based technologies, play a significant role in commerce has grown exponentially.[1] Courtesy of technology, industries have introduced new methods of doing business; disrupting incumbents and the value chain generally.[2] It has created jobs and ensured efficiency in the production, and delivery of private and government services. It has also lowered the cost of economic and social transactions.[3] In addition to this, digital trade has reduced the cost of acquiring infrastructure and made information to be available more transparently.[4] This has been achieved through the improvement of the quality, speed, or price at which value is delivered.[5]

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1 S Klaus, 'The Fourth Industrial Revolution, What It Means and How to Respond' (12 December 2015) Foreign Affairs. <https://www.foreignaffairs.com/world/fourth-industrial-revolution>. accessed 7 July 2022

2 World Bank Group World Development Report 2016: Digital Dividends (World BankMarch 15, 2021) https://www.worldbank.org/en/publication/wdr2016 3-30 accessed 8 July 2022.

3 ibid

4 ibid

5 ibid

A key component of digital trade is the monetization of data. The data relevant in the context of this paper, is the kind generated from the digital traces of consumers as they socialize, work, invest, and operate businesses through the internet.[6] This data is then accessed by companies and online platforms[7] *vis a vis* the business models they have built that is based on the data collected.[8] Data has been defined by the Organization for Economic Co-operation and Development (OECD) a group of industrialized countries as; 'the unordered and unprocessed representation of any types of observations that are quantified and stored in symbols'.[9] The economic value of data is derived from its actual use and its culminating nature.[10] This has its genesis in the Metcalfe law. Robert Metcalfe a pioneer in computer networking stated that the value of a network grows in line with the square number of users.[11] This has come to be known as the network effect.[12] This means that the data obtained can be refined; categorized into what is known and unknown. The concept that allows this is known as algorithms. Merriam Webster dictionary defines algorithms as a procedure for solving a mathematical problem, in a finite number of steps that frequently involves repetition of an operation. Over time, with the accumulation of more data, the prediction is efficient to the purpose of the data.

At present, there is limited research done on the measurement of the economic value of data. [13]OECD has indicated that data is most likely to provide a basis for revenue creation, if it has the following characteristics.[14] It should be linkable, meaning it can be combined with other data. It is accessible, easily retrieved and/or integrated into business processes. It can be disaggregated to the desired level. It should be timely; and updated with sufficient frequency to meet the business requirements. It should be trustworthy, meaning that it is unbiased and impartial. It should be scarce; i.e difficult to come by because it is proprietary. Lastly, it should be representative - records do not contain missing fields, data are representative enough to meet business requirements.[15]

The data generated is often used in research and development to improve goods and services.[16] Data-backed services and products, such as targeted advertisements and demand forecasts; are some of the insights of the analysis done.[17] This information is then marketed back to the consumers and

6 V Salomé 'A Relational Theory of Data Governance' 131(2021)2 YLJ 585.

7 D Nguyen and M Paczos , 'Measuring the Economic Value of Data and Cross-Border Data Flows' OECD Digital Economy Papers August 26, 2020 20-22 <https://ideas.repec.org/p/oec/stiaab/297-en.html> accessed 8 July 2022.

8 J van Dijick, T Poell, and M de Waal, The Platform Society. Public Values in a Connective World (OUP, New York, 2018)

9 OECD, Introduction to Data and Analytics (Module 1): *Taxonomy, Data Governance Issues, and Implications for Further Work* (OECD,2013) 35.

10 M Mandel, 'The Economic Impact of Data: Why Data is Not Like Oil' 6(2017) *Progressive Policy Institute* <,https://www.progressivepolicy.org/wp-content/uploads/2017/07/PowerofData-Report_2017.pdf> accessed 7 July 2022.

11 Economist, 'Untangling E-conomics' 23 September 2000 <https://www.economist.com/special-report/2000/09/23/untangling-e-conomics> accessed 25 October 2022.

12 ibid

13 n10 p8

14 n8 pp20-21

15 ibid

16 G Magalhaes and C Roseira,'Open Government Data and the Private Sector: An Empirical View on Business Models and Value Creation. Government Information Quarterly' (2017) ELSEVIER.<https://isiarticles.com/bundles/Article/pre/pdf/162228.pdf> accessed 24 August 2022

17 C Wolfie, 'Corporate Surveillance in Everyday Life' Cracked Labs June 8, 2017) <https://crackedlabs.org/en/corporate-surveillance> accessed 24 August 2022.

is monetized.[18] Consequently, the data economy has birthed two business models; Data-enabled and data-enhanced businesses.[19] The former relies on data as its lifeline and cannot exist without it. A few examples include Amazon, Booking.com and Meta platforms Inc (which owns Facebook)[20] Data-enhanced businesses are those that exploit data, generated from their existing business with and aim to improve it. This transforms them from a traditional goods manufacturer into a data-driven service provider or a combination of both.[21]

These business models and the profit they generate invariably caught the eye of privacy activists. The activists concerns focused on ' the transformation of information about people into a commodity'. [22] They questioned the consumer-centric nature of data collected, at the expense of the privacy rights of the consumers.[23] The main focus of their criticism has been the consent-less and sludgy collection of data.[24] They have also interrogated the harms of access to data; where people are unable to limit or control access to information about themselves.[25] Lastly, they also noted that there is misuse, inaccuracy and discrimination that results from the use of the data collected.[26]

This data exploitation has been likened to colonialism.[27] Data colonialism explores how human life has been reconfigured 'around the maximisation of data collection for profit.'[28] This juxtaposition is based on how colonisation dispossessed resources, to fuel capitalism and economic growth.[29] In the context of the digital economy, data colonialism, occurs as online platforms govern a complex network invisible to the public eye; in contrast to the consumer's lack of control over their own generated data.[30] Lois Musikali exemplified this in her article, where she specified that immense data is taken out from Africa and used by people who are not necessarily answerable to the African people.[31]

The foregoing spoke to a need to safeguard the public interest and values through supervision on a level above and beyond that of the consumer. Data protection regulations, were seen as the answer to police information capitalism and its resultant harm. These regulations were to govern; 'how data about people is collected, processed and used.'[32] The United Nations echoed this need when they noted that there is 'a growing global consensus on minimum standards that should govern the processing of personal data by state, business enterprises, and other private actors.' It

18 n 18

19 n8, p10

20 ibid

21 ibid

22 n 7, p 577

23 n 7, pp 591-598

24 ibid

25 n 7

26 ibid

27 N Couldry and UA Mejias,'Making Data Colonialism Livable: How Might Data's Social Order Be Regulated?' 8(2022)2 *Internet Policy Review* <https://policyreview.info/articles/analysis/making-data-colonialism-liveable-how-might-datas-social-order-be-regulated> 1-5 accessed 8 August 2022

28 ibid

29 ibid

30 ibid

31 LM Musikali 'Data Colonialism: The New Frontier in Corporate Governance and the 'Corporations and Human Rights' Discourse' 1(2022)3 *Governance Journal* pp 99, 111-113.

