SALAR STUDENTS' LAW JOURNAL

University of Nairobi

VOL I: 2015

University of Nairobi – School of Law (Parklands Campus)

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VOL 1: 2015 SALAR STUDENTS LAW JOURNAL

Printed and bound by:

Reflex Concepts Limited

P.O. Box 25663-00100, Nairobi, Kenya

Website: www. reflexconcepts.co.ke

Email: info@reflexconcepts.co.ke

Cover layout and design:

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STATEMENT FROM THE PATRON

The Students Association for Legal Aid and Research (SALAR) was conceptualized with a core mandate of promoting Legal Aid and Research. Accordingly, over the last fifteen years of its existence, SALAR has engaged in substantive activities aimed at realizing its mandate. However, in its activities, SALAR has focused substantively on its Legal Aid mandate much to the exclusion of its research component. This deficiency led to the conceptualization of the SALAR STUDENTS' LAW JOURNAL (SSLJ) in 2014.

The release of this inaugural issue of the SSLJ signifies a commitment by SALAR to realise its mandate for the benefit of all students. Through the journal, students have been afforded an avenue to contribute, in their own right, to the profoundly essential field of legal research.

I take this opportunity to congratulate the SALAR Governing Council, the SSLJ Editorial Board, the authors and all persons who contributed to the successful assemblage and publication of the journal. In the same breath, it remains my hope that the birth of the SSLJ shall not be in vain. The baby shall be nurtured further within SALAR thereby effectively allowing students to contribute to legal research in Kenya and beyond.

Let us all aid in Justice.

Joy Asiema

PATRON-SALAR

STATEMENT FROM THE EDITOR-IN-CHIEF

The SALAR STUDENTS' LAW JOURNAL (SSLJ) is a student-fed and student-led initiative. As the research arm of SALAR, the SSLJ grants students a unique platform upon which they can hone their skills in research and particularly in legal writing. This lead-off publication signifies the wealth of legal knowledge possessed by students on cross-cutting legal issues. Such wealth, amongst budding lawyers, should be encouraged and nurtured. In its furtherance of this noble cause, the SSLJ is committed to relay reliable, informative and authoritative legal information to the multitude of legal information consumers.

I wish to thank all those who have worked tirelessly to bring this idea to fruition. I especially wish to thank the 2014-2015 SALAR Governing Council for conceptualizing the idea of the journal and setting the ball rolling. The efforts of the chairperson, Yohana Gadaffi, deserve special mention in this regard. To all the authors, this publication would not be, without your brilliant articles. I thank all of you for your unwavering cooperation through the many reviews as we sought to refine and re-evaluate your articles. It is my sincere hope that with this inaugural issue, you will not find your efforts to be acts of vanity. To the Editorial Board, I acknowledge your invaluable input in the review of each and every article published herein. Working with all of you has been nothing short of insightful, wonderful and fun. To Remmington Otieno, I cannot thank you enough for the ever constant help rendered in various stages of this publication.

Special acknowledgement and gratitude goes to Mr. Francis Kariuki who reviewed all the articles and gave his invaluable input. May the Lord bless you exceedingly and abundantly well.

To all; have a good read!

Esther Chege

EDITOR-IN-CHIEF (2015)

NOTE ON CONTRIBUTIONS

THIS JOURNAL SHOULD BE CITED AS VOL I: 2015 SSLJ

The SALAR STUDENTS LAW JOURNAL (SSLJ) publishes student contributions on cross-cutting legal issues. The articles submitted for publication have not been published elsewhere. The views expressed in the articles remain those of the authors and are not a representation of SALAR or any of the editors.

The journal is published once in every academic year. The journal is available in hardcopy and the softcopy is available at www.uonsalar.org

Following a call for papers, students are invited to submit their articles by email in MS Word format to the Editorial Board at info@uonsalar.org Articles should be between 2,000 – 3,000 words (excluding footnotes). The acceptable font is Times New Roman, font size 12 and font size 10 for the footnotes. The articles should be double spaced. Further, articles should be in conformity with the citation style prescribed in the Oxford University Standard for the Citation of Legal Authorities (OSCOLA).

Submitted articles should have an accompanying abstract of not more than 250 words and should also include a short profile of the author(s).

ARBITRATION AS AN ALTERNATIVE TO LITIGATION OF ELECTION PETITIONS

By Pauline Njoroge*

ABSTRACT

Generally, alternative dispute resolution mechanisms provide for dispute resolution outside the court room. Some dispute resolution mechanisms like mediation and negotiation give parties complete autonomy over the process and outcome while others like arbitration have limited party autonomy to some extent. With the increase in election petitions in Kenya and even beyond, this paper explores the viability of arbitration as an alternative to litigation in settlement of post electoral disputes.

1. Introduction

The right to vote is crucial in a free and democratic society[1] and is the cornerstone of democratic governance. It is recognized by the Universal Declaration of Human Rights as the basis of a government's authority.[2] Although this right is widely recognized, an examination of state practice reveals that elections face many challenges as a result of human interference.[3] Consequently, there is no scarcity of post-election litigation.[4] There is no doubt that post-election litigation is a necessary tool not only of ensuring that election regulations are adhered to but also

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[1] 'Developments in the Law: Voting and Democracy' (Harvard Law ReviewVol. 119, No. 4, Feb., 2006)

[2]Article 21The Universal Declaration of Human Rights, The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret ballot or by equivalent free voting procedures.

[3]Edwin Odhiambo Abuya, 'The role of the Judiciary in Promotion of Free and Fair Elections' Available on <http://www.juridicas.unam.mx/wccl/ponencias/1/1.pdf> accessed 28 June2014.

[4]Rebecca Green 'Mediation and Post-Election Litigation: A Way Forward' (2012) *faculty Publications.* Paper 1479.

for affirming the choice of the electorate with regard to their representation. Voters and candidates alike have the right to lodge an election petition.[5] Election petitions arise mostly when the vote returns are so close that the losing candidate has reason to believe that he or she could win if the votes were recounted or otherwise challenged.[6] When election results point to a clear winner, voters and candidates are less likely to challenge the outcome.

Although litigation is widely applied in settlement of election petitions, this work seeks to bring out the role that arbitration can play as an alternative to litigation. In doing so, it explores the negative aspects of litigating election petitions that can be mitigated if such disputes were resolved through arbitration. The paper begins by looking at the challenges posed by litigating electoral disputes. It moves on to discuss why arbitration would be a workable alternative and concludes by considering the all-important question of arbitrability. It is important to state from the outset that the model of arbitration envisioned here is one grounded in statute.

2. Challenges posed by litigation of election petitions

Election petitions introduce additional workload on the judiciary. This puts a new strain on judicial time as well as staff. To compound the situation, they come with time lines that must be kept to.[7] The judiciary is at such a time forced to shift its focus from other matters in order to

[5] The determination that there is no known provision under the constitution or other laws that prohibits a voter from filing a petition was made in the finding of Githua J in *Sarah Mwangudza Kai v Mustafa Idd & 2others,*Malindi Election Petition No. 8 of 2013 [2013] eKLR.

[6] Erin Butcher-Lyden 'The Need for Mandatory Mediation and Arbitration in Election Disputes'; (2010) 25 Ohio State Journal on Dispute Resolution 531.

[7] The Constitution of Kenya provides that a petition raising questions as to the validity of a presidential election shall be determined within 14 days. Any petition filed in the High Court whether in its original or appellate jurisdiction shall be determined within six months.

dispense with the election petitions. The unfortunate and rather inevitable consequence is a longer wait for justice for persons whose matters have to be put aside.[8]

To illustrate the above point, in the aftermath of the 2013 elections in Kenya, the judiciary was faced with a total of 188 election petitions.[9] The Chief Justice named 98 judges and magistrates to hear the petitions.[10] This team comprised of 39 judges out of a total of 53 High Court judges, thus leaving only 14 judges to handle all other High Court matters.[11] Considering the heavy constitutional mandate placed upon the High Court,[12] it is clear that this arrangement left a huge personnel gap in the High Court. The pool also comprised of 59 magistrates to hear the 68 petitions in respect of County Assembly elections. The effect of this pressure was to increase the case back log that is already a problem in the Kenyan Courts.

The case is no different in Uganda since after the general election in 2006, 18 judges were taken off other matters in order to finish the petitions within the stipulated six month period. This illustrates the enormous drain that the election related cases presented for the Ugandan judiciary.[13]

Besides being a drain on the judiciary's resources, post-election litigation is an expensive affair to the disputants[14] as well as the tax payer[15] and can drag on for a long time. Elisha

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[8] Rule 6(4) of the Elections (Parliamentary and County) Petitions Rules 2013 at Rule 6(5) provide that A judge or a magistrate appointed to an election court may not, for the duration of the election petition, be engaged in any other court matter except a matter for which a ruling or judgment was pending and the date of which ruling or judgment is within the period before the Judge or Magistrate concludes election the petition.

[9] Available from <http://.judiciary.go.ke/portal/election-petitions-updates-as-at-ugust-16-2013.html> accessed on 18/6/2014.

[10] Press Statement on April 22nd 2013, Chief Justice Picks Bench to Hear Election Petitions. Available from <www.judiciary.co.ke> accessed on 7/7/2014.

[11] ibid.

[12] Article 165 of the Kenyan Constitution.

[13] Siri Gloppen, (med Emmanuel Kasimbazi, og Alexander Kibandama) 'Elections in Court: the Judiciary and Uganda's 2006 Presidential and Parliamentary elections'

[14] For example, candidate for the Nairobi Gubernatorial Seat, Ferdinand Waititu was ordered to pay 5 million shillings as the cost of the three month long petition he had brought and which he lost. Similarly, Steven Kariuki,

Ongoya argues that one of the reasons why courts became very undesirable forums for resolution of election disputes was the length of time it took to resolve election petitions.[16] The Constitution has attempted to remedy the situation, although delayed adjudication can still be seen.[17]Abuya argues that such delays compromise the fundamental right of citizens to choose their own representatives on the one hand and denies a rightfully elected candidate the right to represent the electorate on the other.[18] Ultimately the remedy offered a candidate found to have won is never sufficient because there is no compensation of lost income.[19]

An election may be viewed as a peak in political activity whose influence is keenly felt and seen by a large proportion of a country's people. The handling of election petitions inevitably thrusts the courts into that political activity. The disputants and the citizenry look up to the court to make a decision that may determine the outcome of an election.[20] The outcome can result in the electorate's impression that judges are political entities or political puppets, and more so when it goes against public expectation.[21] A view such as this dents public confidence in that judiciary and threatens its future. Justice Frankfurter wrote in *Colegrove v. Green*[22]in 1946 that*, '[i]t is hostile to a democratic system to involve the judiciary in the politics of the people*.'

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contender for the post of Member of Parliament, Starehe was ordered to pay 2 million as costs of defending the petition.

[15] The judiciary is a public utility and no doubt runs on a government's budget.

[16] Ongoya E Z, 'The Legal Framework on Resolution of Election Disputes in Kenya' in in Godfrey Musila (eds) *Handbook of Election Disputes in Kenya: Context, Legal Framework, Institutions and Jurisprudence* (Law Society of Kenya, 2013)

[17] A good example is *Dickson Mwenda Kithinji v Gatirau Peter Munya& 2 others* [2013] eKLR, which was originally filed on 26/3/2013 in the High Court in Meru. A final decision was rendered by the Supreme Court on 2/4/2014, over a year later.

[18] Abuya (n4).

[19] ibid.

[20] Butcher-Lyden (n7).

[21] ibid.

[22] *Colegrove v. Green*, 328 U.S. 549, 553-54(1946).

Moreover, scholars have noted that judges may hesitate to impose remedies in the election context in which even minor corrections can have broad, systemic implications.[23]

The credibility of a court is dependent on the confidence that the citizenry has in it and election petitions unnecessarily put this confidence in jeopardy. In the 2007 General Elections in Kenya, the Orange Democratic Movement refused to challenge the outcome of the election in court, calling them 'Kibaki Courts'.[24] This expressed their total lack of confidence in Kenyan Courts to resolve any challenge to the election results independently and impartially.[25]

A final reason why courts are not appropriate for election dispute resolution is that judges are often ill-equipped to handle election law matters.[26] The Judiciary Post-Election Report, March-September 2013 noted that one of the challenges faced in the 2013 Election was novelty and limited relevant experience in that most judicial officers did not have experience in handling election disputes since they had not had much prior interaction with electoral law, practice and procedure. This was exacerbated by the unprecedented scale of the 2013 elections.[27]

3. The Viability of Arbitration as an Alternative

Arbitration is the reference of a dispute to one or more impartial persons for a final and binding decision, known as an award.[28] It is one among the methods of dispute resolution that fall under the head Alternative Dispute Resolution (ADR). If applied to election disputes, these methods are known as Alternative Electoral Dispute Resolution Mechanisms (hereinafter

[23] Butcher-lyden (n20).
[24] Abuya(n 21).
[25] ibid.
[26] Butcher-lyden (n23).
[27] Judiciary Working Committee on Election Preparations Post Election Report 2013, March- September.
[28] Henry Brown and Arthur Mariott, *ADR Principles and Practice* (Sweet & Maxwell, 3rd ed. 2012) .

AEDR).[29] Their primary purpose is not to replace formal EDR mechanisms but to play a supportive role, especially in situations in which the formal systems face credibility, financial or time constraints linked to political or institutional crises or to their inadequate design.[30]

As such, arbitration would not come to supplant the formal EDR mechanisms. Rather, it would supplement litigation. This would go a long way in giving life to Article 159(2) (c) of the Constitution.[31] Of all the ADR methods, arbitration is closest to litigation. Its distinguishing feature is that it culminates in a binding award, just like litigation.

It is envisioned in this work that arbitrators would be picked from outside the court system. As such the judiciary would proceed with its work without much interference. This would preclude the prolonged wait for justice often occasioned by the giving of precedence to election matters. On the other hand, the disputants would have their disputes settled much faster than would be the case had they resorted to litigation. The shortened period of hearing would also likely lower the overall cost of the petition.

As is the case with arbitration, parties would be allowed to agree on the arbitrator. In the event that either, or both sides, to the dispute consist of multiple parties, as they often do, the parties on each side of the dispute would have to agree on one arbitrator for that side to narrow down to a three-member panel. Allowing the parties to select one of the arbitrators themselves would alleviate concerns of biases.[32] Most importantly, it would preclude the need for a court to

[29] International Institute for Democracy and Electoral Assistance 2010/2014.*The International IDEA Handbook*, Alternative EDR Mechanisms, Chapter 8.
[30] ibid.
[31] In exercising judicial authority, the courts and tribunals shall be guided by the following principles— alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted.
[32] Butcher-Lyden (n23).

entangle itself in the political process, which would in turn remove the danger posed to the judiciary's reputation by the handling of a highly political matter.

While most parties subject to arbitration have the choice to make the process private, parties would not have that option for settling election disputes; instead the process would be made public, similar to litigation, for the sake of transparency. The procedural processes for the arbitration would need to be statutorily defined and not for the parties to decide.[33]

The statute should also provide for the minimum qualification and experience of persons to be selected as arbitrators. Ideally, this should include a rich knowledge of election laws and experience in handling electoral disputes.

4. The Question of Arbitrability

The concept of arbitrability deals, on the one hand, with the question of which categories of people are allowed to submit their disputes to arbitration. This is known as subjective arbitrability or arbitrability *ratione personae*.[34] On the other hand, it deals with the question of the nature of disputes that can be referred to arbitration. This is objective arbitrability, or arbitrability *ratione materiae*.[35] In addition, arbitrability limits are sometimes set by considering whether a court or administrative body has exclusive jurisdiction over a matter – arbitrability

[33] ibid.
[34] 'Arbitrability of Disputes' in Gerald Aksen, Karl Heinz Bockstiegel, Paolo Michelle Pattochi and Anne Marie Whitesell(eds.) *Global Reflections on International law, Commerce and Dispute Resolution; Liber amicorum in honour of Robert Briner* (ICC Publishing S.A. 2005).
[35] ibid.

ratione jurisdictionis.[36] If a law provides for exclusive jurisdiction of courts over certain kinds of disputes, they are not arbitrable.[37]

With regard to subjective arbitrability, the question arises of what authority the parties *have to go* to arbitration. Would they be exercising their authority as candidates, or the authority of the electorate that gives them the mandate which is at that moment disputed? In ordinary consensual arbitration, the arbitration agreement is expected to name the parties to any matters to be presented to the arbitrator. In this case, the statute mandating election petitions to arbitration should be clear on which parties are to present their grievances to the tribunal. The statute shall be the one to empower the tribunal as well. The question of subjective arbitrability and arbitrability *ratione jurisdictionis* shall therefore not arise.

The question of objective arbitrability is the more serious one as it raises questions of public policy. An election is a notoriously public affair. The public is not only interested but is also entitled to know who the winning candidate is. Any award made by a tribunal has a direct impact on the people. It has been argued that an arbitrator whose powers are derived from a private agreement between A and B plainly has no jurisdiction to bind anyone else by a decision, as no-one else has mandated him to make such a decision, and a decision which attempted to do so would be useless.[38]

As viable as the argument above is, settlement of election petitions by arbitration presupposes the existence of a statute providing for the same. To this extent, the powers of an

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[36] Professor emeritus Kreπimir Sajko 'On Arbitrability in Comparative Arbitration- An outline'.(2010)60(5)Zbornik PFZ, 961.
[37] ibid.
[38] Mustill and Boyd 2001 Companion Volume to the 2nd Edition of commercial Arbitration at 149 as quoted in *Booz-Allen & Hamilton Inc. vs. Sbi Home Finance Ltd. &Ors*, CIVIL APPEAL NO.5440 OF 2002.

arbitrator would not be derived from a private agreement but from statute. A court of law in referring the matter to arbitration would be doing so not because an arbitration agreement exists but because it is a requirement of the law. Any award arising from such an arbitral process should then be adopted as a judgment of the court from where it originated.

It is important to note that neither the UNCITRAL Model Law on International Commercial Arbitration of 1985 (hereinafter Model Law) to which Kenya is party nor the Kenyan Arbitration Act of 1995 expressly prohibits or proscribes the arbitration of election petitions. Article 1(5) of the model law provides that it shall not affect any other law of a State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law. This leaves model law countries with the discretion to define the bounds of arbitrability in their states.

In the Second edition of Mustill & Boyd on *Commercial Arbitration* the question of arbitrability is given a rather inconclusive treatment. The authors say that:

> English law has never arrived at a general theory for distinguishing those disputes which may be settled by arbitration from those which may not. The general principle is, we submit, that any dispute or claim concerning legal rights which can be the subject of an enforceable award is capable of being settled by arbitration.

They go on to say that:

> [An arbitrator] cannot impose a fine or a term of imprisonment, commit a person for contempt or issue a writ of subpoena; nor can

> he make an award which is binding on third parties or affects the public at large... It would be wrong, however, to draw from this any general rule that criminal, admiralty, family or company matters cannot be referred to arbitration; indeed, examples of each of these types of dispute being referred to arbitration are to be found in the reported cases.

From the foregoing, it is trite to say that there are no hard and fast rules as to what is arbitrable and what is not. In *Fulham Football Club V. Richards*,[39] the court quoted Born on International Commercial Arbitration where he asserts that:

> The types of disputes which are non-arbitrable nonetheless almost always arise from a common set of considerations. The non-arbitrability doctrine rests on the notion that some matters so pervasively involve public rights, or interests of third parties, which are the subjects of uniquely governmental authority, that agreements to resolve such disputes by 'private' arbitration should not be given effect.

The well-recognized examples of non-arbitrable disputes are : disputes relating to rights and liabilities which give rise to or arise out of criminal offences; matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; guardianship matters; insolvency and winding up matters; testamentary matters and eviction or tenancy

[39] [2011] EWCA Civ. 855.

matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.[40]

It is clear from the foregoing that in no terms have election disputes been declared inarbitrable. The question of public policy is however, a persistent concern. In dealing with this concern, it is necessary to consider which method between arbitration and litigation serves the public interest better. This work supports the idea that arbitration serves public interest better and therefore nothing should stop a country from enacting a statute that requires arbitration of election petitions.

5. Conclusion

A system such as the one proposed above would require an overhaul of election laws as well as the thought process of those applying it. It would also take an awfully long time to entrench an arbitration model in the electoral systems of a country. This is however not new as it is well known that established systems never yield easily to fledgling ones, much in the same way as the oppressor never yields voluntarily to the oppressed.

The point of an arbitration model would not be to usurp litigation all at once. It is not even suggested that it would cure all the defects of litigation. The appropriate approach would be to apply arbitration to mitigate the limitations of litigation, while modifying and adapting it with a view to mitigating its limitations as well.

[40] *Booz-Allen & Hamilton Inc. vs. Sib Home Finance Ltd. &Ors*, CIVIL APPEAL NO.5440 OF 2002.

ROLE OF NON-GOVERNMENTAL ORGANIZATIONS (NGOs) IN KENYA: CHALLENGES AND PROSPECTS

By Erick Naibei*

"Civil society is a hitherto missing key to sustained political reform, legitimate states and governments, improved governance, viable state-society and state-economy relationships, and prevention of the kind of political decay that undermined new African governments a generation ago." - *John W. Harbeson*[1]

ABSTRACT

This article gives a brief analysis of the legal framework governing NGOs in Kenya, their role in fostering constitutionalism and democracy and the challenges that NGOs face in their day to day activities. It also analyses the effect of the proposed Statute Law (Miscellaneous Amendments) Bill 2014 that seeks to amend the Public Benefits Organisations Act 2013 so as to cut down NGO funding in Kenya. In this light, this article argues that the Government should not interfere with the operations of NGOs by statutorily limiting the amount of funding that NGOs receive from foreign donors.

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[1] John W. Harbeson 'Civil Society and Political Renaissance in Africa,' in Harbeson et al. (eds)., *Civil Society and the state in Africa*, 51-52, cited in Makau Mutua *Human Rights NGOs in East Africa: Political and Normative Tensions*, (2009) Fountain Publishers Ltd, Kampala. John Harbeson is among the leading scholars on African politics.

