Emerging Jurisprudence on Trade, Technology & the Framework for the Resolution of Disputes of Trade Agreements

A Discussion @ EMJA 2018

BY JUSTICE GEOFFREY KIRYABWIRE

INTRODUCTION

1.This is a very broad topic and difficult to navigate in one key note address

2.Congratulate Justice Faustin Ntezilyayo EACJ for his navigation of the issues

3.At the heart of emerging jurisprudence is change in Trade & Business Practices.

Emerging issues in Trade

- Trade is still driven by contracts & the SPV commonly known as the Company
- However contracts have evolved since the time of Carlill V Carbolic Smoke Ball Co [1893] 1 QB 256
- Increasing dominance of virtual trading

- Emerging issues in Trade
  - Trading engines
  - Amazon
  - Ali baba
  - BE Forward / CEKI etc

  Issues
  - Automated contracts
  - Contractual capacity
  - Authentication
  - Choice of law
  - Crypto currency as a new form of consideration

    Emerging issues in Trade
    - Things have changed a lot in the understanding of a company since Salmon V A Salmon & Co Ltd [1897] AC 22
      ISSUES
      - Companies Act Uganda 2012

-S 4 company of 1 or more shareholders

-S 20 lifting of veil for tax evasion or fraud

-Table F Corporate Governance
-Multiple registration sources i.e. Banks (Financial Institutions Statute)

Emerging issues in Trade

- Super structure over Domestic law created by Community Law

ISSUES

- Protocol Est The EAC Common Market 2008
- EAC Customs Union Protocol

Modern Holdings V Kenya Ports Authority Ref No 1 of 2008 (dismissed on a PO)
Samuel Mohochi V AG – Ug Ref 1 of 2011 (found inter alia to be a violation of Art 7 of Comm Mkt Protocol)

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Emerging issues in Technology

- Need for an enabling legislative Framework

ISSUES

- Electronic Transactions

-Electronic Transaction Act Ug 8/2011
-Electronic Transactions Regulations SI 42/2013

Reg 12 concluding contracts electronically
Reg 16 Protection of Rights
Reg 7 Determing integrity of a data message

- Computer Misuse Ug 7/2011
- Electronic Signatures Ug 2/11

Emerging issues in Dispute Resolution

- Virtual Court (Courts of Tomorrow)
  - Prof Richard Susskind

  From "court room" to "court service"
  - Development of "JudiTech"
- Artificial Intelligence (AI) Judging

  The Guardian Newspaper of 24/10/16 reported that UCL scientists & lawyers led by Dr Nikolaos Aletras had developed an algorithm which in an "AI" Judge program reached the same decisions in 79% of 584 real cases before The European Court of Human Rights relating to torture.

Emerging issues in Dispute Resolution

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On line Dispute Resolution (ODR)

-Entering areas of mediation and arbitration
-Small business dispute resolution for on line transactions airlines/hotel cancellations etc

- Emergence of legal chatbots


Emerging issues in Dispute Resolution
What can I help you with?
a traffic ticket
I'm sorry to hear that. Here's how I can help:
Dispute a parking ticket (Los Angeles)
Automatically fight a parking ticket.
Learn More
Dispute a parking ticket (San Francisco)
Dispute a parking ticket.
Learn More
Dispute a parking ticket (San Jose)
Automatically fight a parking ticket.
Learn More
Dispute a parking ticket (Oakland)
Automatically fight a parking ticket.
Learn More


OTHER EXAMPLES
What can I help you with?
I'm arguing with my landlord
I'm sorry to hear that. Here's how I can help:
Send a Warning
Notify Authorities
Dispute Eviction Notice

CONCLUSION

The landscape for trade and commerce is fast changing

- We have new players like China (Do we understand their contracts?)
- We are in the age of information technology
- which is infecting all areas of the law but we are not adapting as fast as judiciaries to these realities
- We need to support legislative reforms to catch up with modern trade
- We need to prepare for courts of the future today

EAST AFRICAN MAGISTRATES AND JUDGES ASSOCIATION ANNUAL GENERAL CONFERENCE

22nd - 27th October 2018

The role of SDGs in Strengthening Regional Integration

Milly Lwanga for ICJ-Kenya

Present the value and import of regional integration in the face of the SDGs from the perspective of the role of the judiciary

The Objective of this presentation

What will spur development?

- Political solidarity versus economic reality
- Constitutive Act establishing the African Union of 2000 describes regional integration as one of the foundations of African unity
- Individually African economies are too small and countries must integrate to realise meaningful economic impact
- Regionalisation is the most important response to globalization

The link

Humanity can ensure that development meets the need of the present without compromising the future of the generations to come
Humanity can ensure that development meets the need of the present without compromising the future of the generations to come

Should smooth regional integration concern the judiciary?

- The institutionalization of strong regional mechanisms and principles may help ease tensions, mitigate the fears of smaller members, and compensate for the possible costs of stronger integration

Continental & Regional level

- AU is implementing Agenda 2063.
- Regional Intergovernmental and Inter-parliamentary Bodies, such as the East Africa Community (EAC), Common Market

for Eastern and Southern Africa (COMESA), Intergovernmental Authority on Development (IGAD), and the Southern Africa Development Community (SADC) play a critical role in implementing this agenda

Specialized role

Of regional bodies in integrating the SDGs and Agenda 2063 due to their universal coverage, convening power, intergovernmental nature and strength, broad-based cross-sectoral mandate, and experience in mobilizing regional consensus on key intergovernmental agreements.

Unpacking the SDGs

The guiding framework

- Formulation of the SDGs including the goals, targets and indicators was in alignment with the vision, principles, guiding framework and criteria set out at global and regional level
- Africa; proposed that the Rio principles, SDG goals, targets and indicators embody all 3 dimensions of the SDGs and that there be effective monitoring and evaluation, flexibility and universality, availability of adequate means of implementation and the need to promote equitable and inclusive human centred development - be the guiding framework

Priorities for Eastern Africa

- High and sustained economic growth to translate into jobs and human development;
- education and skills development;
  increased agricultural productivity and value addition;
- sustainable energy development ;
- Improvement in access to affordable healthcare ;
- tackling environmental and climate related challenges and
- infrastructural development

Eastern African sustainable development priorities

- Achieve sustainable and inclusive growth and economic transformation

- Sustainable food security accessibility and use
- Sustainable land management and biodiversity protection
- Promotion of science and technology development
- Disaster risk management
- Governance peace and security

Focus on SDG 16
Which intends to:-
"Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels"

What the situation presents as

- Key social development issues
- Poverty, inequality and social exclusion
- Education
- Water, sanitation and access to basic services
- Demography and population growth
- Urbanization and sustainable human settlements
- Health
- Youth unemployment
- Gender and women's empowerment

Source: Report of the Secretary-General, The Sustainable Development Goals Report 2018

- Freedom-of-information laws and policies have been adopted by 116 countries, with at least 25 countries doing so over the last five years. However, implementation remains a challenge.
- Since 1998, more than half of countries (116 of 197) have established a national human rights institution that has been peer reviewed for compliance with internationally agreed standards (the Paris Principles). However, only 75 of these countries have institutions that are fully compliant.

What needs to be done

What the Judiciary niche is-

- The rule of law should be considered an enabler for the realisation of the other SDGs

- Judicial intervention is anticipated in areas where the States will apply policy and legislative interventions to address challenges
- As an enabler of sustainable development, rule of law is the hub and the other 15 goals are the spokes in the network

Highlight challenges and opportunities for the judiciary's role in the realization of the SDGs in the face of regional integration

Should smooth regional integration concern the judiciary?

- The institutionalization of strong regional mechanisms and principles may help ease tensions, mitigate the fears of smaller members, and compensate for the possible costs of stronger integration.

Unpacking the SDG 16

Focus on SDG 16
Which intends to:-
"Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels".

Targets for SDG 16 include:

- Significantly reduce all forms of violence and related death rates everywhere
- End abuse, exploitation, trafficking and all forms of violence against and torture of children
- Promote the rule of law at the national and international levels and ensure equal access to justice for all
- By 2030, significantly reduce illicit financial and arms flows, strengthen the recovery and return of stolen assets and combat all forms of organized crime.

Targets…….

- Substantially reduce corruption and bribery in all their forms
- Develop effective, accountable and transparent institutions at all levels
- Ensure responsive, inclusive, participatory and representative decision-making at all levels
- Broaden and strengthen the participation of developing countries in the institutions of global governance

Targets……

By 2030, provide legal identity for all, including birth registration

- Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements
- Strengthen relevant national institutions, including through international cooperation, for building capacity at all levels, in particular in developing countries, to prevent violence and combat terrorism and crime
- Promote and enforce non-discriminatory laws and policies for sustainable development

What the situation presents as

Some figures for thought

- Corruption is rife and among the institutions most affected are the judiciary and police.
- Corruption, bribery, theft and tax evasion cost some US $1.26 trillion for developing countries per year; this amount of money could be used to lift those who are living on less than $1.25 a day above $1.25 for at least six years
- Birth registration has occurred for 73 per cent of children under 5, but only 46% of Sub-Saharan Africa have had their births registered.

Some food for thought!

Approximately 28.5 million primary school age children who are out of school live in conflict-affected areas.

The rule of law and development have a significant interrelation and are mutually reinforcing, making it essential for sustainable development at the national and international level.

The proportion of prisoners held in detention without sentencing has remained almost constant in the last decade, at 31% of all prisoners.

Even with facts and figures the devil is in the details!

Source: Report of the Secretary-General, The Sustainable Development Goals Report 2018

- Many regions of the world continue to suffer untold horrors as a result of armed conflict or other forms of violence that occur within societies and at the domestic level. Advances in promoting the rule of law and access to justice are uneven. However, progress is being made in regulations to promote public access to information, albeit slowly, and in strengthening institutions upholding human rights at the national level.

- Nearly 8 in 10 children aged 1 to 14 years were subjected to some form of psychological aggression and/or physical punishment on a regular basis at home in 81 countries (primarily developing), according to available data from 2005 to 2017. In all but seven of these countries, more than half of children experienced violent forms of discipline.

  Source: Report of the Secretary-General, The Sustainable Development Goals Report 2018

  More than 570 different flows involving trafficking in persons were detected between 2012 and 2014, affecting all regions; many involved movement from lower-income to higher-income countries.
  In 2014, the majority of detected trafficking victims were women and girls (71 per cent), and about 28 per cent were children (20 per cent girls and 8 per cent boys).
  Over 90 per cent of victims detected were trafficked for sexual exploitation or forced labour.
  The proportion of prisoners held in detention without being sentenced for a crime remained almost constant in the last decade: from 32 per cent in 2003–2005 to 31 per cent in 2014–2016.

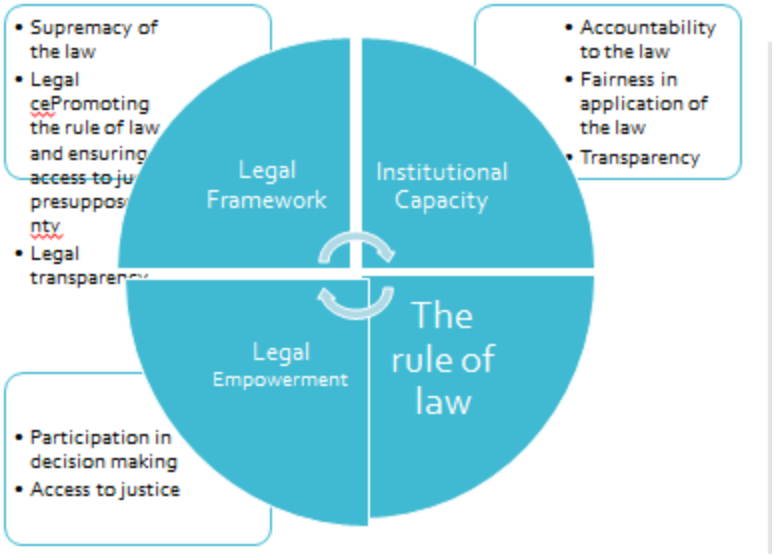
  Source: Report of the Secretary-General, The Sustainable Development Goals Report 2018

- Almost one in five firms worldwide report receiving at least one bribery payment request when engaged in regulatory or utility transactions.
- Globally, 73 per cent of children under 5 have had their births registered; the proportion is less than half (46 per cent) in sub-Saharan Africa.
- At least 1,019 human rights defenders, journalists and trade unionists have been killed in 61 countries since 2015. This is equivalent to one person killed every day while working to inform the public and build a world free from fear and want.

  Source: Report of the Secretary-General, The Sustainable Development Goals Report 2018

- Freedom-of-information laws and policies have been adopted by 116 countries, with at least 25 countries doing so over the last five years. However, implementation remains a challenge.
- Since 1998, more than half of countries (116 of 197) have established a national human rights institution that has been peer reviewed for compliance with internationally agreed standards (the Paris Principles). However, only 75 of these countries have institutions that are fully compliant.

Promoting the rule of law and ensuring access to justice presupposes



What needs to be done

By each actor/sector [judiciary included]

- Development and implementation of national strategies to achieve SDGs
- Track and report own progress towards each target.
- Communicate to national leadership role for advancing national development priorities.
- Advocacy to ensure that resources needed are provided

What the Judiciary niche is-

- The rule of law should be considered an enabler for the realisation of the other SDGs
- Judicial intervention is anticipated in areas where the States will apply policy and legislative interventions to address challenges
- As an enabler of sustainable development, rule of law is the hub and the other 15 goals are the spokes in the network.

What the Judiciary need do……

- The Bangalore Principles of Judicial Conduct impress upon judicial officers to maintain competence and diligence by taking reasonable steps to maintain and enhance their knowledge, skills and personal qualities necessary for the

proper performance of judicial duties and keep themselves informed about relevant developments of international law, including international and regional conventions and other instruments establishing human rights norms.

- Training in skills of judge-craft and other relevant topics (and other opinion writing, sentencing, dealing with certain types of litigants and evidence, media and public relations, understanding of the wider social context to litigation, personal welfare issues) helps increase efficiency.
- Investing in judicial education in areas that are directly relevant to economic, social and environmental aspects of development, such as public policy, development, etc. is worthwhile.

REGIONAL INTEGRATION AND INDEPENDENT JUDICIARIES

By
Emmanuel Ugirashebuja

Topics
1.Can regional integration be a forum for increased demands for judicial independence?
2.What are the challenges of the independent judiciaries in deepening regional integration?
3. If integration is a forum for increased judicial independence, how can it achieve the goal?

Regional Integration: Forum for demand of JI?

Qn 1. Can regional integration be a forum for increased demands for JI? Yes and No. It depends on certain factors:

- The basis for integration;
- The objectives of the integration; can states achieve the desired objectives of development in the areas of commerce, industrialization, infrastructure, cultural, social, security, political and otherwise when integrated rather than individually?
- Will effective judiciaries play a role in the attainment of the objectives?

Basis for Integration? Necessity

v. Choice Imperatives

Threat (Commital- survival, prosperity and security) (EU, AU, EAC?)	Gain (Opportunistic) (ECOWAS, SADC, Defunct EAC, etc)
Power **(Hegemonic)** (former USSR, NAFTA)	**Affection** **(Voluntaristic)** (OAU, SADC, defunct EAC)

Establishment of the Community

Art. 5

Objectives of the Community

(2): "…the Partner States undertake to establish themselves and in accordance with provisions of this Treaty, a customs union, a Common Market, subsequently a Monetary Union and ultimately a Political Federation in order to strengthen and regulate the industrial, commercial, infrastructural, political and other relations of Partner States to the end that there shall be accelerated, harmonious and balanced development and sustained expansions of economic activities, the benefit of which shall be equitably shared"

Effective Judiciaries in Attainment of Integration Objectives

-Will effective judiciaries play a role in the attainment of the objectives? Of Course

-An effective judiciary should have as one of its attributes Judicial Independence.

