



EAST AFRICAN COMMUNITY

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EDITORIAL

A JOURNAL TO HIGHLIGHT ISSUES AND DEVELOPMENTS IN BOTH THE LAWS REGULATING THE EAST AFRICAN COMMUNITY AND THE PARTNER STATES

DR ANTHONY L. KAFUMBE

Managing Editor and Counsel to the East African Community

We are excited to present this inaugural edition of the East African Community Law Journal (*EACOMLJ*), a no fee and open access publication that discusses the various issues and developments in the laws regulating the East African Community (EAC). It also analyses diverse aspects of the laws of the EAC Partner States.

One key request of researchers across the EAC is unrestricted access to legal research and *EACOMLJ* is an endeavor, among others, to respond to that need. The principal aim of the *EACOMLJ* is to provide a forum for debating legal issues with a view to, among others, proposing law reforms not only at the Community level, but also at the respective national levels. Put simply, the *EACOMLJ* aims at:

- a) discussing issues and developments in the laws regulating the integration of the EAC;
- b) presenting informed analyses of the laws regulating the various aspects of Partner States, especially those with relevancy to the EAC integration agenda; and
- c) providing a platform for the sharing and dissemination of legal knowledge in the EAC and beyond.

The *EACOMLJ* promises to advance a better understanding of a broad spectrum of both Community and national laws and practices.

We are publishing the first issue of the *EACOMLJ* following the celebrations in commemoration of the twenty years of the existence of the revived EAC. The theme of the 20th EAC anniversary: *deepening integration, widening cooperation* could not have been more appropriate to this endeavor. Following the revival of the EAC with the entry into force of the Treaty for the Establishment of the East African Community (Treaty), Partner States undertook to cooperate in legal and judicial affairs. To that extent, Article 126 of the Treaty enjoins Partner States to, among others, *revive the publication of the East African Law Reports or publish similar law reports and such law journals as will promote the exchange of legal and judicial knowledge*

and enhance the approximation and harmonization of legal learning and the standardization of judgements of courts within the Community.

Actualizing Article 126 of the Treaty has included several initiatives coordinated by the EAC Secretariat, aimed at harmonizing Partner States laws and coordinating judicial education and all which have been on course for a while albeit with challenges.

Beyond the foregoing, litigation has for many years been conducted at the East African Court of Justice (EACJ), involving not only the Partner States but also the Community and in a number of cases, the Secretary General has been a nominal defendant. The outcome has been, inter alia, judicial pronouncements which are now guiding the interpretation and application of the Treaty. In the above context, this Journal will highlight some of the discourses canvassed in the course of conducting litigation at the EACJ, regional judicial trainings and the harmonization of laws initiatives. Given the foregoing, therefore, *EACOMLJ* welcomes not only articles, but also commentaries, opinions, case reviews, conference proceedings and essays of a legal nature.

The *EACOMLJ* will be published thrice a year both in soft format to be hosted on the website at www.eac.int and subsequently in hard copy. Interested persons may submit manuscripts to progo@eachq.org and copy akafumbe@gmail.com

With regard to citation, it will be cited starting with authors names, title of article (italicised), journal name, volume number, issue number, date of print publication and then page numbers. For example: Anthony L.Kafumbe. *An overview of the East African Legislative Assembly*, East African Community Law Journal, vol 1, no.1 Oct.2020, pp. 100-117.

We sincerely hope that the *EACOMLJ* will meet your expectations as stakeholders and that, it will regularly add value to the EAC integration agenda by not only encouraging regular legal debates but also freely disseminating knowledge within and beyond the Community .

Dr Anthony L. Kafumbe

BREXIT: ARE THERE LESSONS FOR THE EAST AFRICAN COMMUNITY?

PROF. E.F. SSEMEBWA

Former Chairman of the Constitutional Review Commission of Uganda, Professor Edward Frederick Ssempebwa is a celebrated Professor of Law at Makerere University in Uganda as well as the Universities of Dar-es-Salaam and Zambia. Professor Ssempebwa, has practiced law both within and outside the courtrooms with distinction for nearly fifty (50) years and is a leading consultant in several areas of practice in Uganda.

ABSTRACT

Professor Ssempebwa, examines the impact of East African Community law on the sovereignty of Partner States. He observes that as the integration of the Community progresses, concerns over the attendant loss of sovereignty similar to those that crystallised in the European Union and were expressed by the Brexit proponents may arise. The response is unlikely to be an exit by any Partner State given, among others, the various trade and infrastructure linkages that render it very costly to dismantle the Community but will this still hold over monetary integration and federation?

INTRODUCTION

In this paper it is postulated that, as the integration of East Africa progresses, concerns over the attendant loss of sovereignty similar to those that were expressed by the Brexit proponents could arise. It is submitted however, that the response is unlikely to be an exit by a Partner State. The explanation ventured is that the six States that form the East African Community (EAC) can easily address the challenges through changes in the Community structures or rules, or else and more likely, acquiesce in the disregard of some of the burdens of integration. It is suggested that the possible causes of disintegration are over the remaining phases of Community undertakings; *monetary union*, and *a federation*, over which the spectre of a complete surrender of monetary and or political sovereignty can easily override the cost of dismantling the Community.

The paper, however, focuses on a narrow aspect; the impact of Community law on the sovereignty of Partner States. Similarities with developments in the European Union (EU) are already discernible. Hence, the reliance, for comparative purposes, on the role of the European Court of Justice (ECJ) in integrating the legal systems of the member States, at times, to levels never anticipated by the States.

COMPARING UNCOMPRABLES?

In the context of integration and disintegration, the origins of the EU and EAC are not comparable. Britain has had a history of disdain for European integration.¹ France and Germany, weary of persuading it, on their own, commenced a coal and steel common market and invited other European States to join. Six States joined to form the European Coal and Steel Community.² The objective was a free market in the sector. An underlying motive was to integrate Europe out of further military conflicts.³ The *European Coal and Steel Community* (ECSC) Treaty of 1951 was structurally and institutionally the precursor of the EU, subsequent to the establishment of the European Economic Community (EEC) in 1957. Britain joined the EEC in 1973 amidst protests by leaders that sensed a denigration of the “Great” aspect of the Island.

EAC is a second integration project, the first having failed. The politics of the first EAC vacillated between a regional federation and a nucleus for an African political union. Neither was seriously pursued as the three Partner States settled for cooperation over common services and a limited free market.⁴ The current EAC is an economic project based on a common market and a monetary union.⁵ A fundamental difference from the EU is that, on paper, EAC is committed to a political federation.⁶ Assuming a serious intent, the commitment informs progress towards an “*ever-closer union*”, anathema to Britain in the European context.

Structurally, there are similarities. Although EAC is still in the formative stages compared to the EU, both pursue a common market with a monetary union. The institutional arrangement differs. The EU is administered by a supranational Commission. It can formulate policy and it has legislative initiative. It oversees the implementation of the objectives of the union. As a last resort, it can prosecute legal actions against member States that deviate from the objectives of the Union. An intergovernmental Council at which every State is represented participates in policy formation and approves proposals for legislation to be enacted by Parliament. It can also direct the making of regulations. The principal legislative and deliberative functions are performed by an elected Parliament which also adopts the budget. The European Court of Justice is mandated to “ensure that in the interpretation and application of this Treaty the law is observed.”⁷

In lieu of a Commission, EAC has a Secretariat under a Secretary General, the chief executive officer of the Community.⁸ Unlike the Commission, the Secretariat is more of an administrative, rather than an executive, organ, relying mostly on the directions of the Council,⁹ the most powerful organ of the Community next to the Summit of the Heads of State (Presidents of the Partner States) Unlike the European Council of the Heads of Governments of the European States, the Summit has wide powers beyond merely giving general direction and impetus. Its role is defined by the Treaty but, in practice, the whole functioning of EAC tilts around the Summit.¹⁰

¹ Greenwood S, “Britain and European Cooperation since 1945 (1992; Oxford. Blackwell pp. 64-67)

² France, Germany, Italy and three Benelux nations, Belgium, Netherlands and Luxemburg.

³ M. Holland, “European Integration from Community to Union (Pinter 1993).

⁴ Mahiga AP “The Pitfalls and Promises of Regional Integration in East Africa ; <http://archives.lib.msu.edu/DMC/African%20journals/pdfs/cltafete/vol12.No1>

⁵ The Treaty for the Establishment of the East African Community (EACT) Chapters 11 and 14, The Protocol for the Establishment of the East African Community Common Market 2009, East African Monetary Union Protocol.

⁶ Article 5(2) EACT

⁷ The Treaty referred to is the EC Treaty (Craig, “ The Treaty of Rome 1957 ”) On the institutional arrangement at the EU, see Ian Ward, “A Critical Introduction to European Law” (2nd Ed 2003, Lexis Nexis, Butterworth, London) pp. 22-25.

⁸ Chapter Ten EACT

⁹ Chapter Five EACT

¹⁰ Article 11 EACT

The Council of Ministers from Partner States initiates policy and shares the legislative function with the East African Legislative Assembly¹¹ (EALA) Members of EALA, unlike those of the EU Parliament, are not elected. They are selected by the respective parliaments of the Partner States.¹² Finally, the judicial function; to interpret and apply the Treaty, is performed by the East African Court of Justice (EACJ).¹³

THE PARTNER STATES AND DECISION MAKING UNDER EAC

It is clear from the institutional structure that the Partner States retain a grip on the integration process. Policies have to be approved by representatives of the States in the Council and endorsed by the Heads of State in the Summit.¹⁴ Unlike the EU where decisions are by simple and qualified majorities, EAC provides for consensus at the Summit and Council, with a power of veto.¹⁵ Accommodation of differences on the pace of integration is possible through the principle of *variable geometry*. But in view of the apparent contradiction between *variable geometry* and consensus accompanied by the power of veto,¹⁶ the principle is unlikely to be applied beyond a loose *Coalition of the Willing*.¹⁷ EALA cannot function in a truly supranational manner since allegiance is to its constituency, the respective Partner States. It seems, therefore, that the hysteria by the English, over unfavourable political decisions being made by unelected and unresponsive institutions in Brussels,¹⁸ is so far, not a factor in the EAC project.

BREXIT: AN ECONOMIC OR A SOVEREIGNTY ISSUE?

A cost benefit analysis of Brexit, if based solely on the economic premise, will for long remain inconclusive. It is true that some members of the EU had economic challenges with resultant costs to the other members, for example, in the form of increased immigration to the UK. On the benefit side is the access to a *single market* of over 400 million consumers.

More than 50% of UK's trade, both export and import is with the EU.¹⁹ Sceptics downplay the economic benefits. They contend that, by operating within the Union market, UK is prejudiced by trade diversion from low cost non-EU products to high cost EU products;²⁰ that UK is disabled out of the advantages of new markets of the eastern world.

Immigration was a major boost for Brexit. But immigration is not necessarily a negative development. Immigration can boost the host country's workforce and expand the internal market, thus enabling the economy to grow while keeping wages and inflation stable. UK has itself exported over one million of its citizens to the EU. Possibly, the UK might "eat its cake and have it" by successfully negotiating to retain most of the benefits of the Union.²¹ But were the remaining Member States to react with irrational anger, exit could result into crippling barriers on UK trade with Europe. With all that, no analysis has come to a definite conclusion that exit will be a loss or a benefit to Britain, although attempts at quantitative assessment have been made.²²

What may not easily be subjected to analysis is dignity; the perception that the EU had assailed the sovereignty of the "Great" Britain. What follows below is an outline account of how the ECJ has contributed to this perception.

FEDERATING EUROPE-A PERCEPTION OR REALTY

The ECJ is the one institution of the EU that was well posed to weave the spill over of economic integration into one coherent economic and political system.²³ This created a perception of a deliberate process of *federalising* Europe. How?

As a spill over from free trade, it became necessary to harmonise the regulatory systems in the Member States of Europe. It would have been ineffective and haphazard to leave the initiative to individual nations. Hence the need for law emanating from the Treaties, Acts of Parliament, plus regulations and directives issued by Council. The ECJ assumed the role of ensuring that this law is effective, and applied uniformly throughout the Union.

11 Under Article 14(3) EACT, Council can initiate Bills to EALA and also has power to make regulations, issue directives, take decisions and give opinions.

12 Article 50 EACT

13 Article 23 (1) EACT

14 Articles 14(3) and 11 of EACT

15 Articles 12(3) and 15(4) EACT

16 The EACJ in its opinion in Application 1 of 2008 In the Matter of a Request by the Council of Ministers of East African Community for an Advisory opinion (Advisory Opinion 1 of 2005) labored to find harmony between "Consensus" and "Variable Geometry".

17 Kenya, Rwanda and Uganda at one time cooperated closely in a speedier implementation of some Community projects in which they were closely linked but did not anchor this on "Variable Geometry". The move, termed the "Coalition of the Willing" (COW) raised suspicious as to whether it was meant to leave the unwilling States behind.

18 Jonathan Freedland, "The Brexit Campaign is wrong; the UK is already a Sovereign Nation" www.theguardian.com/Comments/free/2016/Feb/16/brexit-campaign-wrong-uk-severeign-nation-eu-master-of-our-destiny-power.

19 Rahel Aichelea and Gabriel Felbermayr, "Costs and Benefits of a United Kingdom Exit from the European Union". (2015) Report of a Study Commissioned by Bertelsmann Stiftung. www.bertelsmann-stiftung.de/fileadmin/files/BSF/Publikationen/Grau-Publikationen/BREXIT_En.pdf.

20 See analysis by John Springford and Simon Tilford, "The Great British Trade-off: The Impact of leaving the EU on the UK's Trade and Investment." (2014) Centre for European Reform. www.cer.org.uk/sites/default/files/publications/attachments/pdf/2014/pb-british-trade-16jan-14-8285.pdf.

21 As suggested by the UK Foreign Secretary Boris Johnson but discounted by the EU. See, The Evening Standard story, "Brexit Chief tells UK: You can't have your cake and eat it." www.standard.co.uk/news/politics/brexit-chief-tells-uk-you-can-t-have-your-cake-and-eat-it.a3350296.html

22 Rahel Aichelea and Gabriel Felbermayr op. cit note 19

23 Julian Bergmann and Avne Niemann, "Theories of European Integration and their Contribution to the Study of Foreign Policy" (2013) Paper for the 8th European Conference on International Relations, Warsaw. www.eisa-net.org/be-bruga/eisa/files/events/warsaw_2013/Bergmann-Theories-of-European-Integration-and-their-Contribution-to-the-study-of-EFP.Pdf.

The first major development in this respect is that the ECJ elevated European Law from the status of non-binding international law to a binding directly enforceable system, to the chagrin of Member States, such as the UK, which followed a dualist approach. For the UK, the development was particularly poignant in view of the constitutional principle that Parliament is supreme. In spite of the *European Communities Act of 1972* which incorporated Community law into UK law, and, surrendered sovereignty in respect of EU matters of competence, the perception of possible derogation by subsequent Acts of the British Parliament persisted. So did the notion that Treaties were binding only at State level. But the ECJ decided in the *Van Gend en Loos* case²⁴ that the *European Economic Community Treaty* (EEC Treaty) had *direct binding effect* in Member States because: (a) its objective was to establish a Common Market the functioning of which was of direct concern to the people; (b) the nationals of the member States brought together in the Community must cooperate in its functioning through the intermediary of institutions such as the European Parliament; and therefore, (c) the Community constituted a *new legal order* for the benefit of which the Member States had surrendered their sovereign rights, although in limited fields. The Court concluded with a broad statement that Community law not only imposes obligations on individuals, but also confers upon them enforceable rights. The result was the doctrine of *direct effect* through which European law became binding without regard to the nature of national legal systems.²⁵ It also enabled individuals to challenge breaches of what could have remained agreements amongst the States.²⁶

Second, European Law was accorded a status of supremacy over national legal systems. If national law was in conflict, or had the effect of defeating the objectives of the Union, then it had to be disapplied. To the dismay of Britain, the ECJ ruled that the long standing rule that injunctive relief does not restrain the Crown, was to be discarded if it stood in the way of according effective application of, and, remedies provided by European law.²⁷

Third the ECJ contrived a doctrine of indirect effect to ensure that *directives* of the Union are effective. The court had to take the step because, unlike Acts of Parliament, or Regulations which are binding when issued, *directives* may simply oblige Member States to adjust their laws so as to be in tandem with the objectives of the Union. The State is primarily accountable to the Union for failure to follow a *directive*. Otherwise a *directive* would have no binding effect in a State, unless the State transposed it into the municipal law. An injustice would have arisen if individuals could not invoke the *directive* even if it was intended to affect their rights. To counter possible injustice, the Court ruled that in certain circumstances, *directives*

would have effect (could be invoked by individuals against the State) if it would defeat the objectives of the Union to prevent them from doing so.²⁸ But the Court soon went on to rule that a *directive* could also have effect indirectly to enable individuals to enforce rights arising out of it as against other individuals.²⁹ It was evident that European law was taking on a supranational character, to be issued and applied even without an input from the States³⁰.

Fourth, it was ruled that the States were liable to compensate individuals for loss arising from a failure to implement, or, a violation of, European law. In *Francovich*,³¹ a person sued the Italian government for loss arising from Italy's failure to implement a *directive* to set up a guarantee fund from which employees would be indemnified in case of employer's insolvency. Whether a national court could grant the relief was a question that was referred to the ECJ for a Preliminary Ruling. The Court ruled that the relief had to be granted because, "the full effectiveness of Community rules would be impaired if individuals are unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State could be held responsible."