1. Introduction

Kenya has come a long way in the fight for the expansion of democratic space.. It was not until the early1990s that the civil society, specifically Non-Governmental Organisations (NGOs) became visible institutions in the fight for constitutionalism and democracy.[2] NGOs have been a key pillar in the shaping of the political landscape. According to Makau Mutua, the emergence of NGOs and the human rights movements in sub-Saharan Africa is an extension of the international human rights movement which originated from the industrial democracies of the West.[3] This came after, among other factors, the utter inefficiency of one-party authoritarian states and the "whittling away of absolute state power" in most states. This opened up space and environment for the establishment of such organizations in the West.[4]

Most NGOs in Kenya have strong links with the West.[5] They depend on donor aid from the West and their formation was conceptualized there. As shall be explained later in this paper, it is this strong link between NGOs in Kenya and foreign nations that for many reasons threatens the life and operations of the civil society organisations today.[6]

2. What are NGOs/PBOs/CSOs?

Non-Governmental Organizations fall in the broader category of civil society organizations (hereinafter 'CSOs').In fact, many authors have substituted the term NGOs with civil society organizations. Under the new Public Benefits Organisation Act of 2013, NGOs are

[2] See Willy Mutunga *Constitution-making from the Middle: Civil Society and Transition Politics in Kenya* (1999) Sareat, Nairobi, Kenya at 42.
[3] Makau Mutua *Human Rights NGOs in East Africa: Political and Normative Tensions* (2009) Fountain Publishers Ltd, Kampala, Uganda at 18.
[4] ibid.
[5] Mutunga(n3).
[6] Many authors and analysts have argued that the strong connection between NGOs and foreign nations (donors) is injurious to the country's sovereignty. Some of them include Prof Makau Mutua and Chief Justice Willy Mutunga.

now referred to as Public Benefits Organisations. This article shall use the terms NGOs, PBOs and CSOs interchangeably.

Makau Mutua has approached the concept of civil society using what he refers to as the long standing tradition. According to his analysis, until the middle of the eighteenth century, CSOs used to denote 'a type of political association which places its members under the influence of its laws and thereby ensures peaceful order and good government.'[7] After the eighteenth century, however, the term civil society acquired a different meaning; a clear distinction between civil society on the one hand and the state on the other has emerged.

Mutua adopts John Keane's broad interpretation of civil society which postulates that civil society is a large cartilage that is positioned "between the simple world of the patriarchal household and the universal state."[8] Keane illustrates that civil society includes the market economy, social classes, corporations and institutions concerned with the administration of "welfare" and civil law. Civil society is the independent eye of the society, made of a plurality of self-organized and vigilant civil associations. Without civil society, 'those in power can turn into despots.'[9]

According to the definition adopted by the Organisation for Economic Co-operation and Development's Assistance Committee, CSOs can be defined to include all non-market and non-state organisations outside of the family in which people organise themselves to pursue shared interests in the public domain.[10] Examples of CSOs according to this definition include community-based organizations and village associations, environmental groups, women's rights

[7] Mutua (n4) at 13.
[8] ibid.at 14.
[9] ibid.
[10] Information available at http://www.cn.undp.org/content/dam/china/docs/Publications/UNDP-CH03%20Annexes.pdf (accessed 2/11/2014).

groups, farmers' associations, faith-based organizations, labour unions, co-operatives, professional associations, chambers of commerce, independent research institutes and the not-for-profit media.[11]

The Public Benefits Organization Act, 2013 defines a PBO as a voluntary membership or non-membership grouping of individuals or organizations engaged in public benefit activities in any or a combination of the following: legal aid, agriculture, rights and welfare of children, culture, working with or for persons with disabilities, energy, education, environmental conservation, gender issues, governance, poverty eradication, health, housing and settlement, human rights and HIV/AIDS.

3. The legal framework governing NGOs

By the1990s, the regulatory regime governing NGOs in Kenya was still not elaborate. Sihanya, in his report presented to the International Center for Not-for-Profit Laws (ICNL) and World Bank Conference on Non-Profit Law,[12] argues that in spite of the significant role NGOs played in the development process, the regulatory regime at the time was still 'hostile, murky, and at best ambiguous.'

However, the laws have since been revised and modified. First, Kenya has since then promulgated a new constitution in the year 2010. Second, the NGO Coordination Act of 1990 was revised in 2012. Third in 2013, the NGO Coordination Act was repealed by the Public Benefits Organisation Act. The administrative and regulatory framework within which PBOs

[11] ibid.
[12] Ben Sihanya 'Regulatory Regimes Governing NGOs in Kenya, a study presented at the International Center for Not-for-Profit Laws (ICNL) and World Bank Conference on Non-Profit Law, Carleton Hotel, Johannesburg in September 1996.

operate has been placed under the Ministry of Planning and Devolution, unlike the previous regime where it fell under the Ministry of Foreign Affairs.[13]

3.1 Non-Governmental Organizations Co-ordination Act, 1990

This Act established the Non-Governmental Organizations Co-ordination Board[14]whose functions were, *inter alia*, to facilitate and co-ordinate the work of all national and international Non-Governmental Organizations operating in Kenya. The Act also provided for the registration of NGOs.[15]

3.2 The Constitution of Kenya 2010

The Constitution of Kenya 2010, does not have express or specific references to regulations on NGOs. However, it embodies the Bill of Rights under Chapter 4 which contains human rights principles that apply to NGOs. Article 36 (1) of the Constitution provides that every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.

On registration of associations, Article 36(3) provides that any legislation that requires registration of an association of any kind shall provide that registration may not be withheld or withdrawn unreasonably and that there shall be a right to have a fair hearing before a registration is cancelled. Article 37 provides that every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities.[16]

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[13] Suba Churcill 'Why NGOs are jittery over the Public Benefits Organizations Act 2013,'(2013) at http://www.penkenya.org/UserSiteFiles/public/Why%20NGOs%20are%20jittery%20over%20the%20Public%20Benefits%20Organizations%20Act%202013.pdf (accessed 2/11/2014). Suba Churchil is the National Co-ordinator at National Civil Society Congress.

[14] Section 3.

[15] It made it illegal to operate an unregistered NGO.

[16] This is the Constitutional justification that has enabled most NGOs to execute their objectives without fear of facing legal consequences.

3.3 Public Benefits Organisations Act of 2013

The Public Benefits Organisation Act was passed in January 2013. It provides for the establishment and operation of PBOs. It gives the framework for enhancing good governance in the civil society, fostering effectiveness and sustainability of the work of CSOs. It also streamlines the interaction and partnerships between the State, Civil Society among other actors.

PBOs can engage in areas that were previously a preserve of voluntary organisations. These include information, informal sector, old age, peace building, population and public health, refugees, disaster prevention and preparedness, provision of relief services, pastoralism and marginalization, sports, water and sanitation, animal welfare and the youth. Any organisation whose objective includes the direct benefit of its members shall not be conferred the status of a PBO.[17] The Act also establishes the Public Benefits Organizations Authority which has taken over the roles and powers of the NGO Coordination Board.

Under the previous regime on NGOs, it was not mandatory for an NGO to be registered. Some NGOs could be registered as trusts and still be regarded as NGOs. However, under the new regime, no organisation shall be regarded a PBO if it is not registered under the Act.[18]

4. Role of NGOs in the State

NGOs are critical in Kenya's and Africa's development. A state like Kenya which has severally gone through ethnic clashes and is in dire need of constitutionalism and the rule of law

[17] Section 5 (2).
[18] ibid. Section 6.

requires immense input of civil societies. To this end, civil societies have initiated peace-building and reconciliatory efforts among different communities in Kenya.[19]

The rising rates of corruption, bribery, crime, violations of human rights by state agencies, and other challenges underline the need for strong democratic institutions. This cannot be achieved by the Government itself. CSOs have contributed immensely in championing for the observance of democracy, rule of law and good governance. [20]

NGOs also play a pivotal role in developing a democratic culture. This is through provision of programmes in learning institutions and in the mainstream media that seek to enlighten the public on the various aspects of governance, their civil and political rights. NGOs have championed for the key values of probity, transparency, accountability, justice and good governance.[21]

In addition, NGOs help mobilize disadvantaged groups in the society, for example, women and Persons With Disabilities and represent their interests and in this way helping them to access justice. Whenever rights of disadvantaged groups are infringed upon or violated, NGOs rise up and speak on behalf of such groups. Cases on Gender discrimination and violation of women's rights have in most instances been raised by NGOs.[22] Kituo Cha Sheria, among other NGOs, in Kenya have played a key role in enhancing access to justice through the provision of legal aid and legal advice.

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[19] Harriet Jepchumba Kidombo 'The Role of Civil Society in Peace building: Lessons from the Tegla Lorupe Peace Foundation' An Essay Submitted in Partial Fulfillment of the Requirements for the Post Graduate Certificate in Conflict Resolution Skills of Coventry University, Centre for Peace and Reconciliation Studies in 2013 available at< https://profiles.uonbi.ac.ke/hkidombo/files/role_of_civil_society_in_peace_building_-_tlpf_essay_7.1.2013.pdf> (accessed 21/11/2014).

[20] Millie Odhiambo "The Role of Civil Society in Kenya Today," at http://www.crecokenya.org/wp-content/uploads/speechmil.pdf (accessed 26/2/2015)

[21] ibid.

[22] ibid.

Whenever food prices or inflation skyrocket in the country, NGOs play a key role in presenting grievances on behalf of the members of the public. In this respect, NGOs mobilize interest groups e.g. the consumers (common mwananchi) against unfair economic policies by the state through organization of protests and peaceful demonstrations.[23]

NGOs employ a large number of the working population in Kenya. This reduces the burden on the state to employ its citizens and also enhances economic growth in the country. Moreover, most NGOs take up graduates or university and college students for internship placements, hence complementing the Government in providing employment and training.

Besides that, NGOs play a significant role in opening up political space in many countries. NGOs in Kenya have for the past decade exerted immense influence on the political process. This was evident in the early 1990s' civil society's role in the quest for constitutionalism and respect for human rights. This enhances civic education and public participation on governance matters.[24]

NGOs are also significant in advocacy and development of human rights standards at the national and international level. Human Rights NGOs like the Kenya Human Rights Commission have done a lot in advocating for respect of human rights through various means. These include, but are not limited to, litigation, organization of seminars, media addresses, protests and peaceful demonstrations, among others.

In summary, NGOs form an important sector in the country. It is therefore recommended that NGOs should promote values of diversity by preaching peace and unity and leading by example.

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[23] ibid.

[24] Mutua (n4). See also Walter O. Oyugo 'The Role of NGOs in Fostering Development and Good Governance at the Local Level in Africa with a Focus on Kenya,' (2004) 29 African Journals Online http://www.ajol.info/index.php/ad/article/view/22205 (accessed 28/11/2014).

These groups should do this by first ensuring that their internal organizational set up meets the constitutional standards in terms of the representation in the leadership structure. A balanced ethnic and regional representation enhances the legitimacy of NGOs**.**

5. Current state of NGOs in Kenya: Pressing Challenges

NGOs in Kenya face a myriad of challenges. Some are caused by internal factors that can be remedied by appropriate corrective measures by NGOs themselves. Others are caused by external factors, this mainly being government interference.

First and foremost, there is lack of an astute relationship between NGOs and the state. The relationship between local NGOs and the Government of Kenya has always been characterized by mutual suspicion.[25] This has had negative effects particularly on the operations of NGOs. One major effect of the bad relationship between NGOs and Government is that NGOs cannot access crucial information from the Government. Yet for NGOs to effectively discharge their role of checking the state, they need to arm themselves with credible research data and information. This has not been possible. It is for instance hard to access information implicating high profile state officers.[26]

The Kenyan state has not passed an enabling legislation to ensure effective access to information that would facilitate the collection of information by civil societies. It is however the

[25] Suba Churchill (n 13).

[26] Information on land dispute cases and corruption scandals implicating the "big fish" are among the sensitive data that Government agencies deny non-state actors.

hope of the writer, and Kenyans in general that the Access to Information Bill 2013 that is in its late stages of enactment shall mitigate these challenges.[27]

Secondly, there is overdependence on foreign aid by most NGOs. Nearly all East African human rights NGOs are "almost wholly" funded by external, usually western governments and charities.[28] The effect of this, as Makau Mutua observes, is that it will distort the ideological vision of civil society and alienate them from the people on whose behalf they are supposed to serve. Willy Mutunga has provided an elaborate conceptual framework for analyzing donor-donee relationship.[29] He argues that the best relationship between donors and NGOs is one governed by a democracy contract, whose features include common interests, transparency of both interests and transactions by both parties, and transparency in the performance of contracts.

Many scholars have cautioned against donor funding for NGOs. Mahmood Mamdani sees the involvement of donors as a shift from one type of clientelism to another and that this results in 'retrogression of the society.'[30] In his opinion, African society has turned into clients of international donors. Betty K. Murungi summarizes this challenge into one: the aspect of ownership of the agenda or ideas of NGOs. She laments the "patron-client" relationship between NGOs and their donors as the main challenge to the freedom to think and act independently as NGOs.[31] This therefore appears to be the major challenge facing NGOs in Kenya.

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[27] The Access to Information Bill is a Bill for an Act of Parliament to give effect to Article 35 of the Constitution; to confer on the Commission on Administrative Justice the oversight and enforcement functions and powers and for connected purposes. Among other things, the Bill provides for proactive disclosure by the state of information it holds.

[28] Mutua (n4) at 8.

[29] Willy Mutunga (1999) *Constitution-Making from the Middle: Civil Society and Transition Politics in Kenya*, Sareat, Nairobi, Kenya.

[30] Michaela Serban-Rosen (ed) (2001) "Constitutionalism in Transition: Africa and Eastern Europe," *Conference Report on Comparative Constitutionalism* .Warsaw: Helsinki Foundation For Human Rights, at 354.

[31] Betty K. Murungi 'Donors and the sustainability of NGOs,' in Makau Mutua *Human Rights NGOs in East Africa: Political and Normative Tensions* Fountain Publishers Ltd at 46.

Thirdly, there are some laws and administrative practices which discourage NGO activity. Currently, most NGOs in Kenya concentrate on health, education, agriculture and the environment. Others which are considered to be high-profile NGOs like the Open Society and Africog are keen on matters of political accountability. These are the entities that have apparently "upset" the government through their immense contribution to the quest for constitutional democracy and governance.[32]

Recently, the Government has introduced a Bill in Parliament that is intended to amend the Public Benefits Organisations Act of 2013[33] by cutting foreign funding for PBOs to 15% of their annual budgets.[34] This Bill had earlier on been introduced in December 2013 (The Statute Law (Miscellaneous Amendments) Bill, 2013). It was however dropped after intense pressure and resistance from the CSOs and international organisations. It was argued that the proposed amendments posed 'serious threats to the respect and protection of the right to freedom of association in Kenya, and that it was 'likely to jeopardize the ability of civil society organisations to carry out their activities effectively, independently and free from governmental interference.'[35] The Amendment Act would have allowed interference from the executive on the operations of NGOs. The same Bill was re-introduced in Parliament in 2014, with the main objective of amending the PBO Act 2013 so as to cut down NGO funding.

The move to amend the relatively new legislation on NGOs has been evident since the campaigning period by the Jubilee Government. Critics have observed that this is partly because

[32] Sam Kiplagat '100,000 jobs at risk over law on NGO financing,' *The Star*, (October 27, 2014) at http://www.the-star.co.ke/news/article-189912/100000-jobs-risk-over-law-ngo-financing#sthash.rjkdnvx0.dpuf (accessed 27/10/2014).

[33] This Act provides for the establishment, registration, operation and regulation of civil society organisations in Kenya. The bill is sponsored by TNA MP Moses Kuria.

[34] David Mwere 'New Government Bill may cut NGO foreign funding to 15%,' *The Star*, (October 22, 2014) at 6.

[35] Information available at http://www.fidh.org/en/Africa/kenya/14469-kenya-parliament-decides-to-withdraw-controversial-amendments-targeting (accessed 2/10/2014).

some key NGOs in Kenya actively participated in the push for the cases lodged in the International Criminal Court against alleged perpetrators of the 2007/8 post-election violence cases and the ensuing "negative" implication of individuals as suspects in the Hague Trials.

As Suba Churchill notes in his paper:[36]

> On page 65 of its manifesto, the Jubilee Coalition that formed the government after the March 4, 2013 elections has this curious provision: "the Jubilee Coalition government will introduce a Charities Act to regulate political campaigning by NGOs to ensure that they only campaign on issues that promote their core remit and do not engage in party politics. This will also establish full transparency in funding both for NGOs and individual projects.

It is to be remembered that most NGOs were also aggressive in supporting the Salaries and Remuneration Commission in their move to downsize the salaries paid to Members of Parliament in 2013. This partly explains the "anger" against CSOs by a section of the Kenyan MPs.

The other challenges to NGOs include lack of clear vision and mandate, poor leadership and management and bias in political and governance matters. These are internal challenges which have an impact on the legitimacy and influence of NGO activities in Kenya.

In summary, this study argues that the amendment if passed shall negatively impact on the survival of NGOs and their future operations. In as much as overreliance on foreign funding

[36] Suba Churchill 'Why NGOs are Jittery over the Public Benefits Organizations Act 2013,'(2013) available at http://www.penkenya.org/UserSiteFiles/public/Why%20NGOs%20are%20jittery%20over%20the%20Public%20Benefits%20Organizations%20Act%202013.pdf (accessed 2/11/2014).

by NGOs is dangerous, the move to cut down donations to 15% is unreasonable and unrealistic, if not ill-motivated. Only a small percentage of NGOs participate actively in political matters. Majority of them, however, deal with health issues, refugees, education, children rights and technology.

6. Conclusion

NGOs need to establish mechanisms for alternative funding that will reduce their reliance on foreign donors, as well as manage their funds properly. This will enhance their independence.

Civil societies also need a free political environment to enable their smooth operation. Interference on the operations of NGOs by the Government through unfair amendments to the relevant legislation shall ultimately kill them. The state should provide an enabling environment that will support NGOs in advancing their vision.

In addition, self-criticism by NGOs is important in building their effectiveness and credibility. It should not always be the Government or its agencies that criticize NGOs. NGOs should also check each other. Legitimacy, accountability and transparency are key values for development of NGOs. Livingstone Sewanyana [37] summarizes on NGOs; 'civil society groups will need to balance the tensions between autonomy and cooperation, vigilance and loyalty, scepticism and trust, and assertiveness and civility.'[38]

[37] Livingstone Sewanyan is the Executive Director, Foundation for Human Rights Initiative.
[38] Livingstone Sewanyan (2010) 'State and civil society relations,' in Makau Mutua '*Human Rights NGOs in East Africa: Political and Normative Tensions*,'(2009) Fountain Publishers Ltd, Kampala, Uganda at 216.

Key NGOs in Kenya

Kituo Cha Sheria- It is the oldest human rights organisation in Kenya.[39] It was set up in 1973. Its mandate is to provide legal aid and raise awareness among the population about their legal rights. Its programmes also deal with issues of forced migration, advocacy, governance and community partnerships.

Federation of Women Lawyers in Kenya (FIDA-Kenya) – Established in 1985 after a women conference in Nairobi that year. Initially, its mandate was to provide legal aid to indigent women. Currently it has evolved in its mandate and tasks. FIDA monitors the status of the human rights of women in Kenya.[40]

Kenya Human Rights Commission – Established in Kenya in 1992. It was initially formed in the United States in 1991 by Kenyan exiles and academic professionals who were keen on fighting for human rights and promotion of constitutional democracy in Kenya. Its advocacy for human rights in 1992 was aggressive and confrontational and it has been credited for its important input in the fight against human rights violations by Government in 1990s.[41]

The Green Belt Movement - Founded by the Late Professor Wangari Maathai in 1977 under the auspices of the National Council of Women of Kenya (NCWK) to respond to the needs of rural Kenyan women who reported that their streams were drying up, their food supply was less secure, and they had to walk further and further to get firewood for fuel and fencing. Together

[39] http://kituochasheria.or.ke/?lang=en (accessed 16/11/2014).
[40] http://fidakenya.org/ (accessed 16/11/2014).
[41] http://www.khrc.or.ke/ (accessed 16/11/2014).

with the political opposition, it has lobbied for an end to forest excision and land grabbing by politically connected and corrupt individuals.[42]

[42] Available at < http://www.greenbeltmovement.org/> (accessed 16/11/2014).

PATERNALISM AND THE EMPLOYMENT CONTRACT: A PANACEA OR ANATHEMA?

By Zulfa Roble, Odhiambo Lubeto, Pauline Njoroge, Stella Nasirumbi & Carolyne Kinyua.*

ABSTRACT

The employment relationship in Kenya is greatly influenced by the employee protection/social justice model which is paternalistic in nature. This is evidenced by the numerous provisions in legislation governing labour relations in Kenya aimed at protecting the employee. These provisions may not be derogated from and are swiftly enforced by the courts whenever there is such derogation. The desirability of such a system is however questioned on the ground that it distorts the labour market and limits the freedom of contract. This paper argues, however, that the benefits derived from a paternalistic model justify such limitation.

1. Introduction

In the words of Otto Khan Freund,

> The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.[1]

Arguably, Freund's postulation still reigns supreme especially in the Kenyan labour law regime. This paper intends to discuss the contract of employment and the employment relationship in Kenya. It seeks to demonstrate the paternalistic

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[1] P Davies and M Freedland, *Khan Freund's Labour and the Law* (3rd Edition, Stevens and Sons 1983) 18.

underpinnings in the current labour law regime in Kenya. Additionally, the paper shall discuss both paternalistic and free market principles with a view to establishing whether free market principles can adequately replace paternalistic ones.

1.1 The Models Informing the Employment Relationship

Arguably, the employment relationship has been influenced by three models. These are the free collective bargaining model, the free labour market model and the social justice model.[2]

The earliest of these was the free collective bargaining model where the principal actors were the employers and trade unions with employees being relegated to mere recipients of whatever was agreed upon between the two parties.[3] This model had two distinctive characteristics. First, it created a permissive framework in which trade unions could lawfully exist, engage in collective bargaining and call for organized industrial action.[4] Secondly, it provided some very limited explicit protection for employees.[5]

The free market model succeeded the free collective bargaining model. This model was heavily nuanced by free market principles. As such, it informed policy approaches such as: the deregulation of the labour market, the promotion of economic objectives encouraging cost effectiveness, competitiveness and flexibility in the use of labour, the primary importance of individualism in the employment relationship and curbing of trade union power by abolishing statutory recognition of rights and by constraining unions' ability to organize industrial action.[6] From its principles, it is conceivable that the free market labour model led to the erosion of any gains which employees may have had under the free collective bargaining model.

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[2] An Introduction to Employment Law (Pearson Education) available at <http://catalogue.pearsoned.co.uk/assets/hip/gb/hip_gb_pearsonhighered/samplechapter/1408270471.pdf> accessed 20 July 2014.
[3] ibid.
[4] ibid.
[5] ibid.
[6] ibid.