32 n 7 p 577

emphasised that the resulting rights to be protected 'should also apply to information derived, inferred, and predicted by automated means, to the extent that the information qualifies as personal data'.[33] Consequently, regulations enacted on data flow control across national borders increased tremendously.[34] In 2017, 87 countries spread across 64 economies had placed such restrictions.[35]As of 2019, the total count of data regulations was above 200.

Data protection law, has its genesis in the right to privacy. Meagan Richardson, indicates that data protection developed when it was clear that the privacy laws in place were not adequate to deal with the concerns raised as regards misuse of data.[36] The legal tapestry of the right to privacy has its genesis in the Universal Declaration of Human Rights, 1948. Under Article 12, the treaty recognizes that; everyone has a right to protection from arbitrary interference from among others, privacy, honor, and reputation. The International Covention on Civil and Political Rights (1966) has used a similar language.[37]

Different jurisdictions have developed various jurisprudence in this regard. English jurisprudence has developed the tort of misuse of information as an outshoot of the breach of privacy.[38] The United States has patchy legislation on data protection despite the existence of the Privacy Act 1974. The United States has deliberately made laws that allow their technology industry to prosper, thus its narrow privacy rules.[39] In Australia, the main way privacy is addressed by courts is through the principle of breach of confidence.[40] They have the Privacy Act (1988). In the European Union, privacy is considered a human right under the General Data Protection Regulation of 2018 (GDPR). China has a Cyber Security Law that can be described as a mix between the US and the EU approach. India has the Information Technology Act (2000). South Africa's Protection of Personal Information Act came into force in July 2020. Kenya has a Right to Privacy embedded in the Constitution under Article 31, as well as a Data Protection Act 2019.

As much as the laws enacted have been a panacea for the ills that birthed them, they have also created a different challenge. The divergent legal regimes on data protection do not facilitate, and in some instances hinder, the needed avenue for the interoperability of data.[41] This in the backdrop of the primary body of law governing international trade-the law of the World Trade Organization (WTO) being in the pre-digital era. This makes it irrelevant to the digital economy.[42] At present, the WTO membership is yet to agree on the different levels of commitment that would facilitate trade in the digital economy.[43] The complexity of the issues to be discussed, in particular the classification

33 UN High Commissioner for Human Rights 'The Right to Privacy in the Digital Age' 2018 A/HRC/39/29 <https://documents-dds ny.un.org/doc/UNDOC/GEN/G18/239/58/PDF/G1823958.pdf?OpenElement>

34 n 10 p28

35 ibid

36 M Richardson 'Is Data Protection the New Privacy?' 93(2013) Amicus Curie 2 <https://journals.sas.ac.uk/amicus/article/view/2133/2063> accessed on 25 August 2022

37 n 38 arts 12 and 17.

38 Mckennitt v Ash [2008] QB 73

39 A Chander 'How Law Made Silicon Valley' 63(2014) Emory Law Journal 639.

40 Wilson v Ferguson [2015] WASC 15

41 Z Wentong,'The Digital Challenge to International Trade Law'52 JILP 540-591

42 ibid

43 ibid

of digital products, and the divergent needs of the member states have made decision-making difficult.[44] This stalemate has created a loophole in the law that has morphed into a geo-political and economic strategy, much to the detriment of digital trade.

II. Conduits in Statecraft

It is important to explain how Geopolitical power comes about. Geo-politics has been defined as 'how the spatial allocation of resources between states shapes international politics'.[45] Susan Strange, a political economist theorized structural power, a key ingredient of geopolitics as 'the power to shape and determine the structures of the global political economy'.[46]

A good example of a country that has achieved this is, the United States of America (United States). Its global domination is largely due to its ability to exert a 'disproportionate share of global production flows and the resulting stream of profits'.[47] One of the key strategies the United States has used in this regard, is the international nature and influence of most of the big technology companies' domiciled in the country.[48] Their enormous power ensures that they do leverage some political authority in the international economy.[49] Their business models make them part of the necessary and irreplaceable social infrastructure in whichever country they operate in.[50]

As mentioned in the abstract, this is an intentional strategy. It enables the state to use them 'as conduits for internationalising state power through the extraterritorial application of state authority'.[51] This is not new to the internet. Innovations such as telegraph cables and the telephone, were used in similar ways to 'alter established international power relations.[52]'

For the state to have that level of influence on the technology firms, it must exercise power over them. This is done by controlling the market in which they operate, which in turn gives the state the access needed.[53] The state control is also achieved through the sunk costs the companies have made. This is the investment made in the host country which makes it logistically difficult to change the business location.[54] The United States, for instance, initially had lenient data protection restrictions, compared to other world leading economies, that has enabled their technology companies to thrive. The other is substitutability; the business environment the company enjoys is not easy to replicate.[55] The key one is the market for their products. Most big technology companies

44 ibid.

45 M Cartwright 'Internationalising State Power through the Internet: Google, Huawei and Geopolitical Struggle' 9(2020) <https://policyreview.info/articles/analysis/internationalising-state-power-through-internet-google-huawei-and-geopolitical> accessed 24 August 2022

46 S Strange States, and Markets (2nd edn, Continuum 1994) 24-25.

47 H MSchwartz, 'Elites and America and Structural Power in the Global Economy' 54(2017)3 IP 277 <https://uva.theopenscholar.com/files/hermanschwartz/files/elites.pdf> accessed 25 August 2022.

48 n 47

49 ibid

50 ibid

51 ibid

52 H Jill The Struggle for Control of Global Communication; The formative Century (UIP 2002) 7.

53 n 47 pp5-10

54 ibid

55 n 47

such as Alphabet (which owns Google), have a vast home market affording them economies of scale.[56] In addition to this, those companies must have an oligopoly nature in the international markets.