-The founders of the EAC believed that in order to achieve the goals of integration the role of the judiciary is vital: establishment of a regional judiciary (Chapter 8 of the Treaty), role of domestic judiciaries in application of the Treaty (Art. 34 of the Treaty, Preliminary References, Art. 54 of the CMP Settlement of Disputes).

Effective Judiciaries in Attainment of Integration Objectives

Article 6

Fundamental Principles

"The fundamental principles that shall govern the achievement of the objectives of the Community shall include

…

(d) Good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights"

Effective Judiciaries in Attainment of Integration Objectives

Art 26

(AFCHPR)

"State Parties to the present Charter shall have the duty to guarantee the independence of the Courts…"

Regional Integration and Judicial Independence

Qn.2: What are the challenges of the independent judiciaries in deepening regional integration?

Judiciaries have neither the sword of the executive nor the purse of the legislature "but merely judgment".

Regional Integration and Judicial Independence

Criticism of and threats to judges:

it is not unusual nowadays for judges to be subjected to personal attacks, transcending legitimate criticism for making unpopular decisions; either by competing parties in politics, media e.g., enemies of the people;

Personal and unprincipled attacks on judges sap the strength of individual judges and the entire judiciaries

The 20-70-10 rule kicks in if the environment within which judges work in threatens their independence;

Policing the line between appropriate criticism of particular decisions and those attacks that erode judicial independence is not only a matter of legislation but for good sense and societal value.

Regional Integration and Judicial Independence

Systemic threats to judicial independence:

- those endemic in the framework of government;

-The necessary reliance by the judiciary on the political branches of the government for sustenance creates the potential for weakening the judiciary as in institution;

-Budgetary control and supervision of the judiciary should not exceed legislature's role of performing its budgetary role;

-Micromanaging the business of courts should be halted;

-A simple system Cost of living adjustments to judges should be devised;

-Diminishing judicial pay and emoluments should be considered sacrilegious

Integration and Achievement of JI

Qn. 3: If integration is a forum for increased judicial independence, how can it achieve the goal?

1.Cases before the court on independence of the Judiciary;

2.Forum shopping ;

3.Judiciaries' networks;

4.Benchmarks on JI and accountability;

5.Evaluation of judiciaries of the region against an established benchmark by a regional body.

Integration and Achievement of JI

1. Cases before Courts:

E.G 1.

On 2nd of August the Polish Supreme Court referred questions to the European Court of Justice or not forced retirement of most of its senior judges and other infringements of judicial independence are compatible with EU law;

-In newly amended Act on Supreme Court judges who were 65 years of age or older were to retire unless they submitted a will to remain on their positions and present a health certificate, and then obtain the consent of the President of the Republic;

2. Minister of Justice and Equality v. LM (Deficiencies in system of justice) Irish High Court Preliminary Reference: The Irish High Court Judge asked the ECJ for clarity on extradition orders if an EU member state does not think another's judicial system is fully respecting rule of law including "interference of judicial independence". The Court considered that

"…information in reasoned proposals recently addressed by the Commission to the Council…is particularly relevant for the purposes of that assessment

3.In Wilson v. Ordre des Avocats du Barreau de Luxembourg (C-506/04, ECLI: EU: C: 2006: 587) the problem of independence and its elements occurred in the context of rules governing the composition of bodies to hear appeal proceedings; the ECJ held "… guarantee of independence and impartiality require rules, particular as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it"

4. In Associacao Sindical do Juizes Portugueses (C-64/16) the issue was whether the salary reduction measures infringe the principle of judicial independence of national judges;

5. Hon. Justice Malek v. Minister of Justice the Republic of South Sudan & the Secretary General of the EAC: Malek alleges that the unlawful removal of some justices and judges of the judiciary of the RSS totaling to 14 was a breach of the Treaty and that such a decree was a blatant abuse of power and tantamount to interfering in independence of the judiciary "and has had an adverse effect on the independence of justice'. (the Case is ongoing)

Forum Shopping

- Certain instances permit parties to choose from more than one forum as a result of RI and this may enhance judicial independence and effective access to justice;

-e.g Katabazi Case,

Forum Shopping Cont'd.

- Modern Holding v. Kenya Ports Authority Ref 1 of 2008: Applicant Tanzanian company, imported 21 containers of Masafi fruit juice through Mombasa port in December 2007 & January 2008

Consignment not cleared on time due to post election violence; Claimed damages under EAC Customs Management Act;

Held: Respondent was not an institution of the Community (Article 9 (2)), or a surviving institution of the former EAC

Reference improperly before the Court as Respondent lacked capacity under Article 30 of the Treaty.

Court had no jurisdiction to entertain the Reference

In September 2016, the Commercial Court in Mombasa found KPA liable for loss in handling the cargo & awarded US$ 9.8 USD, payable with interest

Integration and Achievement of JI

Judiciary Networks/Fora

-Judges' Regional networks/fora such as the EA Chief Justice Forum, EAMJA, are vital for achievement of JI.

-The fora could issue communiqués where there is blatant erosion of JI;

-Establish benchmarks for JI and come up with road-maps for achieving JI;

-Possibility of creation of more networks: East African Network for Judicial Service Commissions? See. European Network of Councils for the Judiciary which has been vital given role of the Judicial Service

Benchmarks on JI and Accountability:

Benchmarks should be established by EAMJA or EA Chief Justices' Forum or even the EAC Secretariat on JI and accountability;

The benchmark should include: appointment and promotion of judges; judges' emoluments; discipline and judicial ethics; administration of the courts; performance management of the court; protection of the image of the court; setting up a system for evaluating the judicial system;

Role of Regional Bodies:

- The EAC secretariat should play a proactive role in observing erosion of JI in any part of the region:

-Art. 29 of the EAC Treaty (Reference by the Secretary General): challenges of consensus decision-making process of the Council;

-The European Commission on 14th August 2018 sent a Reasoned Opinion to Poland regarding the law on the Supreme Court and now has instituted an infringement proceeding against Poland (the Commission does not require consensus of the parties).

Conclusion

-Like most projects, the project of JI requires continual maintenance, upkeep and renovation.

-This forum should move beyond conferences and come up with focused research and benchmarks on what JI is and the best way to defend JI from intrusion, intimidation, coercion or domination from any source.

Role of the Insurance Regulatory Authority (IRA)

Presented by:
Diana Sawe Tanui

Contents

- Who is the Insurance Regulatory Authority?
- Why supervise the Insurance Industry?
- Benefits of Supervision.
- Why Promote Insurance?
- Role of the Judiciary

Who is IRA?

The mandate of IRA is to regulate, supervise and promote the development of the insurance industry.

Functions of the IRA

- Regulate and supervise the insurance industry;
- Protect the interests of policy holders and beneficiaries; and
- Promote the development of the insurance industry.

The Insurance Industry

Serial No.	Category	Number
1.	Reinsurance Companies	4
2.	Insurance Companies	53
3.	Reinsurance Brokers	11
4.	Insurance Brokers	221
5.	Medical Insurance Providers	31
6.	Insurance Agents	9320
7.	Insurance Loss Adjusters	32
8.	Motor Assessors	126
9.	Insurance Investigators	142
10.	Insurance Surveyors	32
11.	Risk Managers	9
12.	Claim Settling Agents	5
13.	Bancassurance Agents	28

Supervision

Watchful eye

Things working correctly

Compliance

Stability

Regulation

- Updating Laws Towards International Standards
- Providing Industry Standards
- Approval of Insurance Rates
- Investigation and Prosecution of Fraud (IFIU)

Development

- Approval of Insurance Products
- Consumer Education

- Complaint Resolution
- Enabling Innovation Through Technology

Why supervise the Industry?

- Insurance is a business of trust and can be abused;
- Insurance is a promise, a promise which must be kept;
- Ensure balanced outcomes e.g. shareholders, stakeholder and policyholders

Why supervise the Industry?

- Power asymmetry between providers and policyholders;
- Protection of public interest; and
- Proper Market Conduct and Professionalism

Benefits of Supervision

- Stable insurance industry
- Informed and protected consumer
- Increased public confidence
- Create competitive industry
- Increased access to insurance
- Increased income and savings

Challenges

- Low Awareness
- Poor Perception

- Insurance Fraud
- Limited Adoption of Technology
- Motor Third Party Claims

Role of the Judiciary

- Interpretation of insurance law as well contracts in favour of public interest
- Encourage Alternative Dispute Resolution Mechanisms
- Suitable bond terms in respect to insurance fraud and financial offences
- Timely conclusion of cases

Insurance Regulatory Authority (IRA)
P.O BOX 43505 - 00100 NAIROBI
Zep-Re Place Longonot Road
Upper Hill,
Nairobi

Tel: (+254) 20 4996000, 0727 563110
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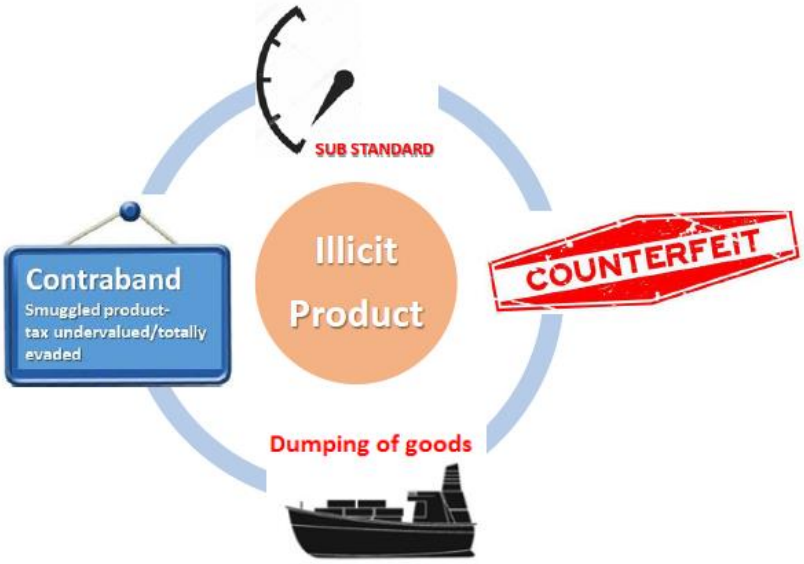
Website: www.ira.go.ke

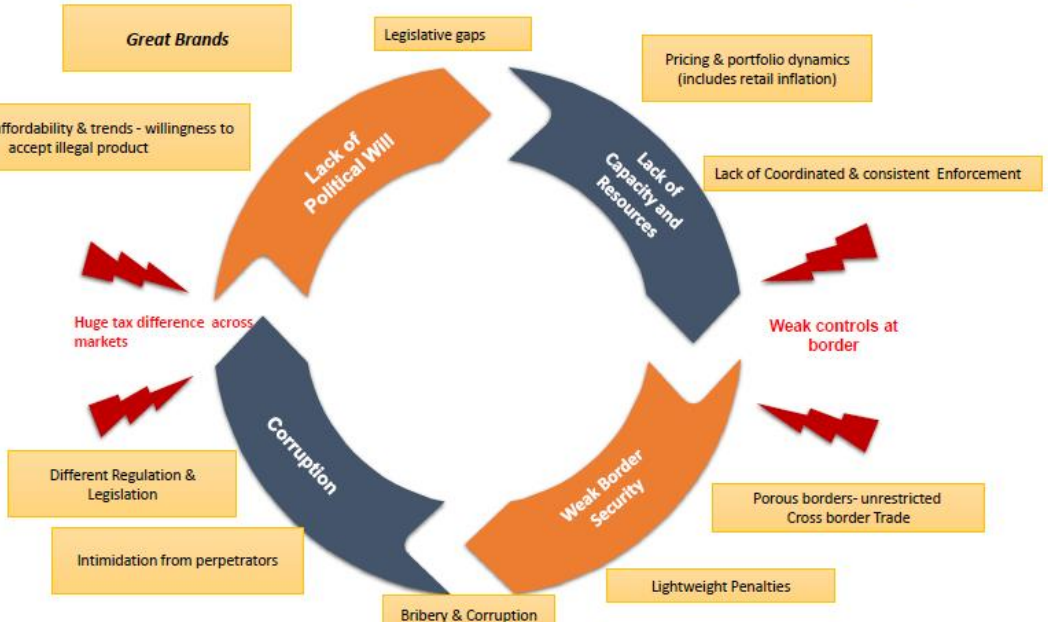
Combating illicit trade in East Africa
by
Nadida Rowlands
Legal Director
East African Breweries Limited

What is illicit trade?



How does illicit trade affect me?

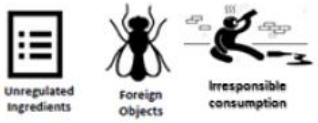
The Drivers of Illicit Trade in East Africa



Effects of illicit trade

Lost Government Revenue

Jeopardise Consumer's Health

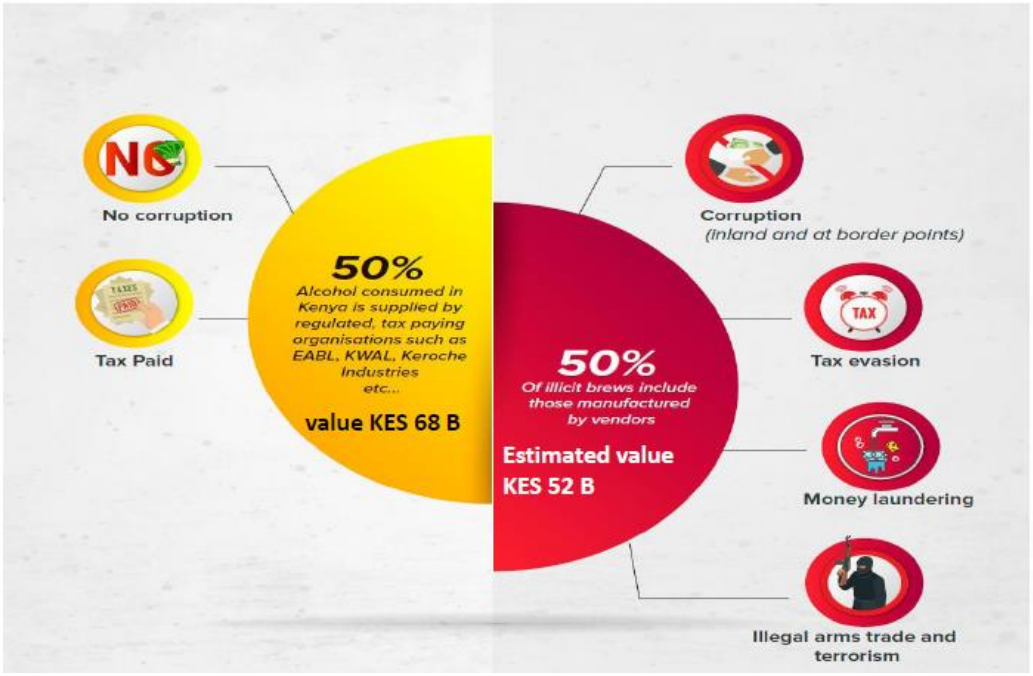


Fuels Crime

Harms Local Economies

Negative Effects of Illicit Trade

An East Africa Beverage Alcohol Industry Case Study

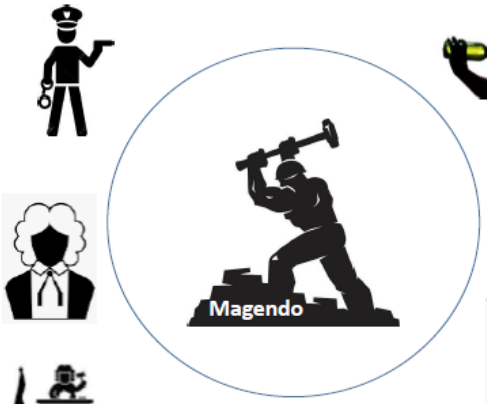


Our role in eradicating Illicit trade

LEAs(Police, KRA, KEBS,ACA)
- ✓ Be vigilant and increase patrols in known illicit havens
- ✓ Efficiently investigate illicit complaints, collect and preserve evidence.
- ✓ Arrest perpetrators and arraign them in court