There are many other areas of ECJ made law making inroads in the sovereignty of national legal systems. A significant development is the ECJ's attempt to synchronise the constitutions of member States with EU law while straining to avoid a declaration that these basic laws are subservient to EU law. *International Handelsgesellschaft v. Einfuhr-und-Vorrastelle fur Getreide und Futtermittelauer*,³² a Community Regulation was challenged on the grounds that it contravened rights guaranteed by German's constitution. When the dispute was referred to the ECJ for a Preliminary Ruling, the Court ruled that Community law, being a separate legal order, the dispute had to be decided solely by reference to that law, and not the national constitution. Sensing the controversy the Ruling was bound to generate, the Court went on to opine that fundamental rights form an integral part of the general principles of Community law whose application must draw inspiration from constitutional traditions of the Member States. The attempt to incorporate the constitutional principles of Member States into EU law was meant to allay fears of intrusion in the States' sovereignty. Nevertheless, controversy continues over, not only the status of national constitutional rules, but also as to the yardstick by which constitutional norms, which are not uniform, can be recognised by Community law.

Then, the harmonisation of standards in support of the *single market* has meant that a bulk of trade Regulations and *directives* are issued at Union level to be interpreted and applied by

24 *N.V. Algemene Transport-en Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1.

25 See *R v. Secretary of State ex parte Factortame Ltd and Others* [1990] ECR 1 - 2433

26 Camil Kaya, "The Role of the European Court of Justice in the Process of European Integration". www.ist-univ.de/gripark.gov/tr/download/article-file/2040.

27 *Ex- Parte Factortame*, op.cit note 25

28 *Van Duyn v. Home Office* [1974] ECR 1337

29 *Seda Kiicihdevic v. Swedex Gubolt & Co. Kg. Case C-555/07*

30 See Henri de Waele and Anna Van der Vleuten, "Judicial Activism in the European Court of Justice – The Case of LGBT Rights."

31 *Andrea Francovich and Others v. Italy* Joined cases C-6/90 and C-9/90

32 [1970] ECR 1/25. As to the controversy over the supremacy of EU Law over national constitutional principles see, Annali Albi, "Supremacy of EC LAW in the New Member States" (2007) 3 *European Constitutional Law Review* 25. http://kar.kent.ac.uk/424/1/Supremacy_300CT_07DP.pdf and Oreste Polliano, "The New Relationship Between National and the European Courts. After the Enlargement of Europe: Towards a Unitary Theory of Jurisprudential Supranational Law". Vol 29(1) *Yearbook of European Law* 65. www.yel.oxfordjournals.org/centent/29/1/65.full

the ECJ. Some interpretations in support of the fundamental freedoms of the Community are not in accord with social or moral standards in some States, thereby causing grievance.³³ For example, a *directive* for the States to ensure equal treatment for men and women as regards access to work was applied by the Court to protect a person who had changed his sex in spite of Britain's protestation that the *directive* was never meant to apply to transsexuals.³⁴ A source of particular grievance by Brexit proponents is over the free movement of persons within the Union. Unrestricted immigration from other member States was bad enough. But when the ECJ's concept of European citizenship leads to immigrants, and in some cases, their dependants who are not European citizens, being entitled to the generous social security benefits of Britain³⁵ leading to a dependent immigration community that is intolerable. It is not that the immigration issue had grown to uncontrollable proportions. Rather, it is because The UK was increasingly unable within the EU systems, to stem the tide of EU laws/*directives* that interpreted the Single Market rights liberally.³⁵

OPTIONS OTHER THAN BREXIT

Rather than exit, why did the UK not call for amendments to the law to address the apparent assault on the sovereignty of member States? There are instances when the UK tried to do so. For example, after *Franco v. UK*, UK moved for restricting state liability to only instances of grave and manifest disregard of European law by a State. But the requirement of majorities from so many States rendered the option of corrective amendments difficult³⁶ Member States had to weigh the cost of living with painful Court judgments against disruption of the integration process from which they were benefitting.

A consensus towards disobedience of Court decisions, the other option, was out of the question. A unilateral step to disobey would make the recalcitrant State look ridiculous and would be challenged in the same court. This option was certainly against Britain's outlook on the rule of law and good governance.

So long as the benefits of the Union flowed, Britain tolerated while lamenting: "*Some things at the Court are very much to our distaste,*" Prime Minister Thatcher complained to Parliament.³⁷ Lord Denning lamented the indignity:³⁸

"Our sovereignty has been taken away by the European Court of Justice. It has made decisions impinging on our statute law and says that we have to obey its decisions instead of our own statute law...No longer is European law an incoming tide flowing up the estuaries of England. It is now like a tidal wave bringing down our sea walls and flowing inland over our fields and houses to the dismay of all."

Such discontent continued simmering eventually erupting over economic shocks in weaker Member States, resultant disruption of market benefits, the burden of financial contributions to the Union, and, immigration issues.

THE EAST AFRICAN TREND

The EACJ has been in operation for too short a time to assess accurately its trend over East African Community Law. Moreover, legislative activity by Council (through Regulations, Directives and Decisions) and the East African Legislative Assembly (EALA) is yet to intensify. That the Partner States have part surrendered sovereignty is clear through Article 8(4) of the Treaty, by which Community laws shall take precedence over similar national ones on matters pertaining on issues of integration. Nevertheless, some decisions of the EACJ have, and, may continue to jostle the Partner States into the realisation of the real effect of their undertakings.

The earliest of these, was an Application in *Anyang Nyong'o v. The Attorney General of Kenya and Others*.³⁹ The Ruling on the Application in effect restrained Kenya, preventing their nominated members to EALA from assuming their seats until the legality of their election in terms of the EAC Treaty had been determined. An election to EALA is guided by Article 50 of the Treaty against which the electoral rules of Each Partner State must conform. To determine that the Kenya rules had or had not conformed to the Treaty was therefore within the mandate of the EACJ to interpret and apply the Treaty. Nevertheless Kenya reacted angrily, condemning the decision as an affront to its sovereignty.

To vent the anger of one State, and possibly to avoid a similar "calamity" being visited on other States, the Summit hastily assembled and, without following the proper procedure,⁴⁰ approved amendments to the Treaty. Among these were provisions that weakened the security of tenure of judges.

The Summit further displayed its displeasure by trying, rather ineptly, to curb the jurisdiction of the Court. A proviso to Article 27(1) of the Treaty was introduced to the effect that *the court's jurisdiction to interpret the Treaty shall not include the application of any such interpretation conferred by the Treaty on organs of Partner States*.

³³ P v. S [1996] ECR 2143

³⁴ See UK v. Council Case C-431 of 2011 and UK v. Council Case C.656 of 2011.

³⁵ Elaine Chase and Martin Seeleib-Kaiser, "Migration, EU Citizenship and Social Europe". www.socialeurope.eu/2014/01/eu-citizenship-social-europe/

³⁶ Daniel Keleman and Heiner Schulz, "The European Court of Justice, National Governments and Legal Integration in the European Union." www.seep.eu.hu/alpsa/article/garret.pdf

³⁷ 546 Parl. Deb, H.L (5th ser) (1993) 560 UK as reported by Henri de Waele and Anna Van der Vleuten op.cit. note. 30

³⁸ Cited by Gary Duncan, "The Inside Threat: European Integration and the European Court of Justice (M. Sc. Theses of the Linkopenings University) www.diva-portal.org/smash/get/diva2-22177/Fulltext.pdf.

³⁹ Application arising out of Reference 1 of 2006.

⁴⁰ A process that was condemned by the EACJ in *East Africa Law Society and 5 Others v. The Attorney General of the Republic of Kenya and 7 Others*. Reference 3 of 2007.

The amendment was most probably intended to admonish the Court for purporting to determine the validity of an EALA election, a matter that was reserved for national courts.⁴¹ But, the Court had made a distinction between testing the validity of national rules as against the Treaty, which was within its competence, and determining the validity of an EALA election, which was not. Since organs of the Partner States have no jurisdiction to interpret the Treaty,⁴² the amendment will remain redundant.

Anyang Nyong'o illustrates that, unlike the EU, the six Partner States of EAC can easily mobilise consensus and will not hesitate to amend the Treaty, or cause the repeal of any law or *directive* with unfavourable outcomes. Why have they not reacted in a similar manner to other decisions which challenge the sovereign rights of the States collectively, or, appear to be intrusions in national affairs? For example, when the validity of the process by which the amendments referred to above were effected was challenged before the Court in *East Africa Law Society and Others v. The Attorney General of Kenya and Others*, it rejected the argument that amending the Treaty was an exclusive sovereign right of the Partner States which cannot be questioned. On the premise that the Treaty was more than a mere agreement between the States (it was people-centred and created rights and obligations for the people) the court ruled that it had jurisdiction to adjudicate the validity of amendments agreed to by the States. Otherwise to construe the Treaty “as if it permits sporadic amendments at the whims of officials without any form of consultation with stakeholders would be a recipe for regression.... to the past when lack of participation contributed to the collapse of the first Community.”⁴³

Further, the Court has seized the thin rope of the States’ undertakings(under Article 6(d) of the Treaty) to abide by principles of good governance, the rule of law, and protection of human rights to repeatedly hang the States for abuse of human rights. Beginning with *James Katabazi and Others v. The Attorney General of Uganda and Another*⁴⁴, no State has escaped condemnation.⁴⁵ Human rights are, for the moment, out of the domain of the Court, but, are litigated under the notion of interpreting the Treaty. Are there reasons why the States have not reacted to this apparent intrusion by a regional court into a politically sensitive area? A plausible answer is that over matters like this where all States are culpable in varying degrees, they would rather allow the judicial process to progress while they acquiesce in silent disregard of the Court’s Rulings. In any case the Rulings on issues of good governance have been, so far, declarative, not calling for embarrassing execution of judgements.

The EACJ’s activism in extending Community law over national legal systems is obvious in the Court’s liberal interpretation of its jurisdiction so as to accommodate literally all litigants who, in their pleadings, allege a breach of the Treaty. This is a source of considerable satisfaction to aggrieved individuals and their counsel, but could go overboard into national jurisdictions leading to acrimony. In *Mary Ariviza and Another v The Attorney General of Kenya and Another*, the Court ruled that it had jurisdiction to inquire into whether the process leading to the Referendum to approve the Kenya constitution complied with the Treaty simply because due process (*good governance and the rule of law*) was an issue.⁴⁶

Granted that matters of the Partner States’ compliance with the Treaty over issues of the rule of law, democracy and good governance fall squarely within the purview of the EACJ, it is a delicate situation when the Court has to test compliance by utilising general principles of constitutional law over specific national rules. *Baranzira Raphael and Another v. The Attorney General of the Republic of Burundi*⁴⁷ was a challenge of the legality of a law enacted by Burundi establishing a Special Court on Land and Other Assets.⁴⁸ Appeals from a National Commission of Land and Other Property were to go to the Special Court. One of the grounds for the challenge was that a section of the law made the appointment of the Special Court’s judges, a sole responsibility of the Executive. The economic and political context indicated that Burundi was trying to deal with “a grave historical problem that was intertwined with the Republic of Burundi’s social-political history.” That is probably why Burundi government opted to have some control over the Special Court. The EACJ disregarded this factor in deciding that it had jurisdiction over the legality of a Partner State’s law. Then, relying on the principle of separation of powers, the Court went on to dictate a constitutional superstructure for Burundi. According to the Court, the law offended the principle of separation of powers “in so far as it designates the appointment of judges of the Special Court as the sole preserve of the executive branch of government without any demonstrable safeguards...” thus contravening the Community’s fundamental principle on good governance.

As an initiative in setting and harmonising standards of good governance in the region, *Baranzira* is explicable. On the other hand, it could be justifiably protested as an intrusion over sovereignty through dictating constitutional standards. *Separation of powers* is a principle that is understood and applied in varying forms depending on the circumstances of each State. As the Court conceded, there is no agreement internationally as to the acceptable process of appointing judges. Indeed, there is no uniformity even at East African level. Matters of transparency and participation by the various organs of government in judicial appointments are treated differently in each State. A glance at the constitution of Burundi indicates that

⁴¹ Article 52(1) EACT

⁴² As ruled in *Anyang Nyong'o and Others v. Attorney General of Kenya and Others* Reference 1 of 2006.

⁴³ *East Africa Law Society and Others v. Attorney General of Kenya and Others* op. cit note 40

⁴⁴ Reference 1 of 2007.

⁴⁵ *Attorney General of the Republic of Rwanda v. Plaxeda Rugumba App. 1 of 2012, Independent Medical Legal Unit v. Attorney General of the Republic of Kenya* Reference 3 of 2010, *East African Community Ref.7 of 2014 East Africa Law Society v. Attorney General of the Republic of Burundi* Ref. 1 of 2014

⁴⁶ Reference 7 of 2010

⁴⁷ Ref. 15 of 2014

⁴⁸ Act 1/26 (Burundi)

in the appointment and discipline of judicial officers, the State has a strong presence. The *Superior Council of the Magistrature* which originates nominations is presided over by the President, assisted by the Minister of Justice.⁴⁹ The government is prominently represented at the *Superior Council*.⁵⁰ This arrangement may not be in tandem with what pertains in other jurisdictions but it is Burundi's constitutional choice based on its own experiences.

A similar move to "constitutionalise" the Treaty is *Burundi Journalists Union v. The Attorney General of the Republic of Burundi*.⁵¹ The press law of Burundi was tested against the requirements for good governance, democracy, the rule of law and upholding of human rights under Article 6(d) of the Treaty. Among other restrictions, the law prohibited dissemination of information relating to the stability of the currency, or that which could harm the credit of the State and national economy, offensive articles or reports regarding public or private persons, reports of scientific research and those of Commissions of Inquiry by the State. While proceeding to declare that these prohibitions offended the Treaty, the Court observed that what it was considering was:

"not a question whether the Press law meets the test of constitutional muster under the constitution of the Republic of Burundi, but whether it meets the expectations of Articles 6(d) and 7(2) of the Treaty.."

The Court then went on to strike down parts of the Press law that did not conform to the Treaty, a disguised process of declaring the constitution of a Partner State as a subordinate to the Treaty.

Then, just like the ECJ, the EACJ has declared the supremacy of Community law over national laws. In *Samuel Mukira Mohochi v. The Attorney General of Uganda*⁵² the Applicant, a Kenyan national approached the Court after he had been (purportedly on security grounds) denied entry to Uganda and deported under the country's *Citizenship and Immigration Act*.⁵³ Uganda's plea, that the Treaty could not take away its sovereign power to determine what was in the interest of national security, was rejected because Community law takes precedence over national law. A Partner State can no longer plead sovereignty to avoid its obligations under the Community. The obligation in *Mohochi* was to guarantee the right of free movement of nationals of Partner States undertaken under the Common Market Protocol.

LIABILITY FOR COMPENSATION

As indicated above, so far the Court's decisions have not led to liability for compensation. Ordinarily, in the interpretation and application of the Treaty, the Court invokes declarative reliefs, and, directions to the States to abide. But no provision in the Treaty can prevent an activist court from awarding compensation in appropriate cases, and, the EACJ in *Henry Kyarimpa v. The Attorney General of Uganda*⁵⁴ has so stated:

"We are of the considered view that the Treaty having provided a right, it is for this Court to provide such a remedy or remedies as may be appropriate in each individual case. And it maybe said that in providing a remedy, the Court does no more than implement the obligation that was not respected. In our view, the legal consequences to be visited upon the State in breach of its international obligation to a resident of a Partner State may, in appropriate cases, include cessation (usually known as injunction in internal law) or reparation (which usually takes the form of damages) or similar or other remedies."

An award of damages would be a loud wake-up call to the States. It would make the States' acquiescence in disregard of the Court a less attractive option since judgement creditors would be pressing for satisfaction. For the time being it is, even where one State's violation of Community obligations has wronged another State. Thus, the Court's condemnation of the action of one State expelling en mass resident non-nationals from its territory to the territory of another State where they originated has had no effect on the offending State. Neither has it evoked a strong reaction, through the Community processes, from the Victim State.⁵⁵ Rather, the States have acquiesced in the continued disregard of the Court's pronouncements.

So long as an individual State's economic interests are not deeply wounded by another State's, or, other States' failure to abide by Community obligations, even the Treaty options of sanctions⁵⁶ or Court action by the Secretary General,⁵⁷ are unlikely to be brought into play.

EXIT OR COLLAPSE?

Factors that contributed to the collapse of the first Community, such as personal disagreements in the leadership, and, perceived inequities are unlikely to be replayed. Ongoing trade and infrastructural linkages make the cost of dismantling the Community high. The voyage that could wreck the ship should the States decide to continue with it is, the East African Monetary Union (EAMU) Why? The *Protocol on the Establishment of the East Africa Community Monetary*

49 Article 219 Constitution of Burundi 2005

50 Article 217 Constitution of Burundi 2005

51 .Reference 7 of 2013

52 Ref 5 of 2011

53 Act 5 of 2009

54 App. 6 of 2014

55 It is the Bar that has expressed concern through litigation, see *East Africa Law Society v. The Secretary General of East African Community Ref 01 of 2014*

56 Article 193 EAC Treaty. See E. F.Ssempebwa, "East African Community Law (Lexis Nexis, 2015) chapter on the Monetary Union and Political Federation.

57 Articles 28 and 29 EAC Treaty

Union requires strict discipline in fiscal and monetary policy as conditions for admission to, and for, an effective monetary union.⁵⁸ Judging by the poor history of performance, the Partner States might find adherence problematic. Second, and, what explains the poor progress towards convergence of fiscal and monetary policies,⁵⁹ is the fact that sovereignty over monetary policy is a necessary tool in addressing country specific economic shocks which the States would rather retain. It cannot be guaranteed that an East African Central Bank, to which control over monetary policy is to be handed,⁶⁰ can manage the diverse shocks. It is likely that some of the Partner States may not qualify to join the union due to failure to meet the conditions. In the unlikely event that they all do, squabbles over the centralised management of economic shocks, and, problems arising out of fiscal indiscipline would soon arise. An EAMU of five or six States is not the sort of project where an exit by one would not inhibit progress. An exit would shake the whole foundation of the integration process possibly leading to a collapse of the Community.

PROPOSED CONFEDERATION OF EAST AFRICA

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Director of Kenya Judiciary Training Institute, 2016- 2018. This paper has been extracted and edited from the presentations that were made to the East African Judicial Education Committee (EAJEC) in 2018. Professor Odiak, a prolific and widely published legal scholar, regrettably passed away in December 2019 before this publication.