This state influence is not unique to the United States. China, which is second to the United States in global technological success, has adopted a different strategy, but with similar intentions.[57] The Chinese have in place online censorship policies which restrict foreign internet companies from accessing the Chinese market, known as the Great Firewall of China.[58] This is a sophisticated digital checkpoint that filters online traffic with ease. China blocks popular US platform applications such as Facebook, Google, Twitter, and Instagram.[59] They in turn developed their own home-grown technology products that rival those of the United States. They enjoy little competition in the lucrative Chinese market. This has resulted in a symbiotic relationship between the state and the internet firms, and allows China to use them to internationalize power.[60]

Unlike their American counterparts, Chinese technology companies do not have a similar international presence, and soft power. To this end, China has intentionally made efforts to create a market for them.[61] This has been done through China's ambitious Belt and Road Initiative (BRI) a global infrastructure policy being developed and built by Chinese firms.[62] In addition to this, there is *Made in China 2025*; a ten year, sector-specific, industrial development project. The intention is for China to dominate global markets in advanced technologies like robotics, autonomous vehicles, and artificial intelligence.[63] The potential of Chinese technology firms to achieve this is obvious. The success stories exemplified by some of their big technology companies such as Alibaba, Tiktok and Huawei speak to this.[64]

The lacuna in the international trade law aforementioned, and the Chinese ambitious challenge to the United States hegemony, has created a perfect ambience for a Sino-American trade war.

2.1 The Technology Cold War.

In October 2019, some members of the US Senate sent a letter to their director of intelligence asking for a report on how Tiktok's collection of data poses a security risk. This was based on the fact that ByteDance, its parent company, was subject to China's regulations in specific privacy requirements. An investigation was opened two months later. This led the then United States President Trump to declare that TikTok's 'data collection threatens to allow the Chinese Communist Party access

56 ibid

57 ibid

58 ibid

59 ibid

60 N Tusikov, 'How US-Made Rules Shape Internet Governance in China' 8(2019)2 IPR 3I <https://policyreview.info/articles/analysis/how-us-made-rules-shape-internet-governance-china>, accessed 24 August 2022.

61 n 47

62 H Shen,'Building a Digital Silk Road? Situating the Internet in China's Belt and Road Initiative' 12(2018) IJC , 2688 <https://ijoc.org/index.php/ijoc/article/view/8405/2386> accessed 25 August 2022.

63 K Min- Hyung 'A Real Driver of US-China Trade Conflict: The Sino-US Competition for Global Hegemony and Its Implications for the Future' 3(2019)1 ITPD p 30-40. <https://www.emerald.com/insight/content/doi/10.1108/ITPD-02-2019-003/full/html> accessed 24 August 2022.

64 n 47 pp7-8

to Americans' 'personal and proprietary information'.[65] This restriction also applied to Wechat, a popular Chinese social media site equivalent to Facebook. Fortunately, the executive order did not have the intended effect as it was rescinded in 2021.[66]

Huawei and ZTE another Chinese firm were not so lucky. In February 2020, US intelligence officials claimed that Huawei has had 'backdoor' access to mobile phone networks, through its telecommunications products since 2009, an allegation Huawei denied.[67] The report advised United States companies against trading with Huawei and ZTE. The officials recommended executive and legislative action to stall their growth in the US market.[68] To this end, the United States gave directives to[69]prevent Huawei from accessing the necessary software and hardware it needs for its operations.[70] The US Department of Commerce in compliance with the executive order issued placed Huawei and 68 of its affiliates on the 'Entity List'. The reason given was that there was reasonable cause 'to believe that Huawei has been involved in activities contrary to the national security or foreign policy interests of the United States'.[71] When a company is placed on the entity list, it means that United States firms/ companies must receive a licence to trade with it.[72]

Huawei relied on United States-based firms such as Intel, for semiconductors and other components used in its products.[73] The export restrictions on semiconductors were further extended to Taiwan and South Korea, further crippling Huawei.[74] Huawei phones use Google's Android operating system. To give effect to the directive, Google suspended Huawei from accessing updates from its Android system. Huawei could only access the open version of the operating system. This version did not have such features as Gmail, Google play store, and YouTube.[75] The companies in the United States were given a period for transition before they could start applying for licenses.[76] This only applied to Google; the supply of the semiconductors was stopped immediately.[77] Huawei's revenue thereafter suffered a dip.[78]

65 This was via Executive Order 13942 of 6th August 2020 <https://www.federalregister.gov/documents/2020/08/11/2020-17699/addressing-the-threat-posed-by-tiktok-and-taking-additional-steps-to-address-the-national-emergency> accessed on 24 August 2022.

66 It was rescinded vide executive order no. 14043 of June 9th, 2021.

67 B Pancevski 'US Officials Say Huawei Can Covertly Access Telecom Networks' The Wall Street Journal February 12 2020) <https://www.wsj.com/articles/u-s-officials-say-huawei-can-covertly-access-telecom-networks-11581452256 accessed August 25, 2022.

68 M Rogers and D Ruppersberger, 'Investigative Report on the U.S National Security Issues Posed by Chinese Telecommunications Companies Huawei and ZTE' (Housing Intelligence Committee, 2012) iv-vii <https://stacks.stanford.edu/file/druid:rm226yb7473/Huawei-ZTE%20Investigative%20Report%20%28FINAL%29.pdf> accessed 25 August 2022.

69 ibid

70

71 MS Borman 'Addition of Entities to the Entity List, A Rule by the Industry and Security Bureau' (Federal Register June 24, 2021) at <https://www.federalregister.gov/documents/2021/06/24/2021-13395/addition-of-certain-entities-to-the-entity-list> accessed August 25, 2022.

72 ibid

73 n 47 p11

74 B Davis and KS Ferek 'US Moves to Cut off Chip Supplies to Huawei' The Wall Street Journal May 15, 2020 <https://www.wsj.com/articles/u-s-moves-to-cut-off-chip-supplies-to-huawei-11589545335> accessed 25 October 2022.

75 n 47

76 ibid

77 ibid

78 The Economist reported in its October 23rd, 2021 issue that sales of the mobile units offered by Huawei have tumbled from more than 60 million units in 2019 to about 15 million in 2021.

The irony is; the United States has used its technology titans for statecraft.[79] Edward Snowden, in 2013 leaked highly classified information from the National Security agency (NSA), of the United States. They revealed that Microsoft, Google, Yahoo, Facebook and Apple, have all been used in surveillance by the government of the United States.[80] Lois Musikali called both China and the United States 'centers of power in data colonialism.' She analyzed how in Kenya, both countries surreptitiously use their technology companies for illicit data collection.[81] This is an inkling that the directives by the United States could be a red-herring.[82] It is not farfetched to expect countries to pursue nationalistic impulses and economic protectionism; to realise the benefits of competition, and innovation in the digital economy.[83] However, Geo-political tensions exemplified have undermined the rule-based multilateral trade. [84] It promotes covert discrimination and data colonialism. This is however not unique to China and the United States. The European Union is another case in point. Their use of Data protection law has had the effect of increasing administrative and compliance costs. It also limits the transfer of data across national borders with adverse effects to the digital economy[85]

2.2 The Brussels effect

The continent that brought the world printing press, combustion engine, and the World Wide Web is falling behind in the digital revolution.[86] Europe generally does not have a robust technology industry.[87] Those that are in existence lag behind their counterparts in China and the US.[88] As a result, and seemingly to keep up, the European Union, (EU) has used data protection as a way to attain digital sovereignty. With the advent of the internet, the EU in 1995, passed the Data Protection Directive. The regulation addressed some of the security and privacy issues that resulted. The EU legislators later on passed comprehensive data protection rules to address the use of data and the privacy concerns aforementioned. It is termed, the General Data Protection Regulation (GDPR). It came into effect on 25th May 2018. At present it is the most stringent data protection law in the world.