The third model, the employee protection/social justice model was informed by the fact that there was a need to elevate the position of employees in the employment relationship. As such, its principal concern was the protection of employees in the relationship. This model informed an increased interference in the employment contract by the state through legislation. Additionally, it is the model in which the paternalistic approach to the employment relationship is anchored. It is instructive to note that in practice, none of the three models operate independently. There are bound to be instances of overlap. The fundamental task is, therefore, to strike a balance between the free labour market model and the social justice model.

2. The Kenyan Position

In the Kenyan context, the spirit of the legislation is protective. The employee is deemed to be at the weaker bargaining position and consequently, the legal regime comes in to ensure justice, fairness and protection of the employee. In this section, the paper shall demonstrate the protective nature of labour law in Kenya.

2.1 Constitutional basis

The protective character of the labour regime is derived from the Constitution. The strongest protection is seen in Article 19(1) which states that the Bill of Rights is an integral part of Kenya's democratic state, and is the framework for social, economic and cultural policies.[7] Further, Article 19(2) states that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings.

By dint of these provisions, the tone for the protection of the employee and the preservation of his rights is set right in the supreme law. The role of the State is captured succinctly in Article 21(1) which provides that it is a fundamental duty of the State and every

[7] Constitution of Kenya, 2010.

State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. The legislature picks the cue from the latter provision. Additionally, Article 41(1) provides that every person has the right to fair labour practices. Sub-Article 2 provides for the rights of workers which include fair remuneration, reasonable working conditions, among others. Sub-Article 3 provides for the rights of employers.

Apart from the above, there are provisions of the constitution which though general in application, can be beneficially utilised in protection of the employee. Article 27 provides for equality and freedom from discrimination. Any worker who feels that they are unfairly discriminated against upon any grounds stated in this Article can approach the Court. Article 48 enables the application by the employee for relief against any misdeed in the workplace by providing for a right of access to justice. Lastly, Article 47 by providing for fair administrative action for each person ensures that an employee has every right to bring an action before any labour board or tribunal and for their matter to be given a fair hearing.

2.2 Legislative preposition

The legislative intervention is captured in five main statutes. These statutes are the Employment Act,[8] the Labour Relations Act,[9] the Occupational Health and Safety Act,[10] the Labour Institutions Act[11], The Industrial Court Act[12] and the Work Injury and Benefits Act.[13] This paper places emphasis on the Employment Act given that it's the primary legislation that governs the employment relationship.

[8] No. 11 of 2007.
[9] No. 14 of 2007.
[10] No.15 of 2007.
[11] No.12 of 2007.
[12] No. 20 of 2011.
[13] No. 13 of 2007.

Section 3(1) of the Employment Act outlines the parties subject to the provisions of the Act. It provides that the Act shall apply to all employees employed by any employer under a contract of service. This should be read together with section 3(6) which provides that the terms and conditions of employment set out in the Act are the minimum terms and conditions of employment of an employee and any agreement to relinquish, vary or amend the terms provided shall be null and void. Part V of the Act is essential in as far as the rights of the employees are concerned. It regulates the basic minimum conditions of employment, hours of work, annual leave, maternity leave, sick leave, housing, water, food and medical attention.[14]

The Employment Act also provides for parameters within which termination of the contract and dismissal of employees is lawful.[15] The Act allows the employer to terminate the contract of employment but is generous enough to afford the employee an opportunity to plead unfair termination.[16] Paternalism equally favours the employer. This is illustrated, *inter alia*, in section 19 of the Act which provides for lawful deductions to the wages, including a reasonable amount for any damage done to, or loss of property lawfully in possession or custody of the employer occasioned by the wilful default of the employee.

Under the Labour Institutions Act, is established the Wage Council whose function is to make recommendations to the Minister on minimum wage remuneration and conditions of employment after consultation with interested parties.[17]

3.3 Judicial Enunciation

The courts have not been shy to enforce some of these provisions. The case of *Robai Musinzi v Safdar Mohamed Khan*[18] can be used illustratively. In the case, the claimant, a

[14] Employment Act, ss. 26-35.
[15] ibid, Section 35(4).
[16] ibid, Section 45
[17] Labour Institutions Act, Sections 43 and 44.

domestic worker, sued the respondent for wrongful dismissal and refusal to pay terminal dues. The Industrial Court finding in favour of the claimant awarded the following against her employer: one month salary in lieu of notice at Kshs. 11,000/=, House Allowance amounting to Kshs. 72,500/=, 11 days worked in October at Kshs. 4033/=, severance pay amounting to Kshs. 22,000/=, unpaid leave days amounting to Kshs. 44,000/= and two months' salary as compensation for unfair termination amounting to Kshs. 22,000/=. In total, without the costs awarded, the employer was to pay Kshs. 175,533/=. From an employee protection perspective, this case qualifies as an exemplar of justice.

The case of *Joseph Okindo & Ronald Barasa v Vapor Sports Ministries*[19] is equally illustrative. In the matter the contract of employment stipulated that the claimants would work 5 hours a day, for a monthly salary of Kshs. 6,000. This was subsequently raised to Kshs. 8,160 but they worked for 12 hours a day, between 6.00 a.m. and 6.00 p.m. They only went on leave once in a period of six years. On the 30th of July 2012, the respondent terminated their contracts without reason, notice or warning. The court noted that the maximum hours of work permitted under the Regulation 6 of Regulation of Wages [Protective Security] Services Order 1998 for all employees including day and night guards, was 52 hours, spread over 6 days a week. The Claimants worked 12 hours for 6 days, bringing their total hours to 72 hours in a week. Having worked from 2006, a period of 6 years, the court found that they worked 20 hours of overtime every week. Regulation 7 stipulated that where an employee has worked overtime, he/she is compensated at one and a half times the normal hourly rate of wages, in respect of the overtime hours. Consequently, they were each awarded Kshs. 313,344 in overtime payment.

[18] [2012] eKLR.
[19] [2014] eKLR.

Having demonstrated the protective nature of the legal regime, the paper at this juncture, posits the question whether the status quo should be retained or replaced with a free market model? From the outset, it is imperative that valid arguments suffice for either side of the divide. In this section the paper shall consider both arguments.

3. Free Market Model

Foremost, the paper calls for labour regulations to conform to the ideal position. Under the ideal position, the law should set a general framework and allow discretion for intimate decisions to be set between contracting parties fully alive of the operating environment.[20] This is to say, the law is not all-knowing and cannot purport to anticipate the special and peculiar situations that characterize various employment relations. In other words, this paper concedes that regulation is necessary, but more importantly, calls for its limited application. This must be read together with the Freedom of Contract Theory.

The Classical Contract Theory asserts that the unrestricted exercise of freedom of contract between parties who possess equal bargaining power, equal skill, and perfect knowledge of relevant market conditions maximizes individual welfare and promotes the most efficient allocation of resources in the marketplace.[21] The same received judicial acknowledgement in the case of *Printing & Numerical Registering Co. v. Sampson*,[22] where the court stated:

> It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and

[20] supra (n1) pp 56.
[21] C Edwards "Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues" (2009)Faculty Publications, 281
[22]19 L. R.-EQ. 462, 465 (M.R. 1875).

> competent understanding shall have the utmost liberty of contracting, and that their contracts when freely and voluntarily entered into shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider - that you are not to lightly interfere with this freedom of contract.[23]

Some scholars have questioned the departure of the labour contract from the basic contract. One such scholar is Llewellyn who poses these questions: What would happen if all these labour laws were scrapped off? What if the employment relationship was solely governed by the basic rules of a contract? In a normal contract, one chooses whether to sign or not, and they can only be bound by an agreement they have mutually consented to. Why then should the labour contract be so different from the basic contract?[24]

Llewellyn uses the General Motors (GM) situation where an employees' strike affected all North American plants leading to their shutdown. Llewellyn opines that in a free market situation, the management would find an easy solution. For instance, GM would have advertised job openings complete with market wages. They would have gone further and trained them before hiring them. Subsequently, they would produce goods for public consumption. This, according to Llewellyn, is the ideal free market at its best. Instead of doing this, however, GM proceeded to court, bending to bureaucracy and pleaded that the federal law illegalised strikes. At the end of it, GM bore heavy legal costs, shortage of labour and the attendant drop in levels of production. That was an illustration of the heavy cost of intrusive intervention of the government in the labour market.

[23] ibid.
[24] L H Rockwell, Jr, 'Liberty and Labour' (1998) 16 The Mises Institute Monthly 10.

Alongside the ideal position argument is the compelling principle of rationality. The standard competitive equilibrium model assumes that all individuals are rational. Paternalism disagrees, asserting that individuals showcase the tendency to deviate from reason, and this leads to incongruence between their choices and their circumstances. Further, markets are deemed to suffer from irrational exuberance and irrational pessimism. Government regulation is thus deemed to be the saviour. However, one may pose thus: Why should there be a presumption that government is more rational or better informed than individuals? Why should the government impose its beliefs of what is rational on others? Is this not a dictatorship by government and by extension an attack on freedom of choice?

Following the Hobbesian conception of liberty as the absence of external interference, proponents of free-market argue that so long as the individual only harms himself, there is no reason for government intervention. Further, they observe that society is self-regulating. Society cannot stand idly by when it sees someone starving—even if it is a result of the individual's own mistakes, say, not saving enough.[25] Society will bail out the individual. In most cases the traditional welfare systems present in societies cushion against the ills of irrationality. Could the legislation of such matters be an indictment that society is amoral?

The paternalistic approach is prejudicial in nature. This is because the paternalistic approach assumes that, absent regulations, the party at a higher bargaining position would be unwilling to observe certain desirable principles hence the need to legislate on them. These principles include fairness, equal treatment and reasonableness, non-discrimination, prohibition on sexual harassment and prohibition of forced labour. Nothing could be further from the truth. In a competitive and free enterprise system, these principles, would inform the basic structure of a free market model. This is because the free market model is inevitably characterized by the

[25] J Stiglitz "The Global Crisis, Social Protection and Jobs" (2009) *International Labour Review*1-14.

freedom of choice. Either party is therefore at liberty to elect, first whether to enter into a contract and, secondly whether to remain in the same contract. The desirable principles are thus left to the electing parties' consideration.

Arguably, the strongest argument for a free market perhaps lies on the need to consider the economic consequences arising from paternalistic regulations. One may argue that, the law must not place conditions with huge economic burdens on its implementers. The law, while adopting a protective lens, needs to approach protection with an economically realistic perspective. In the Kenyan context, the legislature must not merely transplant legislation oblivious of the economic conditions of the domestic market.

Further, in revisiting the *Robai Musinzi* case,[26] a genuine and candid discussion is necessary from the third perspective that seeks to balance interests between the two parties. [What] economic consequences does the same decision have on the labour market? Although there is no available empirical evidence, this paper contends that the Industrial Court's jurisprudence would have negative repercussions on the labour industry and more specifically for domestic workers given the economic realities in Kenya. This would be another instance of market distortion consequent of state intervention through legislation.[27] The net effect of it is that the rate of unemployment may be heighted by such uncanny and ambitious application of the law.

3. Paternalistic Model

It is a widely acknowledged fact that capitalism is the predominant economic system in most countries of the world. Kenya is no exception. Capitalism has a major disadvantage in that it tends to emphasize on profits leading to factors of production being viewed as simply a means

[26] supra (n 18).
[27] S M Vettori, *Alternative Means to Regulate the Employment Relationship in the Changing World of Work,*(LLD Thesis Pretoria: University of Pretoria 2005) 26.

to an end. An emphasis on profits may lead to poor labour practices so as to ensure profit maximization. Such labour practices may include poor remuneration and poor working conditions.

The situation is compounded by the industrial age accounting mind-set which still prevails in the accounting field to date. According to this mind-set, machinery was viewed as central to an organization and was thus regarded as an asset while employees were regarded as an expense and classified as a liability. The practice then was to as much as possible try reduce the liabilities while simultaneously increasing the assets. The danger with such an approach is that it adopts a very simplistic view as far as employees are concerned. Additionally, it led to an overemphasis on the needs of the employer at the expense of the needs of an employee. It is against this background that paternalism emerged to protect employees from any potential abuse of power by the employer and in the process attempt to correct the power imbalances.

The justification for a paternalistic approach is informed by the nature of the contract of employment itself. From the onset, it is important to highlight the fact that the contractual relationship arising from the contract of employment is unique. As one scholar has argued, its uniqueness arises from the fact that it governs a dense, multi-dimensional and on-going relationship.[28] This relationship is not a purely commercial one. It is one that is nuanced by various factors which influence labour law. Such factors may include the law, markets and political forces. As such, without external interference in the contract, there is a high likelihood that the contract may be skewed in favour of the employer.

Additionally, it may be structured in such a way that seeks to attain limited objectives; primarily those that favour the employer. The employment contract cannot arguably fit within

[28] G Mundlak, 'Generic or Sui-Generis Law of Employment Contracts' (2000) 16 The International Journal of Comparative Labour Law and Industrial Relations 309, 313.

this simplistic framework. This is primarily because it is a relational contract.[29] Unlike discrete contracts, its "stand out" features are complexity and duration.[30] It is not a contract which simply focuses on the 'hard' issues such as wages.[31] It covers much more. Arguably, it is the dense and complex nature of the employment contract that necessitates the intervention of other players. Left to the employers only, the contract may only focus on the hard issues such as wages. It may not adequately provide for such 'soft' issues as the welfare of the employee. The paternalistic underpinnings in Kenya's labour law play a critical role in ensuring that a holistic approach to the employment contract is realized.

Another justification for paternalism is seen in the pluralist approach. Under the same, it is presumed that the organization consists of individuals and groups who have conflicting interests and goals. However, the two parties, employer and employee, are interdependent and it is in their interest that the organization survives. The conflict, therefore, needs to be managed to avoid disruptive results. The State, through regulation, steps in to manage the said conflict.[32]

The free market model is premised on freedom of choice. However, in a market like Kenya which is arguably characterized by limited employment opportunities, the employee is faced with only two choices, namely: take the wage and working conditions provided by the employer or starve. The employee's financial reality precludes voluntariness. A contract entered into under these circumstances is arguably coercive.[33] This state of affairs necessitates state intervention to prevent exploitation of the employee.

[29] ibid at pp 315.
[30] ibid.
[31] ibid.
[32] supra (n.31) p.24.
[33] H Spector, 'Philosophical Foundations of Labour Law' Florida State University Law Review, available at <http://www.law.fsu.edu/journals/lawreview/downloads/334/spector.pdf> accessed 14 July 2014.

Paternalistic protection may also be justified not as interfering with free will as viewed by proponents of the free market model, but as giving effect to the free will of individuals.[34] An individual may, for instance, desire few working hours but would be unable to as a result of competition. Eventually, all workers would end up working longer hours for less pay unless they all agree not to, which agreement would never be reached.[35] The state gives effect to the employees' desires by setting the maximum working hours and imposing sanctions to ensure it is not derogated from.

Research shows that job security increases innovation in industry[36] and promotes skill development.[37] Legal provisions which guard against unfair dismissal are paternalistic but arguably have the overall advantage of stability and increased innovation in industry. The regulation of wages has also been found to increase labour growth productivity as it encourages capital deepening, increases the proportion of highly skilled workers in the labour force and promotes labour-saving technological progress.[38]

4. Conclusion

This paper has discussed the models informing the employment relationship, the Kenyan position, the Free Market Model and the Paternalistic Model. It has dwelt in detail on the two alternative models (read Free Market and Paternalistic). Having canvassed the two models, the paper assumes the position in support for the paternalistic model. It is the paper's postulation that

[34] M Linder, Paternalistic State intervention: The Contradiction of the Legal Empowerment f Vulnerable Workers 23 U.C. Davis L. Rev. 733 1989-1990 available at<http://heinonline.org> accessed on 14 July 2014.
[35] ibid.
[36] J Michie and M Sheehan, 'Labour Market Deregulation Flexibility and Innovation' Cambridge Journal of Economics 2003,27,123-143 available at <http://cje.oxfordjournals.org/content/27/1/123.full.pdf > accessed 17 July 2014.
[37] M Harcourt and G Wood, 'The Importance of Employment Protection for Skill Development in Coordinated Market Economies' (2007) European Journal of Industrial Relations 13; 141 available at <http://ejd.sagepub.com/content/13/2/141> accessed 17 July 2014.
[38] S Storm and C Naastepad, Labour Market Regulation and Productivity Growth: Evidence for Twenty OECD Countries (1984–2004) available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-232X.2009.00579.x/pdf> accessed 17 July 2014.

indeed, as Freund observed, “The role of labour law is to be a countervailing force to counteract the inequality of bargaining power which is inherent in the employment relationship.” The paper remains alive to such inequalities prevalent in the Kenyan employment relationship. It thus contends that the paternalistic model is a necessary evil; it is a panacea rather than an anathema.

AN ANALYSIS OF ARTICLE 33 OF THE CONSTITUTION OF KENYA: ARE WHISTLEBLOWERS PROTECTED?

By Odhiambo Lubeto J*

ABSTRACT

The paper seeks to analyse Article 33 of the Constitution of Kenya. It calls for a broader interpretation of the right to freedom of expression based on the language of the Constitution. It postulates that the protection of whistleblowers is necessary in Kenya given the role the latter play especially in reporting corruption related cases. The paper advances the need to protect whistleblowers based on two main premises; the enjoyment of the freedom of expression as guaranteed under the Constitution and the need to support public interest disclosure. The paper similarly appreciates the fact that Kenya is signatory to the United Nations Convention Against Corruption and the African Union Convention for Prevention and Combating Corruption.

1. Introduction

This paper advances an argument for the protection of whistleblowers in Kenya. The paper draws the connection between the enjoyment of the constitutional right to freedom of expression and the need to protect whistleblowers. From the outset, the paper advances the position that the protection of whistleblowers is not only in line with public policy, but would actualize Article 33 of the Constitution of Kenya which guarantees the freedom of expression.

2. Legal Framework on Whistleblowers in Kenya

Kenya's progressive Constitution at Article 33(1) provides for freedom of expression. In express terms, Article 33 states that, "Every person has the right to freedom of expression which

includes: freedom to seek, receive or impart information or ideas…"[1] Article 33(2) provides the limitation of the said freedom. It stipulates:

> The right to freedom of expression does not extend to—
> propaganda for war; incitement to violence; hate speech; or advocacy of hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm; or is based on any ground specified or contemplated under Article 27(4).

Finally, Article 33(3) states that in the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.

By dint of Article 33, it is axiomatic that post-2010 the Kenyan constitutional dispensation guarantees the freedom of expression. The same must not be merely theoretical but ought to be seen practically. The question that Article 33 begets in the minds of students of constitutional law is the extent to which the right may stretch. In other words, the courts are yet to give a constitutional interpretation of Article 33. While the Constitution attempts to give the limitations of Article 33 and thereby provide direction as to the extent of its application, it is arguable that in the language of Article 33, protected speech remains broad. The application of Article 33 has been impeded by the legislature's reluctance to enact the Freedom of Information Bill 2012, which is intended to fleshen the bare skeleton that is Article 33 as read together with Article 35. Article 35 guarantees the right to access information held by the State. Information so accessed may then be freely interpreted, analysed and conveyed in any way under the exercise of protected speech. However, the freedom of expression must not be narrowly construed. The same right may equally be interpreted to mean protection for whistleblowers in Kenya.

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[1] Constitution of Kenya, 2010.

By dint of that statement, this paper introduces a new dimension to the discourse on freedom of expression. Legislation offering protection to whistleblowers based on the appreciated need for information remains necessary. In particular, the paper narrows down on Article 33(1) (c) which states thus, "freedom to seek, receive or impart information or ideas." In order to gain an understanding of the interface of whistleblowing and the freedom of expression, it is essential to appreciate who a whistleblower is and his role in Kenya.

Who is a whistleblower? Arguably, the word whistleblower is not a technical or legal term. Rather, it connotes giving information which would otherwise remain confidential, secretive or unknown to relevant authorities for purposes of effecting change. Latimer and Brown postulate that a whistleblower could be loosely described as an 'internal witness', or a person making a disclosure for public interest or one giving public interest information.[2] Further, they adopt the definitions given by Calland and Dehn on the one hand and Near and Miceli on the other. Calland and Dehn define whistleblowing as the options available to an employee to raise concerns about workplace wrong doing.[3] On the other hand, Near and Miceli define whistleblowing as involving the disclosure by organisation members of illegal, immoral or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action.[4] Valarie Watnick, on the other hand, considers whistleblowers as employees who engage in protected activities as contemplated by the USA Sarbanes-Oxley Act.[5] Accordingly, whistleblowers are those employees who meet the statutory stipulations of protected activities.[6] From European and American literature, it is suggested that whistleblowers

[2] Paul Latimer and A J Brown, "Whistleblower Laws: International Best Practice" (2008) UNSW Law Journal 768.
[3] ibid.
[4] ibid.
[5]The Sarbanes Oxley Act fully cited as the Corporate and Criminal Fraud Accountability Act 2002 is the substantive Act that provides protection for whistleblowers in the United States of America.
[6] Valarie Watnick, "Whistleblower Protections under the Sarbanes-Oxley Act: A Primer and a Critique" (2007) Fordham Journal of Corporate & Financial Law 844. The protected activities have been broadly defined to include

must necessarily be employees.[7] However, for purposes of this paper, the working definition for whistleblowers shall be all encompassing. The same is to say that as long as one provides information with a public interest in mind, even without necessarily being an employee, he ought to qualify as a whistleblower; and hence should receive protection from all possible retaliatory measures.

What is a whistleblower's place in Kenya? Kenya is signatory to the United Nations Convention against Corruption,[8] hereinafter the UN Convention, and the African Union Convention for Prevention and Combating Corruption,[9] hereinafter the AU Convention. The UN Convention under Article 33 states:

> Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.[10]

The AU Convention under Article 5 paragraph 5 states, "State Parties shall adopt legislative and other measures to protect informants and witnesses in corruption and related offences, including protection of their identities."[11]By virtue of Kenya's subscription to the two conventions, an elaborate legislation is necessary for the protection of whistleblowers. If Kenya

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reporting information to Congress, any investigatory agency of the federal government, or a supervisor at the employer itself.

[7] ibid.

[8] Information available at <http://www.unodc.org/pdf/corruption/publications_unodc_convention-e.pdf> on 18/10/2014.

[9] <http://www.au.int/en/sites/default/files/AFRICAN_UNION_CONVENTION_PREVENTING_COMBATING_CORRUPTION.pdf> accessed on 18/10/2014

[10] United Nations Convention Against Corruption, Article 33.

[11] African Union Convention for Preventing and Combating Corruption, Article 5(5).

is to progressively realize the letter and spirit of the provisions, then whistleblower protection at least at the statutory level becomes imperative.