ABSTRACT

Professor Otiemo Odek not only traces the history of East African integration, but also clarifies that Federations and Confederations only exist if there is a common agreement among constituents. Indeed, members need to adopt a common constitution to become part of the federation, while entering a confederation is not binding. In both cases, being part of the federation or the confederation should benefit member states. In the first case, constituents give up part of their sovereignty in order to receive protection, security and economic or political advantages. In the second case, states and provinces enter the confederation to create a stronger entity and enjoy administrative and economic advantages without losing power or authority. He counsels that the establishment of political confederation requires the EAC Partner States to clearly define the mandate of the confederation organs and areas of cooperation. Adoption of a confederation requires the Partner States to make a deliberate decision on what are the subject matter of the confederation arrangement. The partner states would have to make a decision on the applicable legal system and confederation laws and whether a confederation court should be established and the extent of its jurisdiction.

⁵⁸ Article 5(3) Protocol on the Establishment of the East African Monetary Union (EAMU Protocol)

⁵⁹ *Towards a Common Currency in East African Community - Issues and Challenges 2012 Report of the Economic Commission for Africa*
www.unea.org/sro.eac

⁶⁰ Articles 14, 15 and 20 EAMU Protocol

INTRODUCTION

The Treaty Establishing the East African Community envisages the creation of an East African Federation as a political union of the six sovereign states of the East African Community of Burundi, Kenya, Rwanda, South Sudan, Tanzania and Uganda – as a single federated sovereign state.

The idea of an East African Federation dates back to the early 1920s. It gained momentum in late 1950s to early 1960 and lost steam from 1965 to 1999. It regained impetus without steam in 1999 and lost vigour by 2015. Time has proved that establishment of a Federation of East Africa is not only a long term goal but a herculean task. It is time that the ambition to create a political federation should give way to a more realistic lesser federation in the form of a political confederation.

As of now, the tune has changed from Federation to Confederation. The EAC Council of Ministers, the policy organ of the Community, has agreed that instead of an East Africa political federation, what should be embraced should be the East African political confederation.

HISTORY OF EAST AFRICA INTEGRATION

In the past, Kenya, Tanzania and Uganda have enjoyed a long history of cooperation under successive regional integration arrangements. These arrangements have included: the Customs Union between Kenya and Uganda in 1917, which the then Tanganyika later joined in 1927; the East African High Commission (1948-1961); the East African Common Services Organization (1961-1967); the East African Community (1967-1977) and the East African Co-operation (1993-2000).

Following the dissolution of the former East African Community in 1977, the Member States negotiated a Mediation Agreement for the division of Assets and Liabilities, which they signed in 1984. However, as one of the provisions of the Mediation Agreement, the three Member States (Kenya, Tanzania and Uganda) agreed to explore areas of future co-operation and to make concrete arrangements for such co-operation. Subsequent meetings of the three Heads of State led to the signing of the Agreement for the Establishment of the Permanent Tripartite Commission for East African Co-operation on 30 November 1993. Full East African Co-operation operations started on 14 March 1996 when the Secretariat of the Permanent Tripartite Commission was launched at the Headquarters of the EAC in Arusha, Tanzania. Considering the need to consolidate regional cooperation, the East African Heads of State, at their 2nd Summit in Arusha on 29 April 1997, directed the Permanent Tripartite Commission to start the process of upgrading the Agreement establishing the Permanent Tripartite Commission for East African Co-operation into a Treaty.

The Treaty-making process, which involved negotiations among the Member States as well as wide participation of the public, was successfully concluded within 3 years. The Treaty for the Establishment of the East African Community was signed in Arusha on 30 November 1999. The Treaty entered into force on 7 July 2000 following the conclusion of the process of its ratification and deposit of the Instruments of Ratification with the Secretary-General by all the three Partner States. Upon the entry into force of the Treaty, the East African Community came into being.

ORMSBY-GORE AND HILTON YOUNG COMMISSIONS ON EAST AFRICA FEDERATION

The 1924 Ormsby-Gore Commission was a Parliamentary Commission, with the official title The East Africa Commission. Its chairman, William Ormsby-Gore, later fourth Baron Harlech, was appointed in June 1924 together with two other Members of UK Parliament. The terms of reference for the Commission included: to report on measures to accelerate economic development, to improve the social conditions of African residents, to investigate employment practices and to secure closer cooperation between the five British dependencies in East and Central Africa. The Commission recommended that transport and other infrastructure should be improved as a precondition of possible later administrative union. It expressed concern over issues of land ownership and the conditions of Africans living on European owned estates, and suggested that promoting commercial agriculture by Africans could be a solution to the problem of labour migration. Although, Gore report stated that forming a federation at that moment was immature, the efforts to confederate East Africa continued. The report proposed formation of a Governor's

Conference, composed of the governors of Tanganyika, Kenya and Uganda as an informal body to oversee East African co-operation. In 1917 a Customs Union between Kenya, Uganda and Tanzania was formed. Next was the East African Currency Board that was established in 1919

In 1926, the Hilton Young Commission on Closer Union of the Dependencies of East and Central Africa was appointed. Its report in 1929 re-examined and supported the closer union of Kenya, Uganda and Tanganyika, but this was not acted on owing to financial constraints.

Following the indecisive UK general election of December 1923, which created a hung parliament, the Conservative government of Stanley Baldwin remained in office until January 1924 and was then replaced by the Labour government of June to November 1924. J. H. Thomas, the Secretary of State for the Colonies created an East Africa Committee, also known as the Southborough Committee, composed of sixteen members including parliamentarians and business representatives, to promote economic development and African advancement in that area. In June 1924, the Parliamentary Commission officially named "The East Africa

Commission” was appointed with the mandate:- “To visit Northern Rhodesia, Nyasaland, Tanganyika Territory, Uganda, and Kenya with a view to obtaining as much information as possible in the time available on all subjects covered by the terms of reference to the East Africa Committee, and to report to the Secretary of State on any facts which they may consider have a bearing upon the above matters.”

The terms of reference to the East Africa Committee were: — “To consider and report: —(a) on the measures to be taken to accelerate the general economic development of the British East African Dependencies and the means of securing closer co-ordination of policy on such important matters as transportation, cotton-growing, and the control of human, animal, and plant diseases; (b) on the steps necessary to ameliorate the social condition of the natives of East Africa, including improvement of health and economic development; (c) on the economic relation between natives and non-natives with special reference to labour contracts, care of labourers, certificates of identification, employment of women and children; (d) on the taxation of natives and the provision for services directed to their moral and material improvement.

The commission visited Africa between August and December 1924. It reported that, owing to transport difficulties, its visits to Northern Rhodesia and Nyasaland were short, and it was unable to visit any of North-Eastern Rhodesia, northern Nyasaland, southern Tanganyika or the Lake Tanganyika area. Two members of the Commission also visited Zanzibar, although this was not within its terms of reference.

Hon. Ormsby-Gore was promoted away from the Colonial Office in 1929, but returned as Secretary of State for the Colonies between 1936 and 1938. In 1936, he announced that the government had no plans for the political amalgamation either of East Africa or the Rhodesia, and continued to promote education and railway development in East Africa, but much of his time was taken up with the situation in Palestine.

THE GOVERNOR’S CONFERENCE

Britain had administrative control of three East African territories of Kenya, Uganda and Tanganyika. There was no formal machinery for integration of the common services in the British East Africa colonies. In order to help coordinate them and promote economic development, Britain relied until 1948 on an informal consultative system known as the “Governor’s Conference” which was first held in Nairobi in 1926⁶¹. The three Governors met periodically to consider matters of common interest and keep under review how common services in the East African region could be provided without a formal federation.

In a 1927 Report to the Colonial Office, Sir Edward Grigg called for the “establishment of a central East African Authority to control main transport services, the customs tariff, inter-territorial communication by land and air including posts, telegraphs, defence and fundamental research.” The Governor’s Conference was the basis for the integrative mechanisms of the 1930s with a permanent secretariat at Nairobi. In order to rationalize the operation of the Common Services, Britain through the 1947 Order in Council established the East African High Commission in January 1948, consisting of the Governors of Kenya, Uganda and Tanganyika.

1960 VISION FOR FEDERATION OF EAST AFRICA

In the early 1960s, the political leaders of Kenya, Tanganyika, Uganda and Zanzibar had become interested in forming a federation. Julius Nyerere, even offered in June 1960 to delay the imminent independence of Tanganyika due in 1961 in order for all of the East African territories to achieve independence together as a federation⁶². Nyerere expressed:

I, for one, would be prepared to postpone the celebration of Tanganyika’s independence for a few months and celebrate East Africa’s independence in 1962 rather than take the risk of perpetuating the balkanization of East

Africa. Federation of at least Kenya, Uganda and Tanganyika should be comparatively easy to achieve. We already have a common market and run many services through the Common Services Organization which has its own Central Legislative Assembly and an executive composed of the Prime Ministers of the three states. This is the nucleus from which a Federation is the natural growth⁶³.

In June 1963, Jomo Kenyatta of Kenya met with the Tanganyika President Julius Nyerere and Ugandan President Milton Obote in Nairobi. The trio discussed the possibility of merging their three nations plus Zanzibar into a single East African Federation, declaring that this would be accomplished by the end of the year and subsequently discussions on the planning for such a union were initiated⁶⁴. At that time their burning desire for the formation of a political federation was captured in their leaders’ “Declaration of Federation by the Governments of East Africa, issued in Nairobi on 5th June 1963. They stated:

⁶¹ Regional Integration: The Case of the East African Community” by John A. Mgaya: Thesis submitted for Masters of Art in International Relations, the Australian National University, August 1986.

⁶² J.S. Nye, Jr. *Pan-Africanism and East African Integration* (Cambridge, Mass: Harvard University Press, 1965 p.175.

⁶³ J.K. Nyerere, *Freedom and Unity*, Dar- esSalaam: Oxford University Press, 1966, p. 96 and 193.

⁶⁴ Arnold, Guy (1974). *Kenyatta and the Politics of Kenya*. London: Dent. ISBN 0-460-07878-X.

We, the leaders of the people and governments of East Africa assembled in Nairobi on 5th June 1963, pledge ourselves to the political Federation of East Africa. Our meeting today is motivated by the spirit of Pan-Africanism and not by mere regional interests. We are nationalists and reject tribalism, racialism, or inward looking policies. We believe that the day of decision has come, and to all our people we say there is no more room for slogans and words. This is our day of action in the cause of the ideals that we believe in and the unity and freedom for which we have suffered and sacrificed so much⁶⁵.

The Nairobi Declaration was backed by a resolution to establish a specific 'Working Party' tasked with the responsibility of formulating the federation's draft constitution. The idea of a draft federal constitution was out of the realization that such an entity required a comprehensive constitutional framework. However, no mention was made as to the structuring of the respective national constitutions, to accommodate the envisaged federation.

The optimism of the Nairobi Declaration was short lived because differences soon emerged within the working party. The most contentious and fundamental difference was the degree of centralization to be built into the new federation. Adoko Nekyon, Head of the Uganda delegation to the Working Party on "Meetings and Discussions on the Proposed East African Federation" said, he wanted to see the "minimal alteration of territorial constitutions."⁶⁶ Upon independence of the three East African states, a sense of national belongingness and national interest emerged rapidly. It was mainly Uganda's objection to the surrender of sovereignty, the desire to preserve its fragile internal unity and the fear of Kenyan control over regional institutions which led to the failure of East African Federation. President Obote expressed that the Nairobi Declaration did not commit Uganda to federation and that the questions of relationships and powers were still in the exploratory state⁶⁷. For Tanganyika and Kenya, regional unity involved the concept of a tightly constructed federation⁶⁸. Throughout the negotiations on East African Unity, Uganda's representative strove to limit the central authority in such filed as foreign affairs, citizenship, external borrowing, agriculture and animal husbandry, mines and higher education⁶⁹.

The last session of the Working Party was held in Kampala in May 1964. The chief target of criticism was the monetary policy and this heralded the collapse of the East African Currency Board. The three Heads of State failed to adopt the findings of the Working Party, as the penultimate conference earmarked for the signing of the draft constitution aborted. The States were more concerned with the pressing matter of economic imbalances, which took centre stage, at the expense of political federation⁷⁰. Privately, Kenyatta was more reluctant regarding the arrangement and as 1964 came around the Federation had not come to pass. In May 1964, Kenyatta rejected a back-bencher's resolution calling for speedier federation. He publicly stated that talk of a Federation had always been a ruse to hasten the pace of Kenyan independence from Britain, but Nyerere denied that this was true. Around the same time Obote came out against an East African Federation in favour of Pan-African unity, partly because of domestic political pressures with the ceremonial kingdom of Buganda being opposed to being in an East African Federation as part of Uganda but rather as a unit in its own right. By late 1964 the prospects for a wider East African federation had died, although Tanganyika and Zanzibar did form a union in April 1964 the United Republic of Tanganyika and Zanzibar, later renamed as the United Republic of Tanzania in October 1964.

CONCEPT OF CONFEDERATION

A confederation, also known as confederacy or league, is a union of political units for common action in relation to other units. Confederation can be used as a transitional stage towards Political Federation. Confederation is intergovernmentalism which is interaction and cooperation between states and takes place on the basis of sovereign independence and equality of governments. Confederation implies cooperation among the member states over significant issues. This type of government symbolizes a centripetal action, where the individual units coalesce to form a league. The most important feature of a confederate government is that its organs derive power from the member states. Although there may be a common constitution, instrument or document specifying the terms of the Confederation, the instrument does not stand as the source of power for the Confederate government or organs. Rather, in a Confederation, for the confederate organs to decide upon any important issue, it requires agreement of all confederate members.

Usually created by a Treaty, Confederations tend to be established for dealing with critical issues such as defence and security, foreign affairs, common currency, international trade, immigration and labour movement. Confederations tend to work on matters pertaining to infrastructure development segments like aviation, railways, marine, navigation, shipping,

⁶⁵ "The Federation Declaration of 5 June 1963" in Leys and Robson (eds), *Federation in East Africa: Opportunities and Problems* (Nairobi: Oxford University Press, 1965 pp. 205-208; see also Anthony Hughes, 'The Search for Unity: Kenya, Tanganyika, Uganda and Zanzibar' (Penguin African Library 1963).

⁶⁶ Dar-es-Salaam, Government Printer, 1964 p.9.

⁶⁷ *East African Standard*, 2nd July 1963, *Uganda Argus*, 3rd July 1963.

⁶⁸ T.J.Mboya, *East African Labour Policy and Federation* in *The Federation Declaration of 5 June 1963* in Leys and Robson (eds), *Federation in East Africa: Opportunities and Problems* (Nairobi: Oxford University Press, 1965 at page 103.

⁶⁹ D. Rothchild, *Politics of Integration: An East African Documentary*, Nairobi: East African Publishing House, 1968, p.2.

⁷⁰ Nabudere Dani, 'The Fast-Tracking of Federation and Constitutionalism in East Africa; see also Arthur Hazelwood (ed.) *African Integration and Disintegration* London: Oxford University Press, 1967; see also T.M. Franck, *East African Unity Through Law*, New Haven and London: Yale University Press, 1964.

roads, postal service, telecommunication and meteorology as well as education, science and technology development. In the EAC context, certain aspects of a confederation are already taking shape and these include harmonisation of the EAC Education Systems and Curricula, Cooperation in Health, Sports, Defense, Peace and Security, Trade and Customs and Harmonisation of Standards and Environmental Management among others.

The nature of the relationship among the member states constituting a confederation varies considerably. Likewise, the relationship between the member states and the general government, and the distribution of powers among them is highly variable. Some looser confederations are similar to international organizations. Other confederations with stricter rules may resemble federal systems. Since the member states of a confederation retain their sovereignty, they have an implicit right of secession. Political philosopher Emmerich Vattel observed:

‘Several sovereign and independent states may unite themselves together by a perpetual confederacy without each in particular ceasing to be a perfect state. ... The deliberations in common will offer no violence to the sovereignty of each member’.

Under a confederal arrangement, in contrast with a federal one, the central authority is relatively weak. Decisions made by the confederate government or any of its organs require subsequent implementation by the member states to take effect. They are therefore not laws acting directly upon the individual, but instead have more the character of inter-state agreements.

DIFFERENCES BETWEEN FEDERATION AND CONFEDERATION

By definition the difference between a confederation and a federation is that the membership of the member states in a confederation is voluntary, while the membership in a federation is not. The terms federation and confederation refer to similar – yet very different – concepts. In a confederation, states come together creating a loose (often temporary) union for matters of political, economic or administrative convenience. Within a confederation, member states maintain their sovereignty and often appoint a weak central authority to speed up bureaucratic matters. Conversely, states or provinces that join a federation, agree to give up part of their powers and to answer to the central government, which has the power to enforce laws and regulations. In both cases, we are talking about a union of countries, states or provinces, but members of the confederation maintain a large degree of autonomy and independence – and can (almost) freely leave the union when they decide to do so – while members of a federation are bound to respect the authority of the central government and maintain limited powers.

The distinction between a federation and a confederation is not always easy to make, but generally speaking, confederations assign much more limited powers to the central government than do federations. One practical criterion often used as the key to distinguishing federations from confederations is that in the latter, the central government does not have direct taxing or enforcement authority over individual citizens but rather must depend upon the regional governments to provide its revenues and give effect to its laws governing individuals

Confederations usually fail to provide for an effective executive authority and lack viable central governments; their member states typically retain their separate military establishments and separate diplomatic representation; and members are generally accorded equal status with an acknowledged right of secession from the confederation.

The term federation is used to refer to groupings of states, often on a regional basis, that establish central executive machinery to implement policies or to supervise joint activities. In some cases, such groupings are motivated primarily by political or economic concerns; in others, military objectives are paramount. A federation is a political system in which individual states come together under the umbrella of a central authority. The decision of entering a federation of state can be voluntary, but in most cases, it is the result of a long historic process or the transformation of a confederation (i.e. temporary and voluntary agreement) into a federation. The balance of power between the constituents and the central government is laid out in a written constitution.