A key component of the GDPR requires that, third-party countries that wish to trade with the EU must comply with the adequacy provisions.[89] To this end, for third-party countries to benefit from this lucrative market they must make provisions in their domestic laws that ensure that the personal data obtained from the EU, has the same legal protection in their countries as provided for in the GDPR. In addition to this, the regulation requires data processors to have binding corporate rules

79 n 47, p 5

80 ibid

81 n 32 pp 97-102

82 n47, 3-5

83 JE Gray The Geopolitics of 'platforms': the TikTok challenge. 10(2021)2 Internet Policy Review 10(2). <https://doi.org/10.14763/2021.2.1557> at 19.

84 n 43

85 ibid

86 A Brnabic 'How Europe's Tech Can Catch up with Silicon Valley and China World Economic Forum' (March 20, 2017) at <https://www.weforum.org/agenda/2017/03/how-can-the-eu-close-the-tech-innovation-gap-with-the-us-and-china/> accessed 10 August 2022.

87 ibid

88 ibid

89 General Data Protection Regulation (2018) arts 3(2) & 45 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679> accessed 3 July 2022.

(BCRs) and standard contractual clauses (SCC) approved for all intra-company data transfers. As a result, most countries have fashioned their data protection regulations, to the provisions of the GDPR. A consequence now known as the Brussels effect, referencing the headquarters of the EU.[90]

To this end, in compliance with the adequacy provisions, the US and the EU entered into two treaties. The Safe Harbour and the Privacy Shield Framework. Both were designed by the United States Department of Commerce, and the European Commission, to aid the two economies with a mechanism to comply with GDPR when transferring personal data from the European Union to the United States.[91] In October 2015, the Court of Justice of the European Union (CJEU),[92] declared the Safe Habour treaty invalid. The court stated that the US law does not provide adequate data protection for EU citizens. The court found that the United States National Security Agencies (NSA) have access to the data in contravention of the GDPR. The two countries renegotiated which eventually led to the adoption of the Privacy Shield Framework.

In a decision delivered in July 2020, CJEU invalidated the Privacy Shield as well.[93] The court made a finding that the decisions rendered by the Ombudsman, the dispute resolution mechanism offered by the United States under the agreement, are not binding on United States security agencies and thus in contravention of the GDPR. In particular, it found that Section 701 of the Foreign Intelligence Surveillance Act and Executive Order 12333 (the foundational authority in which the NSA collects, retains, and disseminates information that occurs outside the United States) were not consistent with the GDPR. Further, the CJEU made it clear that the Standard Contractual Clauses (SCC) and binding corporate rules (BCRs) signed by companies in compliance with the adequacy provisions of the GDPR, separately, are not exempt from a similar finding. The third-party companies are required to inform the EU of any change in legislation in their home states that will affect the data subject rights entrenched in the GDPR.

The opinions of the CJEU, are not farfetched; the use of technology firms as conduits of statecraft by the United States gives its finding credence. However, the EU does not require member states to have in place any compliance with the GDPR for data they receive from third-party countries. This creates an obvious imbalance, and advantage in the exchange of data flow and its economic benefits. Dr. Joshua P. Melzer whilst analysing the impact of the latter decision by CJEU, indicated the 'GDPR sets up real tensions and trade-offs in terms of getting what the EU wants under GDPR in terms of privacy, and access to and use of data consistent with a robust engagement in the digital economy'.[94] He opined that the verdict will have an impact on digital trade, cloud computing, and Artificial intelligence.

90 A Bradford, The Brussels Effect: How the European Union Rules the World (OUP 2020). LM. Musikali (n 32) specifies how the Kenyan Data Protection Act 2019, complies with the adequacy provisions.

91 US Department of Commerce 'Privacy Shield Overview' Privacy Shield Program Overview | Privacy Shield https://www.privacyshield.gov/Program-Overview accessed 25 August 2022.

92 Maximillian Schrems v Data Protection Commissioner (2015) CJEU C-362/14.

93 Data Protection Commissioner v Facebook Ireland and Maximilian Schrems, (2020) CJEU C-311/18.

94 JP Meltzer 'The Court of Justice of the European Union in Schrems II: The Impact of GDPR on Data Flows and National Security' Brookings (March 9 2022) <https://www.brookings.edu/research/the-court-of-justice-of-the-european-union-in-schrems-ii-the-impact-of-gdpr-on-data-flows-and-national-security/> accessed 10 August 2022

Conclusion

The need for data governance cannot be gainsaid. It has been instrumental in policing informational harm, and serves as a benchmark for consumer rights; against a pervasive digital surveillance for profit. These regulations however have to be balanced with the importance of data in the digital economy. As referenced in the article, the solution lies with the membership of the WTO. The urgency for the WTO member states to find a framework for highly controversial topics such as restrictions on data transfer and the attendant costs of privacy regulations, is obvious. Such discussions have so far been bogged down by ideological and policy differences among the member states. Particularly on how certain digital products are to be incorporated into the WTO legal framework. Jurisprudence from the Appellate body of the WTO, its dispute resolution mechanism, can be an avenue for a sui generis approach to the stalemate observed. The decisions it makes can come up with commonly accepted rule-based guidelines on data colonialism, transfer of data and consequences for non-compliance. The converse is, WTO will overtime be irrelevant to the digital economy, with grave economic consequences. What the digital economy needs is a predictable, non-discriminatory business environment for all countries.

WHAT ON EARTH ARE LAWYERS FOR?

Sussie Mutahi*

Abstract

The image of the lawyer in the present century is tainted and tattered. He is viewed as a villain, a hired gun and the antithesis of justice. Sadly, most of these attributions are fair and justified. A small minority of them arise from a misunderstanding of the role of the lawyer, which again is largely the lawyer's fault. And the question of the lawyer's purpose in society has arisen countless times in countless places. The paper begins with a brief empirical analysis of the history of the lawyer, and that of his tool of trade, the law. It builds on the premise that the law is made for the benefit of society and the lawyer, as a corollary, must exist for that purpose. The paper then proceeds towards an exploration of the idea of law as a communally owned resource, and of legal knowledge as a public trust. The conclusion highlights practical ways in which the lawyer's relevance to his society can be rekindled and the slipping professional image salvaged.