Further, the need for protection of whistleblowers can be seen in various fraud cases witnessed in Kenya. For purposes of this paper, emphasis is placed on the Anglo-Leasing scandal[12] in which the main whistleblower, Mr. John Githongo,[13] had to flee the country. In the said scandal, billions of Kenyan taxpayer money was lost through payments in satisfaction of promissory notes allegedly processed in return for ghost projects yet to evince. The fact that Githongo was forced to flee read together with the fact that persons responsible for the scandal remain at large perhaps indicate the need for protection of whistleblowers.[14] The argument often adduced by the anti-corruption czar explaining the absence of criminal prosecution of corruption scandals is the insufficiency of incriminating evidence. It may be accurately observed that the insufficiency arises because of the fear by potential whistleblowers to step up. Indeed, without express provisions offering protection against retaliatory measures, expecting whistleblowers to show up remains a pipe dream.

3. Need for Protection

Thus the question remains whether there is a necessity for whistleblowers' protection under Kenyan law. One may argue that the current protection is inadequate.Chris Mahony argues that the Anti-Corruption and Economic Crimes Act 2003 only provides dismal protection to whistleblowers.[15]He points out the admission by senior personnel in the Attorney-General's office that the witness protection legislation was not designed with whistleblowers in mind.[16]

[12] Mars Group, "The Missing Anglo-Leasing Scandal: Promissory Notes"2007.
[13] Chris Mahony, *The Justice Sector Afterthought: Witness Protection in Africa* (Institute of Security Studies 2010) 118.
[14] EACC Recommends Prosecution of Suspects in the Anglo-Leasing Scandal retrieved from http://www.eacc.go.ke/whatsnew.asp?id=602 on 27/10/2014.
[15] supra, (n. 11) 114.
[16] ibid.

Mahony appears to concur with that view, thereby reading the Witness Protection Act in a limited manner to the extent that it covers only witnesses and not whistleblowers.[17] Indeed, the Witness Protection Act only envisages protection for whistleblowers who also qualify as witnesses under the Act.[18] In other words, whistleblowers who do not meet the statutory qualifications as witnesses are not accorded protection by the Witness Protection Agency.

For that reason, whistleblowers are left out in the cold without any tangible protection. In fact, for employee whistleblowers, recourse may only be available under the terms of the contract of employment as governed by the Employment Act. This protection is inadequate given the latitude afforded to the employer under the Act[19] and the expanded doctrine of freedom of contract.

4. Basis for Protection

Can the right of whistleblower protection be derived from the freedom of expression? This paper responds in the affirmative. The jurisprudence emanating from the European Community is illustrative on this point. Guyer and Peterson observe that, under the European Convention on Human Rights,[20] hereinafter the ECHR, courts are prepared to offer protection from retaliatory practices meted out after employees' whistleblowing actions.[21] Article 10 of the Convention grants the freedom of expression.[22] Interestingly, according to European whistleblower jurisprudence, Article 10 of the ECHR has provided moderate protection for

[17] ibid, the language here is used to refer to Mahony's use of the words "Personnel admitted that…"The assumption is that personnel admitted to him as he was carrying out his research.
[18] Witness Protection Act, 2006 as amended in 2010. s 3.
[19] Under the Employment Act, 2007 Part VI Termination and Dismissal, the employer is afforded some leeway to terminate the employment relationship. For instance, under s. 35 an employment relationship may be legally terminated as long as notice is duly given.
[20] http://www.echr.coe.int/Documents/Convention_ENG.pdf accessed on 18/10/2014.
[21] Guyer Thad and Peterson Nikolas, "The Current State of Whistleblower Law in Europe," (American Bar Association Section of Labour and Employment Law International Labour and Employment Committee, Rome, 2013) 9.
[22] European Convention on Human Rights, Article 10.

whistleblowers in countries amenable to the ECHR but lacking express whistleblower protection.[23]

Borrowing from European Union jurisprudence, it is imperative to consider the import of Article 33 of the Constitution. In that context, it is necessary to problematize whether whistleblowing qualifies as an expression as contemplated by Article 33. As earlier intimated, whistleblowing does not connote a technical or legal term. It relates to a number of activities. However, the bottom line is the fact that whistleblowing involves an element of disclosure. Further, the disclosure is often in the interest of the public. In the long run, the information disclosed if well applied should avert or mitigate an otherwise adverse situation.

In that context, whistleblowing should be entertained under the law on two main premises. First, through whistleblowing, the public interest is protected and preserved. This is to say that the action pursued consequent to disclosures obtained from whistleblowers aids in the promotion of the public good. For that reason, the sources of such disclosures need protection from any retaliatory action. This informed the provisions of the UN Convention for the Prevention of Corruption specifically at Article 33. It is only logical that whistleblowers would come out strongly against corruption once their well-being is assured. Any potential threat to their well-being compromises their ability to reveal critical information at their disposal.

Secondly, protection should be based on the need to actualize the freedom of expression as contemplated under Article 33 of the Constitution. It is the paper's argument that the constitutional draftspersons did not merely intend to please the eyes of its readers by capturing the said provision. The Constitution was purposively written and must live up to its mandate in the society. As such, constitutionalism demands an actualization of all constitutional provisions. The Constitution must not only have an enduring life, but its provisions must impart society in a

[23] supra (n. 19) 10.

positive, progressive and pragmatic manner. In achieving such constitutional ends, the question posed is whether protection of whistleblowers in any manner actualizes Article 33. The paper responds to the question in the affirmative. By providing protection, both natural and juristic persons are afforded their freedom of expression. The same is to say that persons would not fear reprisals, among other retaliations, in their quest to provide critical information at their disposal. In other words, by acting proactively and providing prior protection, the legislature would be living to the true meaning of Article 33. The legislature would be inviting persons to enjoy their freedom of expression by imparting and receiving information without fearing retaliations. In that breath, whistleblowers' protection would indeed actualize Article 33 at least at the statutory level.

5. Conclusion

This paper advocates whistleblowers' protection. It seeks to justify the need for protection of whistleblowers in Kenya on two main bases: the promotion of public interest and protection of the freedom of expression. The paper argues that to give full meaning to Article 33, it is necessary for the legislature to act in a proactive manner by providing protection to whistleblowers.

THE ILLS OF COLLECTIVE BARGAINING IN CONTRACTS OF EMPLOYMENT: THE OTHER PERSPECTIVE

By Muriuki Muriungi*

ABSTRACT

This paper examines the question as to whether collective bargaining and strong trade unions are useful to organizations in modern day economic conditions. It takes both the pluralist and the unitarist perspectives as understood in the context of employment relations. The paper argues that collective bargaining is not appropriate to modern organizations because it leads to protracted impasses, increases the chances of strikes thus causing slower economic growth and losses, it may lead to destruction of relationships due to its confrontational and adversarial nature, and it relegates other workers who are not employees below the employed.

1. Introduction

The paper begins with a short discussion of the key terms, examines the ways in which the employment relationship exists and how it has changed in the workplace. It adopts a comparative analysis of various jurisdictions such as the United States and Canada in a bid to demonstrate the negative effects occasioned by collective bargaining. The paper also analyses whether interventions through collective bargaining have been advantageous to the various stakeholders or not, by examining the impacts of its involvement. In conclusion, it takes the position that collective bargaining is inappropriate for most organizations and other stakeholders in general. In this endeavour, the paper makes use of an interdisciplinary approach by borrowing

from various disciplines such as organizational behaviour and theory, management, psychology, and law.

While collective bargaining in organizations has been exhorted in various sectors of the economy as having the ability of arresting the countervailing inequality of bargaining power, little regard has been given to the negative consequences of the same that accrue to organizations and the economy at large. Trade unions that represent employees in collective bargaining in agitating for better terms and conditions of service during strikes and other labour stand-offs occasionally take advantage of the existing deadlock and vulnerability of employers to push through their agenda. Not infrequently, this has the effect of diluting gains that may have been achieved through collective bargaining not only to employers and employees, but to all stakeholders in the economy.

Collective bargaining is defined as an exchange relationship where employers and employees negotiate on the terms and conditions of work through the agency of a trade union.[1] Bargaining power, on the other hand, connotes the ability of a party in an employment relationship to induce another party to make a decision that it would otherwise not make, absent the inducement.[2] This paper adopts these two definitions.

2. The Pluralist and the Unitarist Approach

There are two major approaches taken in the explanation of the basis of the employment relationship, namely: the unitarist and the pluralist approaches. The unitarist approach is taken by

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[1] Ackers, P., & Payne, J. British trade unions and social partnership: Rhetoric, reality and strategy. (1998). *International Journal of Human Resource Management, 9*(3), 529-550.

[2] Kaufman, B. Paradigms in industrial relations: Original, modern and versions in between. *British Journal of Industrial Relations, 46*(2), 314-339.

an employer or management team who view themselves as the sole authority in a relationship with the function of controlling and giving directions to employees so as to meet the goals of an organization.[3] As such, this approach views an organization as a unitary system where there is a single authority, namely the employer, as well as a single loyalty, usually to the organization. Consequently, unitarists see no usefulness in collective bargaining and trade unionism as these are likely to introduce conflicts.[4]

The pluralist perspective, on the other hand, suggests that there are various parties in an organization who have conflicting interests which need to be satisfied. In addition, it has been argued that an organization has a multiple personality in that it is a social, political, and an economic institution.[5] According to this theory, an organization is made up of powerful and divergent entities, to wit, the trade union and management. Put differently, it is perceived that disagreements and conflicts of interest are inevitable. The effect of such an approach is that management focuses more on persuasion rather than enforcement and control. There is usually a concession that conflicts are bound to occur in an organization and should be dealt with by way of collective bargaining. Indeed, collective bargaining in this setting is usually seen as a crucial tool that is evolutionary in nature and one of positive change in the organization.

3. Organizational change and developments

The employment relationship exists by way of an employment contract. Employment contracts may either be oral or written, in accordance with the relevant labour law regime. It is also worth appreciating that employment relationships have changed in workplaces thus

[3] Kitay, J., & Marchington, M. A review and critique of workplace industrial relations typologies. (1996). *Human Relations, 49*(10), 1263-1290.
[4] ibid.
[5] Ross, P., & Bamber, G. Strategic choices in pluralist and unitarist employment relations regimes: A study of Australian telecommunications (2009). *Industrial & Labor Relations Review, 63*(1), 24-41.

influencing both employers and employees.[6] A number of developments such as mergers and acquisitions, outsourcing, and fragmentation of organizations are only some of these developments. For instance, outsourcing and mergers and acquisitions create a complex employment relationship since employees have several masters and are governed by a myriad of rules.[7]

Further, organizations continue to deal with virtual workforce through social media as well as mobile group of employees. The fragmentation that has emerged as a result, now poses challenges to employment relationships and especially to trade unions, in that it has compounded unionization efforts.[8] Some high-profile disputes, such as those that occurred in several organizations like Lindsey and Gate Gourmet, illustrate the increasing complexity of the employment relationship.[9] They constitute evidence that the absence of a forum for formal representation could lead to such disputes becoming individualistic in nature. The absence of face-to-face communication due to the onset of technology and social media is sure to rob the resolution of disputes, its key feature of emotional attachment.[10]

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[6] Seo, M., & Hill, N. Understanding the human side of merger and acquisition: An integrative framework. (2005). *The Journal of Applied Behavioral Science, 41*, 422-433.

[7] Weick, K., & Quinn, R. Organizational change and development. (1999). *Annual Review of Psychology, 50*, 361-386. For instance, employees in an organization may experience an outright change of employer through the transfer of personnel as is the case during outsourcing or mergers. This means that it can no longer be assumed that workers at a particular organization are employees of the same employer with similar terms and conditions of service.

[8] Pearlin, L., & Schooler, C. The structure of coping. (1975) *Journal of Health and Social Behavior, 19*, 2-21.

[9] Gate Gourmet is a sole provider of in-flight meals to the British Airlines. A total of 350 members of its staff were sacked at Heathrow airport over issues of pay and working practices, causing other members of staff to go on a sympathy strike in solidarity with their colleagues. These job losses were occasioned by a corporate restructuring program at the organization in the year 2005. It is worth noting that despite enjoying huge turnovers of $ 1.9 billion in the year 2004, the company had not posted any profits since the year 2000. It thus sought to change its obsolescent working practices through the restructuring program.

[10] Kiefer, T. Feeling bad: Antecedents and consequences of negative emotions in on-going change (2005) Journal *of Organizational Behavior*, *26*(8), 875-897. In this digital age, most negotiations may be done virtually through teleconferencing, telephone, and other modern means of communication where the personal touch that is key to successful negotiations is mostly absent.

4. Pros and cons of collective bargaining

Collective bargaining has both its supporters and critics. Supporters argue that it clearly spells out the rights of management and safeguards the rights of both employees and employers through a binding collective bargaining agreement.[11] They further state that there is increased performance for organizations since disputes are resolved through the input of both employer and employee and that this collective bargaining process promotes fairness in policies and employment decisions.[12] Proponents also argue that collective bargaining affords employees the opportunity of choosing whether they want union representation and that agreements entered into provide a bilateral, legally sound relationship.[13]

Conversely, opponents of collective bargaining cite the restriction of management's authority as well as freedom through a negotiation of the rules as a negative effect of unionization.[14] From a unitarist perspective, this would appear to be an assault on the single authority, mutuality, and commitment to an organization.[15] There is also an increased risk of polarization between employers and employees as well as bureaucratization that unnecessarily lengthens the time for resolving disputes.[16]

5. Impact of Trade Unions

Undoubtedly, intervention by trade unions by way of collective bargaining on behalf of employees has had a huge impact on various stakeholders including employers, employees, and

[11] Felbermayr, G., A. Hauptmann, and H.-J. Schmerer: "International Trade and Collective Bargaining Outcomes: Evidence from German Employer-Employee Data," (2014) The Scandinavian Journal of Economics, 116(3), 820–837.
[12] Hunter, L. Can strategic participation be institutionalized? Union representation on American corporate boards (1998). *Industrial & Labor Relations Review*, *51*(4), 557-578.
[13] supra (n.13).
[14] Lee, D. S., and A. Mas: "Long-run impacts of unions on firms: New evidence from financial markets, 1961–1999," (2012) The Quarterly Journal of Economics, 127(1), 333.
[15] supra (n.1).
[16] ibid, 17

government. A trade union is an association that represents employees in a collective bargaining process with an employer.[17] The traditional role of trade unions is to act as bargaining agents in a bid to offset the inequality of bargaining power that is usually inherent in an employer-employee relationship.[18]

However, an analysis of the impact of trade unions on a majority of stakeholders appears to be negative.[19] At present, trade unions operate like cartels thereby acting to increase the costs of employees in terms of increased wages. This has a cascading effect as it forces employers to reduce the number of hirings owing to the higher wages associated with hiring employees.[20]

6. The Kenyan Context.

In the Kenyan context, as is the case in other jurisdictions, there is a legal framework governing collective bargaining, trade unions, and other labour dispute resolution processes. Article 41 of the Constitution of Kenya 2010 provides for labour rights which include the right to go on strike and fair labour practices. Further, the Labour Relations Act 2007 provides the legal basis for industrial relations between employers or organizations and employees through their trade unions. The Labour Relations Act provides for the right to form, join and participate in the activities of trade unions, and engage in the democratic activities and other functions of the unions.

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[17] Long, R. J. The effect of unionization on employment growth of Canadian companies. (1993) *Industrial and Labor Relations Review, 46*(4), 691-703.

[18] Adam Smith, in his book *The Wealth of Nations* (1776) Chapter 8 argues, "It is not, however, difficult to foresee which of the two parties must, upon all ordinary occasions, have the advantage in the dispute, and force the other into a compliance with their terms. The masters, being fewer in number, can combine much more easily; and the law, besides, authorizes, or at least does not prohibit their combinations, while it prohibits those of the workmen…" Further, in the words of Sir Otto Khan-Freund: "The main object of labour law has always been, and I venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent in, and must be inherent in the employment relationship" in Kahn-Freund, Otto (1977) Labour and the Law (2nd edn), London: Stevens & Sons at p.6.

[19] Leonard, J. S. Unions and employment growth. (1992) *Industrial Relations, 31*(1), 80-94.

[20] supra (n. 2).

In line with these constitutional and statutory provisions, a number of bodies and trade unions have been formed in Kenya in the various sectoral areas to unionize members and avail a platform for collective bargaining. Some of these include the Kenya National Union of Teachers (KNUT), Central Organization of Trade Unions in Kenya (COTU), Kenya Universities Staff Union, and the Kenya Union of Post-Primary Education Teachers (KUPPET), among others. We argue that whilst these trade unions have in a number of times fought for the better rights of their members, they have also been subject of political manipulation and have led to needless strikes and lock-outs leading to a loss in the economy.

Frequently, there are usually cases of striking teachers demanding nearly impossible pay raises of over 300 per cent from the government. Similarly, there arise cases of nurses, doctors, and other civil servants threatening to go on strike over pay. Indeed, this is not only so in the public sector but also in the private sector. It is not uncommon to hear workers threatening and indeed going on strike in the transport industry or the horticultural sector demanding pay raises. While in no way suggesting that the demands for better working conditions and better pay in these occasions is without merit, we argue that the terms demanded at times, are usually unsustainable. It is frequently the case that the leaders or officials of the trade unions take advantage of the vulnerable position of employers to grind the operations of organizations and other essential sectors to a halt, thus causing untold suffering and loss in the economy. More so, collective bargaining rarely results in tangible and sustainable results in the long-term.

More importantly, collective bargaining is not appropriate in modern day Kenya when one takes into account the various changes that have taken place at the workplace. Trade unions in Kenya are confronted by various challenges such as changes in production technologies which have made it not only preferable, but also cheaper to mechanize production thus causing a layoff

of workers. Other challenges include mismanagement, lack of visionary leadership, political manipulation of unions, and mentality shift among workers and employers with regard to the value of trade unions. However, one of the main concerns that is of a global nature, is the issue of globalization that has without doubt have had an impact on human resources the world over.[21] Owing to globalization, there have been changes in organizational structures and designs which have become leaner as evidenced by layoffs and retrenchments. Cases in points include Kenya Airways, Kenya Railways[22] and the telecommunication sector such as the Postal Corporation of Kenya as such organizations seek to maintain a competitive edge and profitability.

Besides, trade unions usually agitate for improved terms and conditions of service for its members without taking into account the output or performance of its individual members. It is likely the to be the case, especially in the public sector where there are absent or lax monitoring mechanisms that most employees are absent from work or have very little productivity that does not deserve any appraisal or improved pay packages.[23] We suggest that an alternative mode of individual contracts among employees with their employers is preferable.

7. Negative Effects of Collective Bargaining on Various Stakeholders

The upshot of collective bargaining is increased unemployment and slower economic growth.[24] In the end, the employees that trade unions seek to protect are left without jobs. This

[21] Gachunga, H.G. (2008).'Impact of globalization on the human resources management function in developing countries: a case study of Kenya public corporations', JKUAT Nairobi.

[22] See the case of, Aviation and Allied Workers Union vs. Kenya Airways Limited & 3 Others (2012) eKLR, where Kenya Airways had laid off a number of workers citing large increase in headcount, significant annual salary increment and costly decisions arising out of tough collective bargaining decisions had pushed the wage bill to unsustainable levels. Collective bargaining leads to increased costs in terms of salaries on an annual basis up to unsustainable levels that has a negative effect on both the organization and the overall economy.

[23] While trade unions are usually keen on seeking better pay for its members, they usually frown at the suggestion of performance contracting or evaluation. See the refusal by KNUT to peg a review the terms of its members on performance contracting, which is a practice the world over.

[24] The increased costs of employees due to increased wages obtained through collective bargaining and trade-unionism has an effect on the capacity of firms to profitably sustain a big number of employees resulting in

has happened in the automobile industry in the United States with the United Auto Workers, a union representing workers in Detroit, which continuously unionized its members to go on strike until their wages were increased. Interestingly, workers for Honda and Toyota in America are non-unionized, and these plants have been able to produce high quality vehicles at low prices, a feat that has proved impossible in Detroit. In fact, the plant in Detroit was at the brink of insolvency owing to the activities of this trade union.[25]

Besides, union intervention is not laudable as it inhibits innovation and changes like mechanization and privatization.[26] Unions only serve to protect the status quo so as to preserve the jobs of its members thereby inhibiting innovation and change that would lead to greater efficiency and economic growth in the long run.[27] Further, strikes deny the citizenry essential services provided by such organizations and lead to the slow-down of the economy and loss of profits.[28]

8. Conclusion

In view of the above, it is the contention of this paper that intervention by trade unions is disadvantageous to the various stakeholders and should be abandoned. This is because collective

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layoffs and retrenchment or dismissals from employment. This has occurred at British Airlines through a corporate restructuring program.

[25] Medoff, J. L. Layoffs and alternatives under trade unions in U.S. manufacturing. (1979) *The American Economic Review, 69*(3), 380-395. This is not to say that some employers and firms have not been taking advantage of employees through exploitation. Nonetheless, the institutionalization of collective bargaining in contracts of employment constitutes an unwarranted intrusion into the operation of market forces and the freedom of contract theory. Such an intrusion, albeit noble in some instances, acts to destabilize the labour market and make it less competitive, thus leading to inefficiencies and an overall decline of the economy.

[26] Freeman, R.B. and J. L. Medoff, The two faces of unionism. (1979) *Public Interest* 57, 69-93

[27] Freeman, R. B., & Kleiner, M. M. Do unions make enterprises insolvent? (1999). *Industrial and Labor Relations Review, 52*(4), 510-527.

[28] Jakubson, G. Estimation and testing of the union wage effect using panel data. (1991). *Review of Economic Studies, 58*(5), 971-991.

bargaining lengthens the resolution of disputes, destroys relationships, inhibits innovation and change, and may lead to increased unemployment.

WITNESS PROTECTION: THE CLOAKED STRANGER; THE SHADOW MASTER; THE GHOSTLY FIGURE

By Josephine Wairimu*

ABSTRACT

Witness protection presents itself as a formidable force in the fight against crime and the attainment of justice. It seeks to conceal and protect the witness as well as to secure justice for the victims affected by the commission of crimes. The state as the protector of human rights is tasked with the duty of ensuring the safety and security of its citizens. This article explores the various aspects of witness protection, as well as the institutions and legal frameworks that seek to safeguard witnesses. Special focus will be directed to the Kenyan jurisdiction in seeking to analyze witness protection. This will take the form of a comparative analysis of Kenya and United States of America (USA).