Provinces and states members of a federation do not entirely lose their power, and can enjoy a certain degree of independence. Individual states can maintain separate laws, traditions and habits, but in a federation, the central government has authority over: Defense and security matters; Foreign policy; International relations and diplomacy; Decision to start or end a war; National currency; and Military. In addition, the federal central government can interfere on the legal and economic aspects of the member states/provinces. Policies and regulations approved by the central government apply to the federation members – in line with the provisions laid out in the constitution – and constituents are legally bound to respect such regulations.

In a confederation, the member states maintain their sovereignty and their powers almost entirely, and there is no superior, unified, central government. Depending on the structure of the confederation, there might be a weak central body, appointed by all constituents, created to speed up bureaucratic processes and facilitate communication.

In a confederation there is no: Unitary budget; Common military; Common foreign policy strategy; Common diplomatic representatives; and Common legal system. The concept of

confederation is similar to the principles on which international organizations stand.

Being part of a federation or a confederation has different implications for member states. In a federation, the constituents give up part of their power and sovereignty while maintaining the ability of taking some independent decisions – while in a confederation, individual states maintain control over their territories and citizens. In a confederation, the central government has no power de facto, and it is only in place to facilitate the decision-making process and speed up communication. Conversely, when states come together to create a federation, they create a new nation state, with a functioning and powerful central government. The constituents lose part of their autonomy and authority, and the central government acquires the ability of making decisions regarding national security, military, foreign policy and diplomacy.

The ties among states and provinces are much stronger in the case of the federation. Indeed, in a confederation, states agree to come together for various purposes, but they are not legally tied together and can technically back up or exit the confederation whenever they want (depending on the type of confederation).

Conversely, in a federation, there are binding legal agreements that prevent states from leaving the union. Relations among states within a federation are stronger as the different entities come together to create a new nation state.

SHORTCOMINGS OF CONFEDERATION

Right to secede: the right to secede from the Union is at the heart of the concept of confederation. It can be termed as the culprit behind separatism, or a liberty favoring the units as well. Confederacies are a unified body of individual states or provincial units. These peripheral units are stronger than the union. They coexist, but maintain their separate identities. Each region, canton, or province is considered equal, and has a say in shaping the nature of central authority.

Weak centre: a major disadvantage of a confederation is the weak centre. If the central government derives its authority from the states, it is bound to become weak. The member states have majority of the legislative powers, thus, leaving the center with no right to make or enforce laws. Also, significant subjects of national interest, like international treaties, issue of currency, or maintenance of an army may not be handled by the center.

Financial powers: a major drawback of the confederate government style is that; the center does not enjoy any power regarding taxation. Levying of or appropriation of taxes in order to regulate the national revenue model is not the function of the central government. Regulation

of the monetary system, budgeting, and monitoring the growth of the nation does not follow a uniform policy.

Internal power struggles: identities of states or provinces as separate units encourages a tussle for political power. Also, secessionist tendencies are built up easily, leading to an internal struggle between the confederates. The relations between the Union and the states, and among the states, are responsible for creating such fault lines in the confederation

Sustenance: confederacies are not observed as a popular form of government across the world. One reason being that, this type of government is not a longlasting one. Though they are seen to be the most decentralized forms, there arises the question of their sustenance.

DILEMMA IN INSTITUTIONAL STRUCTURE AND REPRESENTATION IN A CONFEDERATION

Institutional structures of in a confederation raise two issues: degree of centralization and mode of representation. The representation question varies the weight between unit representation one state, one vote and population-proportional representation one person, one vote. Voters have incomplete information and can reduce policy risk by increasing the degree of centralization or increasing the weight on unit representation. Moderates prefer more centralization than extremists, and voters in large states generally have different preferences from voters in small states. This implies two main axes of conflict in decisions concerning political confederation: moderates versus extremists and large versus small states.

CONSTITUTIONAL IMPLICATIONS OF CREATING AN EAST AFRICAN CONFEDERATION

None of the national constitutions of the EAC Partner States refer to or mention prospects of an East African confederation. All the national constitutions recognize national sovereignty and national boundaries; they do not envisage a political confederation. Establishment of a political confederation among the partner states would come with political, legal and economic consequences. The confederation would directly impact the sovereignty of the independent partner states as each partner state would have to cede their respective national sovereignty.

Establishment of political confederation requires the EAC Partner States to clearly define the mandate of the confederation organs and areas of cooperation. Would the partner states be ready to cede limited sovereignty in favour of a confederation? For instance, presently, each Partner state has its own foreign and defence policy, a fact attributed to national sovereignty. Adoption of a confederation requires the Partner States to make a deliberate decision on what are the subject matter of the confederation arrangement. The partner states would have to make a decision on the applicable legal system and confederation laws and whether a confederation court should be established and the extent of its jurisdiction.

SIMILARITIES BETWEEN FEDERATION AND CONFEDERATION

Despite their natural differences, federation and confederation have some aspects in common. In both cases, various states, countries or provinces come together to create a new entity for matters of political, economic and security convenience. Federations and confederations only exist if there is a common agreement among constituents. Indeed, members need to adopt a common constitution to become part of the federation, while entering a confederation is not binding. In both cases, being part of the federation or the confederation should benefit member states. In the first case, constituents give up part of their sovereignty in order to receive protection, security and economic or political advantages. In the second case, states and provinces enter the confederation to create a stronger entity and enjoy administrative and economic advantages without losing power or authority.

CHARACTERISTICS OF FEDERATION

A Federal Constitution generally possesses the following five characteristics:

Dual or two sets of governments: in a unitary state as the name indicates there is only one government. The national government. In a federation two sets of governments co-exist. The national (also called central or federal) government and the government of each constituent State.

These two governments derive their powers from the same source (the Constitution) and are controlled not by the other but by the Constitution. But it would be erroneous to assume that they work in watertight compartments. They govern the same people and their object is to serve the same populace so naturally their functions many times touch and affect each other. They must necessarily work not in isolation but in active cooperation with the other.

Written Constitution: in order to make the distribution clear and permanent it must be reduced to writing and must be made amendable to amendments and changes by observing the procedure laid down in the Constitution itself. Left to unwritten conventions or understanding it would create fluidity which in turn would generate uncertainty leading to dissatisfaction among the constituent units.

Supremacy of the Constitution: the Constitution is regarded as a higher law which is there for the Union and States to obey and honour. None of the Units has the authority to override or disregard the Constitution. In some cases, the Union may have overriding powers but not in relation to the divisions of power. Federal Constitutions guard attentively the distribution of powers and do not tolerate encroachments.

Rigidity: rigidity does not mean that the Constitution is not subject to any change and must remain in the same static condition. But as a corollary of the necessity of having a written Constitution it is required that the provisions containing and regulating the distribution of powers must not be left to the discretion of the Centre or the States.

Authority of Courts: in a federation there is possibility of a State encroaching upon the field of another State. There is also the possibility of the Union trespassing on the rights of one or more States as also the States purporting to exercise the functions of the Union. To take care of such contingencies a federation contemplates an independent judicial body which will decide the rights of the Units and keep them confined within their limits. The Courts have the last word in regard to questions involving the interpretation of the Constitution. The Court may invalidate and injunct any act which transgresses the division. It may be an administrative act or a legislative measure. The Court may be moved by any person aggrieved by violation of the distribution of powers or by any State or the Union.

POTENTIAL AREAS OF COOPERATION IN AN EAST AFRICAN CONFEDERATION

Confederating states must agree on areas of cooperation and the mandate of the confederation organs. In East Africa, the following common areas of interest are ripe for an East Africa Confederation. The proposed subject matter for the Confederation of East Africa borrow heavily from the Union matters of the United Republic of Tanzania and the Protocols already ratified under the auspices of the East African Community.

The proposed subject matter includes: Implementation of the EAC Treaty; Citizenship of the Confederation; Immigration; Service in the Confederation Government; Customs Union matters and Income tax payable by individuals and by corporations, customs duty and excise duty on goods manufactured within the Confederation; EAC Common Market and African Free Trade Area; Harbours; Financing of the Confederation and Revenue Raising Powers; International and Foreign Trade powers of the Confederation; Power of Confederate Authority or Organs to borrow money in the domestic or foreign market; Matters relating to air transport; Matters relating to posts and telecommunications; Monetary Union and all matters concerning coinage and currency for the purposes of legal tender including notes; Industrial licensing and statistics; Money laundering, cybercrime and transnational crimes; Higher education; Conduct and setting of common confederation syllabus and examinations; Civil aviation; Research; Meteorology; Statistics; Intellectual Property; Regional Peace and Security – and power to raise army or police or coordinate army or police activity; Appointment of ambassadors or plenipotentiaries for the Confederation; Vesting of judicial power and the East African Court of Justice; Court of Auditors to check the financing of the Confederation activities; Confederation Investment Bank; Confederation Ombudsperson; EAC Confederation School of Administration – to train staff

on EAC integration issues; EAC Specialized Agencies - to handle a range of technical, scientific and management tasks; EAC Confederation Media and Publication Office; and Transitional provisions from EAC to Confederation of East Africa.

Matters the amendment of which requires to be supported by consensus or two-thirds of all Members of the Confederation should include : the existence of the Confederation; admission to the Confederation; the existence of the Office of President of the Confederation; the Authority and structure of the Government of the Confederation; the existence of the Senate and or Parliament of the Confederation and qualifications and elections to Confederate Parliament. Others are the jurisdiction of the East African Court of Justice; and the list of subject matters that form Confederation issues.

PROPOSED STRUCTURE OF THE CONFEDERATION OF EAST AFRICA

The proposal to establish the confederation of East Africa must examine what structure of governance should the confederation have. The key structures to be considered are: Presidency – qualifications, eligibility and mode of election – direct universal suffrage, by college of electors or rotational presidency; Senate and or Parliament - qualifications and mode of election; Confederate Supreme Court – composition and jurisdiction; Executive Authority of the Confederation; Institutions of the Confederation such as the Parliament, Council of Ministers, Summit, Court, Central Bank, Court of Auditors, Competition Commissions etc. The EAC Confederation can borrow from the EU’s unique institutional set-up which is: European Council, which brings together national and EU-level leaders. The Presidency of the Council is shared by the member states on a rotating basis. Governments defend their own country’s national interests in the Council of the European Union. The European Council sets the EU’s overall political direction – but has no powers to pass laws. Led by its President, it comprises national heads of state or government and the President of the Commission, it meets for a few days at a time at least twice every 6 months.

Members of European Parliament (MEPs) represent European citizens in the European Parliament. MEPs are directly elected by citizens of EU member states.

The interests of the EU as a whole are promoted by the European Commission, whose members are appointed by national governments. Together, these three institutions produce through the “Ordinary Legislative Procedure” (ex “co-decision”) the policies and laws that apply throughout the EU. In principle, the Commission proposes new laws, and the Parliament and Council adopt them. The Commission and the member countries then implement them, and the Commission ensures that the laws are properly applied and implemented.

RECOMMENDATIONS

In order to craft an acceptable instrument for an East African Confederation, the structure of the East African High Commission should be analyzed and where possible adopted.

LIKE A PHOENIX FROM THE ASHES OF INSOLVENCY: AN APPRAISAL OF THE RESCUE CULTURE OF THE KENYAN INSOLVENCY ACT OF 2015

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ABSTRACT

Caroline Lichuma and Florence Shako posit that the goal of any modern insolvency regime is to salvage financially viable companies or to provide individuals in financial distress with breathing room without or before subjecting them to the liquidation or bankruptcy processes. The application of the Insolvency Act 2015 and the accompanying Insolvency Regulations of 2016, they note, is bound to have a more than positive change in the Kenyan insolvency regime. In that context, the rescue procedures should be adequately utilized in order to ensure a lasting change in the administration of the insolvency regime in Kenya. It is hoped that there will be no need to be 'rescued from rescue' procedures as a result of misuse or abuse of these mechanisms. They convey optimism that under the aegis of this fortified rescue culture, many deserving debtors in Kenya, especially companies worth saving, will live on to trade and enrich the country.

INTRODUCTION

Before the commencement of the Insolvency Act of 2015, the statutory provisions regulating insolvency law in Kenya were found in the Companies Act, Cap 486 of the Laws of Kenya and the Bankruptcy Act, Cap 53 of the Laws of Kenya. The pertinent provisions of the former outlined the procedure to be followed in the event of corporate insolvency while the latter detailed the course of action to be followed in the event of personal insolvency, or bankruptcy as it is more commonly known.

Despite the dissimilarities in the two regimes of insolvency law there was one crucial similarity between them, that is, neither the Bankruptcy Act nor the Companies Act espoused a rescue culture. An individual found to have committed “an act of bankruptcy” would be declared bankrupt by a court of competent jurisdiction and a corporate body would in most cases be wound up. It is for this reason that the insolvency laws in Kenya were for a long time referred to as the “Kiss of Death” Laws. This reality was articulated in *Jambo Biscuits v. Barclays Bank* (2002) where Justice Ringera stated, “I think it is notorious facts of which judicial notice may be taken that receiverships in this country have tended to give the kiss of death to many a business.”⁷¹

The Kenyan Insolvency Act of 2015 is closely modelled upon the UK Insolvency Act of 1986. This latter Act epitomizes the rescue culture. As elaborated upon by Lord Browne-Wilkinson the rescue culture seeks to preserve viable businesses and is fundamental to much of the Insolvency Act of 1986.⁷² This Act was the governmental response to the report and recommendations of a multi-disciplinary committee tasked with reviewing insolvency law and practice in the United Kingdom in the late 1970s.⁷³ The Cork Committee laid the foundations for the so called rescue culture and argued that a good, modern system of insolvency law should provide a means for preserving viable commercial enterprises capable of making a useful contribution to the economic life of the country.

*“We believe that a concern for the livelihood and well-being of those dependent upon an enterprise which may well be the lifeblood of a whole town or even a region is a legitimate factor to which a modern law of insolvency must have regard. The chain reaction consequences upon any given failure can potentially be so disastrous to creditors, employees and the community that it must not be overlooked.”*⁷⁴

Rescue procedures are thus major interventions necessary to avert the eventual failure of a company. Central to the notion of rescue is, accordingly, the idea that drastic remedial action should be taken at a time of corporate crisis.⁷⁵ This remedial action should take place *ex ante* as opposed to attempting to deal with the backlash that follows total corporate failure *ex post facto*.

The term rescue culture has primarily been used in the context of corporate insolvency, but the present research will attempt to extend its use to personal insolvency specifically arguing that the various alternatives to bankruptcy do have the effect of rescuing an insolvent individual from otherwise imminent bankruptcy which has grim ramifications for persons adjudged bankrupt.

In this paper, Part I endeavors to summarize the roots of the current insolvency regime in Kenya, as well as examine the meaning of rescue culture together with its importance in any well-functioning insolvency regime. Part II analyzes the aspects of the Insolvency Act, 2015 that espouse a rescue culture for insolvent natural persons. Part III analyzes the rescue options for corporate bodies whose financial position is redeemable.

AN OUTLINE OF THE ROOTS OF KENYAN INSOLVENCY LAW AND THE NATURE OF RESCUE CULTURE

THE ROOTS OF KENYAN INSOLVENCY LAW

Kenyan Insolvency Laws, both the current and previous regime, can be traced back to the Insolvency Laws that developed in the United Kingdom. The earliest insolvency laws of the United Kingdom have a common law heritage dating back to medieval times and were concerned with individual insolvency or bankruptcy.⁷⁶ This early common law offered no collective procedure for the administration of a bankrupt person’s estate and a disappointed creditor could seize the effects of the debtor or his person. Moreover, disgruntled creditors had to pursue remedies against errant debtors individually. This is because there was no collective mechanism that allowed the general body of creditors to pursue the debtor jointly.

The Statute of Bankrupts passed in 1542 by Henry VIII introduced the *pari passu* principle of distribution and directed requisite authorities to seize and sell assets of debtors and pay creditors according to the debt owed to them.⁷⁷ *Pari passu* means “equal in right of payment” and is one of the most important principles underpinning insolvency law. In essence, this principle means that all unsecured creditors in insolvency processes, such as administration,

71 Fancy Chepkemoi Too, *Drivers of Insolvency Reforms in Kenya*, (2016) NIBLeJ 5
 72 *Powdrill v. Watson*, 2 Appellate Case, 394, 442A (House of Lords 1995)
 73 Kenneth Cork, *Insolvency Law and Practice: Report of the Review Committee* (1982)
 74 *Ibid.*

75 Alice Belcher, *Corporate Rescue* (Sweet & Maxwell, London, 1997)
 76 Vanessa Finch, *Corporate Insolvency Laws: Perspectives and Principles* (Cambridge University Press, 2009)
 77 *Ibid.*

liquidation and bankruptcy must share equally any available assets of the company or individual, or any proceeds from the sale of any of those assets, in proportion to the debts due to each creditor i.e. pro-rata to the debts that they are owed. This ensures fairness and equity in insolvency proceedings.

Numerous bankruptcy laws followed but in contrast to modern bankruptcy law, their aim was penal rather than rehabilitative. For instance, when the person of the debtor was seized, detention in person at the creditor's pleasure was allowed by law. Insolvency and the ensuing bankruptcy was therefore seen as an offence a little less criminal than a felony.⁷⁸

The Bankruptcy Act of 1705 began to move towards rehabilitation by introducing relief for bankrupts through the concept of discharge from debts for those who co-operated with their creditors.⁷⁹ It is however interesting to note that until 1861 there were two systems in place, bankruptcy for traders and insolvency for non-traders. Because of this distinction non-traders could not be declared bankrupt, the assumption being that traders could find themselves unable to pay their debts through no wrong doing of their own, but rather because of the vagaries of trade. As such they deserved the limited protection offered by the then bankruptcy laws. Non-traders on the other hand were considered to have wantonly defrauded their creditors and therefore were not offered any protection by the bankruptcy laws.⁸⁰ For instance, a difference that existed between the bankruptcy laws available to traders and the insolvency schemes for non-traders was that whereas the bankrupt's liabilities to creditors could be discharged on surrender of assets even if these assets were insufficient to satisfy his entire debt, the insolvent non-trader was still obliged to repay the remainder of his judgment debt even though he had suffered seizure of his goods or served his term of imprisonment.⁸¹ The Bankruptcy Act of 1861 abolished this distinction and was later replaced by the Bankruptcy Act 1914 which codified the laws on bankruptcy.