1. Introduction

There is no dispute over the global prestige and power associated with the legal profession, both in the past and in the present.[1] The profession is hailed for its intellectual authority, neutral political positions, stringent code of professional ethics, lengthy training and standardised practice.[2] This professional posture and the work done by lawyers in advancing client, community and country interests appears to demand deference from the wider society.[3] The manner in which this power is exercised however, has drawn an exceeding amount of criticism through the ages.[4] Quotations from Plato, Shakespeare, Dickens and even Jesus decry the crafty and devious methodology employed by lawyers to twist cases, evade professional liability and perpetuate the miscarriage of justice.[5] It is argued that even the few attractive qualities lawyers once held, as advisors and helpers, have altogether vanished. The competition and commoditization of lawyer services is seen, almost on a global scale, to transform the profession into a business, with greater concern for the financial bottom line.[6] The esteem with which the public regards the present day lawyer is so low, that it has been held impossible to go too far in demonising the profession.[7] Unsavoury labels have been handed out with increasing consistency, defining lawyers as greedy,[8] smooth-tongued scoundrels

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1 A Mann et al 'Dream Jobs', (OECD 2020) 14-22.

2 R Abel, O Hammerslev, H Sommerlad, and U Schultz, 'Lawyers in 21st Century Societies'(Hart Publishing 2020) 2.

3 ibid p 9.

4 R Cramton 'What Do Lawyers' Jokes Tell Us About Lawyers and Lawyering' 23(1996) 1 Cornell Law Forum 3.

5 ibid

6 J Macey 'Occupation Code 5411110: Lawyers, Self-Regulation, and the Idea of a Profession' 74(2005) 3 Fordham Law Review 79.

7 ibid p 4.

8 J Budd 'Doctors and lawyers: We're Specialized-but are We Civilized?' 3(1975) 2 Ohio Northern University Law Review 502

,[9]shysters and hired guns.[10] In response various arguments designed to prop up the slipping image of the profession have been fronted, including attributing the bad publicity to the unrealistic and often negative portrayal of lawyers in TV shows and songs. [11]This vein of argument, supported by a growing body of research, posits that the profession is in much better shape than advertised.[12] It is explained that members of the public extract their perception of lawyers from popular culture, the goal of which is to create an exciting and suspense filled story, in which the lawyer's role is often that of the antagonist in a plot of sugar-coated legal, social and ethical dilemma.[13] In addition, the growing number of lawyer jokes depicting lawyers as atrocious, unfeeling, money-mad individuals does not help the situation.[14] Another argument in defence of the profession is that lawyers are often hired to help clients through some of the toughest periods of their lives, including divorces, personal injury, family disputes and criminal trials, which events do not conjure happy memories. [15] It is contended that the depressed emotions during these events tends to colour even the actors, contributing to a biased perspective of the lawyer.[16] It is further argued that the distrust attaches to a misunderstanding of the lawyer's role in representing one party against another in an adversarial situation.[17] Although it would be inaccurate to label the entire profession as irredeemably wicked, [18] there is consensus that the persona of the lawyer is headed south in a hurry, even if the exact speed is disputed, especially by the lawyers.

The paper explores solutions towards the reinstatement of honour in the legal profession beginning by a brief exploration of the lawyer's history and his original purpose as a compass to what ought to presently occupy his efforts and resources.

1. A Brief History of The Law, and The Lawyer

The lawyer's tool of trade is the law. It is futile to describe who the lawyer is and what he does, apart from the law. And the law, for all the books written about it, is difficult, if not impossible to define. [19] Authors writing on the law go in depth about its branches and purposes, carefully sidestepping the controversy and mystery that is its definition.[20] It is not difficult however, to see from whence the difficulty in definition stems. The multiplicity of accounts on where the law originated, when it first appeared on the scene, what its purpose ought to be and how the specific brand of law fits in within

9 M Asimow 'When Lawyers were Heroes' 30(1996) *University of San Francisco Law Review* 131.

10 M Galanter 'The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes and Political Discourse' (1998) *University of Cincinnati Law Review* 805.

11 A Chase 'Lawyers and Popular Culture: A Review of Mass Portrayals of American Attorneys' 11(1986) 2 *American Bar Foundation Research Journal* 81.

12 C Banks *The American Legal Profession: The Myths and Realities of Practicing Law* (CQ Press, Washington DC, 2018) 2-5.

13 ibid p 9.

14 L Friedman 'Law, lawyers and Popular Culture' 98(1989) *The Yale Law Journal* 600.

15 M Asimow, K Brown, and D Papke *Law and Popular Culture: International Perspectives* (Cambridge Scholars Publishing, Newcastle, 2014) 1-26.

16 ibid p 14.

17 M Asimow et al 'Perception of Lawyers: A Transnational Study of Student Views on the Image of the Law and Lawyers' 12(2005) *International Journal of the Legal Profession* 412.

18 n17 p 12.

19 H Willis 'A Definition of Law' 12(1926) *Virginia* LR 203-207.

20 V Aubert 'The Concept of Law'52(1963) 2 *Kentucky* LJ 363-367.

the atmosphere of legal pluralism contribute to the divergent opinions.[21] One theory of the source and nature of law advanced by positivists is that of the law as a series of commands dictated by a sovereign, prescribing what is wrong and what is right.[22]Anthropologists and sociologists disagree with this postulation, arguing the prior existence of unwritten customary law, birthed from social understandings of justice.[23] Natural law theorists on the other hand assert the existence of a moral, immutable law, preceding humanity's contrivance of the shape and structure of law, engraved by God on the hearts of men, consisting of an indestructible sense of justice, determinable by reason. [24] The origins of written law have been traced as far back as 3000 BC in Egypt's Civil Code, which addressed social inequality.[25]About 1960 BC, King Hammurabi would codify Babylonian law by engraving it in stone, with many of the 300 rules setting out punishments for various offences. [26] The law on twelve tablets codifying Roman custom and borrowing certain Greek laws, developed around 450 BC is considered the bedrock of Roman Law.[27] Between 529 BC-534 AD, Justinian, Emperor of the Byzantine empire, ordered a systemic codification of law, setting up the historical pillars to some of the modern legal systems in Europe.[28] As the curtains closed on the 18th century, emergent nation states embarked on national codifications, with the Napoleonic Code[29] and the German Civil Code[30] as some of the best known examples. From the development of the Magna Carta in 1215, the evolutionary nature of Common Law has made it adaptable to most of the colonial territories, including Kenya.[31] The degree of evolution and the historical development of common law was however seen to vary from one country to the next, shaped primarily by prevalent political circumstances.[32]

Conceptualizations on the purpose of law are equally multitudinous and varied.[33] One of the functions it is held, is to escape the state of nature as conceptualised by Hobbes, in which individualism and scarce resources imbued life with constant fear of sudden death, rendering its quality solitary, poor, short, nasty and brutish.[34] Law is also credited with allowing people freedom to plan their affairs with a reasonable degree of confidence in the legal aftermaths of their chosen paths of action.[35] Law is also observed to play the critical role of guarding against arbitrary use of power by distributing the power among various levels of government.[36] Nachbar agrees on the

21 ibid.