1. Introduction

Stories have been told about the ghosts and monsters that hide under the beds and in the closets and come out in the dark of the night. These fictional characters are conjured from the realities that are faced in life. They are a true reflection of our inner secrets when we try to suppress the truth which eventually emerges as a creature that seeks to break free. Witness protection has been related to such an analogy. The witnesses are referred to as ghosts and monsters carrying with them our deepest secrets and intimate truths. Their voices haunt us as they seek to remind us of our misdeeds. However, they are hidden in the shadows never revealing themselves, watching us from a distance, and hoping never to be unearthed. They exist

among us in the shadows, like a cloaked stranger walking in the dark of the night seeking sanctuary, as their existence is threatened for they hold the most crucial information; the truth.

Before delving into witness protection it is necessary to understand the underlying conceptual issues. This is because the nitty-gritties of these definitions form the foundational basis upon which witness protection is made operational in the legal system.

2. Who is a witness?

In providing an answer to this question, one often thinks about the movies and television shows depicting Italian mafia groups. The most famous being the movie ***"The Godfather"*** concerning an Italian mafia group based in New York consisting of family members.[1] As the movie goes on, the mafia group always finds means of dealing with witnesses or whistleblowers that have information relating to their dealings.

According to the Black's Law Dictionary, a witness is a person whose declaration under oath or affirmation is received s evidence for any purpose, whether such declaration is made on oral examination or by deposition or affidavit.[2] In other words this is a person who testifies under oath in a trial with first hand evidence or as an expert who provides evidence that is used in a court of law. A witness is a person who gives testimonial evidence, and includes experts and

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[1] Written by Charlie Ness, available at <http://www.imdb.com/title/tt0068646/plotsummary>
The story begins as "Don" Vito Corleone, the head of a New York Mafia "family", oversees his daughter's wedding with his wife Carmela. His beloved son Michael has just come home from the war, but does not intend to become part of his father's business. Through Michael's life the nature of the family business becomes clear. The business of the family is just like the head of the family, kind and benevolent to those who give respect, but given to ruthless violence whenever anything stands against the good of the family. Don Vito lives his life in the way of the old country, but times are changing and some don't want to follow the old ways and look out for community and "family". An up and coming rival of the Corleone family wants to start selling drugs in New York, and needs the Don's influence to further his plan. The clash of the Don's fading old world values and the new ways will demand a terrible price, especially from Michael, all for the sake of the family.

[2] Black's Law Dictionary Free Online Legal Dictionary 2nd Ed, Law Dictionary: What is WITNESS, n? definition of WITNESS, n (Black's Law Dictionary) <http://thelawdictionary.org/witness-n/> accessed on 24th February 2015

victims.[3] These are essentially persons who have key information on the occurrence of a particular event whether it constitutes part of a criminal or civil wrong. There also are individuals who are known as whistleblowers/informants who are persons that merely provide information to the relevant security agency. They could also serve as witnesses in a criminal matter. Whistle blowers/ informants are referred to as *'*the eyes and ears*'* of the security forces in the community at the grass-roots level as they update the security forces on any suspicious activities. As noted by the United Nations Office on Drugs and Crime (UNODC) such individuals play a crucial role in law enforcement efforts to bring the perpetrators to justice.[4]

3. What is witness protection?

Witness protection is defined as a state initiated program in which a witness to an activity which imputes liability upon one or more persons is protected.[5] The activity itself may impute liability under civil or criminal law under the laws of a particular state. It is a collection of security measures, taken up by the criminal justice system in liaison with security personnel to effectively protect a witness before, during and after a trial. These include physical and psychological measures[6] used to shield the witnesses from abuse and intimidation. In seeking to understand this concept, the following issues must be addressed.

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[3] Karen Kramer, *Witness Protection As A Key Tool In Addressing Serious And Organized Crime* at pp. 8 available at <http://www.unafei.or.jp/english/pdf/PDF_GG4_Seminar/Fourth_GGSeminar_P3-19.pdf> accessed on 15th October 2014.

[4] United Nations Office on Drugs and Crime, One Step Closer to Witness Protection in Kenya http://www.unodc.org/unodc/en/frontpage/2010/January/one-step-closer-to-witness-protection-in-kenya.html accessed on 23rd October 2014.

[5] US Legal Definitions, Witness Protection Program Law and Legal Definition <http://definitions.uslegal.com/w/witness-protection-program/> accessed on 15th October 2014.

[6] United Nations Office on Drugs and Crime: *Victim Assistance and Witness Protection*: <http://www.unodc.org/unodc/en/organized-crime/witness-protection.html> accessed on 15th October 2014.

4. What are the security measures adopted by the courts?

Firstly, police protection involves the use of security personnel to actively protect the witnesses.[7] This may involve the use of security personnel to man the area around the witness and also adopting technological assistance in ensuring security. This includes adopting the use of security cameras at the witnesses' residence. This measure is adopted depending on the level of risk that the witness is exposed to. However this may not be practical in many jurisdictions due to the financial and personnel constraints.[8]

Secondly, Procedural Protections involves measures taken at the request of the prosecutor, the witness or *sua sponte*[9] by the court to ensure that the witness can testify free of intimidation and fear.[10] Such measures include anonymous testimony; presence of an accompanying person for psychological support; shields,[11]disguises or voice distortion; Use of a witness's pre-trial statement instead of in-court testimony; testimony via closed-circuit television or videoconferencing; and removal of the defendant or the public from the courtroom.[12] This gives the witness assurance that he or she will remain anonymous during the trial process. This is a measure that is adopted particularly where children are witnesses in a case. However, some of these measures may not be implemented easily in other states due to the financial and technological constraints as some of these measures are of a capital intensive nature.

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[7] ibid at pp. 9

[8] "The United States WITSEC program has a conviction rate of 89%. Over 10,000 criminals have been convicted, thanks to testimony from protected witnesses. Unprotected witnesses generally prefer not to testify." Adopted from the Witness protection FAQ available at <http://www2.usanetwork.com/series/inplainsight/theshow/witsecfaq.html>

[9] This means of one's own accord. This is an act of authority that is adopted without formal prompting from another party.

[10] Karen Kramer, *Witness Protection As A Key Tool In Addressing Serious And Organized Crime* at pp. 6 available at <http://www.unafei.or.jp/english/pdf/PDF_GG4_Seminar/Fourth_GGSeminar_P3-19.pdf> accessed on 15th October 2014.

[11] This may include the use of opaque or translucent material to hide the identity of the witness. Usually used during the court sessions while giving testimonies.

[12] ibid.

Thirdly, covert witness protection[13] programmes are measures adopted by a state to specifically address the plight of witnesses. These are usually agencies formed by state and non-state actors to cater for witnesses. The United Nations Office on Drugs and Crime's (UNODC) *Good Practices for the Protection of Witnesses Manual* further defines a witness protection programme as:

> A formally established covert program, subject to strict admission criteria that provides for the relocation and change of identity of witnesses whose lives are threatened by a criminal group because of their cooperation with law enforcement authorities.[14]

This measure is adopted depending on the severity of the risk that the witness is exposed to. It is adopted as a measure of last resort as the witnesses are forced by circumstances to relocate or change their identity. For instance, after the 2007/2008 Post Election Violence (PEV) in Kenya, there was need to offer protection to the witnesses who were to testify against the suspects. However, at that time there was no coherent legislation available for use by the Kenyan Courts for the protection of witnesses.[15] As a result, many witnesses sought asylum in other countries for protection.

5. International legal and institutional framework

The UNODC is the principal body that deals with matters of crime prevention and criminal justice reform. One of the key issues within their docket involves the assistance, support

[13] United Nations Office on Drugs and Crime, Victim Assistance and Witness Protection <http://www.unodc.org/unodc/en/organized-crime/witness-protection.html> accessed on 15th October 2014.

[14] United Nations Office on Drugs and Crime Vienna, *United Nations Office on Drugs and Crime Witness Protection Good Practices Manual,* New York 2008 at pp.5. available at <http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf > accessed on 15th October 2014

[15] The Witness Protection Act, (**Cap 79**) which came into operation on 1st September 2008 by **Legal Notice No. 110/2008.**

and security for victims and witnesses as elements in upholding the rule of law in a bid to combat crime.[16]

The United Nations Convention against Transnational Organized Crime[17] is the primary international legal instrument for combating transnational organized crime. This was a joint effort of states in response to the rapidly increasing occurrences of crimes with special emphasis on organized crimes. Article 24 of the Convention provides for the protection of witnesses who may also be victims of crime. It states that parties to the Convention must "*take appropriate measures within their means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings*."[18]

The Convention provides a list of offences which should be taken into account[19] including activities of an organized criminal group, laundering of proceeds of crime, corruption, obstruction of justice and serious crime.[20] The Article provides means of protection such as physical protection, protection while giving evidence as well as physical relocation.[21] Obstruction of justice, in general, is a vice that is frowned upon as it interferes with the work of

[16] Karen Kramer, *Witness Protection As A Key Tool In Addressing Serious And Organized Crime* at pp. 4 available at <http://www.unafei.or.jp/english/pdf/PDF_GG4_Seminar/Fourth_GGSeminar_P3-19.pdf> accessed on 15th October 2014.

[17] This was adopted by *General Assembly Resolution 55/25* on 15 November 2000. It is also known as the *Palermo Convention.* The convention is supported by three protocols namely *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children* (UNGA resolution 55/25), *The Protocol against the Smuggling of Migrants by Land, Sea and Air* (UNGA resolution 55/25), and *The Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition (UNGA resolut*ion 55/255).

[18] Article 25

[19] United Nations Office On Drugs And Crime Vienna, *United Nations Convention Against Transnational Organized Crime And The Protocols*, United Nations New York, 2004 Art 3 available at <https://www.unodc.org/documents/middleeastandnorthafrica//organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf> accessed on 19th October 2014.

[20] ibid Articles 5, 6, 8, 23 and 2 respectively. Article 2 defines ***serious crime*** as conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.

[21] ibid, Articles 24(2) and (3).

security agencies in attaining justice. This proves to be a stumbling block to these agencies[22] as the culprits, through their devious means, seek to walk away scot free thus preventing attainment of justice. Article 23 of the Convention defines obstruction of justice.[23] As noted in the Convention, obstruction of justice can either be directed to the witnesses or to the law enforcement officers as a delay tactic and whose effect is to distort or conceal potentially incriminating information. Member states have an obligation to formulate and implement measures to enhance cooperation of persons with law enforcement authorities especially with regard to providing information concerning criminal activities.[24]

The UNODC provides technical assistance in reviewing and strengthening legislative frameworks for victim support and witness protection.[25] This has led to the creation of a manual on *"Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime"*. This manual is a guideline that prescribes measures, procedures and institutional frameworks that may be used in witness protection. It provides a benchmark to all member states as they formulate their own policies relating to witness protection.

6. The Kenyan scenario

In Kenya, the mandate for witness protection was initiated by a small unit under the Office of the Attorney General in 2006 which was given force by the Witness Protection Act,

[22] These agencies include the police, and the armed forces

[23] This is usually through the use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage

[24] ibid, Articles 26 and 27
Facilitating communication of criminal activities to the law enforcement officers may prove to be difficult. This is because such information may be self-incriminating to an individual. The convention suggests that leniency should be exercised in cases where accused persons or accomplices to crimes come forth with information. Measures of lenience to be exercised include reducing a sentence or granting immunity from prosecution.

[25] United Nations Office on Drugs and Crime, *Victim Assistance and Witness Protection*, United Nations <http://www.unodc.org/unodc/en/organized-crime/witness-protection.html> accessed on 19th October 2014.

2006 which was later amended by The Witness Protection (Amendment) Act No.2 of 2010.[26] Prior to this, there was no formal legislation that guaranteed protection to witnesses. This has had the effect of curtailing the efforts of the legal system in ensuring justice for persons affected by wrongful activity committed against them, whose remedy can be sought under law.

The Witness Protection Act of 2006 was adopted to respond to the difficulties the country had experienced over the years in investigating and prosecuting those involved in high-level corruption.[27] However this did not curb the intimidation, torture and killing of witnesses who proved to be a threat to the suspects involved in the crimes.[28] A year later, after the occurrence of the 2007/2008 Post Election Violence (PEV), there was an increasing need to review and develop the law relating to witness protection. The United Nations Office on Drugs and Crime (UNODC) intervened and gave support to the Kenyan government since 2008 regarding the establishment of a robust witness protection mechanism.[29]

To that effect, the existing Witness Protection Act of 2006 was amended by the Witness Protection (Amendment) Act of 2010. Section 3A of the Act establishes the Witness Protection Agency which is charged with the sole responsibility of ensuring the protection of witnesses.[30] The amendment to the 2006 Act clearly defines the scope and functions of the Agency. For instance the Act lists the powers and functions of the Agency, leadership and organisational structure, as well as guaranteeing its independence and accountability as an entity.[31] It also sets

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[26] Kenyan Legal, Witness Protection Agency Kenya, 3rd March 2014, http://kenyanlegal.com/2014/03/03/witness-protection-agency-kenya/ accessed on 24th February 2015.

[27] United Nations Office on Drugs and Crime, *One Step Closer to Witness Protection in Kenya* <http://www.unodc.org/unodc/en/frontpage/2010/January/one-step-closer-to-witness-protection-in-kenya.html> accessed on 23rd October 2014.

[28] These include the incidences at the Nyayo house torture chambers where opponents of the Moi regime were detained and tortured.

[29] ibid

[30] Witness Protection Act 2010, Section 3B as read with section 4. Persons who may apply for protection include persons who have reported a crime, persons testifying in proceedings, as well as family members.

[31] ibid sections 3C, 3D, 3E, 3F, 3G, 3K, 3L, 3M

out measures aimed at cushioning victims serving as witnesses, who have suffered loss due to a tragic event.[32] This is in the form of monetary compensation which may be made to the victim or his family.

Apart from the Agency, the Act establishes the Witness Protection Advisory Board which will operate as the principal administrative, advisory and regulatory body regarding all matters that the Agency deals in. It also establishes the Witness Protection Appeals Tribunal whose responsibility will be to shall review and determine grievances by persons not satisfied with the decisions or orders of the Agency relating to admissions or terminations of placement into the programme. The Witness Protection (Amendment) Act 2010 has expanded the meaning of 'Witness' to include a person who requires protection from a threat or risk that exists on account of being a crucial witness.[33]

In deciding whether to include a witness in the program, the Attorney-General shall have regard to various factors.[34] These include seriousness of the offence, nature and importance of evidence, nature of danger, relationship of witness to other witnesses, alternative methods of protection, and criminal record of the witness.[35] However a memorandum of understanding[36] will be signed by the witness that stipulates the legal obligations rights and duties of the witness. Protection of the witness may be terminated if the participant deliberately breaches any term of the memorandum of understanding. There are also temporary means of protection offered to witnesses in cases of urgency pursuant to section 9.

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[32] ibid section 3I.
[33] The Kenyan Section of the International Commission of Jurists, ICJ Kenya's Critique of the Witness Protection (Amendment) Bill, 2010 at pp 3. <http://www.iccnow.org/documents/Critique_of_the_WitnessProtection_Act_and_Amendment_Bill.pdf> accessed 24th February 2015.
[34] Section 6(n 30).
[35] Ibid.
[36] ibid Section 7.

The Act provides for measures to protect the identity of the witness which extends to obtaining new identities[37] as well as non-disclosure[38] of former identity of protected persons at all times as well as during legal proceedings.[39]

To supplement the provisions of the Act, the Constitution of Kenya 2010, under the Bill of Rights has guaranteed witness protection as a fundamental human right. Most importantly Article 48 guarantees that persons have the right to access justice and correspondingly, Article 50(9) provides for the need to have legislation to provide for protection, rights and welfare of victims of offences. Also Article 50(8) provides that the press will not be excluded except where it is to protect witnesses or vulnerable persons, morality, public order or national security. This when construed together with Article 48, illustrates the onus of the state to protect witnesses though subject to certain criteria provided for in the Act.

Other legislation which provide protection to witnesses include the following. The Sexual Offences Act under sections 31 and 32 provides for the protection of vulnerable witnesses[40] in Sexual and Gender Based Violence (SGBV) cases which are to be heard in camera.[41] The court may also afford protection to persons on its own initiative or on request of the prosecution where

[37] Section 13 of the Witness Protection Act 2006 provides a witness with a chance to obtain documents which will allow a witness to establish a new identity or to restore a former participant's former identity in order to protect the witness. This shall be applied for through the use of a court order pursuant to section 14.

[38] Witness Protection Act 2006 Sections 23 and 24

[39] Kenyan Legal, *Witness Protection Agency Kenya*, <http://kenyanlegal.com/2014/03/03/witness-protection-agency-kenya/> accessed on 23rd October 2014.

[40] Laws of Kenya, Sexual Offences Act, section 31(1)

[41] Such witnesses shall be protected in the following ways: allowing such witness to give evidence under the protective cover of a witness protection box; directing that the witness shall give evidence through an intermediary; directing that the proceedings may not take place in open court; prohibiting the publication of the identity of the complainant or of the complainant's family, including the publication of information that may lead to the identification of the complainant or the complainant's family; or any other measure which the court deems just and appropriate.

he or she is deemed to be vulnerable on the account of certain criteria.[42] This criterion shall be considered carefully by the court which has the power to summon any intermediaries to advise it on the vulnerability of such witnesses. Under section 32 vulnerable witnesses are to be notified of protective measures by the prosecution.

Similarly, Section 77(4) of the Children's Act requires that cases involving children shall be held in children's court at distinct times from other cases and that no unauthorized persons shall be allowed in the court room. Section 75(5) of the Children's Act provides for the protection of the children by prohibiting the publication of the identity of the child, their home or last place of residence or school in any proceedings. In this respect the Witness protection Act has formulated a special protection form that caters for the needs of children who are witnesses in cases. Closely related to this is Section 77 (2) of the Criminal Procedure Code which provides for in camera proceedings in cases relating to incest, abduction, rape and defilement.[43]

The Prevention of Terrorism Act provides for the protection of witnesses from vengeance and intimidation by making such actions criminal offences.[44] Specifically, sections 17, 18 and 19 ensure the protection of such witnesses. Section 17 provides that persons who do or omits to do any act against the family or person of a witness in retaliation for the person having given information or evidence under this Act commits an offence, Similarly persons who compel others to abstain to do or do anything and through this action causes a witness to reasonably fear for his safety or the safety of anyone known to him, commits an offence.[45] Both offences are

[42] This criteria as provided in section 31(2) age; intellectual, psychological or physical impairment; trauma; cultural differences; the possibility of intimidation;- race; religion; language; the relationship of the witness to any party to the proceedings; the nature of the subject matter of the evidence; or any other factor the court considers relevant.
[43] Kenyan Legal, Witness Protection Agency Kenya, 3rd March 2014, http://kenyanlegal.com/2014/03/03/witness-protection-agency-kenya/ accessed on 24th February 2015.
[44] ibid
[45] Laws of Kenya, Prevention of Terrorism Act, No 30 of 2012, Section 18.

liable to imprisonment for a term not exceeding twenty years. Under the Act, disclosure of information which is likely to prejudice the investigation or interferes with material which is relevant to the investigation, is an offence and on conviction, one is liable to imprisonment for a term not exceeding twenty years.

Recently, the Victim Protection Act 2014[46] was enacted pursuant to Article 50(9) of the Constitution safeguarding the rights and welfare of victims of offences.[47]It offers minimum standards established to support the protection of victims of crime. The Victim Protection Board has been established as the authority responsible for protecting victims and administering a Trust Fund to cater for incidental expenses with regard to protection of victims. This new legislation seeks to work synergistically with the existing Act to provide protection to both victims and/or witnesses.

7. Case study: United States of America (USA)

The year is 1961. Gerald Shur is a U.S. Attorney in the Organized Crime and Racketeering Section (OCRS) of the U.S. Department of Justice.[48]He has tons of criminal cases regarding organized crime and none of the witnesses is forthcoming. He assures the witnesses that they shall receive protection from the state for the information they are giving. Joseph Valachi[49] a mafia member becomes the first to publicly acknowledge the existence of the Mafia.

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[46] This was assented to on the 14th of September 2014.

[47] Pravin Bowry *"A new era for victims of crime in Kenya,"* Wednesday, October 22nd 2014,Standard Digital Media
available at: <http://www.standardmedia.co.ke/?articleID=2000139033&story_title=a-new-era-for-victims-of-crime-in-kenya> accessed on 23rd October 2014.

[48]To the Best of our Knowledge, Transcript For Gerald Shur on the Witness Protection Program, <http://www.ttbook.org/book/transcript/transcript-gerald-shur-witness-protection-program> accessed on 23rd October 2014. Also noted by Kevin Bonsor, *How Witness Protection Works*, <http://people.howstuffworks.com/witness-protection7.htm> accessed on 19th October 2014.

[49] *Valachi* was previously involved in criminal activity such as burglary and larceny. He faced and 18 months imprisonment after a botched robbery in 1923. In 1930 he was introduced to the mafia where he became a recruit.

Even when in prison Valachi feared that his boss Vito Genovese had ordered for his execution due to the information he gave to the police.

Due to his cooperation with the police, Valachi became known as a traitor and since then his name has been used to denote a person who is an informant/traitor. In his testimony regarding the mafia he spoke about the Mafia's Law of Omerta[50] which is a code of silence and secrecy that forbids members from betraying their 'brothers' to authorities or rival gangs.[51] *Non Sento; Non Vedo; Non Pardo.*[52]From this the Witness Security program was developed by Gerald Shur.

The Witness Security Protection Program[53] was authorized by the Organized Crime Control Act of 1970 and amended by the Comprehensive Crime Control Act of 1984.[54] The Act of 1970 provides for the health, safety, and welfare of witnesses who offered valuable testimony in organized crime proceedings.[55] In 1984 there was a new Act which provided for the protection of certain relatives and associates. The Comprehensive Crime Control Act of 1984 contains regulations and provides general information about the Witness Security Program, setting forth most of the current procedures by which a government attorney may apply for the services of the

[50] This is based on *five codes*. Firstly, to *observe Silence/ Secrecy* regarding mafia issues. Secondly, to always be *obedient* to the Mafia leader irrespective of the circumstances. Thirdly, to provide *Assistance* to other mafia factions who may need help? Fourthly, *Vengeance* shall be used where a member is attacked. Lastly, *Avoiding contact with authorities*.

[51] Mafia Life Blog, *Omerta: Code of Silence: "He Who Is Deaf, Blind, And Silent Will Live A Hundred Years In Peace."* 22 August 2011 <http://mafialifeblog.com/omertacode-of-silence%E2%80%9Che-who-is-deaf-blind-and-silent-will-live-a-hundred-years-in-peace/> accessed on 19th October 2014.