Prosecutor (DPP,KRA,ACA)
- ✓ Draft the right charges
- ✓ Diligently submit the facts in court

udiciary
- Ensure timely prosecution of cases
- Non-fine sentences ensuring perpetrators are not paying off their ills and released to drive more harm in their activities
- Stiff penalties to discourage errant traders
- Developing Anti illicit trade legal jurisprudence



Community

Inform LEA on any suspected Illicit activity

Consumer
- ✓ Inform LEA or brand owner in the event of suspicion
- ✓ Shun from consuming suspect product

Retail Trade

Shun from selling illicit trade

Brand Owner
- ✓ Develop technological deterrents
- ✓ Train consumers and LEAs on how to spot and stop
- ✓ Share intelligence on illicit trade with LEAs
- ✓ Support LEAs/ Prosecutor by being a brand expert witness during investigation and litigation

Legal regime on illicit trade

Key national laws

Anti Counterfeit Act, The Standards Act, Excisable Goods Management Act ,Tax Procedures Act, Trade Description Act, Trademarks Act, Copyright Act, Industrial Property Act, Weights and Measures Act, Trade Remedies Act 2017

The Industrial Property Act, The Trademarks Act, The Trade Secrets Protection Act, The Copyright and Neighbouring Rights Act

The Zanzibar Industrial Property Act, The Zanzibar Copyright Act, Copyright and Neighbouring Rights Act ,The Patents (Registration) Act, The Trade and Service Marks Act, Merchandise Marks Act

Law No. 1/13 on Industrial Property in Burundi, Law No. 1/021 on the Protection of Copyright and Related Rights in Burundi

Law No. 31/2009 on the Protection of Intellectual Property

Literary and Artistic Works Act, The Copyright and Neighbouring Rights Protection Act, Industrial Designs Law, Patent Law ,Trademark Law

Regional Laws

1. Protocol establishing the EAC Common Market (Article 43)
2. East African Community Customs Management Act 2004
3. EAC Intellectual Property (IP) Policy

International laws

1. WTO – Trade Related aspects of Intellectual Property Rights TRIPS Agreement-

An international legal agreement that requires WTO members to provide for IP enforcement procedures, remedies and dispute resolution mechanisms

2. WTO- Anti Counterfeiting Trade Agreement

Support Required from you

As a consumer:

Be an **anti illicit campaign ambassador**

Shun from purchasing **illicit products**

Once you **suspect a product** to be illicit **share information with LEAs/ Brand owner**

As a custodian of Justice:

During litigation you may **invite** the **Brand owner** to **inform the court on brand authentication features**

Remember illicit product is **harmful** to the **consumers, affects** legitimate **businesses, denies** the **government revenue** and **proceeds of illicit trade are used to finance other crimes**

Two companies in Uganda are being investigated over the supply of suspected fake Hepatitis B vaccines

Fake drinks sold in Nigeria Kills

Support Required from Judiciary

Formation of an anti illicit trade task force
Members- brand owners and Judicial officers
Key Outcomes
- ✓ Support the manufacturing agenda
- ✓ Avenue for creating and monitoring joint Anti illicit initiatives

Review Prosecution Manual
Why Review it?
- Manual available only in Kenya & Uganda
- There are legislative changes

Key Outcome
- ✓ Manual to act as a guide to Judicial officers and LEAs

Issuance of deterring sentences
Current sentences are lenient

Key Outcome
- ✓ Sentence to be based on the socio economic impact of the crime

Champion Law Reforms
Current laws not innovative
Key outcome
- ✓ Can you revoke perpetrators business licence?
- ✓ Can perpetrators issue public apology?
- ✓ Can we create more Anti illicit trade legal jurisprudence?

Partner with Brand Owners
Brand owners are brand experts
Key Outcome
- ✓ Brand owner to advice on impact of illicit trade
- ✓ Can brand owners seat as assessors?
- ✓ Can brand owner be invited by the court to give expert evidence?

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Thank you!

A DIALOGUE ON REGIONAL FRAMEWORKS FOR OIL, GAS AND MINERALS VIS-À-VIS RIGHTS OF COMMUNITIES TO EXPLOIT NATURAL RESOURCES

PRESENTED BY : ALI H. MAALIM

A DIALOGUE ON REGIONAL FRAMEWORKS FOR OIL, GAS AND MINERALS VIS-À-VIS RIGHTS OF COMMUNITIES TO EXPLOIT NATURAL RESOURCES

PRESENTED BY : ALI H. MAALIM

INTRODUCTION

- Historically, in most African countries extractive operations has focused on extracting and exporting raw materials to industrialized countries at the expense of their countries' development.

- As a result, in many resource-rich countries mineral resources wealth have been found to be less a blessing and more of a "resource curse"

INTRODUCTION

The latest discovery of oil and gas in East African members states has made East African Region as an emerging hydrocarbon hotspot.

- Uganda: 6 billions barrels discovered in Lake Albert
- Kenya: 600 millions barrels in Lake Turkana
- Tanzania: 57 Trillion cubic feet of natural gas
- South Sudan: Oil Production since 1980s
- In order to ensure long term benefits of the discoveries and protection of community rights:
  - appropriate policy, legal and regulatory frameworks must be in place.
  - devise and implement strategies that maximize domestic participation and protection of host communities in the extractive industries
  - monitoring and enforce compliance with the regulations
  - Hence, a dialogue on Regional Frameworks and right of communities to exploit Oil, Gas and Minerals by EAC's Magistrates and Judges is quite relevant and has come at the right time.

THE ZANZIBAR LEGAL FRAMEWORK FOR OIL AND GAS

- Under the United Republic of Tanzania (URT) Constitution (First Schedule Item15) mineral oil resources including crude oil and other categories of oil or products and natural gas is a union matter.

- However, the Petroleum Act, No. 21 of 2015 of URT vested powers to Revolutionary Government of Zanzibar (RGoZ) to administer petroleum activities undertaken in Zanzibar territory.

THE ZANZIBAR LEGAL FRAMEWORK

- In the year 2016, the Zanzibar Government formulated the Zanzibar Oil and Gas (Upstream) Policy and also enacted the Oil and Gas (Upstream) Act No. 6 of 2016.

- The two instruments constitute the basis for regulatory and legal framework for Oil and Gas Upstream activities in Zanzibar.
  - The Oil and Gas (Upstream) Act, 2016 establishes:

- Zanzibar Petroleum (Upstream) Regulatory Authority (ZPRA) responsible for monitoring and regulating exploration, development and production of petroleum and,

- Zanzibar Petroleum Development Company (ZPDC) which acts as a commercial entity and safeguard the national interest in petroleum activities

MAXIMIZING BENEFITS IN EXTRACTIVES INDUSTRY

- Many resource-rich countries make efforts to improve the local economy by leveraging linkages to extractive projects, beyond the revenues they generate.
- This is done by promoting the supply of domestically produced goods and services and the employment of the local workforce or requiring certain activities such as technology transfer in the country where the extractive operations takes place. This is referred as Local Content.

LOCAL CONTENT

- Local content is increasingly recognized as critical way for countries to get maximum benefits of their resource wealth. It can take many forms:
  - Ownership & operation of assets in sector
  - Increased employment
  - Transfer of skills and technology

  - Materials and supplies used in the sector are produced locally not imported
  - Services and labor provided by local service providers
  - Strengthening demand directed at local market
  - Diversification of industrial sector
  - Development of technology intensive sector

- There are a number of ways a government can implement Local Content:
  - Quotas - embedded in laws, regulations or contracts, are provisions to require companies to award a certain percentage of hires, contracts or equity ownership to local companies or professionals.
  - Training program requirements or incentives - are aimed at requiring or encouraging foreign companies to build the skills of the domestic workforce.
  - Public education initiatives - Government opens training centers, establishes programs or organizes overseas scholarships to build a cadre of expertise in sectors with strategic links to oil and minerals.

REFLECTION OF LOCAL CONTENT IN THE ZANZIBAR OIL AND GAS ACT

- History of Oil Gas in Zanzibar
- Exploration activities started in 1957 where the first onshore well was drilled at Kama Unguja, followed by another one at Tundaua in Pemba.
- The Revolutionary Government of Zanzibar (RGoZ) has recently started exploration activities following the enactment of Oil and Gas (Upstream) Act 2016. It has conducted seismic survey in February 2018 both onshore and offshore

- The Oil and Gas (Upstream) Act imposes an obligation to the National Oil Company and contractors to contribute to the development of local content by:
  - supporting to develop local institutions and vocational training centers
  - adopting measures to guarantee, promote and encourage local investors to invest in petroleum activities
  - giving preference to goods and services available in the local market rendered by Zanzibaris and local companies

REFLECTION OF THE LOCAL CONTENT

- National Oil Company must submit to the Authority annual report of its achievements and its contractor's achievements in utilizing local goods and services during the financial year.

- Submission of detailed program for recruitment and training of locals and report on the execution of the program.

- The Company and a contractor is also required to prepare CSR plan jointly agreed by the relevant local government authority.

- The plan must take into account the local government priorities of the host community.

- The local government authority oversee the implementation of CSR action plan

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- The plan must take into account the local government priorities of the host community.

LOCAL CONTENT CHALLENGES

- Local content from Oil and Gas faces some specific challenges:
- Low employment - Extractive industries are capital intensive and therefore hire fewer employees compared with other industries. Though there may be very high expectations for the extraction site itself to employ many individuals, the nature of the business is such to have few employees, particularly after construction is completed.
- The local government authority oversee the implementation of CSR action plan

- Local content from Oil and Gas faces some specific challenges:
  - Low employment - Extractive industries are capital intensive and therefore hire fewer employees compared with other industries. Though there may be very high expectations for the extraction site itself to employ many individuals, the nature of the business is such to have few employees, particularly after construction is completed.
  - Technical expertise - Many extraction jobs and related services are highly technical and require skills that may not exist locally.

- Quantity and quality requirements - Even non-technical jobs such as food production require a level of capacity that may not exist in the community. Small-scale farmers often lack the capacity to meet the quality and quantity requirements for companies to use their produce.

  - Corruption - local content can create large opportunities for corruption and elite capture of an industry. For example, requirements to partner with local companies could encourage elites to create shell companies to personally profit off the requirements.
  - Businesses servicing the oil and gas industry require a sound capital base because of the capital-intensive nature of the industry, but many local companies may not have sufficient financial means.

- Foreign companies have well-established supply chain networks. Hence, they prefer to deal with global suppliers or award major service contracts to specialized global firms. They are reluctant to abandon established relationships so as to deal with local companies.

PROTECTION OF COMMUNITY RIGHTS

- Extractive operations can disturb existing rights of communities:
  - Require the resettlement of local communities
  - Cause damage to environment, local businesses and affect the livelihood of the community
  - Cause accidents (Deepwater Horizon oil spill).
- Environment is well protected under the relevant environmental laws and also the Oil and Gas Law. Severe penalties and other redress are available
- Land rights, however, is a serious issue and face many challenges:

CHALLENGES IN PROTECTION OF COMMUNITY RIGHTS

- Shortfalls in the existing laws relating to compulsory acquisition of land (no clear procedures, multiplicity of laws and authorities for land acquisition)

- The Zanzibar Constitution, 1984 (section 17) provides for fair and adequate compensation where there is compulsory acquisition of land but clear guidelines on compensation of affected property are lacking.

- Under the recent amendments on Land Tenure Act, (Act No. 1/2018) RGoZ may compulsorily acquire land without compensation on national interest

- Compensation is only for unexhausted improvement on the land and not for the land itself. (All land in Zanzibar is public land. Land Occupiers are known as "holders" with limited rights and not owners)

- Property Compensation Rates are out of date. The latest revision on crops compensation rates was made in 2008 and valuation process not transparent.

- No option for in-kind compensation (resettlement) or monetary compensation.

- No timelines for payment of compensation. It may be delayed for indefinite time.

CHALLENGES IN PROTECTION OF COMMUNITY RIGHTS CHALLENGES

- Many land occupiers have no legal title. They may be treated as unlawful occupiers and consequently lose their right to compensation
- Employment and loss of business rights in the affected area are not protected.
- Lack of knowledge and awareness among community people on land ownership and rights increases the magnitude of the challenges

ROLE OF JUDICIARY

- Addressing these challenges will require the help of the judiciary:
  - Judiciary is key to protecting human rights
  - Judiciary will have to adjudicate compensation claims.
  - Ensure access to justice for victims of rights abuse.
  - Fast tracking cases involving deprivation of community rights
- A clear understanding of the philosophy and intended objectives of local content laws by the judiciary is critical to their sound interpretation, effective compliance and enforcement.

- Preventing and addressing corruption that might include government officials will require a strong and independent judiciary.

- Resolving conflicts between local content and international/regional agreements

- Interpreting and enforcing local content
  - Local content laws can be complex and require judicial interpretation
  - What qualifies as local content?

  Is local content inputs from anywhere in the country or the resource rich region specifically?
  - What qualifies as a local business—is it enough to have certain percentage owned by nationals?

LOCAL CONTENT AND REGIONAL AGREEMENTS

- Do local content laws in EAC countries align with the EAC's treaty?

Local content laws are often developed without sufficient consideration given to potential conflicts with existing international/regional agreements.

- Under the EAC Treaty, the region has agreed to adopt common policies to ensure joint fossil exploration and exploitation along coast and rift valley.

- The articles on local content in the respective Petroleum Act may not be in conformity with spirit of the Treaty and the Common Market Protocol
- The judiciary will be a key actor in resolving these conflicts

WAY FORWARD TO MAXIMIZING BENEFIT

- A regional approach is essential to the success of local content and protection of rights

- A coherent and coordinated effort is therefore needed, not only to preserve regional integration agenda but also to tap market opportunities from neighboring countries and make use of their comparative advantage to complement national efforts.
- The judiciary will play a critical role in expanding on the provisions of the EAC Treaty to develop a harmonized framework for maximizing the economic benefits of natural resource wealth for all of the EAC

CONLUSION

- EAC's Partner States need to continue with this dialogue and agree on common strategies that will ensure that natural resources are not a curse but a blessing and bring social benefits to the entire region.

STRATHMORE EXTRACTIVES INDUSTRY CENTRE (SEIC)&THE EXTRACTIVES BARAZA (EB)

Transforming the policy landscapein the Extractives Sector

ABOUT THE STRATHMORE EXTRACTIVES INDUSTRY CENTRE □SEIC□

The Strathmore Extractives Industry Centre (SEIC) is an autonomous research Centre based at the
Strathmore University Law School (SLS).
The Strathmore Law School is one of the constituent schools of Strathmore University (SU), a leading
nonprofit university in Kenya. Strathmore University was the first multiracial and multi – religious educational institution in Eastern Africa. It holds a peerless reputation for quality in academic and professional education as well as personal formation.
Since its creation in 2014, SEIC seeks to bridge theory and practice in
Kenya's (and the broader East African region) extractive sector and support constructive dialogue and collaboration among companies ,relevant agencies of government, civil society, and local communities through its key activity of action research. SEIC believes that research-led cooperation among these varied stakeholders leads to the promotion of knowledge of the extractives sector
and constructive dialogue on the motivations and objectives of the various economic forces, agents and policy makers that operate in or influence the performance of the extractive sector. As such, SEIC seeks to produce empirically grounded qualitative and quantitative research that leads to publications, round table discussions, conferences, short courses and other outcomes which may influence law, policy and discourse on key political, governance and socioeconomic issues surrounding extractive activities.