22 J Simonto 'On the Origin and Nature of Law' 11(1902) 4 Yale LJ196.

23 World Bank Group Governance and the Law, (The World Bank 2017) 84.

24 n 22 p 207.

25 N Van Blerk The Concept of Law and Justice in Ancient Egypt with Specific Reference to the Tale of the Eloquent Peasant (University of South Africa 2006) 1-10.

26 R Harper The code of Hammurabi King of Babylon (The University of Chicago Press, London 1904) 12-109.

27 A Johnson, P Norton, and F Bourne Ancient Roman Statutes: Introduction (University of Texas Press Austin 1961).

28 F Dingledy 'The Corpus Juris Civilis: A Guide to its History and Use' 123(2016) Library Staff Publications 1-20.

29 W Benning, The Code Napoleon (London 1904) at <https://files.libertyfund.org/files/2353/CivilCode_1566_Bk.pdf>

30 Federal Ministry of Justice German Civil Code (GBG) (Juris GmbH).

31 S Joireman 'The Evolution of the Common Law: Legal Development in Kenya and India' 68(2006) Political *Science Faculty Publications* 3-4.

32 n 30 pp 8-20.

33 D Burchardt, 'The Functions of Law and Their Differences: The Differentiated Functionality of International Law' 20(2019) *German* LJ 410-411.

34 T Hobbes *Leviathan* (Andrew Crook of Green Dragon, 1651) 78.

35 R Fallon 'The Rule o fLaw as a Concept in International Discourse' 1(1997) *Columbia LR* 7-8.

36 ibid.

government establishment function of law, and the resultant tripartite assurance to the citizens of security, predictability and reason[37] Dana argues that law also has an ordering function in shaping and regulating human interaction, both at an individual and institutional level.[38] According to Kant, the function of law is to draw a line on the point where the greatest extent of personal freedom curtails the freedom of other individuals or the state.[39]

The origins of the legal profession are widely traced to ancient Greece and Rome around 620 BC.[40] At the time aggrieved persons were required to plead their own cases before the judicial magistrate or, when appearing before the court of Areopagus to require the assistance of a member of that court to assist in presenting their case.[41] This member of the court was often referred to as an orator and merely served as the mouthpiece of the aggrieved party and was forbidden from charging fees for the representation.[42] Later legal reforms allowed litigants to litigate in person before the court of Areopagus, dispensing with the requirement for representation.[43] The magisterial courts and court of Areopagus were, after the time of Solon, replaced by juries numbering about 500 Athenians, referred to as Heliastic Courts. Before this new courts, litigants were required to deliver a brilliant speech in order to sway the decision of the wavering jury and it was increasingly believed that the chances of success were better achieved through the procurement of one who could win the oratory contest in exchange of a capped legal fee.[44] These orators, by reason of multiple representations before the court, mastered the law and procedure, birthing one of the earliest forms of the legal profession, and with it, an inherent distrust and suspicion.[45] This is because, in order to sway the lay jury, these orators used all sorts of shrewd mechanisms to win the case, including misrepresenting the law, appealing to political biases and exciting violent passions.[46] This mistrust appears to follow the rise of the legal profession in various jurisdictions, specifically because of the riddles and jargon with which the legal language was carried on, so that as early as 1724 books were being published on how to avoid the vexation, abuses, expenses and delays injected into cases by lawyers.[47] Shakespeare's play, Henry VI: Part I, calls for the killing of all lawyers as the first order of business.[48] It is argued that the constant criticism and attack on lawyers, at times unjustifiably, propelled the urgency for informal self-regulation, which later attracted the endorsement and support of the state, leading to the development of various professional legal bodies around the world.[49] Although the role of the lawyer was traditionally played by white elitist males, there is significant departure in this composition, fueled by gender equality crusades and the significant growth in the specialisations within the profession.[50] The Kenyan bar at present boasts a membership of over twenty thousand lawyers.[51]

37 T Nachbar *Defining the Rule of Law Problem* (The Green Bad 6 (2D), 2009) 305.

38 n 22 pp 411-429.

39 G Fletcher 'Law and Morality: A Kantian Perspective' 87(1987) *Columbia LR* 535.

40 A Singh 'Historical Development of the Modern Legal Profession' 3(2021) 4 *International Journal of Legal Science and Innovation* 774-775.

41 A Chroust 'Legal Profession in Ancient Athens' 29(1954) 3 *Notre Dame LR* 340.

42 n 40.

43 ibid p 341.

44 n40

45 ibid p 386.

46 ibid p 387.

47 Anonymous, *Law Quibbles* (E. Nutt & R. Gosling, London, 1724) 4-5.

48 W Shakespeare, *Henry VI:* Part I (Southwark, 1592).

49 P Chassaigne and J Genet, *Law and Society in France and England* (Sorbonne Publications Paris 2003) 103-126.

50 P Baron and L Corbin *Ethics and Professionalism in Australia* (Oxford University Press Melbourne 2017) 3.

51 The Law Society of Kenya 'Membership' < https://lsk.or.ke/membership/> accessed on 28th October 2022.

2. The Playthings of Lawyers are Communally Owned

The common thread running through the competing functions of law as theorised by different scholars, is that law is made for the benefit of society. The law, by and of itself consists of nothing more than words on paper. It is an inert abstraction, activated only by its application to the stuff of the living. It is the inevitable millions of interactions carried on between individuals and institutions which summon the need for rules of engagement and dispute resolution. Keeping with this argument, the law was not made for the lawyer. It was made for the human, and for the legal persons that the human creates. In the law-thick climate in which the human operates, he bears an inherent stake in the laws made and their implementation.[52]