[52] This when translated means: *"Hear no evil; See no evil; Speak no evil."*

[53] Also known as *WITSEC.*

[54] U.S. Marshals Service, *Witness Security Program* <http://www.usmarshals.gov/witsec/index.html> accessed on 19th October 2014.

[55] R N Slate *Federal Witness Protection Program: Its Evolution and Continuing Growing Pains* criminal justice ethics Vol 16 1997. Available at <https://www.ncjrs.gov/App/publications/abstract.aspx?ID=177247> accessed on 19th October 2014.

program in order to protect a witness from dangers that may be related to the witness's testimony.[56]

Prompt action is taken when one decides to enter the program. This is known as the *"Control-Alt-Delete"* approach.[57] The U.S. Marshals arrive at one's residence first to take the witness away together with his/her family members for an orientation program. This orientation program covers a session where the victims and their families are provided with a new identity such as new names and a new family history. Correspondingly they are provided with new documentation verifying their new identities as well as security detail that will monitor and protect them. Gerald Shur[58] puts it as follows:

> The rules are fairly simple; have no contact with anyone in your former community. You don't write to them. You don't call them because of caller ID. You don't write to them where you can have a postmark or return address on it. You are now a new person in a new community, that's where your life is.[59]

He admits that this is not an easy task as this is a life changing event whose effects may last for a lifetime. He also states that this proves to be a difficult task for the law enforcement

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[56] To the Best of our Knowledge, Transcript For Gerald Shur on the Witness Protection Program, <http://www.ttbook.org/book/transcript/transcript-gerald-shur-witness-protection-program> accessed on 23rd October 2014. Also noted by Kevin Bonsor, *How Witness Protection Works*, <http://people.howstuffworks.com/witness-protection7.htm> accessed on 19th October 2014.

[57] ibid

[58] *Gerald Shur* is the founder of the Federal Witness Protection Program, as he was working as an Attorney in the Organized Crime and Racketeering Section (OCRS) of the U.S. Department of Justice. He headed the program for over 34 years. This was an interview that was conducted by a media personality which influenced the writing of the book *"WITSEC: Inside The Federal Witness Protection Program"* authored by *Pete Earley* an investigative journalist together with *Gerald Shur*.

[59] To the Best of our Knowledge, *Transcript For Gerald Shur on the Witness Protection Program*, <http://www.ttbook.org/book/transcript/transcript-gerald-shur-witness-protection-program> accessed on 23rd October 2014.

agencies as their main task is to protect the witness until the conclusion of the trial as well as after the trial.[60]

The Organized Crime Control Act of 1970 acknowledges the need for witness protection as organized crime is a highly sophisticated, diversified, and widespread activity which affects the economy as a whole.[61] The Act provides for the guarantee of immunity from prosecution of witnesses[62], after providing self-incriminating evidence unless in proceedings for perjury, giving a false statement, or otherwise failing to comply with the order to testify. It also provides for the provision of housing facilities for witnesses as well as measures to preserve the testimony.[63]

8. Conclusion

In retrospect, the primary objective of the Act was to secure the protection of witnesses. However, the initial implementation of this Act came with its fair share of challenges. First, the independence of this programme was therefore severely compromised as evidence against 'powerful' state officials was not assured.[64] This impaired the ability of witnesses to come forth and give vital information regarding several illegal activities. This independence was further compromised by the power given to the Attorney General to decide whether to include a witness in the programme or not.[65] This left the placement of witnesses in the program to the discretion of the Attorney General. Presently the Agency is autonomous as a body corporate with perpetual succession and a common seal as well as under the leadership of the Director who is an impartial individual appointed by the Agency.

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[60] ibid.
[61] Organized Crime Control Act of 1970, Statement of Findings and Purpose.
[62] ibid Part V, Title Ii, 602.
[63] ibid, title V, Section 501 and 601.
[64] The Kenyan Section of the International Commission of Jurists, ICJ Kenya's Critique of the Witness Protection (Amendment) Bill, 2010 at pp 1. <http://www.iccnow.org/documents/Critique_of_the_WitnessProtection_Act_and_Amendment_Bill.pdf> accessed 24th February 2015.
[65] ibid at pp 2.

Sustainability of the program was a major problem. Witness protection programmes are very expensive, and must be funded from the consolidated fund.[66] However set up in the Act is the Victim Trust Fund which is financed from the consolidated fund, gifts, grants, donations and even money arising out of investments of the fund.[67] Monies from this fund are payable as a means of restitution to victims or families of victims of crime or even compensation for death of a victim. Though commendable, there are no structures that have been put in place to manage the funds resources. This may potentially create a leeway for the misappropriation and mismanagement of funds.

From the foregoing, there is need for effective implementation of laws that will lead to the realization of an efficient witness protection program. The state and its law enforcement agencies should seek to be transparent and accountable in exercise of their mandate in order to ensure objective criticisms towards the established systems as well as contribute to their development. The state should seek to encourage active participation of its citizens in upholding their rights and in collaborating in the fight against crime.

[66] Ibid at pp 6
[67] Ibid

FORMALIZATION OF COMMUNITY LAND RIGHTS: THE NASCENCE OF AN ERA OF REFORM OR EVIDENCE OF AN UNPOINTED TENDENCY FOR NOSTALGIA?

By Alvin Kosgei*

ABSTRACT

The reforms that have been witnessed in the land sector are unquestionably a breath of fresh air. That the new regime has shifted focus from preoccupation with protection of individual ownership to community ownership is an indication of change in policy and thinking. This paper contends that the condescending attitude adopted towards the African commons was reductionist. The paper will examine the ethos of community ownership, particularly customary land tenure with the view of finding out whether the new dispensation was properly advised.

1. Historical Vista

Land is one of the perennial causes of ethnic clashes that have become the mainstay of our election cycles.[1] This serves as a reminder of the fact that land occupies a special position in the hierarchy of property rights. It is Blackstone who remarked that there is nothing that strikes the imagination of man than the idea of absolute ownership of property.[2] It is any person's dream to own anything that resembles a kingdom wherein they exercise dominion.[3] The interconnection between land and the socio-political tragedies is reason enough for effective policy formulation

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[1] Mgangha Mawandawiro, *Usipoziba Ufa UtajengaUkuta: Land, Elections and Conflicts in Kenya's Coast Province* Heinrich Boll Stiftung, East and Horn of Africa, 2010.pg.2

[2] Blackstone W. (First Edition) Commentaries on the Laws of England, University of Adelaide (2014) web edition available at <http://e.books.adelide.edu.au/b/blackstone/william/comment/index.html> This publication borrows from the ideas posited in the second edition of Blackstone's commentaries on the laws of England.

[3] ibid.

aimed at solving the underlying causes of conflict. The tribal clashes are arguably caused by dissatisfaction with the manner in which land has been dealt with.[4] They are tips of the simmering tensions over land due to perceived historical subjugation of ancestral title.[5]

This paper is premised on the argument that the colonisation of Africa was a put on and therein laid the reason for disregard of commons.[6] This is so because it is clear that then, Africans lived in communities which were based on mutual vulnerability for survival.[7] The social set up of African communities was dependent on sharing of resources without emphasis on individual ownership. Consequently, the shared resources were used by all in the expectation that all would consider the interests of the community at large in the course of use.[8]

On colonization, laws were introduced to govern land. These were in the form of Ordinances in Council which essentially were Acts of the British parliament. Mweseli[9] posits that these laws were introduced without concern as to the wholesome interests of the Africans. This, according to him, was covert imperialism which as per Lenin was to be the indication of the epitome of capitalism.[10]

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[4] See Republic of Kenya, Report of the Commission on Investigation of Post-Election Violence (CIPEV), October 2008, available online at www.kenyadialogue.org or https://www.ictj.org/sites/default/files/ICTJ-Kenya-Dialogue-Inquiry-2008-English.pdf accessed 26/02/15 pg.1

[5] ibid.

[6] Commons, community tenure and customary tenure might be used interchangeably. This would be to bring out particular fine nuances at different times but the general meaning is mutually inclusive.

[7] Dirobilant, Anna. The Virtues of Common Ownership, Boston University Law Review, pp1363 Vol 91 (2011¬)

[8] H.W.O Okoth-Ogendo "Tragic African Commons: A Century of Expropriation, Suppression and Subversion. " Keynote address to African Public Interest Law and Community Based Property Rights Workshop, (USA River Arusha , Tanzania: CIEL/LEAT/WRI/IASCP), Amplifying Local Voices for Environmental Justice> Proceedings of the African Public Interests Law and Community Based Property Rights Workshop (USA:CIEL, 2002) pp.7

[9] Tim Mweseli. "The Centrality of land in Kenya: "Historical Background and Legal Perspective" in Essays on Land Law. The Reform Debate in Kenya edited by Smokin Wanjala, Faculty of Law, University of Nairobi.". In: University of Nairobi Law Journal, Volume 2, Issue I (2004), pp.158-164, .WFL Publisher; 2000.

[10] See generally,V. I Imperialism, The Highest Form of Capitalism (1999, 23 Abercrombie St, Chippendale NSW 2008, Australia)

Additionally, the pre-independence policy did little to change this. The Swynnerton Plan[11]was arguably aimed at gaining political mileage. The goal was to engender political stability through the development of a modernised African aristocracy.[12] Although this might not have been a direct assault on communal ownership of land, the unceasing efforts of the state to ensure individualization of tenure worked to that effect. This is because it resulted in policies aimed at total annihilation of customary tenure. This has only changed in the recent past. The basis of such policies was that communal tenure resulted in an inefficient property system.[13]

The transcending theme was and continues to be a focus on individual enterprise without regard to the social and cultural aspects of land.[14] Individual tenure was propagated as the condition sine qua non to industry and enterprise. This purported masterstroke of individualization, which was the reason for the view of traditional structures of ownership as a waste of resources was expected to incubate agricultural development.[15] Ogendo explains that this policy was merely an indication of the search for stability and security which proved elusive.[16] The political tension and heightened sense of subjugation spurred the colonial authorities into action. In the end, security of land rights was achieved for those who benefited

[11] The Report of the East African Royal Commission, 1953- 1955 (Cmd.9475), discussed on pp. 179 of *Essays on Land Law: The Reform Debate in Kenya.* The Committee knew clearly well that ad verse consequences would follow but all the same recommended individualization of tenure

[12] Ghai Y and MacAulsan J P W B(1967), *Public Law and Political Change in Kenya*, Nairobi London: O.U.P, see also para 19(c) of the 2009 Land policy.

[13] I acknowledge the lectures and material of Professor Patricia Kameri-Mbote in explaining the need for an efficient property market for a proper and efficient economy.

[14] See generally, Laura A. Young and Korir Sing'oei Land, livelihoods and identities: Inter-community conflicts in East Africa (December 2011. Printed in the UK, Minority Group International) available at http://www.minorityrights.org/download.php@id=1076 last accessed on 29/01/15

[15] H.W.O Okoth Ogendo, Tenants of the Crown(Nairobi, Kenya, African Centre for Technological Studies; 1991,170).

[16] ibid 171.

from consolidation and adjudication of the reserves. In the end, status quo was maintained and from the point of view of the African agricultural economy there was very little change.[17]

Little in terms of policy changed during the post-independence period and there was no relent in the crusade for individual tenure[18]. However, customary ownership remained resilient in spite of the several attempt at its life.[19] According to Okoth Ogendo, customary ownership of land was continually the scapegoat for underdevelopment.[20] Often, it was confused with an open access scheme[21] and was lambasted as the reason for waste for over a century. Despite its suppression, scholars aver that it still is the most widespread system of ownership.[22]It is, therefore, conceivable that the policy informing the legal framework was everything short of catering for the interests of the African. This failure to appreciate the socio-cultural facet of land has been the bridle that has held the horses of reform at the stables of ignorance.

2. Legal Provisions Governing Community Tenure

Before 2009, customary ownership was formally recognized by the Trust Land Act and the Land (Group Representatives) Act. Notably, these pieces of legislation have not been repealed.[23] It appears that the Community Land Bill will replace them. The trust Land Act[24]provides that the areas occupied by natives are vested in and managed by local authorities.

[17] ibid 172.
[18] Migai J M (2001) *Rescuing Indigenous Tenure from the Ghetto of Neglect: Inalienability and the Protection of Customary Land Rights in Kenya* Nairobi, Acts Press. Pg1. See also Para. 21 of the National Land Policy 2009.
[19] ibid Migai.
[20] ibid (n 8).
[21] See generally Harding G, "The Tragedy of the Commons,", Science, 162(1968):1243-1248.
[22] Ogolla, D.B. and Mugabe, J. "Land Tenure Systems and Natural Resource Management" in Juma, C. and Ojwang, J.B. (Eds), In Land We Trust: Environment, Private Property and Constitutional Development (Initiative Publishers and Zen Books, Nairobi and London, 1996) 85—116. at page 97.
[23] Mona Doshi, The Land Laws of Kenya: A Summary of the Changes (October 2012). http://estates.uonbi.ac.ke/sites/default/files/centraladmin/estates/Summary-of-the-Land-Laws-Anjarwalla-Khanna-October-2012.pdf.pdf accessed on 26/02/2015
[24] Cap 288 Laws of Kenya, first enacted in 1938 as revised in 2012.

With respect to occupation, use, control, inheritance, succession and disposal; every tribe, group, clan or family has the rights they may enjoy under customary law.[25]

Moreover, there is an elaborate procedure for the alienation of land in these reserves.[26] On inquiry, it was established that such lands were the subject of continuous appropriation by powerful and well-connected individuals who converted trust land to private land holdings.[27] Mbote further explains that ownership of trust land has increasingly turned into private ownership and the application of customary ownership ousted.[28] The implication of this is that access by communities is significantly curtailed. An important issue to note is that under the Constitution of Kenya 2010, we no longer have the local authorities but counties.[29] It remains to be seen how they will deal with the land under their jurisdiction

The Land (Group Representatives) Act provides an avenue for registration of group interests in land.[30] It is exceptional since it is the first piece of legislation to recognize common ownership of land.[31] It recognizes a group as either "tribe, clan, family or other group of persons, whose land under recognized customary law belongs communally to the persons who are for the time being the members of the group, together with any person of whose land the group is determined to be the owner."[32] This is covert recognition of customary ownership of land.

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[25] Kameri-Mbote et al, Ours by Right: Law, Politics and Realities of Community Land Rights in Kenya, pg. 42(Nairobi, Kenya, Strathmore University Press, 2013) C f. Section 69.

[26] Odote C The Legal and Regulatory Framework Regulating Community Land Tenure in Kenya: An Appraisal (Nairobi, Kenya, Friedrich Hebert Stiftung 2010) pg. 15 and 5 available at http://www.fes-kenya.org/media/publications/Legal%20and%20Policy%20Framework%20Regulating%20Community%20Land%20in%20Kenya%202013.pdf accessed 20/02/15.

[27] See The government of Kenya, Report of the Commission of Inquiry into Irregular/Illegal Allocation of Public Land (Nairobi, government Printer, 2004).

[28] ibid pg. 43.

[29] Chapter 11, Constitution of Kenya 2010.

[30] The Act envisage the parcellation of trust land into ranches to be owned by pastoralists in what was almost tantamount to joint tenancy(equal undivided shares)

[31] supra Odote at page 58.

[32] Section 2 as adapted from Section 2 of the Land Adjudication Act , 1968 (Revd. 2012)

The Act also provides for a Registrar of Group Representatives who is expected to keep a register of the interests and preside over the nomination of representatives.[33] The representatives are to hold land on behalf of the group and are bound to consult the members fully and effectively.[34] Additionally, the Act allows for dispute settlement via internal mechanisms with an allowance to resort to the District's Magistrates court.[35]

However, this concept failed.[36] This failure is attributable to unscrupulous representatives who sold the land, lack of traditional authority on the part of the representatives and the government's overemphasis on individual over group rights.[37] However, it is important to understand that the inclusion of customary tenure under these Acts was to act as a precursor to individual tenure. The implication of this is that the importance to attach to these legislations as far as recognition of community land is concerned should be lesser as compared to the constitutional dispensation

Recognition of communal rights to land proper [38]began with the incorporation in the National Land Policy, Sessional paper No 3 of 2009.[39] The guiding theme of the policy was '*to guide the country towards an efficient, sustainable and equitable use of land*.' The policy acknowledges that 80% of the total land mass in Kenya consists of arid and semi-arid areas

[33] Section 3.
[34] Section 8.
[35] Section 10 viz. Odote pg. 16
[36] See Focus on Land in Africa, "The Rise and Fall of group Ranches in Kenya" pg. 6 available in file:///C:/Users/AK/Downloads/kenya-rise-and-fall-of-group-ranches%20(1).pdf accessed 24th February, 2015.
[37] See Odote supra at pg. 17.
[38] This is what Mbote et al term the dawn of constitutional recognition of community land rights, supra Mbote, Pg 45.

(ASALs) and is inhabited by only 20% of the population.[40]Such areas are ideally better suited for either commercial beef farming or utilization for pastoralism.[41]

Para 44 as read with Para 57recommend the abandonment of the classification of land as either trust land or private land to private, community and public land. The allodial title is to be vested in the people of Kenya as a nation, communities and as individuals. Community tenure is elaborately analysed in Para 63.The same is reflected in the Constitution.[42] The definition in the policy is also adopted in the Land Act 2012.[43]

3. Case for Inclusion of Communal Tenure in Law

It would easily pass scrutiny if one argues that communal ownership of land, specifically customary is a thing of the past. It would flow from such a postulation that the formalization of communal tenure is a reappearance of anachronous systems of a bygone era. This entails the suggestion that elevation to a legal status of such rights is ontologically misplaced. This is an argument in consonance with colonial ideology which termed our customs outright as claptrap. Additionally, it seemingly suggests that our social structures need revolutionary reform. The aim of this section is to discuss the justifications for the inclusion of community land in the law.

Foremost, there is need to address the question of whether customary tenure is a proper legal system that can exist independently of formal individual tenure. There have been arguments that this system of ownership is incapable of being treated as a juridical system. The conceptualization of communal tenure as terra nullius or non-existent has been refuted by Okoth-

[40] Para.16. The population density ranges from 2 persons per kilometre sq. top 2000 persons per kilometre square in high potential areas in the ASALS.
[41] Nyariki D M et al Land-Use Change and Livestock Production Challenges in an Integrated System: The Masai-Mara Ecosystem, Kenya (2009) J Hum Ecol, 26(3): 163-173 (2009) pp. 1.
[42] Article 63, Constitution of Kenya 2010.
[43] This expectation was effected by The Land Act no. 3 of 2012.

Ogendo.[44] He posits that the nature of communal ownership of land and the customary norms of regulation are a proper juridical system with clear rights and obligations. He conceptualizes the system as a legit order with the radical title being vested in the past present and future generations.

Odote[45] argues that the pronouncement of anathema on our customary structures of ownership should be scrutinized and the fallacies therein brought to the forefront by scholarly discussion. It is easy to term anything African as backward when the measuring scale is the western concept of civilization which is biased. He further contends that there is need to restructure the format of our schooling system which accepts and perpetuates this fallacy. The same argument was put forward to justify the appropriation of native land to settlers.[46] This view considers customary commons as impossible to sustain.[47] This view of illegality was addressed by the opinion that was sought for by the Crown from the Foreign Office.[48]But as is expected, the actions that followed were indicative of the attitude of the colonial masters, plunder without an ounce of consideration for the social set up that existed prior to annexation.[49]

Kameri-Mbote[50]argues that the perception of customary norms of land holding as inferior needs to change. She argues that there is need to challenge the dominant world view which

[44] Okoth-Ogendo H.W.O, *The Tragic African Commons: A century of Expropriation Suppression and Subversion,* A keynoter address delivered at a workshop on Public Interest Law and Community Based Property Rights, Arusha Tanzania, 1-4 August 2000, page???

[45] Odote C (2010). *Retracing our Ecological Footsteps: Customary Foundations for Sustainable Development and Implications for Higher Education in Kenya* Prepared for the 7TH Annual Strathmore Conference Under the Theme: *The Ethics of Sustainable Development in Higher Education* Presented on 28th -29th October 2010

[46] Ogendo (n 18).

[47] The land was not open access, it was occupied by natives who, albeit not having proper systems of order and political leadership were entitled to respect.

[48] Sorrenson M P K, *'Settlement in Kenya',* In the Origins of European Settlement in Kenya, Appendix 1 p. 673. It was the submission of the foreign office that the issuing of land was not based on any law. The acquisition of partial sovereignty did not carry with it any title to the soil; the land was foreign for all intents and purposes

[49] supra Mweseli, (n10).

[50] Mbote P K Community Land Rights: What Exactly is at Stake? The Star, (Nairobi, 17th October 2014)

relegates our norms, ideals and beliefs to an inferior status. This is what leads to the elevation of private or individual tenure to the Holy Grail that ought to be pursued and attained by all means necessary. This is in consonance with suggestions to revamp our legal education with the view of ensuring that it recognizes the importance of communal land tenure in areas that are especially suited to this form of tenure.[51]

The arguments above help to put into perspective the debate as to whether the formalization of community land rights is a cause worth undertaking or it is an exercise that is superfluous an indicator of our tendency to desire souvenirs from the past. The obvious conclusion is that the disregard of common ownership cannot be justified by dismissing it as a non-existent system. It is a proper property system with all the requisite factors. There are right holders, duty bearers and a system of determination of rights.[52]

Secondly, the land historically belonging to these communities is being expropriated without regard for the fact that it is property with owners in the form of a group of individuals. The natives who were being subjected to imperialist exploitation, then, are being subjected to a subtle and refined variant of the same.[53] They are dispossessed of their lands which are held communally. The persons are now at the mercy of insensitive governments, land-hungry, dominant communities and multinational corporations.[54] If the law is not crafted to protect these vulnerable groups, injustice will be visited upon them. Moreover they shall have no recourse in law. This lends credence to arguments in support of the inclusion of community land in law as we have already witnessed.

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[51] ibid. Mbote. She mentions Turkana, Kajiado and Narok as examples of such areas in Kenya, Ngorongoroin Tanzania is given as another good example.
[52] supra Okoth Ogendo (n.8).
[53] Mbote (n.31).
[54] Moody Rodgers (1988), *The Indigenous Voice: Visions and Realities (Vol. 1& 2)* United Kingdom, Biddles Ltd, Guildford and King's Lynn.