SEIC has conducted multiple impact assessments of the oil and gas industry on socio-economic opportunities and gaps for various stakeholders from oil companies to government. In addition to its research, policy and advocacy work, SEIC also provides training in the extractives sector on various topics. In this case, SEIC provides training and capacity building to a range of stakeholders, including young Kenyan professionals, to enhance their ability to utilize and Benefit from the extractives sector and to stimulate sustainable economic growth.
SEIC recently retained the Extractives Baraza (EB) an advocacy neutral public interest online platform that promotes transparency and evidence based stakeholder dialogue on the extractives sector in Kenya. The EB's ultimate goal is to enhance citizen participation and engagement in the governance of
Kenya's extractive sector. EB has honed its skills in conducting dialogues and moderating forums. For more information, please visit www.extractivesbazara.com
SEIC together with the EB aims to bridge the gaps between state and non-state actors by acting as a neutral go between various industry players. SEIC achieves this role as a

neutral umpire with the sole purpose of developing inclusive and sustainable solutions and frameworks in the extractive industry. SEIC's neutrality allows free and unbiased engagement with the industry stakeholders.

ABOUT EXTRACTIVES BARAZA □EB

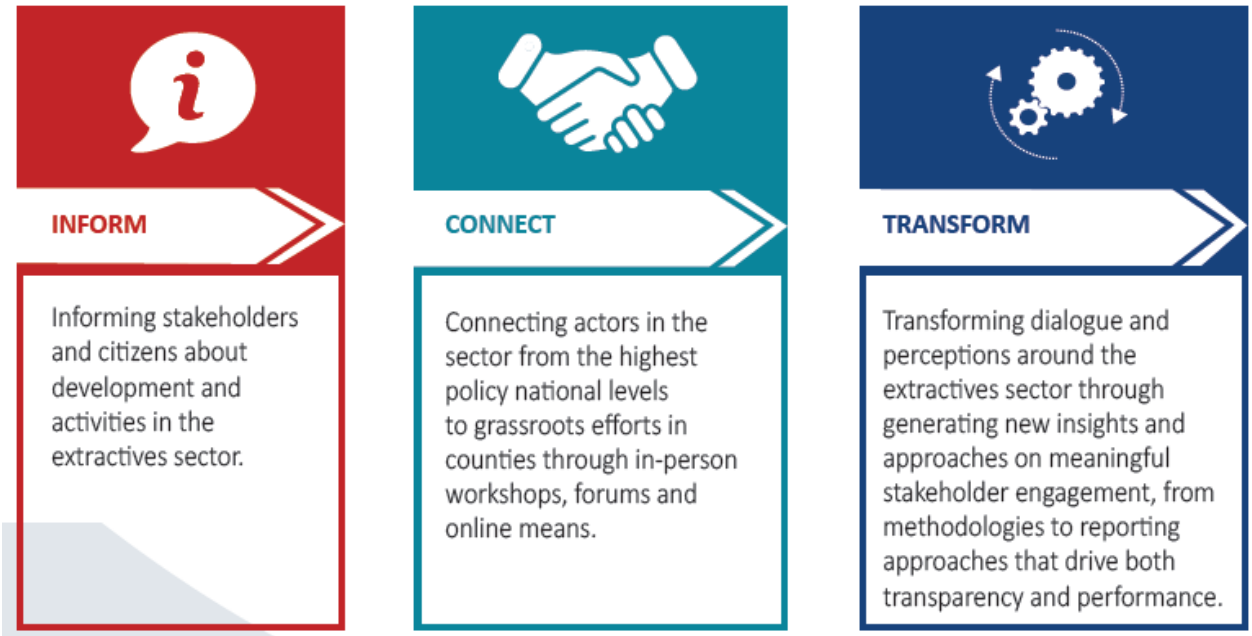
The Extractives Baraza was initially formed as the Information Centre for the Extractives Sector' (ICES) in 2013 as a multi-sector online neutral platform providing the latest extractives news, editorials from experts and commentators, information about extractives sector events, and a resource centre containing a large and diverse selection of useful readings on the subject. ICES was then hosted by the African Development Bank and supported by the governments of Canada and the United Kingdom,and the United Nations Development Programme(UNDP).In March 2017, our platform was relaunched as the Extractives Baraza (EB) hosted by Strathmore University, supported through the Kenya Extractives Program (KEXPRO). This was on the basis of a national information needs assessment exercise, conducted by the Strathmore Extractives Industry Centre, which revealed that the sector operates in an environment that is complex, mired in secrecy and suspicion and is little understood by most stakeholders including citizens.

The EB takes pride in carrying the banner as East Africa's first ever online and dialogue platform that enables access to information, facilitates dialogue, builds capacity and develops new approaches of engagement with companies, government, civil society organizations and international institutions to enable them to have meaningful stakeholder engagement that advances good governance of Kenya's extractives sector. Innovatively, we use social media as a real-time tool to reach a wider stakeholder base and spur conversations on important issues affecting the sector including engaging the youth. This approach has attracted cross-learning and sharing of information within the region and globally from jurisdictions with both advanced and developing extractives sectors. Our team brings together diverse stakeholders to build consensus and foster transformative dialogue that enables real change to happen. It cannot be overemphasized that our foundation of neutrality (being hosted in an academic institution) speaks to our success in pulling a diverse stakeholder base to dialogue.

ABOUT EXTRACTIVES BARAZA □EB□

OUR APPROACH

We have organized our programs around three (3) key streams that we deem fundamental to good governance
in the extractives sector:



OUR VISION

To provide credible information that is dynamic and relevant on a regular and timely basis so as to enhance citizen participation and engagement in the governance of Kenya's extractives sector.

OUR MISSION

Our mission is to keep extractive industry stakeholders continuously informed by providing high quality and dynamic information and knowledge products through research, training an partnership building.

OUR WORK

Delivery of practical and results-oriented services has been accomplished through the following

three integratedactivities:

1. RESEARCH

We conduct qualitative and quantitative research into various thematic areas of the extractive sector and make the output from field and desktop research more accessible to the diverse actors working in the extractive sector.

a. Listening Project

Through our Listening Project, a series of qualitative field studies at the county level to establish community perceptions, knowledge and expectations on extractives project, we have undertaken the pilot study with the support of the Aga Khan University, in Mui Basin, Kitui County.
The EB released a full report to the relevant government ministries and industry stakeholder. We aim to expand the project to other resource rich counties.

b. African Journal on Energy and Mineral Law

This is Africa's first dedicated online journal on Sustainable Development of Energy, Natural Resources and Environmental Law. The Journal is an annual peer-reviewed academic journal, based at Strathmore Law School, specializing in African and international sustainable development of energy, natural resources and environmental law. The Journal is an open-access publication that aims to promote scholarly contributions, which invite inclusive discourse on sustainable development of energy sources, natural resources and the environment.
The mission of the journal is to promote and spread knowledge concerning not only energy, natural resources and environmental law, but also specialist knowledge derived from national and international research in which sustainable development is a vital concept. The Journal editors in cooperation with the advisory board have extensive academic and practical experience in the field of energy, natural resources and environmental law.

c. Transparency Scorecard

COLOUR	IMPLICATION IN THE SCORECARD		
	EXISTENCE *(This will examine whether an assessed factor exists)*	**LEGAL FOUNDATION** *(This will examine whether the assessed factor is included in statute)*	**COMPLIANCE** *(This will test whether there exists implementation of the assessed factor)*
RED (R)	Non-existent	Non-existent	No compliance
AMBER (A)	Ambiguous	Weak Ambiguous	Partial
GREEN (G)	Existent Not ambiguous	Strong	Full

We have innovatively and successfully developed the Kenya Transparency Scorecard and disseminated the same targeted to specific stakeholders including government which has resulted in positive uptake from stakeholders as well as evoking a lot of discussion on transparency and accountability in the Extractives Industry.

2. CAPACITY BUILDING / TRAINING

Our efforts towards Capacity Building are gaining traction and their successes inspire us to reach further and higher. These are targeted at enhancing the capacity of various stakeholders to utilize and benefit from the extractives sector in order to stimulate sustainable economic growth through activities such as delivering education workshops, roundtables, conferences and programs for developing government personnel, extractives sector leaders, and CSOs, collaboration between local and international experts in learning and education, applied research and technical assistance in order to ensure responsiveness to the country's needs.
Some of the projects we have done include:

a. Trainings and Public Lectures

We offer and carry out trainings on different issues in the extractives sector such as the Oil and Gas Training for Lawyers and CSOs offered in conjunction with the International Senior Lawyers Programme, the North Sea – East Africa Conference on Oil and Gas together with the University of Aberdeen and a series of public lectures, the first of which shall cover Investment Decision Analysis in Oil and Gas Projects and conducted by Mr. Mark Dingley, the VP –Operations at Africa Oil Corp some of which are undergoing preparation. Our aim is to continue to offer these much sought after training courses as well as develop and diversify the content and participation.

b. Youth in Extractives Program

We are also passionate about encouraging value creation in Africa led initiatives and in the youth and young professionals and we undertake projects that highlight these endeavors: Together with the African Legal Support Facility (ALSF) and the Strathmore Extractives Industry Centre (SEIC) we have successfully hosted the Africa Mining Legislative Atlas (AMLA) Workshop held in Kenya for the first time in East Africa sponsored by the African Development Bank and the World Bank. Hosting Africa's first Oil and Gas Moot Court Competition under the theme 'Sustainable Exploration and Production of Natural Resources in a Changing Environment' whereby for the first time, the Youth, through legal submissions, have an opportunity to make contributions to the legal framework governing oil, gas, environment and marine issues in the sector.

b. Energy 4i

In partnership with KIPYA Africa Ltd, we carry out the periodic Mining 4i event, which showcases technical innovations from Africa's young industrious minds to stakeholders and industry professionals with the potential of investment and development. With the immense support of the industry,we have undertaken and shall continue to host the Energy 4i targeting the larger energy market and providing a forum that highlights industry specific innovations making way for growth of local content in the Energy sector

d. Commentaries on Kenya's Framework Legislation on Mining

Together with leading law firms and practitioners in the mining sector, EB has developed a commentary on Kenya's legal framework governing the mining sector. This is a continuing project with support and input from stakeholders and practitioners. The commentary aims to demystify the provisions of the new mining legislation and regulatory framework.

e. Executive Courses on Oil & Gas

Together with the local and international partners, we conduct bi-annual executive courses on Oil & Gas targeting mid to senior non-industry professionals, including business executives and legal practitioners.

f. LLM Oil & Gas Masters Programme

The Master of Laws (LLM) in Oil and Gas at Strathmore Law School (SLS) is an 18-month programme designed for lawyers and legal practitioners who wish to expand their knowledge and expertise without interrupting their careers.

The SLS LLM offers student's first-rate increased understanding of local, regional and international legal principles through lectures taught by predominantly by international faculty members, case studies depicting actual problem cases in the industry, research and group work amongst peers.
The Programme aims to provide students with the theoretical and practical building blocks and conceptual tools necessary for the more advanced tasks they will be called upon throughout the course. The curriculum for this programme is designed to respond to the increasing demand for oil and gas legal practitioners in Kenya that are equipped with requisite legal skills in oil and gas contracting; oil and gas financing and project economics; and human rights and socio-environmental aspects.

Advancing Capacity and Access to Justice in Kenya's Extractives Sector

This is a Ford Foundation funded project that seeks to advance capacity and access to justice in the extractives sector in Kenya especially in the petroleum sector. The project is threefold and focuses on the following:

g. Listening Project

Following the success of the pilot Listening Project in Kitui, EB has expanded the project to the oil and gas sector. In August 2018 EB conducted carried out the listening project in Turkana.
The project primarily seeks to listen to, and document, community perceptions, knowledge and expectations of community grievances unique to each stage along the extractives value chain and their preferred grievance handling mechanisms.
The project also seeks to determine the key stakeholder's central to successful grievance handling in the sector. It is our anticipation that the Listening Project will strengthen the grievance handling of extractives related grievances bydiverse actors.

h. Judiciary Guide on Extractives

Developing a Guide for the Judiciary that will outline their role in Kenya's Extractives Sector Value Chain. The purpose of the Guide will be to help judicial officers understand the extractives value chain as well as the best grievance handling procedures, including use of ADR. Specifically, the guide will undertake a value chain approach which:
Identifies potential grievances at each stage of the value chain; Proposes diverse grievance handling options for judiciary to undertake at each stage; and Establishes the interface between judicial and non-judicial(ADR) e.g. mediation mechanisms.
This will be done in collaboration with the Judiciary Training Institute and International Development Law Organization.

i. Judiciary Training

Together with the CCSI, the Judiciary Training Institute and IDLO, we are currently planning to conduct training for the Judiciary. We aim at training judges and their researchers on extractives and related grievances including the interface between ADR/AJS and formal grievance handling mechanism.

j. In-House Training Program

SEIC conducts specially tailored interactive In-House trainings for law firms and/or other business entities on Oil, Gas and Mining

3. POLICY DEVELOPMENT

Work with national and county governments, stakeholders and communities responsible for the governance of the extractives sector to formulate and implement policies and practical strategies in support of a sustainable extractives industry.

a. Transparency and Accountability Framework

The SEIC/EB is currently developing the strategy for Transparency and Accountability Framework for the Petroleum Sector in Kenya, commissioned by the World Bank's International Development Association (IDA) through the Kenya Petroleum Technical Assistance Project (KEPTAP) and facilitated by the Ministry of Petroleum and Mining together with the National Treasury.
The overall objective of this project is to support the Government of Kenya in its commitments towards improving Transparency & Accountability across the petroleum value chain by proposing an applicable governance structure for the Transparency and Accountability in Petroleum framework.

b. Extractives policy working group (EPWG)

The success of Kenya's petroleum sector rests on a robust policy and legal framework, which incorporates consultative submissions from all key stakeholders in the sector. It is on this basis that the Extractives Policy Working Group (EPWG) was established in February 2018. The EPWG is chaired by the Kenya Institute of Public
Policy, Research and Analysis (KIPPRA) and co-hosted by the Extractives Baraza, Strathmore University and Kenya Civil Society Platform on Oil and Gas (KCSPOG). The main objective of the EPWG is to shape and influence policy in the extractives sector through an organized and recognized organ that consolidates diverse stakeholder views as well as incentivize consensus and clarity on key policy issues in the sector that need to be addressed and strengthened to ultimately achieve good governance.
The EPWG is a multi - stakeholder policy group composed of government, industry and civil society. The EPWG seeks to address key policy and legal issues on extractives especially oil and gas as well as mining so as to advance mutual common understanding of different positions, interests etc. among diverse stakeholders, break down

barriers of mistrust and secrecy and contribute towards policy formation.
The creation of the EPWG has also been precipitated by the current policy environment in Kenya which lacks a leading entity that convenes or brings together diverse stakeholders to deliberate on different policy issues and obtain consensus.
Key policy issues addressed so far
The EPWG has discussed three (3) key policy issues on Revenue sharing and Management, Local Content and
Environment, Health and Safety (EHS) through the Kenya Policy Dialogues a training and dialogue platform convened by the Extractives Baraza, OXFAM and Kenya Civil Society Platform on Oil and Gas.