It is important to note that throughout this history the bankruptcy Acts never applied to companies. This is because companies as artificial legal persons only came into existence in the 19th century. More specifically, the birth of corporate insolvency laws goes back to 1844 when the then United Kingdom parliament enacted the Joint Stock Companies Act of 1844 and the subsequent recognition of companies as separate legal entities in the seminal *Salomon v. Salomon & Co.* case.⁸² Corporate insolvency law, therefore, initially piggy backed on bankruptcy laws and did not assume a truly distinctive status until the advent of limited liability for members of a company. The Companies Act 1862 contained detailed winding

up provisions including a provision for *pari passu* distribution. Later Companies Acts made further provisions for corporate insolvency. The Insolvency Act 1986 combined the insolvency of natural persons and artificial persons under one statutory regime. The Kenyan Insolvency Act 2015 borrows heavily from the UK 1986 Act. The Companies Act Cap 480 of the Laws of Kenya and the Bankruptcy Act Cap 53 of the Laws of Kenya both repealed by the Insolvency Act of 2015 were also closely modelled on their United Kingdom predecessors.

Modern Insolvency Law regimes have metamorphosed in a way that now places a new emphasis on rescue and on early actions to respond to corporate and individual troubles. It can be argued that a fundamental shift in both the law and practice has decreased the focus on *ex post* responses to financial crises to one that increasingly involves influencing the ways that corporate and individual actors manage the risks of insolvency *ex ante*.

In the context of the financial turmoil occasioned by the recent global financial crisis and the collapse and/or near collapse of major retail companies in Kenya such as Uchumi Supermarkets and Nakumatt Supermarkets the importance of a strong rescue framework has never been more relevant.

UNEARTHING THE CORE PRECEPTS OF RESCUE CULTURE

The rescue culture which seeks to preserve viable businesses has been said to be essential to much of the United Kingdom's Insolvency Act of 1986,⁸³ and by extension to the Kenya Insolvency Act of 2015. As previously mentioned in this article the so called rescue culture can be traced back to Kenneth Cork and the Cork committee.⁸⁴ It was asserted therein that too many financially distressed companies were unnecessarily liquidated despite the fact that they had a reasonable chance of survival.

We would herein posit that the term rescue culture, can and should be extended to personal insolvency proceedings, where an insolvent individual can be rescued from the finality of a bankruptcy order. In these situations, rather than declare an individual bankrupt, the Insolvency Act of 2015 offers reprieve by enumerating several alternatives to bankruptcy. In both corporate insolvency and personal insolvency therefore liquidation and bankruptcy respectively should be a last resort. Where it is possible to salvage financially viable companies or to provide individuals in financial distress with breathing room without or before subjecting them to the liquidation or bankruptcy process then this should be a laudable goal of any modern insolvency regime. Rescue in this sense therefore means offering both individuals and companies a second chance before relegating them to the murky depths of bankruptcy and liquidation.

78 *V Markham Lester, Victorian Insolvency, (Oxford University Press, Oxford, 1996).*

79 *Ibid.*

80 *William Blackstone, Commentaries on the Laws of England (8th edn, Clarendon Press, Oxford, 1765-9) vol. II*

81 *Vanessa Finch, Corporate Insolvency Laws: Perspectives and Principles (Cambridge University Press, 2009)*

82 [1897] AC 22, 66 LJCh 35, [1895-99] All ER 33

83 *Muir Hunter, The Nature and Functions of a Rescue Culture, 104 Commercial Law Journal 426, winter 1999*

84 *Kenneth Cork, Insolvency Law and Practice: Report of the Review Committee (1982)*

The rescue culture is a concept born out of the ideology that in any economy where there is a reliance on credit, risk is inevitable. Credit is contractual deferment of debt while insolvency is the inability to pay one's debts. It necessarily follows that insolvency is predicated on the extension of credit because without credit there can be no debt, and without debt there can be no insolvency. Both individuals and companies enter into credit arrangements in the course of day to day life. Failure to satisfy the obligations arising as a consequence of these arrangements should not automatically translate into bankruptcy and/or liquidation. Obviously rescue should not be perceived as a mechanism that offers an absolute solution to a financially distressed company or individual. Rather, it should be considered as an attempt to prevent, where possible, bankruptcy and/or liquidation.

Rescue culture should therefore be considered to be a multi-faceted term having both a positive and protective role as well as a corrective and sometimes punitive aspect.⁸⁵ Specifically, a true rescue culture means that there should be munificent treatment of insolvent persons, both companies and individuals, in so far as these persons deserve such treatment. For instance, where the insolvent individual or company has attempted to discharge his or its obligations to creditors by entering into either Individual Voluntary Arrangements (IVAs) or Company Voluntary Arrangements (CVAs) respectively, such persons should be allowed to try and honor their obligations under the IVA or the CVA. On the other hand however, where insolvent persons are deliberately irresponsible therefore increasing the losses suffered by creditors it follows that the law should not sanction such behavior. In these latter cases there is no compunction to attempt a rescue as it were.

It has been compellingly argued that there are ten key principles underpinning the notion of a rescue culture.⁸⁶ We opine that the most important of these principles are that an insolvency regime that espouses the rescue culture should be capable of exercising judicial pressure on an unpaid creditor to accept any reasonable arrangement proposed by a *bona fide* debtor, and that there is a public interest in the preservation and salvage where practicable of productive entities and enterprises.⁸⁷ Where insolvency proceedings have been commenced against an insolvent debtor it may behoove the court to ask whether there are reasonable grounds for protecting the debtor from being declared bankrupt or being wound up, and for not requiring his or its affairs to be administered in bankruptcy or through winding up proceedings.

This kind of reasoning is essential to the rescue culture. In considering what amounts to reasonable grounds it may be necessary to go beyond the interests of individual creditors and consider the socio-economic interests of the community in which the debtor operates or resides. To put this in context, consider the case of Nakumatt Supermarket Holdings Ltd. Once considered the biggest retail franchise in Kenya Nakumatt has in recent times found itself on the receiving end of multiple insolvency proceedings from dissatisfied creditors.⁸⁸ Under the previous insolvency regime this may very well have been sufficient reason to liquidate this retail powerhouse. Under the new regime however, with its emphasis on rescue culture where possible, it would be essential for the courts to consider whether there are other options available rather than rushing to liquidate. The deleterious socio-economic impact of "killing" a company as huge as Nakumatt Supermarkets Ltd. cannot be overstated.

One of the most important weapons in the armory of the rescue culture is the moratorium. A lot of the rescue procedures provided for under the Insolvency Act provide for a freezing of creditors' actions during the subsistence of the moratorium. For example, as provided for under section 559 there is a moratorium on all insolvency proceedings against the company where an administration is under effect. This cessation is not permanent, but is certainly important if a true rescue of the company in question is under contemplation. The moratorium provides the insolvent debtor with the much needed time and space necessary to chart the way forward in as far as improving its financial position is concerned.

In order for the rescue culture to have real life tangible effects as opposed to being merely aspirational it is necessary to concern ourselves with the people who are authorized to take part in insolvency proceedings. Another critical advancement introduced by the Insolvency Act 2015 is the creation of the office of the Insolvency Practitioners. Section 4 of the Act stipulates that bankruptcy trustees, liquidators, administrators and supervisors of voluntary arrangements for both natural and artificial persons must in all cases be qualified insolvency practitioners. Section 5 provides that it is an offense for someone to act as an insolvency practitioner without the requisite authority. Section 6 thereafter outlines the qualifications and disqualifications of insolvency practitioners and Section 8 provides that any person who wants to act as an insolvency practitioner must apply to the official receiver for authorization. By creating and requiring an efficient, honest and properly regulated profession made up of duly trained and qualified personnel it is likely that the ethos of the rescue culture will be manifested in reality.

85 Muir Hunter, *The Nature and Functions of a Rescue Culture*, 104 *Commercial Law Journal* 426, winter 1999

86 *Ibid.*

87 *Ibid.*

88 Brian Wasuna, *Nakumatt Fights to Stop Auctioneers in Battle over Rent*, *Daily Nation (Nairobi, July 3 2017)* available here: <http://www.nation.co.ke/news/Nakumatt-fights-to-stop-auctioneers/1056-3997526-avvh62z/index.html>

RESCUING INSOLVENT INDIVIDUALS: THE ALTERNATIVES TO BANKRUPTCY

DO INDIVIDUALS NEED TO BE RESCUED FROM BANKRUPTCY?

Bankruptcy is the status of a debtor who has been declared by a judicial process to be insolvent or unable to pay his debts.⁸⁹ Bankruptcy law can be argued to have two primary objectives:

- a) Vesting all the property which the debtor has at the commencement of the bankruptcy or acquires before his discharge in a trustee for distribution among the creditors *pari passu* according to their rights⁹⁰
- b) Releasing the debtor from liability to those creditors at the end of a specified period subject to his conduct during the bankruptcy.⁹¹

The law provides that there will be an automatic discharge of the bankrupt individual after 3 years, although an application may be made for an earlier discharge.⁹² During this period of bankruptcy and before the bankruptcy debtor is discharged certain negative consequences follow. For instance, until the bankrupt is discharged all property whether in or outside Kenya that the bankrupt acquires or that passes to the bankrupt before bankruptcy vests in the bankruptcy trustee without that trustee having to intervene or take any other step in relation to the property, and any rights of the bankrupt in the property are extinguished; and the powers that the bankrupt could have exercised in, over, or in respect of that property for the bankrupt's own benefit vest in the bankruptcy trustee.⁹³ Additionally, the trustee in bankruptcy may apply to the court for an income payment order. The effect of this income payment order is that a portion of the money earned by the bankrupt individual during this period of time may be validly received by the trustee for use in discharging the bankrupt's debts.⁹⁴

The problem with this state of affairs lies in the fact that where an individual is insolvent and has multiple creditors it may prove impossible by the culmination of the bankruptcy to fully pay his creditors. The creditors may therefore have to contend themselves with distributions that do not entirely satisfy the obligations that the debtor owed them, and after the bankruptcy comes to an end they will be deemed to have given up the legal rights to pursue the remainder. On the other hand, for the bankruptcy debtor, during his period of bankruptcy he is compelled by operation of law to cede his autonomy to a bankruptcy trustee which has, as has already been mentioned, ramifications for his ability to hold property, retain his incomes or even enter into contracts, a state that may last for up to three years. We would therefore argue that where

an insolvency regime fails to provide alternatives to bankruptcy it is inevitable that a kind of lose-lose situation will arise for both the creditors and the bankruptcy debtor.

THE ALTERNATIVES TO BANKRUPTCY

The Insolvency Act of 2015 has been feted for introducing into the Kenyan Insolvency regime a number of alternatives to bankruptcy. Specifically, the insolvent debtor is allowed to:

- a) enter into Individual Voluntary Arrangements after a proposal to creditors is made and accepted by them;
- b) pay creditors in installments; and
- c) enter the no asset procedure⁹⁵

INDIVIDUAL VOLUNTARY ARRANGEMENTS

Division 1 of part IV of the Act deals with Individual Voluntary Arrangements, or IVAs. One of the biggest advantages of an IVA is the flexibility given to the debtor and his creditors in reaching a mutually satisfactory arrangement.

A debtor may make a proposal to his creditors for a composition in satisfaction of his debts. The proposal has to identify a suitably qualified insolvency practitioner to act as the supervisor. The debtor is expected to obtain the consent of the insolvency practitioner to act as a nominee and submits his proposals to the nominee. The debtor then applies to the court to give him an interim order of protection while the nominee considers his proposals.

The court considers the proposals as well as the nominees comments and directs whether a creditor's meeting should be held or not. A creditors meeting will be convened by the supervisor in order to consider the debtor's proposal. The main purpose of a creditors' meeting is to decide whether to approve the debtor's proposal or not. This may be done with or without modifications.

If the requisite majority of creditors approve the proposal a court order confirming the same will be required. A debtor's proposal takes effect as an IVA by the debtor on the day after the date on which it is approved by the Court and is binding on all creditors.

However, a challenge may be brought against the confirmed proposal on the ground that it unfairly affects the interests of a creditor or that there was a material irregularity as regards the meeting. In the event that there are no challenges however, the proposals are implemented by the supervisor. IVAs can only be set up and implemented by a suitably qualified insolvency practitioner. This person is likely to play three roles during the subsistence of the IVA process:

89 *Insolvency Act 2015, section 13(1)*

90 *Insolvency Act 2015, section 13(2)*

91 *Insolvency Act, section 267*

92 *Insolvency Act, section 254(1)*

93 *Insolvency Act, section 104*

94 Frieze, Steven, *Handbook of Bankruptcy and Personal Insolvency* (6th ed. London: Sweet & Maxwell 1996)

95 *Insolvency Act 2015, Section 14*

- a) Adviser – the insolvency practitioner will advise the debtor as to whether an IVA is suitable in light of the circumstances
- b) Nominee – the insolvency practitioner will help the debtor put together the proposals and make an application to the court as well as organize meetings with the creditors
- c) Supervisor – once the IVA has been approved by the court the insolvency practitioner will supervise it ensuring that creditors receive their entitlements under the agreement

Unlike its United Kingdom counterpart, the Kenyan Insolvency Act of 2015 and the accompanying Insolvency Regulations of 2016 have failed to outline whether all debts can be subject to an IVA or whether there are some debts that cannot be settled using an IVA. Specifically, under an IVA entered into in England the following debts cannot be included; maintenance arrears that have been ordered by a court, child support arrears, student loans and magistrates' court fines.⁹⁶ It will be interesting to see whether debtors will be able to utilize this mechanism to settle any and all types of debts without distinction.

A debtor who intends to enter into an IVA should ensure that he has access to necessary income to enable him to meet his obligations under the IVA. As such, this kind of arrangement would be most suitable for a debtor who has regular income e.g. from a business or even from employment. Where a debtor fails to meet his obligations under the IVA, the arrangement will be terminated and either the creditors or the supervisor can petition for the debtor's bankruptcy.⁹⁷

It may be argued that one of the biggest advantages of an IVA as compared to bankruptcy is the autonomy that the debtor retains. The debtor has a say in how his property will be used to settle creditors' debts. The implication of this is that so long as the creditors consent the debtor may be able to propose plans that do not unduly injure his interests. For instance, if the debtor owns a house or other assets that he does not want to lose he may be able to retain ownership of this property for the subsistence of the IVA so long as he makes suitable arrangements to repay his creditors from alternative sources.

This can be directly contrasted with bankruptcy where all the debtor's property automatically vests in the trustee for purposes of realization and distribution, with the debtor having little chances of retaining any property outside the list of protected property provided for in the Insolvency Act.⁹⁸

SUMMARY INSTALLMENT ORDERS

Division 2 of Part IV deals with this alternative. This is an order made by the official receiver instructing the debtor to pay the debt in installments or in some other way and in full or to the extent considered practicable. Either a debtor or a creditor who has the consent of the debtor can apply for a summary instalment order. The summary instalment order will usually identify a supervisor in charge of ensuring that the debtor complies with the requirements of the order.

A summary installment order will have to propose how payments will be made over a three year period, maximum. However, if the supervisor feels that the unique circumstances of the case warrant him doing so he may extend this period to five years.⁹⁹ During the subsistence of the summary instalment order no proceedings may be brought against the debtor unless he defaults in compliance, or if the Official Receiver gives his permission. Additionally, no proceedings may be instituted against the debtor for recovery of the debts owed to his creditors and agreed to be settled under the summary installment order. The supervisor will be required to send notice of the order to all known creditors of the debtor in question. Failure by the debtor to meet the payments under the order will result in the debtor being in default.¹⁰⁰ The implication of this is that legal proceedings against the debtor for recovery of debts by his creditors may be continued or commenced. A debtor who has entered into a summary instalment order must inform all new creditors of its existence if he plans to incur an additional credit of one hundred thousand shillings or more, failing which he will be deemed to have committed an offence.¹⁰¹ The most attractive aspect of summary installment orders lies in the fact that so long as the debtor meets his obligations to creditors under the order he retains autonomy over his assets. Although the debtor is free to give up any assets he pleases so that the proceeds of their sale is used in repayment of creditors' dues.

THE NO ASSET PROCEDURE

Division 3 of Part IV deals with a debtor who has no realizable assets. In order for an insolvent debtor to be able to enter into the no asset procedure the debtor must prove that they have no realizable asset, that they have never entered into the no asset procedure before or been declared bankrupt. In addition, the debtor's total debts should not be less than one hundred thousand shillings and not more than four million shillings and there should be no way to repay the debts in question.¹⁰² If bankruptcy proceedings have already been commenced against the debtor it is impossible for him to enter into the no asset procedure.