By extension, the entire legal profession is built on nothing more than words. Rodell notes the derision with which lawyers would respond to this supposition, claiming instead that they deal in fundamental principles and concrete concepts.[53] In reiteration, these principles and concepts mean nothing entirely, until they are applied to human affairs. For the legal profession to work, it needs society, not the other way round. In a fanciful situation where no Kenyan cared for electoral positions and no Kenyan cared to vote, the entire oratory spectacle at the Supreme Court, not so long ago, would not have taken place. Similarly, in an illusory world without sexual offences, murders or robberies, the relevant legal instruments and attendant provisions would remain inactivated. On this basis, it is the lawyer who ought to feel privileged when a member of society gives him an opportunity to exercise his trade. And this duty to initiate activation of the law within the context of his client's life, with regard to those he loves and cares about, in relation to an injury sustained or a job lost, ought to be carried on with utmost gratitude and diligence. Of course, this duty has to be balanced against the lawyer's duty to the court and to the profession,[54] to avoid using the legal system towards the client's nefarious aims of instituting frivolous suits and circumventing due process.[55]

In short, the lawyer's tool of trade, and he has only one, is a communally owned resource, desperately requiring activation by human events. The main problem with this resource however, just like the emperor's new cloth, is its invisibility to everyone but the lawyer. The law, it is contended, is mostly carried on in a foreign language.[56] Although there are English words in it, at its pith, the law consists of mediaeval French phrases, which would have altogether fallen into disuse, but for the law.[57] Even the English words present hold a very different meaning in law, so that consideration does not mean kindness nor does damages mean defacements. And this foreign language is not so conducted because there are no ordinary descriptive words as in the field of engineering or medicine, but in order to shroud the law in mysticism.[58] Rodell argues that a patient doctor would be able to explain

52 P Pleasence, N Balmer, and C Denvir *How People Understand and Interact with the Law* (Cambridge, England, 2015) (i).

53 F Rodell Woe *Unto you, Lawyers!* (Yale University 1939) <woe_unto_you_lawyers.pdf (freedom-school.com)> accessed on 27th October 2022.

54 D Freeland 'What is a Lawyer: A Reconstruction of the Lawyer as an Officer of the Court' 3(2012) 2 *Saint Loius University Public* LR 425-493.

55 R Post 'On the Popular Image of the lawyer: Reflections in a Dark Glass' (1987) 75(1) *California LR* 379.

56 n 52 p 6.

57 G Woodbine 'The language of English Law' 18(1943) 4 *Speculum* p 395.

58 V Charrow and J Crandall 'Legal language: What is it and what can be done about it?' *New Wave Conference of the American Dialect Society* (Washington DC 1978) p 4.

what a metatarsus is, where it is located and when required, the problem with it.[59] A lawyer on the other hand cannot, or will not explain in ordinary language what jurisdiction, jurisprudence and constructive trust, are, words which he tosses around with apparent familiarity.[60]

Beyond the jargon, the everyday discourse between counsel and judge in relation to a client's case, loses the client at the opening salutations.[61] As the client ponders whether his case will please the court, pursuant to the lawyer's opening words, 'May it please the court,' he soon finds himself tripping on the level of respect required to make his case sail through, unaware that when counsel expresses 'with greatest respect', he is trying to force down an argument apparent to the judge and counsel present to be nothing more than a Hail Mary.[62] And so, the client hears, without listening, as his marriage, children, finances and property are discussed, waiting for a debrief later from the lawyer, usually in no more than 10 sentences summarising the 1 hour episode and the court's determination.

This portrayal of the law as a complex, incomprehensible apparatus plays a negative binary function of making legal literacy unattainable for society, and isolating lawyers to an exclusive unreachable upper crust. It is strongly argued that this position of things was designed by the lawyer, for the purpose of retaining societal veneration for the important work with which he is involved.[63] The information asymmetry plays another important role of permitting the lawyer to bend the rules, to overcharge, to delay cases, and to play any number of endless games to which the lay public cannot be the wiser.[64] Recently, counsel at an Environment and Land Court hearing, looking to adjourn a case explained that his client was indisposed-another of those long verbose words-meaning ill or sick. This explanation was received by the court, but counsel was called upon to enlighten the court on the malady which his client, a company, could possibly be plagued.[65]

In truth, the smoke of complexity with which both the lawyer and the law are shrouded disservice both the society and the lawyer. First, a legally illiterate society will not appreciate the points at which their affairs intersect with the law, and will therefore not know that they are in need of legal assistance. This lack of knowledge, which as discussed earlier, provides the fodder for the lawyers practice of his trade, denies the lawyer a great many opportunities to apply his knowledge, and consequently derive income. Because the layman is unable to tell what the lawyer is about, mostly because what he knows about him is based on his media portrayal, the majority assume that lawyers are mostly involved in criminal litigation.[66] The legal research, legal analysis and advisory, negotiation and legal drafting functions of the lawyer thus remain obscured from the layman, resulting in unnecessary litigation.[67]

59 n 52 p 6

60 ibid p 57.

61 J Matson 'Lawyer's language'4 (1990) Canterbury LR 308.

62 n 61

63 n 52 pp 4-6.

64 n 52 p 6.

65 *Homeboyz Entertainment Limited v Secretary National Building Inspectorate* [2022] eKLR

66 n 50 p 3.

67 D Howarth *Law as Engineering: Thinking about What Lawyers Do* (Edward Elgar Publishing Limited Cheltenham 2013) 1-51.

On the other hand, all does not seem well in the exclusionary elitist club of lawyers. Studies aimed at figuring out why lawyers are so unhappy are in increasing publication.[68] One author has even generated a label for this phenomenon, calling it 'high-paid misery'[69] while another refers to it as legal unhappiness.[70] One of the reasons attributed to the occurrence is the infiltration of the pessimistic attitude with which lawyers approach cases, into their out of work contexts.[71] Critics of the profession maintain that lawyers encourage clients to approach their cases with self-centred defensiveness, to expect the worst from everybody and to obtain written undertakings in matters where natural and mutual trust has worked well all along.[72] It appears that this stance fostered by their exclusion from normal societal dealings turns around to cannibalise the life of the lawyer and blinds their eyes to alternative justice efforts which would be more conducive to the communities from which they hail [73]

3. Bridging The Lawyer-Society Divide

In order for lawyers to be relevant and to reconnect with the societies, whose affairs fuel their trade, the first point of call would be a mental shift with regard to their position in society. The legal knowledge acquired through training and observation should be viewed as a public trust and not as an instrument of exploitation and unjust enrichment.[74] It is only from this right frame of mind that the lawyer will ably execute his function to the client, the profession and the court. And the more open and eager the lawyer is to serve society, he will in turn learn things like common sense, integrity, trustworthiness, time keeping, listening and empathy, which polls rank higher and more important to society from lawyers than dispute resolution techniques and drafting prowess.[75]

It is only when the lawyer descends from his lofty chair and mingles with the rest of creation that the professional malaise will begin to cure. There, he will learn of life problems to which his legal knowledge would go a long way in addressing. And the problems will be better addressed when he recognizes that the law is only part of the solution, so that a better, more fitting and effective answer lies in collaboration with other professions and skills.