i. Revenue Sharing and Management

Petroleum revenues for a new oil frontier such as Kenya can either be a positive impact on the economy or have detrimental long-term effects due to mismanagement of both funds and expectations. Importance has been placed on ensuring sustainability of petroleum revenues and avoiding the resource curse and pre-mature borrowing and spending. Interventions that take into account the legal framework, national and sub-national priorities and objectives, international perception and international best practices need to take center stage as Kenya prepares to be an oil producer within the next 5 years. There is also need for critical analysis and comparison of different revenue sharing models in oil producing countries with a view towards crafting the best and most relevant model for the Kenya. This topic, was the first of a three-part series, addressed through a Technical Paper and a two-day Scenarios
Building and High-Level Panel Discussion Forum on 4th- 5th April, 2018 whose goal was to interrogate different scenarios critical to robust revenue sharing and management with possible alternatives for Kenya in light of the
Petroleum (Exploration and Production) Bill, 2017

ii. Local Content

Local Content has become an important issue as Kenya moves towards the development phase, for which the basis has been to encourage the use of local labour, goods and services at different stages of the oil and gas value chain. However, lack of specialized or technical skills and poor infrastructure pose significant challenges for Kenyans to obtain the greatest benefits from the oil and gas resources. Controversy has also been sparked around the meaning of the term "local" with different stakeholders taking different approaches – is it national, subnational (county) or geographically placed local communities closer to the drilling sites? These diverse opinions now form the substance of different local content legislative, regulatory and policy proposals including the Local Content Bill 2018, the Petroleum (Exploration, Development and Production) Bill, 2017 and the Petroleum Exploration, Development and Production (Local Content) Regulations, 2014. There is also an emerging issue of how to strengthen linkages with other sectors such as manufacturing and even agriculture given the claim that

the rise of renewable energy is likely to make oil production for energy use obsolete in the (distant) future.
Local Content was second in three (3) topical policy issues identified by the EPWG for deeper interrogation and understanding in light of the current advancements in the petroleum sector. The topic was been addressed through a Technical Paper and a two-day Local Content Scenarios Building and Dialogue Forum themed "Developing a Sustainable In-Country Value Addition Strategy: Real-Time Policy Options for Kenya's Petroleum Sector and was held on 28th- 29th May, 2018. The goal of the forum was to explore different Local Content scenarios critical to robust enhancement of in-country value addition in Kenya.

iii. Environment, Health and Safety (EHS)
The recent flagging off of the trucks for the Early Oil Pilot Scheme (EOPS) has been symbolic as it is expected to trigger the onset of phased developments which will require petroleum sector reforms necessary to help manage environmental and social impacts. Some of the shortcomings in Environment, Health and Safety cited by a variety of stakeholders include lack of specialized or technical skills in the implementing agencies, poor infrastructure, limited human and financial capacity which pose significant challenges for Kenyans to obtain the greatest benefits from the oil and gas resources. There has also been controversy around legislation and the governance of EHS in the petroleum sector. The lack of proper coordination of roles amongst existing agencies, the pending National Oil Spill Response Contingency Plan (NOSRCP), the pending setup of the combined monitoring agency (Energy and Petroleum Regulatory Authority (EPRA)) to monitor and enforce, regulate, verify
and audit the operations of the petroleum players are some of the key issues that may need to be dealt with moving forward.
Environment, Health and Safety was the last of the three topical issues identified by the EPWG. The topic was addressed through a Discussion Paper and the two-day Environment, Health and Safety (EHS) Scenarios Building and Dialogue Forum that was held on 7th – 8th August, 2018 to explore real life potential scenarios led by a key EHS expert with a view to establishing the best probable EHS options, which can eventually contribute towards a robust EHS policy in Kenya that sufficiently tackles the petroleum value chain.

c. Taita-Taveta County, Kenya

Advising the County Government in developing policy, legislation and regulations that would govern the mining sector in Taita-Taveta County. The County has confirmed commercial reserves of gemstones, iron ore, manganese and also has the country's largest ASM workforce.

4. PUBLIC AND STAKEHOLDER ENGAGEMENT

The Strathmore Extractives Industry Centre (SEIC) through its public engagement arm, the Extractives Baraza (EB)

aims to align and co-ordinate with actors to provide a platform for consensus building and make a constructive contribution towards sustainability of the industry. This requires robust engagement with stakeholders from diverse backgrounds in open and transparent dialogues so as to build national capacity for resource exploitation
and increase skills acquisitions through informal knowledge transfer and access to new ideas.
This has been done through the following interventions:

a. **Quarterly Fireside Chat (QFC)**

Our QFCs enable participants to analyse public participation law, practice, and future trends at the national and county levels and offer a predictive look at how public participation has evolved buoyed by the need to adopt sustainable practices that actually worked. We are working towards continued QFCs to facilitate ongoing discussions on sustainable industry led solutions.

b. The Extractives Sector Forum (ESF) are in-depth high-level thematic discussions on specific emotive issues
within the extractives sector such as management of natural resources, land access and acquisition. These forums have been successful in shedding light on ambiguous areas and enabling accord and it is our mission to continue these forums both at the national and county level to enable a holistic approach that encompasses key concerns at the two levels.

c. The SEIC/EB developed, currently convene and manage the Local Content Exchanges in conjunction with
our information dissemination partner, DAI. These Exchanges are high-level breakfast meetings to inform the local content policy direction in the extractives sector in Kenya. As the main facilitator, SEIC/EB aims to continue these impactful exchanges with policy makers and influencers.

d. We manage four social media accounts (Twitter @extrabaraza), Facebook (Extractives Baraza) and 2 LinkedIn
(Extractives Baraza, Dr. Melba K. Wasunna), which assist in advocacy by sharing news, publications and events to targeted audiences. The Team has received various commendations from notable stakeholders like the World Bank. With a high social media presence, we plan on the continued use of these avenues to showcase
our agenda and continue to inspire meaningful convesation from a global audience

EMERGING ISSUES

a. Stakeholder Engagement

Strong, mutually respectful relationships with key stakeholders are essential for extractives sector projects success. By communicating with and engaging stakeholders, it is possible to keep up with the evolving priorities and concerns thus ensuring appropriate response to the arising issues. Currently, there is a range of mechanisms employed by companies and governments to share information with local/host communities where extractives sector projects are taking place. These mechanisms include consultations with the local systems of administration such as Chiefs, Village Elders etc., public meetings and workshops amongst others.

However, there is a level of dissatisfaction about the manner in which community engagement takes place.

Community perceptions, knowledge and expectations can result in misunderstandings and disagreements that can gradually grow into disputes where community members are poorly engaged, marginalized or excluded from

the dialogues that take place in the development process in the extractives industry. An adequate stakeholder engagement through targeted interactions and communications to meet the information needs and expectations of different stakeholders, can result in project success.

b. Local Content

Local content is an evolving topic for foreign direct investment in the extractive industry particularly in emerging resource-rich economies. We see an urgent need to build a structured and facts-based engagement process, bringing together key stakeholders from all sides of Kenya local content debate and to drive a shared vision for value creation, primarily focusing on opportunities arising from the country's petroleum sector. We focus on capacity building, benefiting our fairly large and diverse stakeholder base, and use our platform to enable a more inclusive environment for impactful research, purposive engagement, dialogue and linkages, capacity building and information sharing.

c.Public Participation

As a fundamental right enshrined in the Constitution of Kenya 2010, public participation extends to the exploitation of the country's natural resources including extractives. In the quest for increased meaningful stakeholder engagement within the extractives sector in

Kenya, we work within our key streams; inform, connect and transform, to not only gain insights into perspectives and opinions of all stakeholders across the extractives value chain but also to interrogate existing public participation strategies and their effectiveness. The ultimate aim is to better inform the design and sustainability of such frameworks so as to advance meaningful participation and consensus building for the benefit of all stakeholders

d) Transparency & Accountability

Our program is steeped in the ability to collaborate and pull together diverse stakeholder groups and the ability to use data and evidence to reflect on whether theories in good governance match with practice. With this hybrid model, that has a core knowledge-sharing platform and a collaborative research approach, we believe our focus on transparency and accountability in the extractives sector is well placed in the country given its ability to achieve a larger impact by aligning with stakeholders that share similar, though not identical, goals and values towards good governance.

e) Inadequate Institutional and Legal Framework

Appropriate legal and institutional frameworks are of paramount importance to the full realization of adequate natural resource governance and benefits from the extractives sector.

Legal and institutional frameworks are also essential for establishing the roles and responsibilities of different actors involved in designing, administering, delivering, and enforcing laws, policies and regulations in place.

However, Kenya faces the challenge of conflicting policy and practice between mandated institutions to oversee the extractives industry both at the national and county level.

Kenya is currently undertaking policy reforms for the extractives sector, with the purpose of remedying the

challenges and gaps in the sector. Various incentives already taking place include, the Local Content Bill 2016, The Petroleum Bill 2017, The Natural Resources (Revenue Sharing) Bill, 2014. The development of the Transparency

Framework and the review of the environmental regulations and development of environmental inspection and monitoring manual for the Petroleum Sector.

An appropriate legal framework also establishes entitlements in a clear and transparent way, allowing for those impacted by extractives sector activities to obtain redress in case of a violation of their rights.

f. Gender

Extractives sector activities have the potential to deliver significant growth and development opportunities for host countries. However, in most countries women tend to be excluded to a great extent from these benefits,

whilst at the same time are also disproportiornately vulnerable to many of the risks associated with the

extractive industries. Asymmetries in employment as well as community engagement – can negatively impact extractives sector projects from the social and economic outcomes at the community level. Conversely, improved gender diversity in workforces can have business benefits; increased engagement with community women can strengthen community relations and perceptions of operators; and investment in women in the community is known to deliver long-term health, education and local development outcomes. Improved understanding of the gender-dimensions of the extractive industries can help ensure the increase of positive development outcomes.

g. Youth in Extractives (YIE)

Youth have the potential to be a demographic dividend or a demographic disaster. Given the on-going exploration of commercially viable mineral deposits in most countries in Africa, the continent's natural resource wealth is expected to spur industrial growth, trade and investment when its mineral resources are properly managed with the aid of transparency ,good governance and accountability. All these could create more jobs and business, and promote sustainable economic growth and development. However, the lack of marketable skills and work readiness can undoubtedly present a great barrier for the African youth in particular, to take advantage of the employment and business opportunities created by the extractives sector. The situation is further compounded because Africa's population is rapidly growing, and the number of young people reaching
the working age is increasing. Yet, their skills do not match the current industry needs. The Extractives Baraza has identified this as a gap that needs to be addressed for the youth to realize the potential of the extractives sector
not only in Kenya, but also in the larger African region. The EB considers YIE - Africa project as a revelation for the youth and an intervention that will create opportunities through information/capacity building, innovation, investment and interaction with key industry players.

THE OPPORTUNITY AT HAND

The country's development footprint, the Vision 2030 and the Big 4 Agenda have both included oil and other mineral resources as a priority sector with a high potential of spurring the country's economic development.
Industrialization generally presents immense opportunities to create wealth and raise much-the needed revenue streams to fuel the country's development Agenda.
The country is now leveraging itself through setting up the relevant institutions to support capacity building, finance for development and policy and regulations in place all for promoting value addition in the extractives sector.

PARTNER WITH US!

As our work evolves, we not only grow closer to achieving our objectives but setting even higher targets for value addition in the extractives sector. In this digital age of a global village and taking into consideration the fast pace of the extractives sector as well as all the human-socio intricacies that follow, we remain fully committed to ensure an informed, connected and transformed extractives sector in Kenya and the broader African region. We invite you to join us in this most exciting journey as a sponsor, a knowledge contributor, a volunteer, and any other capacity that complements our vision.

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"JUDICIAL ROLE IN BALANCING HUMAN RIGHTS & THE FIGHT AGAINST TRANS-NATIONAL TERRORISM, CYBER CRIMES AND HUMAN TRAFFICKING"

BY
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(A Presentation at the East African Judges' and Magistrates' Association (EAMJA) conference in Mombasa, Kenya on 24th October 2018)

INTRODUCTION

Transnational crimes are crimes that extend beyond the boundaries or jurisdiction of a single country; hence their description. These include terrorism, human trafficking and more recently cybercrime. The commission of these crimes can be partly or wholly planned and or executed in more than one jurisdiction. However, they are not automatically framed as international crimes within the context of the international community as would be the case with piracy or crimes against humanity. Except for terrorism and the war against terror it appears from internet searches that not much jurisprudence has developed in our courts in so far as human trafficking and cybercrimes are concerned. As a result, there lacks a distinct and clear definition as to what constitutes a cyber crime for instance, as domestic law would normally pass it off as data theft. The closest experience to cybercrimes in Kenya was when there were some foreign Asian nationals who were found syphoning money from the public and also internationally but were deported to a country not of their claimed origin without being arraigned in court. On the other hand, the crime of terrorism is not an emerging issue and has been debated in depth, albeit controversially, ever since the advent of this century and the declaration on the war against terror by the United States of America post the September 11th twin tower attacks. East Africa is no exception to the war on terror as it too has been a victim of terrorist acts, such as the twin bombings in Kenya and Tanzania in 1998, the Westgate mall attack in 2013 and the Garissa University shootings in 2015 all in Kenya and the Kyandondo Rugby bombings of 2010 in Uganda. Today, the crimes of terrorism, cyber crime and human trafficking are acknowledged to be fast rising world over without sparing our region. Some of the reasons that contribute to that is the lack of co-ordination between government agencies both domestically and internationally. Factors such as sharing of information between the respective governments in the East African Community (EAC) has also posed a challenge in the carrying out of thorough investigations and prosecution of cases relating to transnational crimes. Another challenge that has also presented itself is the elevation of the protection of human rights as a premier value in our various constitutional orders. The biblical

scene of Pontius Pilate, Jesus and the Jewish public contextualizes this challenge whereby the judge is placed in a no win position, for if it were up to the public's mandate, the Judge's decision would be construed as failing to satisfy the bar of public interest, and to some extent, I dare say, the Judge runs the risk of being seen as an aider and abettor of the accused. So delicate is the balance between human rights of an accused person and the wider public interest of security and safety of the community that Judges are looked upon, like magicians, to pull satisfactory black and white rabbits from their hats. Unfortunately for them, unlike magicians, they are unable to cast spells on the interested public because of the transparency and scrutiny that judicial work is heir to. The emergence of social media as a near universal communication tool has also not made judicial work any easier because of the level of public awareness and participation in addition to the fact that it is some sort of Kangaroo court where a 'guilty' verdict is determined even before the taking of the plea. Furthermore, some of our governments haven't fully exorcised themselves of the demons of the imperial presidency and do therefore place certain expectations on the court with veiled threats of unaffectionate consequences. It is these issues that underlie any discussion of the role of the judiciary in balancing between human rights on the one hand and the fight against transnational crimes on the other.

The case Law

In the case of Omar Awadh Omar & 10 Others (herein referred to as the Uganda case), the court was presented with an array of alleged human rights violations that were committed by the states of Uganda, Kenya and Tanzania, the essence of which was that some of the petitioners had been arrested in Kenya and handed over to Uganda without any extradition proceedings and others had been surrendered to Uganda by Tanzania while appeals against extradition proceedings were pending and that they had been tortured by law enforcement officers in Uganda. The petitioners' prayers in the Constitutional Court of Uganda were that the court should grant a stay of their criminal trial proceedings before the High Court of Uganda. They challenged 'the constitutionality of their receipt and arrest by the Uganda Police; their detention pre and post remand, whether the places where they were detained were gazetted; their continued detention, alleged ill-treatment or torture while in detention at the hands of the Uganda Police, intelligence, military, prison officers, FBI, and British agents; and their prosecution.' In response, counsel for the state relied on a number of cases seeking to invalidate any irregularities in the receipt and charging of the petitioners on Ugandan soil .For example the Zimbabwean case of Beahan v State was relied upon for the principle that if the prosecuting state has not exercised any force in the territory of the surrendering state then any irregularity in the procedure of the surrendering state is not a bar to prosecution because the sovereignty of the surrendering state has not been violated. Another case that was cited was the case of Ker versus Illinois

which propounded the principle that forcible abduction or mere irregularity in the manner in which a person is brought into custody of the law is not sufficient reason to discharge such a person if he/she has charges to answer before a court that has jurisdiction to try him unless he can show that his right to a fair trial (due process) guaranteed by the American Constitution was affected. Article 124 of the EAC Treaty 2002 also was brought in aid to defend the sort of co-operation Kenya and Tanzania had extended to Uganda as it provided for EAC member states cooperation on security matters and specifically that with respect to cross border crime, partner states agree to provide mutual assistance in criminal matters including the arrest and repatriation of fugitive offenders and the exchange of information on national mechanisms for combating criminal activities. In turning down the Petitioner's prayers the Constitutional Court of Uganda posited the law as follows.