⁹⁶ Citizens advice, "Individual Voluntary Arrangements" available here: <https://www.citizensadvice.org.uk/debt-and-money/debt-solutions/individual-voluntary-arrangements/>

⁹⁷ *Ibid*

⁹⁸ Insolvency Act 2015, Section 161

⁹⁹ Insolvency Act 2015, Section 332

¹⁰⁰ Insolvency Act 2015, section 341

¹⁰¹ Insolvency Act 2015, section 342

¹⁰² Insolvency Act 2015, section 345

The no asset procedure is only available to truly deserving debtors. Which is to say that where a debtor concealed assets with the intention to defraud his creditors, or that the debtor has committed offenses under the Act or has incurred debts knowing full well that he will be unable to repay these debts then such a debtor falls outside the ambit of the no asset procedure.¹⁰³ However, where a debtor has successfully entered into the no asset procedure his creditors are forestalled from any attempts to enforce debts owed by the debtor. Amounts payable under matrimonial causes, the Children Act and loans to secure the education of a dependent child are still payable by a debtor despite entry into the no asset procedure.¹⁰⁴

Unlike bankruptcy which may last for a period of 3 years before the bankrupt debtor is discharged, a debtor who enters into the no asset procedure is automatically discharged after 12 months. Additionally, the procedure may be terminated if the official receiver feels that it was wrongly entered into, or if a creditor with the requisite authority to enforce his debt makes an application to the court to adjudge the debtor bankrupt. Where a debtor is validly discharged from the no asset procedure his debts are cancelled and he is not liable to pay any penalties or interests so long as there was no fraud involved.¹⁰⁵ On the other hand, where the no asset procedure is terminated for a valid reason the debtor will not be absolved from liability. The debtor's debts that became unenforceable on the debtor's entry to the no asset procedure become enforceable again and the debtor becomes liable to pay any penalties and interest that may have accrued.¹⁰⁶

RESCUING INSOLVENT CORPORATIONS: ADMINISTRATION AND COMPANY VOLUNTARY ARRANGEMENTS

DO COMPANIES NEED TO BE RESCUED FROM LIQUIDATION?

Under the Act a company can be said to be unable to pay its debts (or insolvent) when¹⁰⁷:

- a) A creditor who is owed one hundred thousand shillings or more by the company serves it with a statutory demand for the debt but the debt remains unpaid 21 days afterwards
- b) Execution or other process issued on a judgment, decree or order of any court in favor of a creditor of the company is returned unsatisfied in whole or in part
- c) It is proved to the satisfaction of the Court that the company is unable to pay its debts as they fall due. This is the cash flow test of assessing insolvency. Here the fact that the company's assets exceed its liabilities is irrelevant. The courts, moreover, will pay regard to the company's actual conduct so that insolvency will be assumed if the company is not in fact paying its debts as they fall due.¹⁰⁸

¹⁰³ *Insolvency Act 2015, section 346*

¹⁰⁴ *Insolvency Act 2015, section 351*

¹⁰⁵ *Insolvency Act 2015, section 360*

¹⁰⁶ *Insolvency Act 2015, section 357*

¹⁰⁷ *Insolvency Act 2015, section 384*

¹⁰⁸ *Vanessa Finch, Corporate Insolvency Laws: Perspectives and Principles (Cambridge University Press, 2009)*

- d) It is proved to the satisfaction of the Court that the value of the company's assets is less than the amount of its liabilities (including its contingent and prospective liabilities). This is the balance sheet test for assessing insolvency. Liability is a much broader term than debts. It embraces all forms of liability whether liquidated or unliquidated and whether arising in contract or in tort or by way of restitution or for damages for breach of statutory duty. This may involve assessing the value of assets and judging the amount the asset would raise in the market.¹⁰⁹

Insolvency is neither a crime nor a death sentence for a company. It may be possible for a company experiencing financial difficulties to go back to financial health. However, where insolvency persists liquidation will be imminent. Under the previous insolvency regime an insolvent company would have to grapple with the inevitability of winding up proceedings being commenced against it by dissatisfied creditors. In the new regime however, with its emphasis on rescue, a financially distressed company does not have to receive the "kiss of death." There is finality to liquidation of companies that is akin to the death of an individual. Where a company is liquidated it ceases to exist, becoming nothing more than a memory. Rescue culture in this context therefore means that where it is possible and desirable, a company that is experiencing financial difficulty i.e. one that is in the throes of insolvency should be resuscitated and brought back to financial health and wellbeing.

Not all companies that falter or experience serious financial difficulty in a competitive marketplace should necessarily be liquidated; a company with a reasonable prospect of survival such as one that has a potentially profitable business should be given that opportunity where it can be demonstrated that there is greater value and, by deduction, greater benefit for creditors in the long term in keeping the company alive.¹¹⁰

Liquidation portends numerous undesirable consequences for the stakeholders of a company whether internal or external; the bigger the company the more dire the consequences. For instance, employees are likely to lose their jobs and sources of livelihood, shareholders lose their investments, suppliers of the business lose a potentially important customer, customers of the business may face difficulty in accessing substitute services or products, the government loses out on tax revenue and creditors may fail to recover some of the debts owed to them where the proceeds from asset realizations are insufficient to discharge all the obligations that the company owes. Because of the potentially widespread ramifications of the liquidation of a company as illustrated by the foregoing it is essential to consider alternatives to liquidation that may just save the company.

¹⁰⁹ *Ibid.*

¹¹⁰ *Wood, John Michael, Corporate Rescue: A Critical Analysis of its Fundamentals and Existence, (Phd Thesis; University of Leeds 2013) available here: http://etheses.whiterose.ac.uk/4963/1/Wood_JM_Law_PhD_2013.PDF.pdf*

THE ALTERNATIVES TO LIQUIDATION

There are two alternatives to liquidation for a company that finds itself unable to pay its debts. The company may either elect to enter into a Company Voluntary Arrangement (CVA)¹¹¹ or go into Administration.¹¹² Ultimately the choice of which of the two alternatives is appropriate depends on the unique circumstances of the company and perhaps, even more importantly, the relationship between the company and its creditors.

COMPANY VOLUNTARY ARRANGEMENTS

CVAs, just like administration, can be traced back to the Cork Committee. The committee argued that the insolvency laws as they then existed were deficient because they failed to provide that a company could be allowed to enter into a binding arrangement with its creditors by a simple procedure that would allow it to organize its debts, and potentially come out of insolvency without being wound up.¹¹³

A CVA commonly begins with the directors making a proposal to the company and its creditors. (If the company is under liquidation or administration the liquidator or the administrator respectively may propose a CVA). This proposal outlines the possibility of the company entering into a composition in satisfaction of its debts or a scheme for arranging its financial affairs.¹¹⁴ The proposal will be required to identify a suitably qualified insolvency practitioner to function as the supervisor of the CVA. A meeting of both the company members and the creditors must be convened shortly thereafter in order to outline the terms of the arrangement. The main purpose of this meeting is to determine whether to approve the proposals with or without modifications. The proposal (including any modifications made) needs to be approved by a majority of the creditors voting in person or by proxy with reference to the value of their claims. It also requires the approval of a majority of the members/shareholders present at a shareholders' meeting.¹¹⁵ Once the proposal has been approved an application has to be made to the court for confirmation of the proposal. If confirmed, the scheme becomes operative and binding upon the company and all of its creditors (those who were entitled to vote at the meeting or would have been so entitled if they had had notice of it) as a CVA on the day after the date on which it is approved by the Court.

Once a proposal takes effect as a CVA, the supervisor becomes responsible for implementing the arrangement in the interests of the company and its creditors and monitoring compliance by the company with the terms of the arrangement. In the event of default aggrieved creditors

can apply to the court for redress. The CVA therefore operates under the aegis of the court but without the need for court involvement unless there is a legitimate ground for disagreement requiring judicial resolution.¹¹⁶

It is important to highlight that the law does not prescribe exactly what a company should offer its creditors as part of the CVA. Discretion is given to the parties to agree on the most viable option. However, the point is that creditors must be satisfied that all or part of their debts will be paid during the subsistence of the CVA. The consent of the creditors is essential to the commencement of the CVA. This means that the agreement could be a plan to repay creditors from future profits assuming that the company is able to improve its financial performance and working capital position. Alternatively, the deal could require the company to sell certain pre-identified assets and to discharge the obligations to creditors from the sale proceeds.

Whatever the eventual contents of a CVA the entire enterprise is premised upon an attempt to preserve the company (or rescue it from liquidation), rebuild the sales and profits of the company, while at the same time paying back the creditors part or all of their dues over the period of time agreed upon.

The supervisor of the CVA is responsible for implementing the arrangement in the interests of the company and its creditors and monitoring compliance by the company with the terms of the arrangement. In all other respects however the directors of the company are likely to retain control over the affairs of the company during the CVA. It is only in the event of default that the supervisor may take over. For eligible companies, an additional advantage that could accompany the CVA is a moratorium on debt payments.¹¹⁷ An application has to be made to the court for authority for the moratorium to take effect in these cases. If successful, the moratorium protects the company from liquidation petitions, actual liquidation, administration, levy of distress of rent by an unpaid landlord, execution, enforcement of securities among others.

Once the agreed period for the CVA is completed and the supervisor has certified that the company has met all its obligations under it, then the company leaves the CVA state. Any remaining unsecured debts (where partial repayment was approved) are written off and the directors continue to run the business for the shareholders. Where a CVA is successful the company is therefore rescued from the "kiss of death".

¹¹¹ *Insolvency Act 2015, Part IX*

¹¹² *Insolvency Act 2015, Part VIII*

¹¹³ *Vanessa Finch, Corporate Insolvency Laws: Perspectives and Principles (Cambridge University Press, 2009)*

¹¹⁴ *Insolvency Act 2015, section 625*

¹¹⁵ *Insolvency Act 2015, section 629*

¹¹⁶ *Vanessa Finch, Corporate Insolvency Laws: Perspectives and Principles (Cambridge University Press, 2009)*

¹¹⁷ *Insolvency Act 2015, sections 638-642*

ADMINISTRATION OF COMPANIES

Where the reasons for corporate failure can be attributed to the poor leadership of the company management, an alternative approach to turn around the financial status of the company and bring it back to financial prosperity where possible is to appoint an administrator. The roots of administration can be traced back to the Cork Committee's belief that corporate rescue could often be possible where an independent expert is allowed to take over the management of a financially distressed company with the intention of resuscitating it.¹¹⁸

Administration puts a qualified insolvency practitioner, the administrator, in control of the company with a defined plan that most times involves rescuing the company from insolvency as a going concern. However, rescuing the company is not the only possible objective of an administration process¹¹⁹, even though it may be argued to be the most important.

Administration may aim to achieve a better outcome for the company's creditors as a whole than would likely be the case if the company were liquidated. Alternatively, the aim may be to realize the property of the company in order to make a distribution to one or more secured creditors.

The reality of insolvency is that not all insolvent persons can be rescued. In such situations it would clearly be futile for an administrator to attempt a rescue. The task of the administrator in this kind of circumstance could very well be to attempt to achieve a better outcome for creditors even if liquidation is imminent. Arguably, during liquidation there is often an urgency to wind up the affairs of the company, realize the assets and use the proceeds to pay off the company debts. The problem with this state of affairs lies in the fact that creditors may have to contend themselves with receiving distributions *pari passu*, but not the full amount they are owed. A liquidator's key task is to sell the assets, pay creditors and liquidate the company, often the quicker this happens the better. An administrator on the other hand may be driven by the need to implement measures that will facilitate a more than advantageous realization of assets thus increasing creditors' allocations during liquidation. This is a more than laudable goal of a proper rescue regime. Even if the company cannot be rescued, at least its creditors can be rescued from the misfortune of losing a considerable portion of what the insolvent company owes them.

Administration orders and liquidations are mutually exclusive. Once an administration order has been passed by the court, it is no longer possible to petition the court for a winding up order against the company.¹²⁰

Administrators may be appointed either without or by a court order¹²¹. For the former option an administrator can be appointed by either the floating charge holders of the company (only if their charge instrument allows them to do so) or by directors. For the latter option a petition to put the company under administration would have to be filed with the court. This petition may be made by the company, the directors, or creditors of the company.

One of the most important effects of appointing an administrator is the commencement of a moratorium over the company's debts. This happens automatically and continues until the culmination of the administration. No creditor can enforce their debt during the administration unless they have the court's permission. Additionally, there is a freeze on all insolvency proceedings during this period.¹²²

However, the court or the administrator may give permission for security over company property to be enforced, or for goods held under hire purchase by the company to be repossessed, or for a landlord to conduct forfeiture by peaceable entry or for commencement and/or continuation of any legal process against the company.¹²³

When the administrator comes into office he/she is expected to come up with the proposals he intends to implement in order to achieve any of the possible objectives of administration already outlined above. The creditors of the company will have to approve the proposals with or without modification before the administrator can implement them. If the creditors fail to approve the proposals the court may have no recourse but to terminate the administration. Conversely, where the creditors approve the proposals an administrator will have a period of twelve months to effect them. This is because the Act provides for automatic termination of administration after twelve months, although an application may be made for an earlier or later termination.¹²⁴

Clearly administration may or may not end up rescuing the company from financial oblivion. If it does well and good, but even if it doesn't at least an attempt was made to forestall liquidation and its irrevocability. Where administration is successful the company may continue in existence as a going concern, members could experience an enhanced share value because of the regeneration of the business and creditors may be able to have a continued business relationship with the company once the business has been turned around.

118 Vanessa Finch, *Corporate Insolvency Laws: Perspectives and Principles* (Cambridge University Press, 2009)
 119 *Insolvency Act 2015, section 522*
 120 *Insolvency Act 2015, section 528*

121 *Insolvency Act 2015, section 523*
 122 *Insolvency Act 2015, section 559*
 123 *Insolvency Act 2015, section 560*
 124 *Insolvency Act 2015, section 593*

POST SCRIPT: FINAL THOUGHTS

With the coming into force of the Insolvency Act 2015 and the accompanying Insolvency Regulations of 2016 we are living in very exciting insolvency times. While the interpretation of the Act may be argued to be in its very nascent stages it is undoubted that there is a more than positive change in the Kenyan insolvency regime. The authors of this paper hope that the rescue procedures will be adequately utilized in order to ensure a lasting change in the administration of the insolvency regime in Kenya. It is hoped that there will be no need to be 'rescued from rescue' procedures as a result of misuse or abuse of these mechanisms. We remain optimistic that under the aegis of this fortified rescue culture many deserving debtors, especially companies worth saving, will live on to fight and trade and enrich the nation.¹²⁵

UNDERSTANDING LEGAL AID IN THE CONTEXT OF THE ADMINISTRATION OF JUSTICE: A CASE OF TANZANIA

HON. LADY JUSTICE DR. LADY MARY LEVIRA

Judge, Court of Appeal of Tanzania, the paper is an extract of what was presented at the Conference of the East African Regional Legal Aid Networks, Nairobi-Kenya on 5th-8th November, 2018.

ABSTRACT

Justice Levira demonstrates that effective administration of justice among other things, depends on the availability of legal aid services. It is not enough to have laws providing for legal aid services, it is equally important and necessary to have enforceable laws which accommodate both the legal aid services providers and the aided persons. Accessibility and affordability of the services is meaningful only if credible and accountable providers render quality services to the needs of the people in the administration of justice. The Judge, before making pertinent recommendations, also provides an instructive exposition of the Legal Aid Act, 2017 that regulates matters relating to coordination and provision of free legal aid and the conduct of paralegals in Tanzania Mainland.

INTRODUCTION

Legal aid as a term is not a new phenomenon in the administration of justice. It is among the pillars that provide for access to justice in terms of equality before the law, the right to counsel and the right to a fair trial. Technically, legal aid includes legal advice, representation and assistance in drafting of relevant documents and effecting service incidental to any legal proceedings. It also involves creating awareness through provision of legal information and law related education¹²⁶. Thus in the administration of justice, legal aid service can be tested through five key elements: accessibility, affordability, sustainability, credibility and accountability¹²⁷.

LEGAL AID AT INTERNATIONAL LEVEL

THE RIGHT TO LEGAL REPRESENTATION AS A HUMAN RIGHT

The genesis of legal aid can be traced from various international and regional instruments which have given obligations to member states to guarantee access to justice to its subjects. Among the basic international instruments are the United Nation Universal Declaration of Human Right (UDHR) of 1948¹²⁸; International Covenant on Civil and Political Right (ICCPR) of 1966¹²⁹; International Convention on the Rights of the Child (CRC)¹³⁰ which protects the child who is in conflict with the law; International Convention on Elimination of All Forms of

Discrimination Against Women (CEDAW), which requires states to ensure that women are afforded assistance to access justice.¹³¹

The African Charter on Human and Peoples Rights (ACHPR)¹³² also imposes a responsibility on states to ensure people who are charged with criminal offences are accorded fair hearing that includes the right to be represented by counsel. The African Charter on the Rights and Welfare of the Child (ACRWC)¹³³ affords a child accused or found guilty of an offence, a right to dignity as a fundamental right and legal assistance. Furthermore, the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa¹³⁴ ensures women with an effective access to judicial and legal aid services. The Global Sustainable Development Goals, goal 16 provides for state obligations in ensuring Rule of Law and Access to Justice for all¹³⁵.

The right to access justice and fair trial as enshrined in the above international and regional instruments are broadly interpreted to include a right to legal aid through assistance provided to people who are unable to afford legal representation and access to the court system. In realizing those important aspects, individuals need to be afforded the right to be represented whenever one's right is to be determined.

The challenge with the implementation of those rights in the administration of justice is whether the right to access justice and fair trial, should be treated as a right or not.

The practice in most countries and Tanzania in particular has been that, for a number of years legal aid is provided through Non-Governmental Organizations (NGOs), Faith Based Organizations and other institutions. Experience shows that these organizations are not fully funded by their states. In most cases, they depend on donor's funds to run their activities.

¹²⁶ Section 2, the Legal Aid Act No 6 of 2016, Laws of Kenya

¹²⁷ Section 3(a) opcit

¹²⁸ Article 11(1) "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense".

¹²⁹ Article (14)(3)(b) "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing"

¹³⁰ Article 40(2) "To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that: (a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed; (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings".

¹³¹ Article 2 "States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle; (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination"

¹³² Article 7(1) (3) "Every individual shall have the right to have his cause heard. This comprises: (c) The right to defense, including the right to be defended by counsel of his choice".

¹³³ Article 17 "Every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the Children's sense of dignity and worthy and which reinforces the child's respect for human rights and fundamental freedoms of others."

¹³⁴ 2003, (Article VIII(a) and (b), "Access to Justice and Equal Protection before the Law"; (a) Women and men are equal before the law and shall have the right to equal protection and benefit of the law. States Parties shall take all appropriate measures to ensure: (b) support to local, national, regional and continental initiatives directed at providing women access to legal services, including legal aid"

¹³⁵ Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels. In 2015, more than 190 world leaders committed to 17 Sustainable Development Goals (SDGs) to help us all end extreme poverty, fight inequality & injustice, and fix climate change. We each have a role to play if we're going to achieve these goals of a more prosperous, equitable, and sustainable world.