Thirdly, the emergence of multinational corporations which exploit resources in such areas necessitates security of rights attributable to communities.[55] Most of these vast pieces of land occupied by these communities are rich in minerals. Bestowment of legal entitlement ensures that communities are properly placed to benefit from the resources that lie therein. The case of the ownership of the West of Mount Longonot gives a proper illustration of how communities can have their rights violated without any recourse being made available in the formal process of adjudication.[56] The expropriation is traceable to the 1991 Memorandum of Understanding between KenGen and Kenya Wildlife service (KWS). KWS agreed to lease part of the reserve to KenGen for the establishment of a power generating plant. The situation is aggravated when institutions set up to serve the people are at the forefront of perpetrating injustice.

Additionally, it is important to note that land is a source of livelihood to many Africans. Similarly, pastoral and hunter gatherer communities depend on their communally owned land for their economic activities.[57] It is therefore proper to legally recognize their structures of ownership in a bid to elevate them to the same level as individual entitlements. This is what the constitution has done by including Communities as among the jural persons with capacity to own land.[58]

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[55] Op sit Sing'oei et al. cite properly.

[56] Centre for Minority Rights Development(CEMIRIDE) *Kenya's Time Bomb, Development against People: The Case of Olkaria Maasai* available at http://www1.chr.up.ac.za/chr_old/indigenous/documents/Kenya/Report/Olkaria_advc_rept.pdf (last accessed 17/10/14) .

[57] Ujamaa Community Resource Team (2013), *Securing Community Land Rights in Northern Tanzania Using Certificate of Customary Right of Ownership.* Information available at http://www.carbontanzania.com/wp-content/uploads/2014/09/CCRO-Brief.pdf (last accessed 18/10/14).

[58] Article 63, Constitution of Kenya 2010.

Failure to engage law and state machinery in protection of the rights of these communities, who often cannot speak out for themselves, will result in the continuation of exclusion of these communities from engaging in any meaningful economic activity. Law should be a reflection of the ideals and the interests of the people. The implication of this is that law might be relative depending on the time, place and society.[59] This demands sensitivity of the law to the needs of the people and the circumstances. If there is need to formalize communal tenure to protect the people depending on it for livelihood, then the law should be sensitive enough to provide for this.

Lastly, Community tenure is sensitive to the needs of the people-especially pastoral communities- as far as their means of livelihood is concerned. If these communities are dependent on the vast swathes of land for grazing, registration of such lands in their state in the name of the community would be efficacious in ensuring tenure security. Tenure security would then bring stability to their endeavours to engage in development in a way that is within the traditional system of ownership.

It is notable that legislation on Community land ownership is yet to be accomplished. At the moment, we have the 2014 Bill which is an improvement on the 2012 Community Land Bill. This Bill provides for the formation of community land management committees which shall manage the land in accordance with customary Law. The Bill also does well by defining community[60] and expressly incorporating constitutional values as to protection against

[59] Eduhtaiye, MuhtarAdeiza, *The relevance of the Sociological School of Jurisprudence to Legal Studies in Nigeria Today*. In Readings in Jurisprudence and International Law (Published by the University of Illorin), Ilorin Nigeria pp. 217. available at https://www.unilorin.edu.ng/publications/etudaiye/The%20Relevance%20of%20The%20Sociological%20School%20of%20Jurisprudence%20To%20Legal%20Studies%20in%20Nigeria.pdf (last accessed 11/10/2014).

[60] Section 8-9 of the Community Land Bill 2014.

discrimination.[61] Further, the Bill expressly states that 30% of the proceeds from developments in land owned by communities shall be directed at development of infrastructure, education and capacity building, provision of services for these communities.[62]

4. Conclusion

The issues brought out are proof that recognition of communal land tenure is indeed a step in the proper direction. One could argue that it could come with a cost. A good example is the fact that patriarchy might override the values of land use as espoused by the Constitution.[63] But the benefits override the possible costs. It is an inevitable conclusion that the formalization takes into account the needs of communities who have been excluded by law. It is therefore a move in the right direction. The establishment of strong and functional institutions of registration and enforcement of rights is a condition sine qua non to security of community land rights. Hopefully, the enactment of the Community Land Bill will address such concerns.

[61] ibid Section 10(4)(c) viz section 17.
[62] ibid Section 56.
[63] supra (n 6).

THE AFRICAN ELEPHANT AND THE CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA: SAVING NATURE'S LAST GIANTS

By Esther Wairimu*

We are the planet, fully as much as its water, earth, fire and air are the planet, and if the planet survives, it will only be through heroism. Not occasional heroism, a remarkable instance of it here and there, but constant heroism, systematic heroism, heroism as a governing principle.[1]

ABSTRACT

Africa is haemorrhaging its elephants. The elephants are poached for their ivory which is in high demand in Asia. As a result, the African elephant could be extinct in a decade. It is vital to bring this situation to people's attention by discussing what is being done to save the elephant and why the elephant should be saved. The United Nations Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) took the first comprehensive step towards stemming the poaching problem by controlling and banning the ivory trade. This paper discusses the role of CITES in this endeavour and the challenges it faces. It also compares the two main CITES models, that is, a control of the trade and a total ban on the trade and suggests a model that could, quite possibly, save the elephant.

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[1] Russell Banks, *Continental Drift*(Harper & Row 1985) 40.

1. Introduction

Elephants are the largest living land animals in the world.[2] They have no wild enemies.[3] Threats come entirely from man.[4] This is through licensed hunting, culling, loss of habitat to human encroachment, human-wildlife conflict and, largely, poaching. Elephant populations in Africa have decreased from 1.3 million in 1979to less than 400,000 today.[5] 25,000 elephants are reported to have been killed in 2011 alone while 22,000 elephants were killed in 2012.[6] Between January and August2014, 19,400 elephants have been poached.[7]Today, iWorry[8] estimates that an elephant is killed every 15 minutes. At this rate, none will be roaming in the wild in 2025.[9] Much of this has been in a bid to supply the demand of ivory that has been fuelled, largely, by the illegal ivory trade.

Numbers, however, only tell half the story. They do not tell of the horrors of the killings sometimes committed by spraying bullets from AK-47s or using poisoned weapons such as arrows and spears. They do not tell of how the elephant's face is hacked off to get to its

[2] This article deals with the African elephant, *Loxodonta africana*. The Asian elephant, *Elephas maximus*, is slightly smaller in size.

[3] A lion cannot kill an adult elephant, but it can kill a calf. See C. Moss, *Elephant Memories: Thirteen Years in the Life of an Elephant Family* (1988) 48.

[4] -- 'Saving the Elephant: Nature's Great Masterpiece' *Economist*, (London 1 July 1989) 15.

[5] Kenya Elephant Forum, CITES and the Ivory Trade Fact Sheet 03-2013.

[6] 'New figures reveal poaching for the illegal ivory trade could wipe out a fifth of Africa's elephants over the next decade' Available at <http://www.cites.org/eng/news/pr/2013/20131202_elephant-figures.php>. See also Michael Glennon, 'Has International Law Failed the Elephant?'(January 1990) 84 A.J.I.L 1, 6.

[7]Elephants financially worth 76 times more alive than dead! - 10/10/2014<http://issuu.com/davidsheldrickwildlifetrust/docs/dead_or_alive_final_lr/14?e=4311634/9668414> Accessed 13 October 2014.

[8] A campaign by The David Sheldrick's Wildlife Trust.

[9] Information available at <http://iworry.org/crisis/> Accessed 13 October 2014.

tusks.[10]They do not tell of how details of these horrors are left etched in the memories of the survivors.[11]

2. Why Save the Elephant?

A number of reasons have been put forth one being that elephants are a super-keystone species.[12]Their presence enables other species to survive. Their role in dispersing seeds, converting woodlands to grasslands and digging or enlarging waterholes helps in modifying the environment.[13]Arguably, these services are indispensable to the ecosystem and elephants offer them freely as a natural consequence of their existence.[14]

Secondly, the elephant brings in revenue through tourism. Tourism is a key element in many African economies. The elephant's problem is not that it lacks value. If it did, then arguments for saving it would be harder to maintain. Its trouble is that it is too valuable, and that it is available to anybody who wants to kill it.[15]The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)[16]supports this economic brick in its preamble by being "conscious of the ever-growing value of wild fauna and flora from aesthetic,

[10] An elephant's tusks are modified incisor teeth.

[11] Elizabeth A Archie and Patrick I Chiyo, 'Elephant Behaviour and Conservation: Social Relationships, the Effects of Poaching, and Genetic Tools for Management' 765. Elephants suffer from Post-Traumatic Stress Disorder (PTSD). This can be brought about by threat of death or witnessing the death of a loved one. Elephants also mourn their loved ones. This can be observed from their treatment of a carcass or bones of a departed loved one. See also Dawn Adrian Adams, 'What the Elephant Never Forgot' [2005] *Spirituality & Health* 42 <http://www.elephants.com/joanna/What_the_elephant_never_forgot.pdf> accessed November 07, 2014.

[12] EdCouzens**,** 'Is Conservation a Viable Land Usage? Issues Surrounding the Sale of Ivory by Southern African Countries' in Nathalie J. Chalifour, Patricia Kameri-Mbote, Lin Heng Lye and John R. Nolan (eds), *Land Use Law for Sustainable Development,* (Cambridge University Press, 2007).

[13] Jeheskel Shoshani, 'Elephants: The Super Keystone Species' (1993) 2 Swara16 25, 29.

[14] ibid. For example, a forest elephant's activities are crucial to the survival of smaller species of birds and animals which depend on the elephant's 'destructive' nature to clear densely forested areas. On the other hand, the savannah elephant leaves footprints which serve as water troughs for smaller species of birds and animals.

[15] F. Cairncross, 'Costing the Earth – The Challenge for Governments, the Opportunities for Business' (1992-93) 131-141.

[16] Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249, 993 U.N.T.S. 243 [hereinafter CITES].

scientific, cultural, recreational and economic points of view." Moreover, a recent ground breaking report by The David Sheldrick's Wildlife Trust's[17] iWorry campaign has revealed that elephants are 76 times more valuable alive than when poached for their tusks.[18] The report shows that the average value of raw ivory carried by an elephant is $21,000.[19] Yet the value of a single elephant over its lifetime to tourism is $1,607,624.83[20] – a staggering 76 times more. The state should therefore protect the elephant in the public interest.

Thirdly, it has been argued that if maximization of ivory production was really the goal, then such goal would fare better if the elephants were left alone.[21] This is because elephant tusks grow larger and denser with age and could be extracted after the animal's natural death. As it is today, increasingly younger elephants are killed for their tusks leaving a generation of even younger elephants with even small tusks.[22]

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[17] The David Sheldrick Wildlife Trust was founded in 1977 by Dr. Dame Daphne Sheldrick D.B.E, in honour of the memory of her late husband, famous naturalist and founding Warden of Tsavo East National Park, David Leslie William Sheldrick MBE. Amongst the Trust's activities are: conducting anti-poaching measures, enhancing community awareness, addressing animal welfare issues, providing veterinary services to animals in need and rescuing and hand rearing elephant and rhino orphans. See <http://www.sheldrickwildlifetrust.org/about_us.asp> accessed 7 November 2014.

[18] --'Elephants financially worth 76 times more alive than dead!'(10 October 2014)<http://issuu.com/davidsheldrickwildlifetrust/docs/dead_or_alive_final_lr/14?e=4311634/9668414> Accessed 13 October 2014.
See also F. Cairncross, 'Costing the Earth – The Challenge for Governments, the Opportunities for Business' (1992-93) 131-141 for comparative figures on conservation and poaching at that time.

[19] This figure is based on TRAFFIC's estimates that an average tusker elephant carries 5kg of ivory in each of its tusks. See -- 'Elephants financially worth 76 times more alive than dead!'(10 October 2014)<http://issuu.com/davidsheldrickwildlifetrust/docs/dead_or_alive_final_lr/14?e=4311634/9668414> Accessed 13 October 2014

[20] ibid. This is an estimated figure based on revenues from travel companies, airlines and tourists who are willing to pay to see and photograph the elephant.

[21] Michael J. Glennon, 'Has International Law Failed the Elephant?' (January 1990) 84 A.J.I.L. 1, 8-9.

[22] ibid.

Fourthly, arguments have been led that the elephant is intrinsically valuable because it is beautiful.[23] The United Nations General Assembly echoed this in 1982 by declaring that "*every form of life is unique, warranting respect regardless of its worth to man.*"[24] CITES too, recognizes the beauty of species by heralding in its preamble that "*wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth which must be protected for this and the generations to come.*"

Fifthly, there is the claim that the elephant is instrumentally valuable because it helps human beings uphold humanitarian and compassionate virtues. The elephant is one of the key species for conservation efforts worldwide. It provides a wonderful front to keep humans humane, not least because elephants exude many characteristics that are similar to humanity's own.[25]These species also have a right to existence. Human desires should not be the only basis for ethical decisions. Though emotive, it is, arguably, the most important argument towards saving the elephant.[26]

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[23] Willard, 'On Preserving Nature's Aesthetic Features' (1980) 2 Envtl. Ethics 293, 296.However, beauty, even that of nature, lies in the eye of the beholder. It is objective. Its beholders hail from different parts of the world and different cultures. For example, traditional Africans viewed the elephant as a source of meat while others, such as Europeans and Americans saw it as beautiful creature.

[24] World Charter for Nature, GA Res. 37/7 (Oct. 28, 1982).

[25] For example, elephants, like humans, live in close knit families, are intelligent creatures and have the ability to show emotion and even mourn. See Archie EA and Chiyo PI, "Elephant Behaviour and Conservation: Social Relationships, the Effects of Poaching, and Genetic Tools for Management" 765.

[26] See P. Ehrlich & A. Ehrlich, *Extinction – The Causes and Consequences of the Disappearance of Species* (Random House, New York City 1981) for an in depth discussion. To them, the fight for elephants is, at its root, driven by empathy. It is not mere compassion. Humanity would not be as compassionate if, say the mosquito was threatened by extinction. See also Christopher D. Stone, 'Should Trees Have Standing? -Toward Legal Rights for Natural Objects', 45 *S. CAL. L. REV.* 450 (1972) where Stone proposes a framework for translating the ethical rights of nature into legal ones. He argues that natural places should have the legal right to be protected from improper use and that the law could, and should, recognize natural objects as having worth and dignity in their own right. A natural entity should be the holder, rather than the object, of legal rights. Trees, oceans, animals, and the environment as a whole have an intrinsic value and should be bestowed with legal rights, so that the voiceless elements in nature are protected for future generations.

3. Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

The United Nations Convention on International Trade in Endangered Species of Wild Fauna and Flora was signed in Washington, D.C., on March 6, 1973, and entered into force on July 1, 1975.It was signed as one of a number of Conventions surrounding the 1972 United Nations Conference on the Human Environment (UNHCE) in Stockholm. It is a multilateral treaty that spells out conventional norms which protect endangered species by regulating trade.[27]It is the most comprehensive piece of law that enumerates a global conservation system. As of 2013, it had been ratified by 180states.

CITES works on a three-tiered system differentiated by the status of endangered species. It operates through a system of permits for imports and exports of species and products derived from species. The permits are issued based on each species' placement on one of three Appendices.[28]

Appendix I species are accorded the highest level of protection and include "*all species threatened with extinction which are or may be affected by trade.*"[29]Restrictive provisions governing the trade in these species apply to producer states,[30] middleman states[31] and consumer

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[27] This is in addition to the fact that customary international law requires states to protect endangered species. See Michael J. Glennon, 'Has International Law Failed the Elephant?' (January 1990) 84 *A.J.I.L.* 1, 4.

[28] Scott Hitch, 'Losing the Elephant Wars: CITES and the Ivory Ban' (1998-1999) 27 GA. J. Intl & Comp L. 167, 176.

[29] CITES Article II (1).

[30] States with populations of species listed in this Appendix.

[31] States that goods for trade are transported through.

states.[32] The desired result is to shut down international trade in the species listed in this Appendix.

Appendix II species are accorded middle level of protection. It includes "*all species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation.*"[33]Thus, trade in species found in Appendix II is permitted, but regulated. Restrictions governing export are similar to those in Appendix I but those governing imports are less fastidious.[34]

Appendix III species are the least protected. It includes "*all species which any Party identifies as being subject to regulation within its jurisdiction for the purposes of preventing or restricting exploitation*."[35]Thus, species in this Appendix are designated by the exporting state or party concerned and restrictions are derived primarily from the laws of that state.

CITES provides that its members meet biennially.[36] One key function of the meetings is to review the species listed in each Appendix and to determine whether to add, remove or

[32] States that buy the goods. For example, China and Thailand are consumer states for ivory.

[33] Ibid Article II (2)(a).

[34] It does not ban imports. Trade in Appendix I species requires both export and import permits. An export permit is only granted where four stringent conditions are satisfied. These are: the Scientific Authority of the State of export's advisement that the export will not be detrimental to the survival of the species; the Management Authority of the State of export's satisfaction that the specimen was not illegally obtained; assurances that injury, cruelty, and damage to health to a living specimen will be minimized during shipment and preparation; and proof of an import permit. See CITES Article III (2).
To be granted an import permit a party must meet the following requirements: prior grant of import permit and an export permit or re-export certificate and a Scientific Authority of the State of import's advisement that the import will be for purposes not detrimental to the survival of the species involved. Additionally, for living specimens: satisfaction of the Scientific Authority that the specimen will be suitably housed and cared for and satisfaction that the specimen will not be used primarily for a commercial purpose. See CITES Article III (3).
On the other hand, trade in Appendix II species only requires export permits to be issued. See CITES Article IV (2).

[35] Ibid Article II (3).

[36] Ibid Article XI (2).

transfer species from one appendix to another.[37] Amendments to Appendices I and II require the approval of a two-thirds majority of those parties present and voting.[38] The amendments then enter into force 90 days after the meeting.[39]

Several other CITES provisions are worth noting. First, CITES prohibits trade in specimens between a state party and a non-party state where the latter does not produce documentation that is similar to that required of a party state.[40] Second, CITES requires each party to "take appropriate measures to enforce" the Convention,[41] by imposing penalties[42] and confiscating illegal specimens.[43] Third, a Secretariat, headed by a secretary-general, is established to oversee the operation of the Convention.[44] Other provisions recommend that each party designates ports of entry and exit,[45]and keep detailed records of trade in specimens of listed species.[46]

Parties should bear in mind that the Convention does not preclude their right to adopt stricter domestic measures.[47]These may include measures regarding the conditions for trade, taking, possession or transport of specimens of species listed in Appendices I, II and III, or the

[37] ibid Article XI (3)(b).
[38] ibid Article XV(1)(b).
[39] Article XV(1)(c).
[40] Article X.
[41] Article VIII(1).
[42] Article VIII(1)(a).
[43] Article VIII(1)(b).
[44] Article XII Specific functions of the Secretariat include: to arrange for and service meetings of the Parties; to undertake scientific and technical studies in accordance with programmes authorized by the Conference of the Parties as will contribute to the implementation of the Convention, including studies concerning standards for appropriate preparation and shipment of living specimens and the means of identifying specimens; to study the reports of Parties and to request from Parties such further information that it deems necessary to ensure implementation of the Convention; to make recommendations for the implementation of the aims and provisions of the Convention, including the exchange of information of a scientific or technical nature.
[45] Article VIII(3).
[46] Article VIII(6).
[47] Article XIV.

complete prohibition of their trade.[48] It also includes measures that restrict or prohibit the trading, taking, possession or transport of species that are not listed in Appendix I, II or III.[49]

4. CITES and the African Elephant

Before 1989, the African elephant was listed under the Appendix II species. By the end of the decade, however, poaching levels had peaked.[50] For example, the elephant and rhino populations declined by 85% and 97% respectively between 1976 and 1990.[51]The situation prompted governments around the world to call for an international ban on the ivory trade. In order to avoid mass killings before the international ban took effect, many countries, including France, The United States and West Germany banned all ivory imports.[52]In 1989, Kenya's President Daniel arap Moi set 12 tonnes of elephant tusks, worth $3 million, ablaze in Nairobi National Park in a gesture to persuade the world to halt the ivory trade. The 20-foot pile of tusks represented more than 2,000 elephants which had been shot during the past four years.[53] This hugely symbolic act further inspired the global ban on ivory trade in 1990 which elevated the African elephant to an Appendix I species.

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[48] Article XIV (1) (a)

[49] Article XIV (1) (b)

[50] In October 1989, at the Seventh meeting of the CITES Convention of the Parties (CoP7), governments banned international trade in ivory with effect from January 1990.

[51] For detailed statistics spanning that decade see F. Cairncross, 'Costing the Earth – The Challenge for Governments, the Opportunities for Business' (1992-93) 131-141.

[52] Michael J. Glennon, 'Has International Law Failed the Elephant?' (January 1990) 84 A.J.I.L. 1, 13-17.

[53] Jane Perlez, 'KENYA, IN GESTURE, BURNS IVORY TUSKS' *The New York Times* (19 July 1989) <http://www.nytimes.com/1989/07/19/world/kenya-in-gesture-burns-ivory-tusks.html> accessed 13 October 2014.

Echoing his predecessor, in 2011, President Mwai Kibaki set fire to 5 tonnes of contraband ivory in Tsavo West National Park. The 335 tusks were worth KSh. 1.5 billion ($16 million). See Hereward Holland, 'Kenya Burns Tusks To Counter Growing Ivory Smuggling'(20 July 2011) <http://www.reuters.com/article/2011/07/20/us-kenya-poaching-idUSTRE76J5CV20110720> accessed 13 October 2014.

5. Making CITES work

Two approaches have been put forward. These are the 'pure preservationist' approach and the 'sustainable use' approach.[54] They are both embedded in the Convention's preamble and provisions.[55]

The pure preservationists advocate a total ban. It is also known as the 'embargo' model and is represented in the Appendix I ban on the commercial trade. The model originates from the practical impossibilities of differentiating between illegal and legal ivory. It is justified on the basis that the more legal ivory is traded, the easier it will be to place illegal ivory in the marketplace. Theoretically, a ban reduces supply of goods in the market as suppliers are deterred by additional risks and costs of trading in illegal goods. Practically, however, a ban creates a black market. As costs for supplying the goods go up, so will the price of the goods and as long as there is a market for it, the black market will find a way to meet demand.[56]

The 'sustainable use' approach is also known as the "management' model and is represented in the Appendix II regulation of trade. It argues that there are economic gains to be enjoyed from wildlife and as such, there is need to protect it.[57]It permits sales of ivory from confiscated poached ivory, culling operations and elephants that die of natural causes. Proceeds from such sales ideally fund stricter enforcement and conservation efforts. The model is justified on the basis that a ban drives trade underground and propels the price of ivory upwards. Ivory

[54] The sources for this are numerous. See Emily Hutchens, 'The Law Never Forgets: An Analysis of the Elephant Poaching Crisis, Failed Polices, and Potential Solutions' (Winter 2014) 31 *Wis. Int'l L.J.* 934-[iv]. See also Jay E. Carey, 'Improving The Efficacy Of *CITES* By Providing The Proper Incentives To Protect Endangered Species' (1999) 77 Wash. U.L.Q. 1291. See also Bill Padget, 'The African Elephant, Africa and CITES: The Next Step' (spring 1995) 2 *Ind. J. of Global Legal Stud.* 529-552.