Abuse of process warranting stay of criminal proceedings depends on the fact of each case and should therefore be decided on a case-by-case basis upon considering;

(i) The gravity of the offence,

(ii) Whether the suspect poses an immediate and continuing security threat to life and property in the country or elsewhere,

(iii) The nature of the conduct of those involved in bringing the suspects to the jurisdiction of the Trial Court, and

(iv) That there will however be cases so grave that it would be a proper exercise of discretion to permit the prosecution to proceed regardless.

In that case, the Constitutional Court took the view that the charges of terrorism were grave offences such that if the Petitioners were released they may pose a danger not only to Uganda but other Countries as well. There was no infraction on the part of the Ugandan investigative or prosecutorial authority of the law in Kenya or Tanzania. The Uganda police did not violate the Constitution of Uganda in receiving the Petitioners from Kenya and Tanzania and the DPP did not violate the Constitution in prosecuting them. Those detained beyond 48 hours may be entitled to civil redress as quantified by the High Court. The above decision may be seen in two perspectives; On the one hand, the Court's bounden duty of fidelity to the Constitution and laws of Uganda and the Human Rights guarantees therein irrespective of the nature of the charges against the accused persons, and, on the other hand, a major though unarticulated premise of the Court's sensitivity to the imperative of ensuring accountability for grave crimes committed on Ugandan soil. In the latter regard, had the criminal proceedings been stayed, the public would probably have seen it as a case of miscarriage of justice in the very temple of justice.

From Kenya, there is the case of Republic v Ahmad Mohamed &Sayeed Mousavi concerning alleged Terrorism offences by two Iranian nationals who had been convicted and sentenced to life imprisonment by the magistrate's Court . At the tale end of the judgement the magistrate observed

"We, as Kenyans must thank God for saving our Country. It was only by his Grace the accused and their accomplices were stopped on their tracks. I must appreciate our security personnel for detecting and acting swiftly to stop a catastrophe. I know in the past we have only condemned them if something sinister happens but did not stop to appreciate when they execute their duties so well that our Country's security is taken care of."

The sentences handed down by the magistrate were reduced to fifteen years imprisonment by the High Court which Court also disallowed their Appeal. A second appeal to the Court of Appeal was allowed and the accused persons acquitted and an order for their repatriation to Iran made. The DPP sought a certification that the matter was of general public importance for purposes of an appeal to the Supreme Court and a stay of the order for repatriation pending an intended appeal to the Supreme Court. The Court of appeal refused both prayers. The DPP then moved to the Supreme Court and appealed the refusal to certify the intended appeal and concurrently sought a stay of the court of appeal's order of acquittal and repatriation of the subjects pending appeal. The Supreme Court reviewed and set aside the Appellate Court's decision declining to certify the matter as of general public importance and substituted it with an order allowing the DPP to appeal. The court further found that the Principle of development of the law under Article 259 of the constitution and the spirit of the right to a fair trial under Article 50 of the said constitution bestowed on the court an inherent jurisdiction to stay the acquittal of a Respondent pending the determination of the appeal challenging that acquittal, the absence of any constitutional or statutory power to do so notwithstanding. A critical evaluation of the case may lead one to the conclusion that the primary concern of the Supreme Court of Kenya was the upholding of the public interest in ensuring real accountability for serious crimes by not freeing the acquitted suspects before the exhaustion of the available legal process by the state. That conclusion is fortified by the following two observations by the court in the course of delivering its ruling. First, the Court observed

"Due to the nature of the terrorist attacks the Kenyan public has for a time lived in fear and felt insecurity in their own motherland. The crime of terrorism undermines our national security as well as the peace and tranquility of the people of Kenya and all other people who live within our borders."

Secondly, it stated

'' Turning to the case at hand, the respondents are foreigners. They are Iranians. Kenya has no extradition Treaty with Iran. We therefore accept the Applicant's submissions that if repatriated, it will be difficult to secure the respondents presence in Kenya to complete their imprisonment term if the state's appeal is allowed."

It is crystal clear that a different order would have rendered the intended appeal by the DPP nugatory since the accused persons would have been released without any guarantees of their appearing for the hearing of the DPP's

appeal. A critical evaluation of the Supreme Court ruling clearly shows that the primary concern was the satisfaction of public interest irrespective of the fact that there was already an existing order for the acquittal of the accused persons by the Appellate Court who found that the evidence leveled against them was inadmissible to place them at the scene of crime.
From the approach by the courts in the above-mentioned cases, one may extrapolate judicial attitudes that may be the basis of future jurisprudence with respect to matters where fundamental rights and transnational crimes are concerned. Those trends may be crystallized under the following rubrics: -

(a) **Jurisdiction**
The specific issues relating to jurisdiction primarily are focused on bringing the suspects to the jurisdiction of the court. It seems to be the norm that in matters relating to transnational crimes, where there is want of due process in handling suspects, the moment one has been handed over to the requesting state his fundamental freedoms will be dictated by the constitutional order of that state. This was evident in the Uganda case whereby allegations of violations of fundamental rights such as lack of evidence of an arrest warrant, abduction, forcible transfer and claims of torture were not considered as material infractions of human rights as they had not been committed on Ugandan Territory or by Ugandan officials in foreign Countries.

(b) **Fundamental freedoms**
Fundamental freedoms are personal guarantees and rights that are considered to be inherent in human beings by virtue of their being human. They are said not to be grants or privileges by states. These freedoms have been adequately captured in various international instruments including the African Charter on Human and Peoples Rights That International Instrument is expressly recognized as a standard for application in the East African Community by dint of Article 6 of the Treaty for the Establishment of the East African Community. The individual member states to the EAC do also have separate bills of rights enshrined within their respective constitutions. In the context of transnational crimes, it emerges that the balance between Fundamental human rights, including the presumption of innocence and associated right to bail on the one hand, and the public interest in national security and criminal accountability of suspects on the other hand, tilts in favour of the public interest. In short, the law never operates in a vacuum.

(c) **Tools of the court**
The Supreme Court of Kenya (SCK) decision on the prosecution of the two Iranians in Kenya recognized that even though the issuance of stay of release orders is a prerogative of the court, it should be used sparingly. In its ruling, the SCK acknowledged that Kenya has no legal provision in the Constitution or

Statute that directly speaks to the power of an appellate court, be it High Court or Supreme Court, to grant orders committing to prison a person who has been acquitted, pending the hearing of an appeal. Whilst recognizing this fact, it took the position that it was not without power to grant such an order. The US court in the Kerr v Illinois case also expressed this same view. In light of the above, it is again abundantly clear that the courts are willing to invoke their inherent powers to prevent or avoid an injustice to limit or circumscribe fundamental freedoms in the interest of satisfying the public interest in accountability for crimes committed in their jurisdiction.

CONCLUSION

Whichever way we look at it, judges are duty-bound in matters of transnational crimes, and in particular terrorism, to constantly strike a balance between two public interests: observance and protection of the fundamental rights and freedoms of criminal defendants on the one hand, and the effective prevention and combating serious international crimes. The latter in turn entails the public interest in the security of the state and accountability for serious crimes. In balancing those interests, there is no rule of thumb, everything depends on the circumstances of each case. The emerging jurisprudence in this region tends to show that if push came to shove, the interests of the public at large would trump the rights of the individual defendants

REGIONAL JUDICIAL STRATEGIES TO ATTAIN SOCIAL-ECONOMIC GROWTH AND CULTURAL DEVELOPMENT

Lady Justice Monica K. Mugenyi

East Africa Judges & Magistrates (EAMJA) Conference, 2018

Introduction

This Discussion Paper advances the proposition that:

There is a strong link between a strong, effective Judiciary; the Rule of Law, & Socio-Economic Development.

Indeed, the economic development that has ensued from globalization has yielded mixed results.

"There are still more than one billion people who live on less than one dollar a day and nearly three billion who live on less than $2 a day. The poor continue to lack legal rights that empower them to take advantage of opportunities and provide them with security against arbitrary and inequitable treatment. Discriminatory or arbitrarily enforced laws deprive people of their individual and property rights, raise barriers to justice and keep the poor poor. For this reason an effective judiciary is critical."

Dakolias, Maria, The Role of the Judiciary for Social and Economic Development, Speech to the EU Judiciaries Representatives, The Hague, Netherlands, November 2003, p.2

- If the foregoing quote is not sufficiently persuasive, the following critique of the Brazilian Judiciary would obviate any doubts as to the development prospects of a dysfunctional Judiciary.

The sort of judicial credentials we must certainly avoid!:

- "Brazil's dysfunctional judiciary … is increasingly seen as an obstacle to national development. It is a system that allows debtors of all kinds to abscond at will, knowing

that none but the most determined of creditors will pursue them through the courts. It forces banks to lend at astronomical rates of interest because they cannot foreclose on debts. More worryingly, it means that vital infrastructure projects are stalled because investors cannot be sure the judiciary will uphold their rights."

Wheatley, Jonathan, Brazil's Judicial Nightmare Brings Gridlock for Growth, Financial Times, May 24, 2005, p. 18

Therefore ….

- Quite clearly, any purported development that ignores the Rule of Law would be unsustainable.

- Indeed, by way of illustration;

Whereas Argentina experienced economic progress during the 1990s, between 2003 – 2005 it found itself in a financial crisis that was largely attributed to corruption and lack of respect for the rule of law.

- Again, this would scarcely be the sort of inspiration that we in the EAC aspire to emulate. A financial crisis in any one country in the region could off-set a 'spill-over' effect in others.

- The need for evenly balanced socio-economic development cannot therefore be over-emphasized.

What is Socio-Economic Development?

- In the 21st Century, socio-economic development cannot simply be about balance of payments; infrastructure development, or increased tax revenues.

- It is increasingly about the Rule of Law in so far as it facilitates a conducive investment climate that is characterized by the following:

1.Legal Certainty – ie the existence of laws that are transparently and fairly enforced, thus providing due predictability in court decisions.

2.Enforceable Contracts – such that there is promotion of business and commerce.

3.Basic Security – that guarantees safety of persons and property, and an independent judiciary that safeguards both.

4.Access to Justice – that underscores the safety of persons and property.

Socio-Economic Development legally defined

1. ICESCR (International Covenant on Economic, Social & Cultural Rights)

- Provides the basic legal framework within which social, economic & cultural development may be pursued. See Article 1(1).

- However, the socio-economic development that is envisaged therein is subject to the international economic commitments of nation states, provided that compliance with those commitments is mutually beneficial to both the States and their peoples.
- Indeed, the provisions of the EAC Treaty & Protocols are examples of such commitments by the EAC Partner States, to which they may be held to account.

2. The UN Copenhagen Declaration and Program of Action, 1995

- Specifically defined development as a multi-faceted process 'that enables the human person to fully enjoy all economic, social, cultural and political rights.'

In that context, what is Cultural Development?

- The right to cultural development is referred to in the UNESCR and The UN Declaration on the Rights of Indigenous Communities.

- The FPIC concept mandates host communities to development projects to exercise their right to self-determination through their authority to consent to or withdraw consent to such projects in their societies.

- Global economic culture, on the other hand, entails a fusion of the policy dictates (ideas) of IFIs, on the one hand; an imbalanced global trade regime that benefits high income countries more than low/ medium income countries, and the purely profit-driven, often tax-evasive investment activities of TNCs. This is not an environment in which poorer nations thrive.

- Consequently, Regional Integration emerged as an upshot of the lop-sided global economic culture and presents prospects for:

1.A market that is easier to access for regional inter-state trade.

2.Improved access to global markets as a regional Bloc rather than individual countries.

3.Private sector development, given the free movement of persons, thus a sharing of corporate business practices across the Bloc.

The Courts & Socio-Economic Growth & Cultural Development

UN SDG (Sustainable Development Goal) 16 outlines the role of Judiciaries in the global development agenda. It reads:

"Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels."

The Judiciary thus has a three-fold function:

- To promote the harmonious co-existence of and respect for diversity within societies.

- To provide social and substantive justice before competent and impartial judges.
  - Equality of persons before the law and procedural fairness and propriety.

- Foster a culture of national and institutional good governance.
  - Accountability, Rule of law and Separation of Powers.

Policy and Operational Functions of the Judiciary

- Policy function:
  - At policy level, the Judiciary has a duty to engender a national/ regional culture of good governance, respect for the rule of law and accountability.
  - It is also under a corresponding duty to entrench within its own internal administration related good governance practices and accountability. As it seeks to hold other

institutions and the respective body politics to account, it must itself be a corruption-free zone of excellence.

- Operational function:
  - The core, technical function of the Judiciary is the efficient administration of justice with due regard to the principle of judicial economy.
  - Judicial economy is the frugal utilization of judicial resources ie funds, time and man-power.

- **Conclusion:**
  - A Judiciary that turns a proverbial blind eye to good governance contraventions or circumvents the principles of good governance and accountability itself, cannot be a credible footstool in the socio-economic development of the body politic it functions in. it would have metamorphosed itself into a zone of ridicule.

How then do courts foster the Development Agenda?

1. Timely and purposive resolution of commercial disputes

- Court intervention should be characterized by the development of a robust body of case law that, while enabling commercial expediency, does also hold foreign investors (often TNCs) accountable to their tax and other regulatory obligations.
  - Avert capital flight (the repatriation of profits back to home countries).

2. Reconcile the contradictions between the global SDGs viz Sates' international economic obligations.

- International law recognizes peoples' right to social, cultural & economic development. Articles 1, 2 & 25 of ICESCR.
- Whereas infrastructure development was identified as one of the SDGs applicable to the EAC region, it is courts' duty to balance the exigencies of that development goal with host communities' property rights.
  - Ensure fair and adequate compensation for compulsory acquisition of land.
- Courts may also adjudicate social issues that arise from development projects.
  - A local community's rape complaints against Chinese contractors stalled a WB road project. It was resolved diplomatically but could have wound up in court.

3. Enforcement of states parties' international obligations under the ICESCR, EAC Treaty & Protocols.

- Art. 2(1) underscores States' obligation to work progressively towards peoples' socio-economic development. Examples of how this obligation can be achieved include:
  - Provision for public participation in FDI through IPOs.

- Provision for engagement of local content & technology transfer in investment ventures.

- States are also under an obligation to mitigate the negative impact of national investment policies. This may be achieved by:
  - Legislation eg Anti-dumping laws, minimum wage laws.

- The EAC Treaty specifically enjoins the EACJ to uphold its (Treaty's) application. The Court does accordingly articulate stakeholders' obligations under EAC Community Law by:
  - Enforcing the agreed principles governing regional integration.
  - Enforcing the free movement of goods, services, persons and capital.

Factors that undermine courts' function

Inadequate Resources:

- One of the common complaints by judiciaries in developing countries is lack of financial resources and sufficient manpower. It is often argued that more finances and more judges would (presumably other factors being equal) lead to faster disposition of cases and perhaps more effective judiciaries.

However …….

- Research indicates otherwise.

- Although low budgets and few judges are indeed a big problem for developing country judiciaries, it is increasingly clear that neither budgets nor numbers of judges are at the heart of courts' non-optimal performance.

- Indeed, a World Bank review of studies in Latin America and the Caribbean showed 'no correlation between the overall level of resources and the time to disposition of cases.'

Botero, Juan Carlos, Rafael La Porta, Florencio López-de-Silanes, Andrei Shleifer, and Alexander Volokh 'Judicial Reform', World Bank Research Observer, , 2003, p. 63.