The assumption is that if the right to legal representation will be considered to be a human right, then states must assume full responsibility to fund legal aid.

LEGAL AID IN TANZANIA

Tanzania as a member state that has ratified international and regional instruments therefore, has an obligation to ensure that free access to justice and legal representation are guaranteed to its citizens. Tanzania, like many other countries apart from ratifying, has incorporated the international treaties by enacting a number of laws to ensure that there is equality before the law and protection of indigent persons through legal aid. In 1969 the Legal Aid (Criminal Proceedings) Act 1969¹³⁶ was enacted and provided for free legal services but only in criminal proceedings involving indigent persons charged with serious offences.

CONSTITUTIONAL FRAMEWORK

The right to legal aid is construed under the provisions of the Constitution of the United Republic of Tanzania (as amended from time to time)¹³⁷. It provides for a right to a fair hearing¹³⁸. The right to legal representation is one of the fundamental legal aspects that a party in a trial entitled to. The rationale behind this doctrine is premised under the presumption of innocence¹³⁹. This novel right is premised upon two important rights embodied in the Constitution that is: the right to be heard which is articulated under Article 13(6) (a) and the right to personal freedom and liberty provided for under Article 15(2)¹⁴⁰.

Fair hearing presupposes that the parties especially in complex matters (be it criminal or civil) should be able to appreciate what is transpiring in a court of law where technicalities become an integral part of the proceedings that make even the most intelligent members of society fail to properly follow the proceedings. Suffice to say, that the right to a fair hearing is interpreted to include affording the accused the right to be heard and defend his case fairly through obtaining legal aid. The state therefore is under obligation to ensure equal protection and equality before the law.

THE LEGAL FRAMEWORK

THE CRIMINAL PROCEDURE ACT, CAP 20 (R.E 2002)

The context of the right to legal representation is also envisaged under section 310 of the Criminal Procedure Act, Cap 20 RE 2002 (CPA). For easy reference the respective provision states as hereunder that:

“Any person accused before any criminal court, other than Primary Court, may as of right be defended by an advocate of the High Court.”

Unfortunately, the provision above has for years been given a very narrow interpretation in the sense that legal services were conditioned upon those who had the means to engage the service of an advocate. For indigent persons, the service of a lawyer was only restricted to capital offences which had attracted severe punishment. This trend of cases which narrowly interpreted the gist and import of section 310 include the case of the *Director of Public Prosecution vs. Arbogast Rugaimukamu [1982] T.L.R 139*; and the case of *Almasi Kalumbeta vs. the Republic [1982] T.L.R 329*. The above cases do not speak for an indigent accused person who cannot afford to hire an advocate. This signifies, therefore, that under that narrow interpretation of scope and applicability of section 310 of the CPA, an indigent person is automatically excluded and thereby deprived of his fundamental right by the mere fact that he is poor. The true interpretation of section 310 of the CPA was well appreciated in the case of *Lawrent s/o Joseph and Another vs. The Republic [1981] T. L.R 351*; where the Court of Appeal of Tanzania had a chance to discuss as to whether an indigent person is entitled to a right to legal representation in respect of capital and non-capital offences in view of section 3 of the Legal Aid (Criminal Proceedings) Act of 1969, (defunct law). The Court found that an indigent accused person had a right to free legal aid paid by the State in all cases whether capital or non-capital offences. This is the most iconic and yet outstanding precedent given by the most appellate court in the country which had finally acknowledged the true intent that can be gathered from section 310 of the Criminal Procedure Act and Section 3 of the Legal Aid (Criminal Proceedings) Act (supra).

It is good to note that the spirit behind this decision has been reflected in the current legal regime.

¹³⁶ Cap 21

¹³⁷ Article 13 (1) provides that all persons are equal before the law and are entitled, without any discrimination, to protection and equality before the law.

¹³⁸ 13 (6) (a), Cap 2 this Article provides that when the rights and duties of any person are being determined by the Court or any agency, that person shall be entitled to a fair hearing and to the rights of appeal or other legal remedy against the decision of the Court or of the other agency concerned.

¹³⁹ Article 13 (6) (b) states that “No person charged with criminal offence shall be treated as guilty of the offence until proved guilty of that offence”

¹⁴⁰ The Constitution of United Republic of Tanzania, 1977 where it is provided that “ For the purpose of preserving individual freedom and the right to live as free person, no person shall be arrested, imprisoned, confined, detained, deported or otherwise be deprived of his freedom....”

THE LEGAL AID ACT, 2017

In 2017, the Legal Aid Act¹⁴¹, was enacted to regulate matters relating to coordination and provision of free legal aid and conduct of paralegals in the Tanzania Mainland. This new law has repealed the Legal Aid (Criminal Proceedings) Act 1969, which was regulating provision of legal aid in capital offences only as shown above. The current law has introduced some provisions to regulate and coordinate legal aid services to indigent persons in both criminal and civil matters. It also recognizes paralegals as legal aid service providers. Since the law is still new, it suffices here to give an overview particularly in assessing its effectiveness towards the provision of legal aid to the indigent persons and to other people where justice requires.

SCOPE OF LEGAL AID UNDER THE LEGAL AID ACT, 2017.

Unlike the Legal Aid (Criminal Proceedings) Act¹⁴², the new Act has introduced a number of changes in terms of the nature of service, service providers, administrative organs and source of funding. The law has laid a wider perspective foundation of legal aid in terms of its accessibility¹⁴³, affordability, sustainability, credibility and accountability.

ACCESSIBILITY

The primary focus of the law is to aid an indigent person to access justice without unreasonable impediments. The Act defines an indigent person to mean a person whose means are insufficient to enable him to engage a private legal practitioner and also includes other category of persons where the interest of justice so requires¹⁴⁴. However, at the moment it is not only the indigent person who has the access to the legal aid service; the Act has introduced a wide range of circumstances which underline eligibility to legal aid. For instance, when there is a reasonable ground for initiating and defending the matter which attracts legal aid, where the matter is of public interest and in case of a civil matter, there must be a reasonable prospect of success.¹⁴⁵

HOW TO ACCESS THE LEGAL AID

A person (an indigent) who intends to receive legal aid is required to approach the legal aid provider and apply for the service. The application will be assessed by the provider in accordance with the procedure envisaged by the law¹⁴⁶. The service can be sought by the indigent himself or any person or institution on behalf of an indigent person.¹⁴⁷

141 Act No 1 of 2017
 142 1969, Cap 21
 143 This entails how easily the service can be reached and realized by people with insufficient means to their localities when it is needed.
 144 Section 3 of the Legal Aid Act No 1 2017
 145 Section 17 of the Act
 146 Section 21 opcit
 147 Section 23 opcit

LEGAL AID IN CIVIL PROCEEDINGS:

The law provides for legal aid services to the indigent persons in civil matters. It provides that, where it appears to the Presiding Judge or Magistrate, that in the interest of justice a person should have legal aid and such person has insufficient means to enable him to obtain the legal service, the presiding Judge, Magistrate or any other adjudicatory board shall cause such person to obtain legal aid¹⁴⁸. The Judge or Magistrate shall issue a certificate in the prescribed Form to either of the following: Permanent Secretary, Registrar, Assistant Registrar and to the legal aid service provider to provide legal aid¹⁴⁹. This is a new development introduced by this law in a civil litigation.

LEGAL AID IN CRIMINAL MATTERS

The scope of the legal aid in criminal matters has been extended to all criminal cases in terms of the offences and offenders, unlike the previous position where the law covered capital offences only particularly murder, treason and manslaughter¹⁵⁰. In the new law, where it appears to the presiding Judge or Magistrate in the interest of justice, that an accused person should have legal aid in preparation of his defense or appeal and his means is insufficient, the presiding Judge or Magistrate shall certify that the accused ought to have such legal aid. When the certificate is issued, the Registrar assigns to the accused an Advocate¹⁵¹.

LEGAL AID FOR CHILDREN IN CONFLICT WITH THE LAW

For those individuals charged with custody of children who are in conflict with the law, the law requires them to obtain legal aid immediately¹⁵². The legal aid provider is required to report to the Registrar for appointment of an Advocate to represent the child¹⁵³.

The legal aid provider upon receiving such information is required to treat the matter urgently and provide legal assistance with immediate effect¹⁵⁴.

LEGAL AID FOR PERSONS IN CUSTODY

Persons in lawful custody include person detained in police stations or prisons under the supervision of a police officer in-charge or prisons officer in-charge respectively. These detained persons are entitled to receive legal aid under the law¹⁵⁵. The law requires the respective

148 Section 27 opcit
 149 Section 27(b) opcit
 150 Section 33 opcit
 151 Section 33 (1)(b) opcit
 152 Section 35 opcit
 153 Reg 35(1), Legal Aid Regulation
 154 Reg 35(2), opcit
 155 Reg 23 opcit

officer to ensure that the person detained accesses legal aid service by performing the following duties:¹⁵⁶ distributing application form to all people who intends to access legal aid service; collecting the duly filled application forms and prepare the list of names of person who require legal aid service; submitting the list and forms to the designated legal aid desk within a police station or prison and where necessary to the legal aid providers within the area; arranging a meeting of the persons in custody with Advocates, Lawyers or paralegal for the purpose of providing legal aid services; preparing a report indicating names of persons in custody who have accessed legal aid service; and submitting a copy of the reports to the Registrar. Basing on the guidance above, the law has covered a wide range of procedure where persons in custody are entitled to legal aid services immediately after arrest, unlike the previous law where legal representation was provided at the trial stage.

AFFORDABILITY¹⁵⁷

ELIGIBILITY FOR LEGAL AID

The service is free fee payment. The requirements set by the law to enjoy the legal aid service are very basic and common to any person. For instance, a person is eligible for a legal aid if in the opinion of the legal aid provider, he is an indigent person as the first criteria. Secondly, it will depend on the nature of the matter as the interest of justice may require; and the likelihood of winning a case¹⁵⁸ or graveness of the offence. This appears to be an exception to the general rule, as it departs from the general requirement of the law aiming to cover mostly indigent persons.

CREDIBILITY¹⁵⁹

Under the existing law, the legal aid service providers have the quality of being trusted and believed, in terms of their skills and knowledge. Their accreditations are determined as per the qualifications set by the law¹⁶⁰; and the legal aid services they render to the people are monitored by special organs with the mandate to supervise the service.

ADMINISTRATIVE ORGANS

In administration and coordination of the legal aid services, the law has established the National Legal Aid Advisory Board¹⁶¹ and the Registrar of the Legal Aid Providers under the Ministry of Legal Affairs¹⁶². The function of the Board involves: providing policy guidelines to legal aid providers; approving annual reports of the legal aid provider; and determining appeals from the decision of the Registrar.

The Registrar is responsible for legal aid matters in the Ministry. The main functions of the Registrar are: to register the legal aid provider; investigate complaint of malpractice, negligence, misconduct or disobedience against a legal aid provider; suspend or cancel registration of any legal aid provider; coordinate, monitor and evaluate the function of the legal aid provider and give general and specific direction for the proper implementation of legal aid programs; inspect any legal aid provider's office with a view to satisfying himself on the type and quality of legal aid service offered; and determine disputes between legal aid provider other than Advocates and between legal aid providers and aided persons.

The Registrar is answerable to the Permanent Secretary who is the link between the Government and legal aid provider. Apart from the Registrar, the Permanent Secretary has power to designate for each region or district, a public officer within a district of a region to be the assistant Registrar and who is answerable to the Registrar¹⁶³.

REGISTRATION OF THE LEGAL AID PROVIDERS AND PARALEGALS

The requisite qualifications for the registration of the legal aid provider are as follows: two advocates; one lawyer and two paralegals; one advocate and two paralegals; three paralegals who should furnish proof of affiliation with another legal aid provider which has an Advocate.

QUALIFICATIONS FOR THE PARALEGALS

Unlike the previous circumstances before the enactment of the current Act, where recruitment of paralegal was not guided by the law in terms of qualification, the Legal Aid Act has set the following qualification:¹⁶⁴ any Bachelor's degree in any discipline from an accredited institution, save for bachelor's degree in laws; any diploma or certificate from an accredited institution; and any certificate of secondary education.

¹⁵⁶ Reg 24, 25 and 27 opcit

¹⁵⁷ In this the concentration is whether the ordinary people have the ability to afford the legal aid service irrespective of the individual's financial position.

¹⁵⁸ Reg 17 (d) of Regulations

¹⁵⁹ In ascertaining the credibility of the legal aid service providers the criteria is whether they have the quality of being trusted and believed in terms of their skills and knowledge when rendering the services to the intended people.

¹⁶⁰ Section 10 and 19 of the Act

¹⁶¹ Section 4 opcit

¹⁶² Section 6 opcit

¹⁶³ Section 8(1) of the Act

¹⁶⁴ Section 19 opcit

Paralegals undergo the following trainings: short course training for the period three to six months; certificate course; ordinary diploma courses¹⁶⁵. The duties of paralegals include: carrying out educational programs on legal matters; guiding aided persons to a proper forum or to access justice; assisting aided person in the procedure to obtain necessary legal documents and advising the conflicting parties to seek amicable settlement¹⁶⁶. However, paralegals are not supposed to engage in activities that are reserved for advocates. They are also not required to charge fees¹⁶⁷.

SUSTAINABILITY¹⁶⁸

The law in place has imposed various mechanisms which guarantee that legal aid service will be maintained over a period of time. Such mechanisms include material and financial support from the Chief Court Administrator or the Judicial Fund which is yet to be established by the Chief Justice of Tanzania¹⁶⁹. The current position, therefore, entails that any advocate acting as a legal aid provider upon incurring special expenditure may submit his claim to the Chief Court Administrator.

The new law has also widened the scope to access legal aid service for people in remand or custody have a forum where they can easily access the service. For instance, in prison and police stations there are special desks established by the law to serve the people who are in need of legal service¹⁷⁰.

The service is also intended to be maintained in all districts and regions where the majority of ordinary citizen can seek legal assistance. The law has not only imposed obligations on the legal aid service providers but has also sanctioned some of their conduct. With all the circumstances, there is an assurance that legal aid service is not a short term basis program but rather it is a going concern.

COSTS OF CASES UNDER LEGAL AID SERVICE

Generally, the issue of costs has been waived against the aided person when he loses cases in civil proceedings¹⁷¹. There are some exceptional circumstances where an aided person may be subjected to costs. The costs can arise in the following circumstances: where the aided person causes the other party to incur unnecessary costs; unreasonable refusal to negotiate a settlement or participate in alternative dispute resolution; and misleading or deceitfully

conduct.¹⁷² Where costs are awarded against the aided person, the legal aid provider is not liable for the payment of such costs.¹⁷³ In case an aided person is awarded costs the legal aid provider is entitled to a right to recover the costs from such awards.¹⁷⁴

OFFENCES UNDER THE LEGAL AID ACT, 2017

Offences created under the Act include: charging a fee from an aided person; rendering of legal service without qualifications; misuse of funds of the legal aid; and impersonation (pretense). Where it is proved that the above offences were committed, the offender can be subjected to a fine ranging from one to ten million Tanzanian Shillings or an imprisonment sentence of not more than twelve months or both.

BEST PRACTICES OF LEGAL AID SERVICES

LEGAL AID IN KENYA (LEGAL AID ACT 2016)

NATIONAL LEGAL SERVICE

Kenya has a National Legal Service, a body corporate with perpetual succession and a common seal¹⁷⁵. Its functions among others includes: to establish and administer a national legal aid scheme that is affordable, accessible, sustainable, credible and accountable; to provide grants in aid for specific schemes to various voluntary social service institutions; to implement legal aid services; to take appropriate measures to promote legal literacy and legal awareness among the public and in particular, educate vulnerable sections of the society on their rights and duties; to assign legal aid providers to persons granted legal aid; to administer and manage the Legal Aid Fund; and to coordinate, monitor and evaluate paralegals and other legal service providers. It also gives general directions for the proper implementation of legal aid programs.

LEGAL AID FUND

The Legal Aid Act of Kenya, established a fund which consists of: moneys allocated by Parliament for the purposes of the Service; any grants, gifts, donations, loans or other endowments given to the Service; such funds as may vest in or accrue to the Service in the course of the exercise of its powers or the performance of its functions; and moneys from any other lawful source accruing to the Fund¹⁷⁶. The fund is used to: defray the expenses incurred in the representation of persons granted legal aid; pay the remuneration of legal aid providers

¹⁶⁵ Reg 12 of regulations

¹⁶⁶ Section 20 of the Act

¹⁶⁷ Section 20(5) and (6) opcit

¹⁶⁸ special focus is on how the laws in place have underscored the mechanisms to make sure that the legal aid service will be maintained over a period of time (make it going concern).

¹⁶⁹ Section 33(3) and 34 opcit

¹⁷⁰ Reg 24 of Regulations

¹⁷¹ Section 31 of the Act

¹⁷² Section 31(2) opcit

¹⁷³ Section 31(3) opcit

¹⁷⁴ Section 29 opcit

¹⁷⁵ Section 5 of the Legal Aid Act, Laws of Kenya

¹⁷⁶ Section 29 opcit

for services provided; meet the expenses incurred by legal aid providers in providing services; and meet the expenses of the operations of the Service.¹⁷⁷

SERVICES RENDERED UNDER THE ACT.

Legal aid in Kenya is not open to all matters but is restricted to civil matters, criminal matters, children matters, constitutional matters and matters of public interest.¹⁷⁸ A person is eligible to receive the services if he is indigent and is a citizen of Kenya; a child; a refugee; a victim of human trafficking; or an internally displaced person.¹⁷⁹

The following matters are not covered by legal aid: civil proceedings of a company, corporation, trust, public institution, civil society; Non-Governmental Organization or other artificial person; in matters relating to tax; in matters relating to the recovery of debts; in bankruptcy and insolvency proceedings; and in defamation proceedings.