[55] See CITES, *supra* note 17, 27 U.S.T. 1087 at 1090.

[56] Jay E. Carey, 'Improving The Efficacy Of *Cites* By Providing The Proper Incentives To Protect Endangered Species' (1999)77 *Wash. U.L.Q*. 1291.

[57] Ibid 1308-1311.

should thus be legally sold so as to relieve supply pressures created by the black market. This approach was advanced by Erasmus Tarimo,[58] who stated, '*You put a ban on anything but you don't protect it, the poachers will go on. For us, this sale will give us the means to stop the poaching.*'[59]

In addition, an excess of revenue from legally traded ivory would go to the people. Citizens in underdeveloped countries should not starve while their governments accumulate ivory in national stockpiles. For instance, Tanzania's 110 metric tonnes of stockpiled ivory has been accumulated over the last 23 years and is the largest known cache of raw ivory in the world. It is valued at over $50 million yet Tanzania is one of the poorest countries in the world. However, as a result of the CITES ban on ivory trade, Tanzania cannot legally sell her ivory. Proceeds from such a sale could finance efforts to alleviate poverty.[60]

Despite this argument, it is my opinion that the sustainable use approach would only spur on the killings. If the African elephant is to survive, the poaching threat must be eliminated completely. The sustainable use approach, despite its merits, does not work towards eliminating this threat. This is because it legalizes trade. This trade may be strictly controlled and monitored by CITES but the fact remains that there will be a trade nonetheless. Therefore, there will be a market and the rules of demand and supply will apply. Sale of legal ivory cannot possibly satiate the market, and as a result, demand will be met by illegal ivory. The elephant's chances of survival are infinitely better when the pure preservationist's approach is applied. Though it does

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[58] The Director of Wildlife at Tanzania's Ministry of Natural Resources and Tourism.

[59] Anjali Nayar, 'Scientists Against Proposed Ivory Auction' *nature* (11 March 2010) <www.nature.com/news/2010/100311/full/news.2010.46.html> accessed 13 October 2014.

[60] -- 'Tanzania's Ivory Stockpile: What Should Be Done with Stockpiles of Captured Elephant Ivory?'<http://education.nationalgeographic.com/education/media/tanzanias-ivory-stockpile/?ar_a=1> accessed 13 October 2014.

not eliminate demand, it reduces supply. If properly implemented the embargo model could save the elephant.

Thus, the decision to list a species in either Appendix I or II results in a clash of the two approaches. There have been debates over the listing of the African elephant between Northern and Eastern African countries, whose elephant populations have been devastated by poaching, and Southern African countries whose elephant populations have been thriving. Southern African countries advocated for an Appendix II listing of the elephant because they traded in ivory and hides and used the proceeds to help locals and aid in conservation efforts. The 'listing issue' has been raised in almost every Conference of the Parties since the ban in 1989.[61]

6. Shortcomings of CITES on poaching

According to one commentator:

> Successful as the Convention may be in providing for strict controls on trade in endangered species and their derivative products, it is at least arguable that the stated aim of CITES in terms of the protection of endangered species against overexploitation through international trade controls implicitly acts to legitimize such trade in fact.[62]

[61] Kenya Elephant Forum, CITES and the Ivory Trade Fact Sheet 03-2013.

[62] David M, 'The Convention on International Trade in Endangered Species (CITES, 1973): Implications of Recent Developments in International and EC Environmental Law' (1998) 10 *Journal of Environmental Law*291 at 294.

This means that CITES is not designed to protect and conserve species – with the exception of species listed in Appendix I.[63]CITES is designed to control trade.[64]

A Secretariat charged with ensuring CITES operates smoothly oversees the application of the general CITES system. Members are required to submit reports to the Secretariat detailing trade records as well as legislative, regulatory and administrative measures.[65] Unfortunately, some parties may fail to report, or present partial trade records.[66]

The day to day operation of CITES is a matter for the national authorities and parties.[67]Its success, from this angle, depends entirely on the formulation and implementation of national legislation in member states that echo its provisions. Member states are under an obligation to do so.[68] However, implementation of such national legislation is not an easy task. It requires adequate funding and training of personnel. This is a feat that may be too burdensome even for the developed countries.[69] Another problem that emanates from the aforementioned is the differences that arise in different member countries' legislations to give effect to the Convention. Where the provisions and punishments provided in such legislation differ greatly, procedural

[63] Ed Couzens**,** 'Is Conservation a Viable Land Usage? Issues Surrounding the Sale of Ivory by Southern African Countries' in Nathalie J. Chalifour, Patricia Kameri-Mbote, Lin Heng Lye and John R. Nolan (eds), *Land Use Law for Sustainable Development,* (Cambridge University Press, 2007).

[64] David M, 'The Convention on International Trade in Endangered Species (CITES, 1973): Implications of Recent Developments in International and EC Environmental Law' (1998) 10 *Journal of Environmental Law*291 at 294-295.

[65] Article VIII (7)

[66] Bill Padget, 'The African Elephant, Africa and CITES: The Next Step' (Spring 1995) 2 Ind. J. of Global Legal Stud. 529, 532-533.

[67] Ed Couzens**,** 'Is Conservation a Viable Land Usage? Issues Surrounding the Sale of Ivory by Southern African Countries' in Nathalie J. Chalifour, Patricia Kameri-Mbote, Lin Heng Lye and John R. Nolan (eds), *Land Use Law for Sustainable Development,* (Cambridge University Press, 2007

[68] CITES Article VIII

[69] Jay E. Carey, 'Improving The Efficacy Of *CITES* By Providing The Proper Incentives To Protect Endangered Species' (1999) 77 *Wash. U.L.Q.* 1291.

loopholes arise which in turn lead to noncompliance with CITES.[70] There is therefore a need to harmonize member countries' legislation.

CITES also suffers from the 'demand' problem. It does not sufficiently diminish incentives, such as revenue or ivory products, for producer states, middlemen or consumers. The supply of ivory thrives on its demand.[71] For CITES to work, demand for ivory must cease. This may be for moral reasons or consumers may refuse to incur additional costs in order to obtain it. The problem with demand for wildlife related goods is that people "wish to own rare and exotic goods regardless of their illegality."[72]

CITES does not make any provision for financial support of signatory countries that face costs for its implementation.[73]Though the price of raw ivory has now been estimated at $21,000 the poachers do not make this much money themselves. Wages earned from a night of poaching are often more than income on an entire month's worth of honest work. Poverty levels in producer states have thus compelled locals to risk supplying illegal ivory into the market.

In addition, the controversial down listing of the elephant for particular countries from the Appendix I species created frenzy in the market. A decade into the worldwide ban, poaching levels decreased dramatically and elephant populations began to grow.[74]However, in 1997, the Convention voted to allow down listing of the elephant to Appendix II for Botswana, Zimbabwe and Namibia to enable a one-time sale of legal ivory stocks. These countries argued that their elephant populations were stable. Moreover, they needed the money from the sale to fund

[70] ibid

[71] ibid at 1308.

[72] ibid

[73] Ed Couzens, 'Is Conservation a Viable Land Usage? Issues Surrounding the Sale of Ivory by Southern African Countries' in Nathalie J. Chalifour, Patricia Kameri-Mbote, Lin Heng Lye and John R. Nolan (eds), *Land Use Law for Sustainable Development,* (Cambridge University Press, 2007).

[74] 'Recent Events Affecting the International Ivory Trade' (2001) 12 *Colo. J. Int'l Envtl. L. & Poly* 71, 74-76.

conservation efforts. Again, in 2000, South Africa was allowed to down list her elephant population to Appendix II. These sales reignited the thirst for ivory and led to supply of both legal and illegal ivory.[75]In particular, the Northern and Eastern African countries such as Kenya argued that the temporary lifting of the ban on ivory trade jeopardized the survival of the African elephant.[76]It fuelled the market and encouraged poaching in African states. Conservation groups joined this position and assailed the lifting of the ban as the "biggest conservation blunder of the 1900s."[77] This is because it reintroduced the ivory trade, previously viewed as illegal, in a legal capacity. It opened up floodgates where both illegal and legal ivory was supplied to meet the new demand. Once this demand was recreated, it could not be satiated and the elephant has continued to pay the price.

Furthermore, once a precedent had been set, other countries such as Tanzania and Zambia requested to down list their own species in 2010 so as to enable legal sale of their stockpiles. These requests were denied at the Conference of the Parties.[78] Subsequently, Tanzania put forth another request in 2013 but withdrew it before its consideration.[79] Moreover, these periodic sales

[75]Bryan Walsh, 'African Nations Move to 'Downlist' the Elephant'(11 March 2010) <http://content.time.com/time/health/article/0,8599,1971610,00.html> accessed 13 October 2014.
These arguments have been denied by CITES which claims that there is no clear link between the two one-off sales and the increasing levels of illegal trade.
See also --'Upsurge in Elephant Poaching Overshadows Tenth Anniversary of International Ivory Ban' <http://www.eia-international.org/Campaigns/Elephants/Updates/t0000035.html> (quoting Allan Thornton, Chairman of the Environmental Investigation Agency).

[76] See Emily Hutchens, 'The Law Never Forgets: An Analysis of the Elephant Poaching Crisis, Failed Polices, and Potential Solutions' (Winter 2014) 31 Wis. Int'l L.J. 934-[iv] for a detailed analysis.

[77]--'Upsurge in Elephant Poaching Overshadows Tenth Anniversary of International Ivory Ban' <http://www.eia-international.org/Campaigns/Elephants/Updates/t0000035.html> (quoting Allan Thornton, Chairman of the Environmental Investigation Agency)

[78] The Fifteenth meeting of the Conference of the Parties (CITES CoP15) which took place in Doha, Qatar from 13-25 March 2010.

[79] The Sixteenth meeting of the Conference of the Parties (CITES CoP16) which took place in Bangkok, Thailand from 3- 15 March 2013.

only had few advantages – they generated little revenue for sustainable use ends and did nothing to satisfy on going demand.[80]

7. Steps taken in Bangkok 2013

The Sixteenth Conference of the Parties was held in Bangkok, Thailand in 2013. It marked the 40th anniversary of CITES. The Conference of Parties took a strong stand against poaching and smuggling of wildlife products. Particular emphasis was placed on enforcement after recognizing that wildlife crime had now achieved 'serious crime' status.[81] Wildlife crime now poses serious threat to the security, political stability, economy, natural resources and cultural heritage of many countries.[82]

Concrete and time-bound decisions and resolutions were adopted including parties undertaking to: coordinate aggressive enforcement actions at global, regional and national levels such as that used to combat illicit narcotic trade, make better use of forensics and share forensic evidence in cases of seized ivory, move beyond seizures by ensuring that they are followed by investigations and prosecutions especially targeted at the masterminds behind the organized

[80] Doug Bandow, 'When You Ban the Sale of Ivory, You Ban Elephants.' (21 January 2013)<http://www.forbes.com/sites/dougbandow/2013/01/21/when-you-ban-the-sale-of-ivory-you-ban-elephants/> accessed 13 October 2014.

[81] Concern over the status of the illicit trade in wildlife was raised in a number of international and national events leading up to the Conference. For example, the 2011 recommendation of the United Nations Commission on Crime Prevention and Criminal Justice on the need for preventive and judicial responses to illicit trafficking in endangered species of wild fauna and flora (since adopted by the UN Economic and Social Council (ECOSOC) and the declaration of the Asia-Pacific Economic Cooperation (APEC) leaders adopted in 2012, as well as the 2012 US Senate Foreign Relations Committee Hearing on 'Ivory and Insecurity: The Global Implications of Poaching in Africa'

[82] It was recognized that organized criminal syndicates were the masterminds behind wildlife crimes. See John E. Scanlon, 'CITES CoP16, Bangkok 2013: A 'Watershed Moment' for Combating Wildlife Crime' (15 April 2013) <http://biodiversity-l.iisd.org/guest-articles/cites-cop16-bangkok-2013-a-'watershed-moment'-for-combating-wildlife-crime/> accessed 21 October 2014.

criminal syndicates, and support, upon request, countries in the immediate aftermath of serious incidents.[83]

8. The Kenyan Context

The Wildlife Conservation and Management Act, 2013[84] is the primary piece of legislation that governs wildlife in Kenya.[85] It received Presidential Assent on 24th December 2013 and became operational on 10th January 2014. The Act is a culmination of a number of bills that had been tabled before Parliament over the years in an attempt to replace the Wildlife Conservation and Management Act of 1977.[86]

As a whole, the Act provides for both the 'total ban' model and 'sustainable use' approach with regard to wildlife.[87] Its stand regarding the elephant, in particular, is that of the 'total ban.'[88] In furtherance of this, the Act creates various offences. Penalties for these offences, especially those involving endangered wildlife, are particularly severe. For instance, offences

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[83] ibid.

[84] Hereinafter referred to as 'the Act'

[85] The Act recognizes wildlife conservation and management as a form of land-use that has equal recognition with other types of land-use (section 4(d) read with Section 70)
With regard to poaching, the Act has the following among its general principles: to recognize and encourage management and conservation of wildlife as a form of land use; to utilize public participation in the management and conservation of wildlife;[85] and to carry out wildlife conservation and management according to the principles of sustainable utilization to meet the benefits of present and future generations. See section 2 and section 4

[86] President Kibaki would not sign the 2004 Bill because it provided for culling and sport hunting. See "Kenya 'Won't Abolish Hunting Ban'" *news24* (Nairobi, August 2005) <http://www.news24.com/Africa/News/Kenya-wont-abolish-hunting-ban-20050820> accessed February 26, 2015.

[87] It is interesting to note that the Act does not classify the elephant as a 'critically endangered' species but as an 'endangered' species. The distinction between the two terms is, arguably, the difference between Appendix I and Appendix II in the CITES categorization. The elephant is, however, categorized as 'critically endangered' among wildlife categories in relation to offences and penalties involving sport and recreational hunting. (Section 47 read with the Sixth Schedule and the Ninth Schedule).

[88] Tourism is only way that the elephant can, legally, generate revenue. Regardless, the Act provides for 'sustainable use' approach through licensing of consumptive use of specific wildlife species. This is provided in the Eighth Schedule and includes: live sale of game-farmed animals; cropping of wildlife in game-farming and game-ranching, and; processing and sale of wildlife trophies from cropping activities. Wildlife for which game farming is allowed is mostly reptiles (crocodiles, snakes, chameleons, tortoises) and birds (ostrich, quails, ducks, guinea-fowls).

relating to endangered and threatened species or their trophies, such as sport hunting, attract a twenty million shillings fine or life imprisonment on conviction.[89] The import, export and local trade in wildlife species without a permit from the Kenya Wildlife Service is also prohibited.[90]

Enforcement of the Act's provisions, particularly with regard to poaching, is carried out by authorized officers.[91] These officers may stop and search any person,[92] vehicle, vessel[93] or house that is suspected of committing or aiding in the committing of wildlife crime. The Officers may also confiscate any equipment placed for purposes of capturing, harming or killing wildlife[94] and may conduct any investigations that are necessary to arrest and convict suspected offenders.[95]

The Act establishes the Kenya Wildlife Service (KWS).[96] One of its key functions is to provide security for wildlife. To address wildlife crime, KWS has developed specific security interventions. These strategies include: identification, surveillance and profiling of trophy

[89] Section 92and Section 96(2) read with the Sixth Schedule and the Ninth Schedule.

[90] Section 99. If convicted, this offence attracts a fine of not less than ten million shillings or to imprisonment for not less than five years where it involves an endangered species.

[91] In carrying out their functions, it was recently announced that a total of 50 firearms and 616 rounds of ammunition and five tonnes of ivory had been recovered in 2014. During the same year, a total of 1,430 suspects were arrested and prosecuted for various wildlife law offences. 51 of 306 cases have been successfully prosecuted and secured convictions within the provisions of the 2013 Act. The highest penalty in 2014 was nine years imprisonment with an option of a fine of twenty million shillings. See "KWS | Press Statement 5th Feb 2015" <http://www.kws.org/info/news/2015/09feb2015pressconferencewildlifeconservationatKWSHQS.html> accessed February 26, 2015.

[92] Section 110(b) The officers may arrest and detain such persons and may seize and detain any baggage, parcel or house being used to carry or hide such wildlife specimen by the person or his agent. Under section 110(c), the officers may search any person suspected of having committed an offence under the Act or of being in possession of any wildlife specimen in respect of which an offence has been committed.

[93] Section 110(d) The Officers may seize any wildlife specimens and tools found in the vehicles of which they have reason to believe that an offence has been committed. Under section 111(1), authorized officers may set up temporary barriers across any road or place and stop any persons approaching the barrier to search them and their vehicles.

[94] Section 110(e).

[95] Section 110(f) This is, presumably, to prevent poachers from using aircrafts and helicopters in their activities.

[96] Section 6 It is a body corporate which serves as the primary body charged with wildlife conservation and management in Kenya.

dealers; arresting and prosecuting offenders; conducting active security operations to hunt down poachers, establishing and strengthening specialized security units which are deployed throughout the country; deploying a Canine Unit at Jomo Kenyatta and Moi International Airports to enhance detection of contraband ivory; training and building the capacity of law enforcement personnel, forming and deploying an Inter-Agency Elite Anti -Poaching Unit in poaching hotspots; and reaching out to local communities to be partners in wildlife law enforcement.[97]

Finally, the Constitution of Kenya 2010 provides for the sustainable use, management and conservation of natural resources.[98] It also encourages public participation in the management, protection and conservation of the environment.[99] Involving communities and individuals is of vital importance in conservation efforts for the elephant. The WCMA 2013 therefore emphasizes public participation throughout its provisions and in its Fourth Schedule.[100] Public participation has been evident in various instances. For example, on 12th February 2015, KWS announced a call for public participation to formulate regulations and guidelines to the WCMA 2013.[101] A National Elephant Conference was also held at the KWS headquarters on the 18th and 19th of February, 2015 that brought together elephant conservation partners from across the country to

[97] ibid.

[98] Constitution of Kenya Article 69.

[99] ibid Article 69(d).

[100] Public participation is an important factor in formulating policies and in decision making. For example, public participation is necessary in formulating a national wildlife conservation and management strategy under section 5 of the Act.

[101] "THE WILDLIFE CONSERVATION AND MANAGEMENT ACT, 2013: CALL FOR PUBLIC PARTICIPATION TO DEVELOP REGULATIONS AND GUIDELINES" <http://www.kws.org/export/sites/kws/info/news/2015/Download/Wildlife_Conservation_and_Management_Act_Public_Participation_for_Regulation_x_Guidelines.pdf> accessed February 26, 2015.

discuss contemporary elephant conservation needs.[102] The Constitution also provides that general rules of international law[103] as well as Conventions ratified by Kenya shall form part of the national law.[104]

9. Conclusion

Today, poaching is at levels that rival those of the 1980swhen an elephant was poached every 10 minutes.[105]The illegal wildlife trade is "*now the fourth most lucrative transnational crime after drugs, arms and human trafficking. It is estimated to be worth between 10 and 20 billion dollars each year*."[106] The African elephant is on the verge of extinction. Sustainable use, as opposed to a total ban, has been advanced as the only possible solution.[107] Parties must endeavour to establish sustainable use programs across many nations so that a legal trade in

[102] The main objectives of the Conference were to monitor and evaluate progress in implementation of the Conservation and Management Strategy for the Elephant in Kenya (2012-2021) and promote sharing of information among the relevant stakeholders.

[103] Constitution of Kenya Article 2(5) As discussed, customary international law requires states to protect endangered species. See Michael J. Glennon, 'Has International Law Failed the Elephant?' (January 1990) 84 *A.J.I.L*. 1, 4.

[104] Article 2(6) The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is particularly relevant to this paper.

[105]''BLOOD IVORY' – THE MISFORTUNE OF AFRICAN ELEPHANTS « Inside Watch Africa Inside Watch Africa'<http://insidewatchafrica.com/blood-ivory-the-misfortune-of-african-elephants/> accessed November 07, 2014.Today, statistics show that an elephant is killed every 15 minutes.Carl Safina, "Blood Ivory" *New York Times* (February 11, 2013) <http://www.nytimes.com/2013/02/12/opinion/global/blood-ivory.html?_r=0> accessed November 07, 2014.

[106]A speech by HRH The Duke of Cambridge at a reception to mark the London Conference on the Illegal Wildlife Trade(12 February 2014)<http://www.princeofwales.gov.uk/media/speeches/speech-hrh-the-duke-of-cambridge-reception-mark-the-london-conference-the-illegal> accessed 16October 2014.
See also Global Financial Integrity *Transnational Crime in the Developing World* retrieved from <http://www.gfintegrity.org/storage/gfip/documents/reports/transcrime/gfi_transnational_crime_web.pdf> accessed 16 October 2014.

[107]Bill Padget, 'The African Elephant, Africa and CITES: The Next Step' (spring 1995) 2 Ind. J. of Global Legal Stud. 529-552<http://heinonline.org> accessed 15 October 2014.
See also Emily Hutchens, 'The Law Never Forgets: An Analysis of the Elephant Poaching Crisis, Failed Polices, and Potential Solutions' (Winter 2014) 31 Wis. Int'l L.J. 934-[iv]<http://heinonline.org> accessed 15 October 2014.

ivory can prosper.[108]Yet the ban could, potentially, suffice if the 'demand problem' was solved. People do not need ivory. Elephants are poached to satisfy human greed. The elephant will remain endangered if a market continues to exist. Thus, the sustainable approach, whatever its merits, cannot save this species. The enforcement of a total ban on trade is the only practical solution. When the buying stops, the killing can too.[109]Humans need to realize that the elephant, as well as other creatures, is the planet - fully as much as they are. Winston Churchill said that all the great things are simple, and many can be expressed in a single word: freedom, justice, honour, duty, mercy, hope. The elephant deserves these too.

[108] Jay E. Carey, 'Improving The Efficacy Of *CITES* By Providing The Proper Incentives To Protect Endangered Species' (1999) 77 *Wash. U.L.Q.* 1291, 1316.

[109] A campaign to end the demand for endangered species products by World Wildlife Fund (WWF), Africa Wildlife Foundation (AWF), Animal Planet, National Geographic among others.