On the contrary

- Judicial competencies & Administrative Inefficiencies:
  It would appear that the solution lies not in the size of judicial budgets but in the composition of the budgets ie What the money is actually spent on?

- In Argentina it was found that 'approximately 70% of Argentine judges' time was spent on non-adjudicative tasks.'
  Buscaglia, Edgardo, & Pilar Domingo, 'Impediments to Judicial Reform in Latin America', In The Law and Economics of Development, ed. Edgardo Buscaglia, William Ratliff, and Robert Cooter, 1997. p. 297

- It has also been opined that unless judges are appointed and promoted on merit-based considerations, the traditional budgetary lines of judiciaries such as training, hardware, consultants, international conferences, ICT technical assistance, caseload management were futile.
  See Kaufmann, Daniel. Rethinking Governance: Empirical Lessons Challenge Orthodoxy. Working Paper (Discussion Draft March 11, 2003), p. 25

Case Backlog:

- Backlog is a dysfunctionality that greatly erodes public confidence in the judiciary or in court intervention as a viable dispute resolution mechanism.
- However, backlog is sometimes the offshoot of short-sighted and subjective legal reforms, as well as the absence of judicial intervention to redress them.

Examples:

- In Brazil, a new Constitution (1988) so expanded the range of constitutional rights, including new social and economic guarantees, and the kinds of plaintiffs entitled to bring constitutional actions, that backlog multiplied many times over.

- By contrast, in the U.S, the requirement for parties raising a constitutional issue to show that it affects them in a direct and legally cognizable way, & the ability of the U.S Supreme Court to limit its intake of questions to important issues, has enabled it to limit its substantive decisions to well under 200 cases per year.

Emerging Issues: The Brazilian Case

- The Brazilian Scenario:

Increased access to the courts (or reduction in the cost of access), though necessary, can also lead to heavier case workloads.

- Much of the Brazilian Constitutional litigation appeared to have been motivated by the promulgation of an overly prescriptive constitution.

- It was necessary to establish rules and procedures that channel court intervention to only deserving cases, not such matters as would clog the system yet they can be resolved by ADR or less formal procedures (eg Small Claims Procedures in Uganda).

- "Unfettered access for everyone had produced, not surprisingly, access for no one."
- Prillaman, William C., The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law (Ibid).

Lessons Learned

1.Courts as 'special purpose vehicles' for socio-economic growth

- Enforce the balance between states' responsibility to pursue the UN SDGs so as to drive economic development; their social obligations to their peoples, and the peoples' right to development.

- Courts must define the parameters within which consent to development projects may be withdrawn by host communities so as to avert undue disruption and/ or frustration to projects that are critical to the socio-economic development of a host state.

- To this end, courts would be required to balance the cultural rights of host communities, on the one hand, with the development interests of the host state and the international economic obligations of nation states.

2. Courts as cultural change agents

In terms of fostering a good governance culture, courts must endeavor to clarify and redefine the governance balance between the independence and interdependence of the 3 branches of government. As stated in Phillips, O. H. & Jackson, P., 'Constitutional and Administrative Law', Sweet & Maxwell, 2001. 8th Edition, p.12: "A complete separation of powers, in the sense of a distribution of the three functions of government among three independent sets of organs with no over-lapping or co-ordination, would (even if theoretically possible) bring government to a stand-still. What the doctrine must be taken to advocate is the prevention of tyranny by the conferment of too much power on any one person or body, and the check of one power by another."

As regionalism and globalization take root, we must as a regional body of judiciaries decide what judicial culture we wish to espouse.

Whereas the EAC region pursues both civil law and common law jurisdictions, we are seeing an increasing convergence of the two systems, each borrowing best practices from the other.

We may wish to make a fresh clarion call on judicial ethics, conduct, etiquette and values. We may wish to rethink where we draw the lines on legality viz propriety; conscience viz convenience, principle viz popularity; the rule of law viz the force of law. Ultimately, judging for posterity.

Conclusion

- "People are 100% for Progress but 1000% against Change."
  Hon. John J. Molaison, Jr. & Hon. William F. Dressel

- It is our duty to change mindsets in as far as the Rule of Law is concerned.

"The rule of law must be included in any conversation about economic or social development. It is up to … every person in this room, to make sure that the rule of law is an integral part of that conversation."
Dakolias, Maria, The Role of the Judiciary for Social and Economic Development, Speech to the EU Judiciaries Representatives, The Hague, Netherlands, November 2003, p.3

I thank you all for your kind attention. Asanteni Sana!

JUDICIAL ROLE IN DEEPENING REGIONAL INTEGRATION AND THE POST -2015 DEVELOPMENT AGENDA: DEVELOPMENT AGENDA: A DIALOGUE ON OPPORTUNITIES AND CHALLENGES

"The Regional Frameworks for Oil, Gas and Minerals Regime vis-à-vis the rights of communities in Natural Resource Exploitation"

Acknowledgement and Disclaimer: This body of work was primarily produced by Dr. Korir Sing'oei- Office of the Deputy President for delivery to the LL.M Oil and Gas Programme on Human Rights Issues in Oil and Gas. Strathmore University has however tweaked it to meet the expectations of this Conference. Nevertheless, Strathmore University hereby gives full credit to Dr. Korir Sing'oei for the excellent piece of scholarly work.

ISSUES TO PONDER

1.Bridging Gov't Ownership -versus- Community Interests: The Unholy Nexus

2.Do Communities have rights over natural resources?

3.Does the Bench have a role in protecting investments?

4.If so, what role is this?

5.How should the Bench balance out investor rights against community rights? Or shouldn't they?

THE SOCIAL LICENSE TO OPERATE

A Critical Review
Outline

- Introduction
- WHAT is social license to operate (SLO)?

- Rationale for (SLO)
- Nature or character of SLO
- Actors in SLO- who grants, who receives & who monitors social license
- How do companies secure SLO?
- FPIC
- Indicators
- Lessons Learnt
  Introduction

  There are many LARGE SCALE DEVELOPMENTS IN EXTRACTIVES, ENERGY, AGRICULTURE ETC that have been delayed, disturbed, and even shut down because of poor community engagement.

  These delays mainly result from stakeholder-related risk -regarded as major non-technical risks.

  Risks include hostage taking of resource company workers, forceful occupation of installations, sabotage of operations, legal challenges against resource operations at home and host states etc.
- 15 billion shillings Kinangop wind project
- Flouspar mines closure
- Geothermal development in parts of Olkaria, Naivasha
- Lake Turkana wind project
- Ngamia oil fields

WHAT is social license to operate (SLO)?

That which a project proponent in the extractive sector must do beyond complying with formal legal requirements in order to facilitate extractive operations.

Anchored on the concept that the exploitation of non renewable natural resources where only one generation is the likely direct beneficiary of a resource calls for 2 levels of approval- formal legal permitting and social acceptance of the project by communities within the extractive site.

Social License, then, is an intangible construct associated with acceptance, approval, consent, demands, expectations, and reputation.

Moreover, these notions suggest an overarching concern with organizational legitimacy (Parsons, Lacey and Moffat "Maintaining legitimacy of a contested practice: How the minerals industry understands its 'social license to operate,'"

Resources Policy 41: 83–90

- SLO has been criticized for lacking conceptual clarity and being open ended: "While the social license is intended as a metaphor to encapsulate values, activities and ideals which companies must espouse …even metaphors require clear boundaries to make them meaningful." Bice, S. 2014, What Gives You a Social Licence? An Exploration of the Social Licence to Operate in the Australian Mining Industry

- It has also been criticized for weakening the rule of law: "An extra-legal social permission may be based on other dimensions beyond even best environmental and social practice and can easily be distorted by public misinformation since the debate lacks structure and accountability." (Business council of British Columbia, 2015, Rethinking Social Licence to Operate – A Concept in Search of Definition and Boundaries. a SLO suggests that some segment of the public must give "permission" – tacit or otherwise – for an activity to operate or for an investment to be made. But which segment of the public makes that call?

Justification for SLO

1.PRAGMATIC CONSIDERATIONS: De-risking investment in extractives. Disruption/ violence/ legal suits

2.Globalization: innovations in communication technology and social media have revolutionized how public debates on resource developments unfold. Public sentiment can be influenced and organized in innovative ways. Social engagement has changed and is continuing to evolve at a dramatic pace.

3.Absence of effective recourse mechanisms for host communities under national & international law.

4. LEGAL CONSIDERATIONS: constitutional/ international human rights law developments- property rights, participation, dignity, right to development

Residual Property Rights

- COLONIALISM CREATED A DUAL CHARACTER OF PROPERTY RIGHTS –ONE LEGAL & THE OTHER CUSTOMARY.

- Layered nature of property in Africa means that even after payment of compensation, cultural conceptions still refuse to admit the permanent alienability of land & resources thereon. Due diligence on title over land the subject of extractive activities must take cognizance of underlying cultural claims over the land which may militate against complete noninvolvement of a contiguous community. The existence of the legal right over a resource does not extinguish social-cultural claims, hence need to provide means to validate with the resident community.

- "Today we declare that established traditional and artisanal fishing rights and routes exist in areas immediately within the Kenyan archipelagic areas and which are within Kenya's Exclusive Economic Zone (EEZ) and National Waters…the existence of this penumbral right under our Constitution is merely a reflection and extension of existing international law…" (para 298 & 299 LAPPSET corridor case.)

Participation

Consultations the Respondent State undertook with the community were inadequate and cannot be considered effective participation. The conditions of the consultation failed to fulfil the African Commission's standard of consultations in a form appropriate to the circumstances. It is convinced that community members were informed of the impending project as a fait accompli, and not given an opportunity to shape the policies or their role in the Game Reserve (Endorois v Kenya, achpr, para 281).

Whether there was sufficient public participation in the conceptualization and implementation of the LAPSSET Project: "Public participation is generally the real involvement of all social actors in social and political decision-making processes that potentially affect the communities in which they live and work" (para 211). "we take the view that it would be contrary to a person's dignity (see Article 28) to be denied this constitutional and statutory right of public participation." It can be seen as genuine consultation or merely information dissemination. "It may also involve community education or be viewed as a means of promoting social responsibility and citizenship" (para 219)

Right to Development

- Commission determined that RTD is both constitutive and instrumental- or useful as both a means and an end (para 277) and, must be equitable, non-discriminatory, participatory, accountable and transparent.[1] "Active, free and

meaningful participation in development" as per UN Declaration would per the Commission lead to the empowerment of the Endorois community (para 283). In this regard, it held that both the choices and the capabilities of the Endorois had to improve in order for their right to development to be realized.[2].

- Agreements with community based on unequal bargaining power would be insufficient to satisfy RTD requirements (para 282).

- [1] endorois v Kenya, ACHPR, para. 277.
- [2] endorois v Kenya, ACHPR, para. 283.

Dignity

Right to dignity demands that people be allowed to participate meaningfully in matters that will affect them-particularly when it affects matters of fundamental importance such as their attachment to the place where they reside (Matatiele municipality and others v President of South Africa (2007) paras 66-67)

Parties to SLO

- PROJECT PROPONENTS-COMPANY and GOV'T?

- COMMUNITIES- WHO? WHAT STRUCTURES? POWER DYNAMICS

- 3RD PARTY MONITORS

Free, Prior and Informed Consent (FPIC)

This is a specific right that pertains to indigenous peoples and is recognised in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). It allows them to give or withhold consent to a project that may affect them or their territories. Once they have given their consent, they can withdraw it at any stage. Furthermore, FPIC enables them to negotiate the conditions under which the project will be designed, implemented, monitored and evaluated. This is also embedded within the universal right to self-determination.

Role of FPIC (1/5)

Securing SLO?

- Community ownership of development processes and outcomes can be improved through free prior informed consultation/consent

- Free prior and informed consent ("FPIC") is a specific right that allows indigenous peoples to give, withhold or withdraw consent to a project or activity that may affect the lands, territories and natural resources that they customarily own, occupy or otherwise use. FPIC enables them to negotiate the conditions under which the project will be designed, implemented, monitored and evaluated. FPIC is not just a concern for governments: businesses must also respect this right. The aim of FPIC is to establish the participation and consultation of an indigenous or tribal population prior to the beginning of a development on their land/or land they occupy and/or using resources within that territory.

- FPIC is embedded within the right to self-determination and is not codified in any one universally-binding treaty. It derives from a series of international legal instruments, which includes ILO Convention 169 on Indigenous and Tribal Peoples ("ILO 169") and the UN Declaration on the Rights of Indigenous Peoples ("UNDRIP").

Role of FPIC (2/5)

All elements within FPIC are interlinked. Consent should be: sought before any project, plan or action takes place (prior); independently decided upon (free); and based on accurate, timely and sufficient information provided in a culturally-appropriate way (informed) for it to be considered a valid result or outcome of a collective decision-making process.

DOES "consent" equate to a right to veto, or whether it simply requires mere consultation? Generally, the rule under international law is that good faith consultation undertaken with a view to receiving consensus is required. Consent of the indigenous group, however, is not an absolute requirement in most circumstances.

However, there is an exception to this where the proposals under consideration involve large-scale or major projects that could have the effect of denying the cultural survival of

the indigenous group in question. In that case, free, prior and informed consent in its full sense is required.

Role of FPIC (3/5)

Key requirements of free, prior and informed consultation can be summarised as follows:

(A)Consultations must be entered into in good faith, and must involve a real engagement and dialogue, with a view to achieving consensus. They must not be a mere formality without any real engagement.

(B)Consultations must be carried out in a culturally-appropriate manner, using language that can be understood by the indigenous peoples. They should respect traditional forms of authority and decision-making; in some circumstances this will require consulting directly with an entire community, not merely with community representatives that are recognised by other state administrative laws (where community decision-making processes would not give those representatives authority to make such decisions without internal consultation or consensus).

(C)Consultations should not be undertaken in a way that deliberately undermines the social cohesion of the indigenous. Actions such as bribing individual community leaders or members are inconsistent with appropriate and effective consultations.

(D) Indigenous groups must be given full information about the project, including its nature, scope and duration, and likely positive and negative effects upon the community, including environmental and health risks. Furthermore, the state must be prepared to receive information from the community, i.e. there must be an exchange of information.

(E) Proper information and dialogue is an essential requirement. If a community consents (for example, because it has been promised material rewards) without having been informed properly about the project, its consent is void.

(F) An social and environmental impact assessment that takes into account environmental, social, economic, cultural and spiritual risks must be undertaken at an early stage, and that information provided to the community. Where this is delegated to a private company contracted by the developer, it must be subject to strict state monitoring and oversight to ensure that the assessment is fair and comprehensive.

(G) Consultation must occur at the earliest possible stage of the project and should continue throughout the life of the project.

(H) It is insufficient for the state to delegate consultation to the company that is interested in pursuing the development, at least without substantial monitoring & OVERSIGHT.

Role of FPIC (5/5)

Certain treaties such as the International Covenant on Economic, Social and Cultural Rights ("ICESCR") have been interpreted to extend the right to FPIC to non-indigenous communities. For example:

(A)The right to take part in cultural life requires that states obtain the FPIC of persons belonging to minority groups, indigenous peoples or to other communities when the preservation of their cultural resources (especially those associated with their way of life and cultural expression) are at risk ("General Comment No. 21: Right of Everyone to Take Part in Cultural Life," [E/C. 12/GC/21] (December 21, 2009), para 55(e))

(B)The right to adequate housing requires states to obtain the FPIC of affected persons, groups and communities regarding their resettlement (United Nations, "Basic Principles and Guidelines on Development –Based Evictions and Displacement").

(C)UN Declaration on the Right To Development talks of the "active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom."

FPIC IN ACTION: AS PART OF FINANCING/INDUSTRY STANDARDS

The Equator Principles III applies to advisory services, project finance, corporate loans and bridge loans of a signatory financial institution in its support of a new project. Principle 5 requires that indigenous peoples be consulted when potentially affected by projects.