Now, in order for the lawyer to mingle, he will first have to drop the verbosity and legalese. If every profession was allowed to speak in their technical terms, even the lawyer would have a rough time understanding what his engineer client is talking about. Given that the law is made in service of society, and the context of the vast of the lawyer's community is not mediaeval French, both the lawyer and the lawmaker have to excel in the art of simplicity. It is a mistake to imagine, and many have, that plain English, sans the *wherebefores* and *howsoevers*, is drab and anti-intellectual. [76] Plain English revives precision and communication in place of confusion and unintelligibleness

68 M Seligman, P Verkuil and T Kang 'Why lawyers are unhappy' *(2001) 10(1) Deakin LR* 49-66.

69 J Organ 'What Do We Know About the Satisfaction/Dissatisfaction of Lawyers? A Meta-Analysis of Research on Lawyer Satisfaction and Well-being' (2011) 8(2) *University of St. Thomas LJ* 225.

70 A Shete and K Garkal 'Legally unhappy: Psychological Distress in legal Practitioners' *15(2016)5 Journal of Dental and Medical Sciences* 129-132.

71 n 68 pp 54-57.

72 ibid p 10

73 ibid

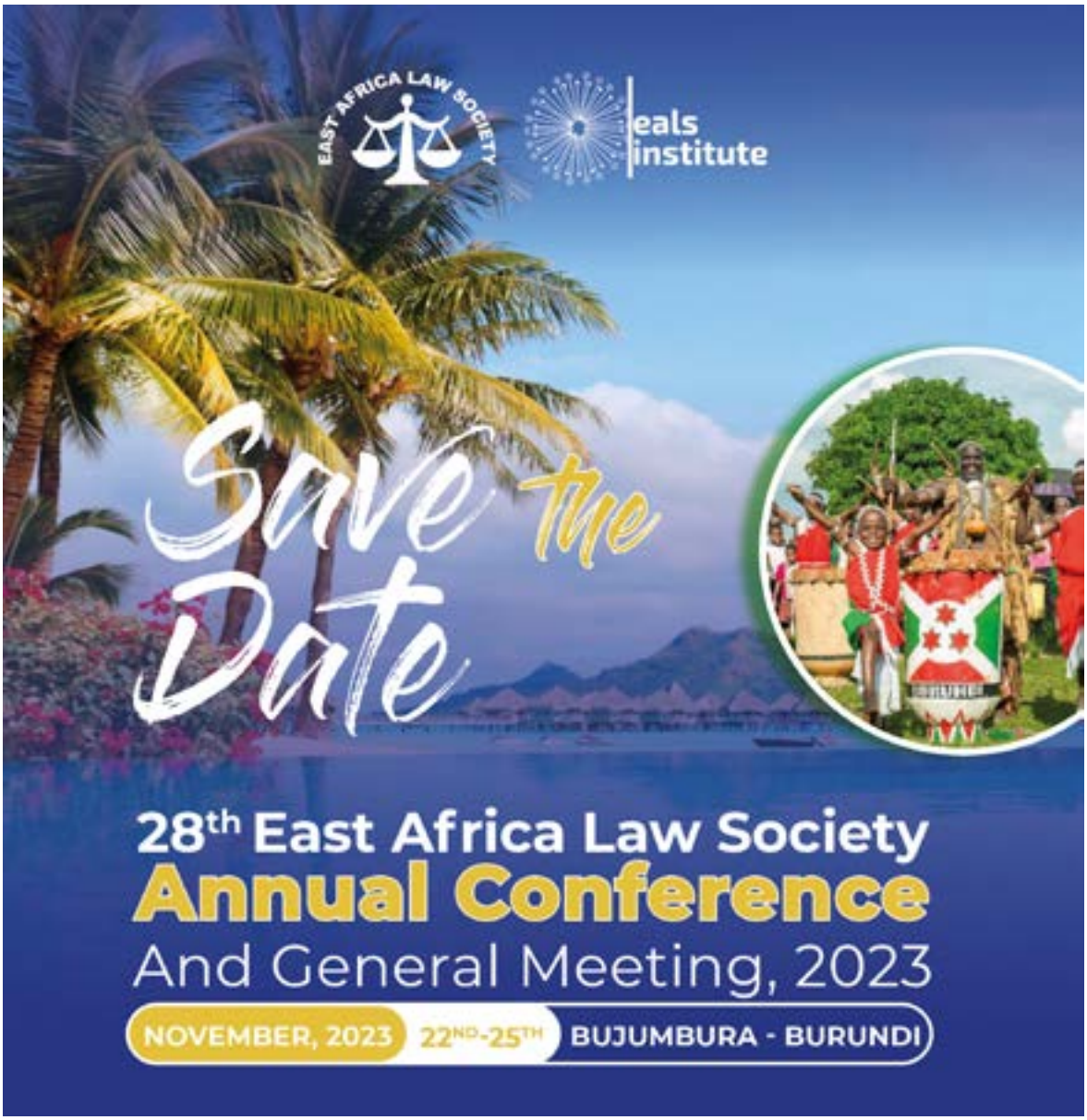
74 Y Ghai and J Ghai *The Legal Profession and the New Constitutional Order in Kenya* (Strathmore University Press Nairobi 2014) 4.

75 A Gerkman and L Cornett 'Foundations for Practice: The whole Lawyer and the Character Quotient' (Institute for the Advancement of the American Legal System 2016) 3.

76 J Kimble 'Answering the Critics of Plain Language' 5 (1994-1995) *Scribes Journal of Legal Writing* 52.

and ought to be entrenched in contracts, statutes, judgements and all other documents proceeding from the profession.

One of the ways of putting into use the extensive legal knowledge acquired by lawyers is through civic education. The immediate opposition to this proposition is that lawyers only have the law, which has taken an eternity to acquire and which cannot therefore be given for free. Crafty practitioners at this point immediately recall the rules against advertising. Both of these arguments are fair, but beside the point. The point is that lawyers want to exercise their trade, and that exercise can only come from societal issues referred to them, and these issues can only be so referred, if society knows what lawyers do. It is a win-win situation if society is legally literate and the lawyer has, by this reason, more clients and therefore more work. Some of the media shows designed to educate the masses on various aspects of the law, including conveyancing and labour laws promote the rule of law, because the society is made aware of its legal rights, and do the judiciary a favour in reducing backlog. Legal aid clinics are another great avenue towards bridging the lawyer-society divide. And if the lawyer would take it upon himself to provide legal education to his friends, religious groups and communities, there would be no need at all to hold up the slopping image of the lawyer.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