The International Finance Corporation Policy and Performance Standards on Environmental and Social Sustainability states that projects that adversely impact indigenous peoples require engagement in a process of Informed Consultation and Participation (Performance Standard 7).

The European Bank for Reconstruction and Development's Environmental and Social Policy states that FPIC must be obtained before any of the activities described below are commenced:

(1)those that impact on traditional or customary lands under use;

(2)those that involve relocating indigenous peoples from traditional or customary lands; &

(3)those that propose to use the cultural resources, knowledge, innovation or practices of Indigenous Peoples for commercial purposes.

The Initiative for Responsible Mining Assurance Standard for Responsible Mining requires companies to obtain FPIC from affected indigenous communities before commencing any mining-related activities that may affect indigenous peoples' rights or interests

Indicators of existence of ISO

- LEGITIMACY
- CREDIBILITY
- TRUST
- CO-OWNERSHIP

Lessons Learnt

- ALLOCATE TIME FOR RELATIONSHIP BUILDING
- REGULATORY COMPLIANCE ENHANCES SLO
- TRANSPARENCY AND OPENNESS KEY

  Reflections on EAC

The EAC Treaty: Article 114 requires that for the purpose of co-operation in environment and natural resources management, the Partner States agree to take concerted measures to foster co-operation in the joint and efficient management and the sustainable utilisation of natural resources within the Community for the mutual benefit of the Partner States.

With regard to the management of the mineral resources sector, the Partner States agree, inter alia, to promote joint exploration, efficient exploitation and sustainable utilisation of shared mineral resources.

JUDICIAL ROLE IN BALANCING HUMAN RIGHTS AND THE FIGHT AGAINST TRANSNATIONAL TERRORISM, CYBERCRIMES AND HUMAN TRAFFICKING

Fauz A. Twaib

High Court of Tanzania, Mtwara Zone

24 October, 2018

Outline

The Approach

- Human Rights vs Fight against Transnational Crimes
- Part III of the Constitution (Article 13 vs Article 30)
- The Balancing Act. Transnational Economic Offences
- Case study: Money Laundering

ISSUES ARISING

- What is the role of the Judiciary in maintaining the necessary balance between two conflicting interests: Human rights and the fight against transnational crimes?
- What salient features of the law present particular challenges in this regard?
- How is that law enforced?
- The challenges we face as the Judiciary and how we have so far reacted to those challenges;
- What can be done?

THE APPROACH

- The topic as formulated requires a discussion of the role of the Judiciary in balancing human rights, on the one hand, and the fight against transnational terrorism, cybercrimes and human trafficking the other hand.
- The theme of Session Five ("Trade and Transnational Crimes"):
- Focus: Our role as the Judiciary in ensuring a balance between two critical needs:
- To promote and protect human rights; and
- To support the fight against international economic crimes.
- BALANCING THE NEEDS

  Both are our roles!
- But challenges abound.
- Sharing experiences: How have we (in Tanzania) reacted to those challenges.

- Human Rights: Art. 13 (Rule of Law, Presumption of Innocence, Right to Due Process, Fair Trial, etc.).
- Only exception: Allowance given (to interfere with or curtail their enjoyment: Art. 30 (2) (b) and (e): (Ensuring the defence, public safety, etc., public benefit and national interests generally.

BALANCING THE NEEDS

- Hence, the balance is in ensuring:
- Promotion and protection of human rights;
- The enjoyment of such rights are within legal bounds.
- Meaning: We have to ensure that the criminal law functions, and functions effectively.
- There is an inherent struggle in these two judicial roles.
- Human rights can only be taken away or limited upon a strict adherence to due process.
- Not an easy task—Importance of this discussion.

THE ORIGINS OF ECONOMIC OFFENCES (Tz)

- The specific categorization of certain offences as economic offences began in 1983, when the Government embarked on a crackdown against "economic saboteurs".
- It began with arrests, followed by detention orders by the President. Then the Economic Sabotage (Special Provisions) Act was enacted.
- No Bill of Rights at the time. But the Act posed particular concerns about its propriety, because:

ECONOMIC OFFENCES (Origins in Tz)

- Began with the use of detention powers.
- The Act became law on 4th May 1983, but had retrospective effect to 25th March, 1983.
- Though the "Scheduled offences" were created by various existing laws, courts' jurisdiction during the currency of the Act was vested on a new, special tribunal presided over by a High Court Judge appointed by the President sitting with two lay members also appointed by the President.
- Decision was by majority, and thus lay members could prevail over the High Court Judge.
- Presidential Powers:
- Renewable by further presidential order for six months. Beyond that, Parliament.
- Only the President could grant bail.
- Appeals lay to the President. But only on sentence, not against conviction.
- No right to legal representation.

- But on 2nd July, 1983, the Act was amended – removed most of the powers of the president. Allowed the granting of bail, and legal representation.

CURRENT POSITION

- The strict provisions of the 1983 Act did not last long: Economic and Organised Crime Control Act, 1984 (Sept.). But what happened at the time provide a background for understanding the current legal regime aimed at fighting transnational and economic crimes generally.
- Many relevant legislation. To mention a few:
- The Economic and Organised Crime Control Act, Cap 200 (R.E. 2002);
- The Proceeds of Crime Act;
- The Drugs and Illicit Trafficking in drugs Act, Cap 95;
- The Prevention of Terrorism Act, Cap 19;
- The Mutual Assistance in Criminal Matters Act, Cap 254;
- The Anti-Money Laundering Act.

TRANSNATIONAL CRIMES & ECONOMIC CRIMES

- "The Global Village" phenomenon: A Close connection between Transnational crimes and economic crimes.
- East Africa: Even closer. Effects much closer.
- Though there are many "traditional" crimes that are economic in nature (e.g., theft, robbery, bribery, etc), the economic dimension of penal law has in the recent past taken a new face and more significance.
- Emergence of new types of crimes, with an increasingly international dimension: terrorism, money laundering, drugs and human trafficking, etc.
- Their new-found recognition has come about with changes in their dimensions:
- Rise in their prevalence, the sheer size and magnitude (e.g. from simple theft to plunder of natural resources; from petty corruption to grand corruption; from local use of prohibited drugs to multi-billion dollar businesses by drugs curtails);
- The forms they take (simple theft to theft by public servant);
- The manner in which they are executed (forgeries, counterfeits, cyber crimes, etc.); and
- The necessary connection between them (drugs trafficking/piracy and conflict (both internal and international; money laundering, etc.)

CASE STUDY: MONEY LAUNDERING

- 2006: The Anti-Money Laundering Act, Cap 423.
- The "laundering" (cleaning) of "dirty" money.

- By its very nature, ML consists of more than one crime, though, as is the case in Tanzania, it can stand as a crime of its own—without the need to prove the original crime.
- Its commission begins with a predicate offence (theft, drugs trafficking, piracy, human trafficking, etc.), which creates the proceeds of crime and then goes through three steps to complete the money "cleaning" process:
- Placement: Proceeds of the original crime are disposed or "placed" into the legitimate financial system—through investments in lawful business, etc.) (weakest link and most important stage. Proximity to the predicate offence).
- Layering: BOT Policy on Money Laundering: "A process of executing variety of transactions intended to disguise the audit trail and true source of ownership pf the funds or property". The illicit origin of funds is concealed by creating complex layers of transactions to prevent traces—more complicated when done across borders.
- Integration: BOT Policy: "the re-introduction of the illicit funds back into the economy appearing to be funds from legitimate sources". Completes the laundering process. The funds are "clean", its illicit origin completely concealed.
- JURISDICTION for economic offences:
- RM's Courts, District Courts (less than 10 Mil. & High Court).
- 2016 Amendments to the EOCCA:
- Removed powers of the ordinary criminal registry of the High Court to try economic cases where the value of the subject matter is above TZS 1Bn. Now vested in the Corruption and Economic Crimes Division of the High Court. Replaced the Registry with the Division.

- BUT: DPP has power to confer jurisdiction on a subordinate Court: Section 3 EOCCA.

BAIL for economic offences may be granted:

- Upon arrest and before committal: jurisdiction vested in the RMs or DCs if value is less than TZS 10Mn.
- After committal, before commencement of trial: Vested in "the High Court".
- After commencement of trial: Vested in "the Division".
- BUT: The jurisdiction of all these courts to grant bail is subject to the DPP's powers to object to bail being granted, upon filing a certificate stating that the granting of bail will prejudice the interests and safety of the Republic. Section 36(2) of the EOCCA BALANCING THE ROLES
- Some examples: The challenge to the DPP's powers on bail:
- AG v Jeremia Mtobesya, Civil Appeal No. 65 of 2016 (CAT) (unrep.) (February 2018); and

Emmanuel Simforian Massawe v R, Cr. Appeal No. 252 of 2016 (CAT at Dar es Salaam) (unrep.).

AG v Jeremiah Mtobesya

- Constitutional petition in the High Court, challenging the constitutionality of section 148 (4) CPA. Three HC Judges held:

"S. 148(4) of the CPA is a potential ground for breeding arbitrary detentions as it denies the accused person the right to be heard on matters of bail and prematurely treats the accused person as a convict….Such restriction to bail puts the liberty of the citizen at stake and infringes his right to liberty", and "it is in conflict with the presumption of innocence which is guaranteed by Article 13(6)(b) of the Constitution."

- HC declared s. 148(4) CPA unconstitutional.

BALANCING THE ROLES

- CAT held (dismissing the appeal):
- Such a provision which completely eliminates the judicial process in matters of personal liberty cannot qualify to "prescribed procedure" or by any standards, due process, within the meaning of Article 15(2)(a).
- It should be appreciated that in criminal proceedings, the DPP is no more than a party who, along with the accused person, deserves equal treatment and protection before the law….We should clearly express that it is utterly repugnant to the notion of fair hearing for the legislature to allot so much power to one of the parties to a proceeding so that he is able to deprive the other party of his liberty merely by her say-so and, much worse, to the extent that the victimized party as well as the court or, as the case may be, a police officer are rendered powerless.

- CAT held (Contd)
- "A law which seeks to limit or derogate from the basic right of the individual on grounds of public interest will have special requirements: first, such a law must be lawful in the sense that it is not arbitrary. It should make adequate safeguards against arbitrary decisions, and provide effective controls against abuse by those in authority when using the law. Secondly, the limitation imposed by such law must not be more than is reasonably necessary to achieve the legitimate object. This is what is also known as the principal of proportionality….If the law which infringes a basic right does not meet both requirements, such law is not saved by article 30(2) of the Constitution, it is null and void."
- (Quoting from its own earlier decision in Kukutia Ole Pumpun & Another v Attorney General & Another [1993] T.L.R. 159)

- However, in Emmanuel Simforian Massawe v R., Cr. Appeal No. 252 of 2016 (CAT at Dar es Salaam) (unrep.) the CAT refused to hold, as it did in Mtobesya's Case, that section 36 (2) of the EOCCA was unconstitutional.
- Massawe's Case: Not a constitutional case, nor a test case.

Massawe was facing several charges at the RM's Court mostly under EOCCA. The DPP filed a certificate under s. 36(2).

- Massawe applied to be admitted to bail pending trial. Since the DPP had filed his certificate, the High Court refused bail. The CAT agreed and dismissed their appeal. HELD
- We are of the settled view…that once the certificate by the DPP under s. 36(2) of the Act is found to have been validly filed, the same bars the trial court from granting bail to the accused and that it is not the requirement of the law for the DPP to give reasons for objecting bail where it considers that the safety or interests of the Republic are likely to be prejudiced.
- Only exception: If the DPP acted on bad faith or abuse of the court process.
- Hence, applied "the validity test", a plain meaning, black letter law approach to section 36(2) without consideration of human rights factors:
- Applied DPP v Ally Nuru Dirie (1988) TKR 2002 and DPP v. Li Ling Ling, Crim. Appeal No. 508 of 2016 (CAT-DSM).
- Reason for the CAT position: "The appellant's learned counsel have attempted to persuade us to follow the recent decision of this court in AG v Jeremia Mtobesya….[But that] was a constitutional case challenging the constitutionality of s. 148(4) of the CPA, whereas the present appeal is of criminal nature and its gist is to challenge the certificate of the DPP filed under s. 36(2) of the Act objecting the right to bail."
- Economic Crimes Division was at first unsure about how Mtobesya's Case (on section 148 (4) CPA, would apply to economic cases. Ss. 148 (4) CPA and 36 (2) EOCCA (though in pari materia) (E.g., Peter Zakaria Wambura v R., Misc. Ec. Cause No. 13 of 2018). Hence, those accused under EOCCA still at the mercy of the DPP under section 36 (2).
- Optimism: Strong wording in Mtobesyas Case.
- On bail: Provisions with conditions that require the deposit of half the amount involved, a bank guarantee or deposit of a title deed. Favourable for those with means. Appears to assume that the accused has the money!
- In India, the Supreme Court in Nikesh Tarach and Shah v Union of India & Anor, Writ Petition (Criminal) No. 67/2017: Onerous bail conditions for money laundering charges are unconstitutional. It did not restrict its application to that particular case, or to future cases. The ISC:
- "All such cases are set aside, and the cases remanded to the respective courts to be heard on merit, without the application of the twin conditions…Considering that persons are languishing in jail and that personal liberty in involved, all these matters are

to be taken up at the earliest….The writ petitions and the appeals are disposed of accordingly. "

- ML: A curious structure as an offence. ML punishable by imprisonment of between 3 to 7 years or to a fine of between 50 Mil. to 300 Mill.
- Absurdity: A person is denied bail on a charge which, even if convicted at the end of trial, will not necessarily spend time in jail if he can pay the fine.
- 2017: Shabani Hussein's Case (Ndama Mtoo wa Ng'ombe) who charged with five counts (four of predicate offences, and one of money laundering). Pleaded guilty to money laundering so that he could be convicted and pay his fine, and then remain with the four predicate offences for which bail was allowed.
- Fined 200 Mill. or 5 years imprisonment in default. He paid the fine and secured bail!
- Most relevant challenge is the tendency by the prosecution, since money laundering is not bailable, to include at least one count of money laundering for the purpose of denying the accused bail. Hence, a count that is punishable by a fine can hold the accused in remand for years, while the many predicate offences, some of which may not only carry longer prison sentences, and also have no option of fine, are in law bailable.
- On sentencing: I may be wrong, I stand to be corrected.
- Very few other jurisdictions have more offences that restrict the court's discretion in sentencing by providing for minimum sentences, than Tanzania. Economic offences are among the prominent ones in this category.
- Executive's mistrust of the Judiciary?
- Anyway: An honest appraisal by us, Judicial officers of our sentencing practices.
- Court's hands are tied. Most economic offences have minimum sentencing provisions.
- Another aspect: Human rights vis-à-vis the fight against transnational crimes (But so far not tested in court):
- Duty imposed on professionals (including advocates, bankers, accountants and tax practitioners), to report, within 24 hours, to the Financial Intelligence Unit any suspicious transaction that comes to their knowledge in the course of handling a transaction: Otherwise, criminal offence—five years: Section 17(3) of the AMLA.
- From a human right perspective: An encroachment upon the principle of confidentially applicable in a lawyer-client relationship. The effect is to make lawyers spies of their own clients in breach of professional ethics. How far these provisions can pass the constitutionality test is yet to be determined. So far, no case has been brought to court to challenge its constitutional validity.

CONCLUSION

The Judiciary has the constitutional duty, and therefore the constitutional right, to maintain a balance between the enjoyment of human rights and the need to fight transnational crimes.

I will leave it to you, learned colleagues, to further discuss and arrive at the conclusion, given our performance so far and your experiences in your own jurisdictions, on whether, and to

what extent, we have been able to discharge that role, and where we need to make improvement.