LEGAL AID IN NIGERIA (LEGAL AID ACT, 2011)

Like the law in Kenya, Nigeria through the Legal Aid Act, established the Legal Aid Council with the responsibility of providing legal aid, advice and access to justice in respect of persons entitled thereto¹⁸⁰.

SCOPE OF LEGAL SERVICE

The grant of legal aid, advice and access to justice is provided in three broad areas namely: criminal defense service; advice and assistance in civil matters including legal representation in court; and community legal service subject to merits and indigence tests for the parities¹⁸¹.

FINANCIAL ASPECT OF LEGAL AID

The law has established the Legal Aid General Fund for the day to day administration of the Council. The money is appropriated annually by the National Assembly and sometimes it is provided by the Government of each State of Nigeria.

ENTITLEMENT TO LEGAL AID

In Nigeria, a person is eligible to access legal aid only if his income does not exceed the national minimum wage. However, in exceptional circumstances, the Governing Board may

approve giving legal aid on contributory basis to a person whose income exceeds ten times the national minimum wage. Such contribution is refundable from the costs of the case.

TESTING MEANS OF PEOPLE

The law has underscored that in ascertaining the means of any person, the personal and real property must be taken into account.

LEGAL AID IN SOUTH AFRICA (LEGAL AID SOUTH AFRICA ACT, 2014).

LEGAL AID SOUTH AFRICA

Legal aid in South Africa is governed by the Legal Aid South Africa Act¹⁸² which established Legal Aid South Africa,¹⁸³ governed by a Board established under section 6 of the Act. The objects of Legal Aid South Africa are to: render or make available legal aid and legal aid advice; provide representation to persons at state expense; and provide education and information concerning legal rights and obligations.

FINANCE OF LEGAL AID SOUTH AFRICA.

The funds of Legal Aid South Africa consist of money appropriated by Parliament, and money received from any other source.¹⁸⁴ It must be budgeted for, managed and accounted for, in terms of the Public Finance Management Act.¹⁸⁵

LEGAL AID BY DIRECTION OF COURTS IN CRIMINAL MATTERS¹⁸⁶

A court in criminal proceedings may only direct that a person be provided with legal representation at state expense by considering: the personal circumstances of the person concerned; the nature and gravity of the charge on which the person is to be tried or of which she or he has been convicted; whether any other legal representation at state expense is available or has been provided; and any other factor which court deems fit to take into account. The court may direct Legal Aid South Africa to conduct an evaluation and prepare a report that recommend whether or not the person concerned qualifies for legal representation. The legal aid applicant bears the onus of showing that he or she is unable to afford the costs of his or her own legal representation. He has the responsibility of cooperating fully during investigation conducted by Legal Aid South Africa.¹⁸⁷

¹⁷⁷ Section 30 *op cit*

¹⁷⁸ Section 35 *op cit*

¹⁷⁹ Section 36 *op cit*

¹⁸⁰ Section 1 *Legal Aid Act, 2011 Laws of Nigeria*

¹⁸¹ Section 7(1) and second schedule *op cit*

¹⁸² Section 2 of the Act

¹⁸³ Section 6 of the Act, No. 39 of 2014

¹⁸⁴ Section 21 of the Act, No. 39 of 2014

¹⁸⁵ Act, No. 1 of 1999

¹⁸⁶ Section 22 of the Act, No. 39 of 2014

¹⁸⁷ Section 22(6) of the Act

LEGAL AID IN UNITED KINGDOM (LEGAL AID ACT, 2011)

In the United Kingdom, there is a Legal Services Commission (LSC). It is an executive non-departmental public body of the Ministry of Justice that is responsible for the operational administration of legal aid in England and Wales. Legal Services Commission is responsible for annual budget to run legal aid services. It was established under the Access to Justice Act 1999 and in 2000 replaced the Legal Aid Board (founded on 30 June 1949). The Commission is sponsored by the Ministry of Justice and helps to protect the fundamental rights of the individual and addresses problems that contribute to social exclusion. Its work is overseen by an independent board of commissioners.

The Legal Services Commission is responsible for the development and administration of two service programmes: the Community Legal Service (CLS), which provides services under the Community Legal Advice (CLA); and the Criminal Defence Service (CDS).

The Community Legal Advice aims to improve access to quality information and help for civil legal problems, in fields such as family, debt and housing law. It provides direct legal advice services to the public through its Community Legal Advice website and helpline, and also provides advice centre offices for low-income individuals and families, who are referred to participating solicitors and advice agencies that are certified through the Community Legal Advice's Quality Mark scheme.

The Criminal Defence Service provides free legal advice and representation for people facing criminal charges who are unable to pay for legal help. This is supplied through criminal solicitors' offices and the Public Defender Service.

LEGAL AID: PERSONAL PERSPECTIVES

As a Judge, I have come across different cases involving represented and unrepresented parties. More often unrepresented parties fail to defend their cases properly. They encounter legal challenges in drafting court documents and procedural technicalities during trial. As a result, most of them either lose their rights or delay to realize their rights owing to ignorance of the law.

Parties who are provided services by non-lawyers or advocates in preparation of legal documents also encounter difficulties in defending their pleadings and making meaningful submissions before the Court. Before the enactment of the current legal aid law, the accused (indigent person) had no representation in the preliminary stages immediately after the arrest. Owing to that impediment, therefore, there were procedural irregularities in terms of extracting cautioned statements and the manner through which identification parades were conducted.

For instance: most of the cautioned statements were extracted out of the prescribed time by unqualified police officers; and identification parades were conducted in the absence of the accused's relatives or legal representatives, hence, unnecessary objections in the course of conducting trials. At times after determination of those objections, it led the Court to expunge the document from the court's record.

Cultural affiliation is a setback which attracts unequal treatment among the aided persons. The legal aid providers easily empathize with the emotions of women and children in weighing their problems as tormenting than those of men. In some areas, men are marginalized under the pretext that they are capable financially and women are weak. In a number of cases that I have attended, no parties were represented in the preliminary stages. Eventually most of the cautioned statements and identification parade registers were rejected. Sometimes this led to acquittal of the accused persons as the said statements formed the basis of prosecution evidence.

The other observation is that Advocates assigned briefs to represent accused persons facing serious offences are inadequately paid¹⁸⁸ as compared to the service they provide. Poor payment affects the quality of service rendered by Advocates as they do not take seriously the assigned cases in terms of preparation. Consequently, it causes a miscarriage of justice to the aided parties.

CHALLENGES UNDER THE NEW LEGAL AID LAW OF TANZANIA.

Basing on the above experience, it is anticipated that there are some challenges to be encountered in the administration of justice due to the following:

- a) the law does not specifically set as a requirement for paralegals to hold a certificate or diploma in law consequently, the legal aid service expected to be rendered will be limited;
- b) the law does not set a yard stick as to who is an indigent person. It poses a potential difficulty to ascertain in a precise manner, as to who is entitled to legal aid and the nature of means test to be applied;
- c) delay to establish a special scheme to fund legal aid services will paralyze the implementation of legal aid services. Currently, there is no dedicated National Legal Aid Fund and specific budget;

¹⁸⁸ Normally the maximum payment to the Advocates who render legal aid to accused persons charged with serious offences is Tsh 100,000/=. The amount paid does not consider the nature of the case, distance and expenditure incurred by the Advocates. A good example is demonstrated in the case of *N.I.N Munuo Ng'uni v. The Judge Incharge High Court, Arusha and The Attorney General, Civil Cause 03 of 1993, (Unreported)*; where the Advocates declined to provide legal aid to the accused charged with capital offence due to inadequate payment.

- d) the law does not define what amounts to “special expenditure” in that regard therefore, it paves a way for the Chief Court Administrator to exercise his discretionary powers arbitrarily. The law imposes obligations on the Chief Court Administrator to take care “special expenditure” but there is no budgetary allocation to the Judiciary specifically for legal aid.
- e) The superior language of Courts is English and most of the laws are in English, a language which is not spoken by the majority of the people; and
- f) despite the improvement made by the newly enacted law, it is anticipated that language barrier will hinder the smooth implementation of legal aid services.

CONCLUSION AND RECOMMENDATIONS

CONCLUSION

Effective administration of justice among other things, depends on the availability of legal aid services. As has been demonstrated above, it is not enough to have laws providing for the legal aid services, it is equally important and necessary to have enforceable laws which accommodate both the legal aid services providers and the aided persons. Accessibility and affordability of the services will be meaningful only if credible and accountable providers render quality services to the needs of people in the administration of justice. This will be possible if there is a well-established financial scheme to support the legal aid service for its sustainability.

RECOMMENDATIONS

SPECIFIC RECOMMENDATIONS

Legal aid service providers should endeavor to build public awareness on the existence of the new law and availability of legal aid services. The State should establish a special National Legal Aid Fund for legal aid services. The law should set minimum legal qualifications for paralegals. Public awareness on the existence of legal aid services should also be given maximum attention.

Experienced lawyers should represent aided person in complex matters. Regular trainings should be provided to stake holders and there must be a change of cultural attitude in providing legal aid services. Unemployed law graduates should also be recruited by the state to render legal aid services to society.

GENERAL RECOMMENDATIONS

It high time the East Africa Community Partner States, adopted best practices from other jurisdictions to improve the quality of legal aid services to the vulnerable groups. State authorities should also take deliberate measures to ensure that legal aid services are given priority.

It is also recommended that the right to legal aid should acquire a status of human right to ensure proper administration of justice to all people and State authorities assume full responsibility to fund legal aid services within their countries for the smooth administration of justice.

AN OVERVIEW OF THE EAST AFRICAN LEGISLATIVE ASSEMBLY

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ABSTRACT

The paper highlights an overview of among others, the role, membership, management and related issues in the East African Legislative Assembly(Assembly). The Assembly, is endowed with an oversight, representative and legislative mandate. It plays its oversight and representative role by: regularly addressing regional matters and conducting debates on reports thereon; making budgetary approvals and appropriations; and parliamentary articulation of issues. In exercise of its representativen function, the Assembly also receives and considers petitions, conducts public hearings and undertakes sensitization and outreach programmes that enhance public awareness about integration. The legislative mandate is executed through the passing of Bills.

INTRODUCTION

The Assembly is the legislative Organ charged with among other mandates, under the Treaty for the Establishment of the East African Community (Treaty), the following: debating and approving the budget of the Community¹⁸⁹; considering annual reports of the Community¹⁹⁰; liaising with the national assemblies of the Partner States on matters relating to the Community¹⁹¹ and discussing all matters pertaining to the Community¹⁹². Put simply, the Assembly has a legislative, oversight and representative mandate. In that context, it is an important structure in matters relevant to the efficient functioning of the Community. The Assembly plays its oversight and representative role by regularly addressing regional matters and conducting debates on reports thereon; conducting budgetary debates, approvals and appropriations; and parliamentary articulation of issues. Relatedly, the Assembly adopts a number of recommendations to the Council of Ministers and Partner States aimed at improving the overall performance of the Community in the implementation of the integration agenda. The Assembly also exercises its representative mandate through receipt and consideration of petitions, seeking responses to oral and written questions from the Council of Ministers and Members raising matters of urgent public importance on the floor of the House.

The legislative role is executed through the passing of Bills which is shared with the Summit of EAC Heads of State that assent to such Bills.

MEMBERSHIP

In terms of membership, the Assembly currently comprises of fifty four elected members who are elected by the National Assemblies of the Partner States. In this context, Article 50 (1) of the Treaty provides that:

“The National Assembly of each Partner State shall elect, not from among its members, nine members of the Assembly, who shall represent as much as it is feasible, the various political parties represented in the National Assembly, shades of opinion, gender and other special interest groups in that Partner State, in accordance with such procedure as the National Assembly of each Partner State may determine”

Accordingly, representation in the Assembly is as much as feasible, reflective of diverse backgrounds such as gender, interest groups and varying shades of opinions among others. Besides the elected members, there are also eight ex-officio members consisting of the Ministers responsible for regional co-operation from each Partner State, the Secretary General and the Counsel to the Community (ex officio members). Such is the requirement of Article 48 (1) of the Treaty on membership of the Assembly. Given its diverse and unique nature, membership in the Assembly is not grouped by political parties and therefore, unlike national legislatures, there is no majority or opposition in the Assembly.

RULES OF PROCEDURES AND STANDING COMMITTEES

The Assembly is empowered to make its own Rules of Procedure and to constitute Committees¹⁹³. The current Rules of Procedure of 2015 provide for six Standing Committees, but the Assembly, may also appoint Select Committees when need arises. The Committees are: the Committee on Accounts; the Committee on Legal, Rules and Privileges; the Committee on Communication, Trade and Investment; the Committee on Agriculture, Tourism, Natural Resources; the Committee on Regional Affairs and Conflict Resolution and the Committee on General Purpose. The composition and leadership of each of these Committees is equally shared in rotation among the Partners States.

MANAGEMENT OF THE ASSEMBLY

The Commission is the governing body of the Assembly established under Section 3 of the Administration of the East African Legislative Assembly Act, 2012 (EALA Act). The Commission pursuant to Section 4 of the EALA Act is responsible for among, others: (a) organizing and managing the business and programs of the Assembly; (b) nominating Members of Standing and other Committees; (c) making recommendations to the Council on terms and conditions of service of Members of the Assembly; (d) recommending to the Council the appointment of the Clerk and other officers of the Assembly; (e) causing to be prepared in each financial year, estimates of revenue and expenditure for the Assembly for the next financial year; and performing such other functions as may be necessary for the well-being of the Members and staff of the Assembly, so as to ensure the effective and efficient functioning of the Assembly.

The Commission is chaired by the Speaker and composed of the Chairperson of the Council of Ministers who is an ex-officio Member and two Members of the Assembly from each Partner State elected by the Assembly.

189 Article 49(2)(b) Treaty
 190 Article 49(2)(c) op cit
 191 Article 49(2)(a) op cit
 192 Article 49(2)(d) op cit

193 Article 60 Treaty

With regard to matters of administration, the Clerk is the administrative head of the Assembly. He is responsible for the following functions: (a) is the head of the Assembly's administration and Secretary to the Commission; (b) render expert advice for the Members of the Assembly on parliamentary procedure and practice¹⁹⁴; (c) is responsible to the Chairperson of the Commission for the general working and efficient conduct of the business of the Commission and the Assembly; (d) ensure that proper books and records of the Assembly are kept.

SPEAKER OF THE ASSEMBLY

Article 53 of the Treaty, provides that the Speaker is elected on rotational basis by the elected Members of the Assembly from amongst themselves to serve for a period of five years. The functions of the Speaker include: (a) presiding over the sitting of the Assembly and taking part in its proceedings in accordance with the Rules of Procedure of the Assembly; (b) chairing the Commission which is the governing structure of the Assembly and the Board of Trustees of the East African Parliamentary Institute.

MEETINGS OF THE ASSEMBLY

Article 55 (1) of the Treaty prescribes that the meetings of the Assembly shall be held at such times and places as the Assembly may decide. This is further emphasized by Rule 10 (5) of the Rules of Procedure of the Assembly. In practice, the Commission determines the place and time of the Sitting. In that context and in compliance with Article 55 (1) and (2) of the Treaty and Rule 10 of the Rules of Procedure of the Assembly, the Chairperson of the Committee on Legal, Rules and Privileges moves Motions for Resolutions of the Assembly to sit at the place determined by the Commission.

LEGISLATING FOR THE COMMUNITY

The Assembly's basic accomplishment has been legislating for the Community. This legislative process is undertaken through enactment of Bills some initiated or introduced through motions by any Member of the Assembly provided that such a motion relates to the functions of the Community in accordance with Article 59 (1) of the Treaty. Bills may also be introduced by the Council of Ministers which is the policy organ of the Community in accordance with Article 14 (3) (b) of the Treaty. As noted, Article 59 of the Treaty prescribes a restriction on Bills in the context that the Assembly does not:

(a) proceed on any Bill, including an amendment to a Bill that makes provision for the imposition of any charge upon any fund of the Community; (b) the payment, issue or withdrawal from any fund or the Community of any moneys not charged thereon or the increase in the amount of any such payment, issue or withdrawal; and the remission of any debt due to the Community¹⁹⁵. The Assembly cannot also proceed on any motion that makes provision for such purposes.

It is important to point out that by virtue of the provisions of Articles 62 and 63 of the Treaty, once a Bill has been enacted, it is submitted to the Heads of State for assent. In practice and inspired by the provisions of Article 63(2) of the Treaty, the Speaker is obliged to submit advance copies of the Bills passed by the Assembly to the Ministers responsible for EAC Affairs for the attention and assent by their respective Heads of State.

Where a Head of State for any reason declines to assent to a Bill within three months from the date on which it was passed by the Assembly, it is referred back to the Assembly, giving reasons and a request that the Bill or a particular provision thereof be reconsidered by the Assembly. If the Assembly discusses and approves the Bill, the Bill is resubmitted to the Heads of State for assent and if a Head of State withholds assent to a resubmitted Bill, the Bill lapses.¹⁹⁶

TREND IN REGIONAL LEGISLATION

The trend in the Assembly's enactment of regional legislation is in sharp contrast with past regional practice. During the period 1961-1977, the integration process witnessed the enactment of only 35 Acts of the Community. For the period 2013 -2018 alone, 35 pieces of legislation were passed by the Assembly and out of which 20 have so far been assented to¹⁹⁷. The Assembly is, clearly doing better compared to its predecessor and its trend is also more advanced and focused when contrasted with that of the Pan-African Parliament and the legislative forums of such other regional economic communities like the South African Development Community (SADC) and the Economic Community of West African States (ECOWAS). The SADC Parliamentary Forum is a policy making and deliberative body that approves the SADC budget, makes recommendations to the SADC Summit, considers and makes recommendations on treaties, promotes SADC objectives and programmes. It does not legislate and will only serve as a legislative body when in future it assumes, as is anticipated, a regional parliamentary structure. Similarly, the ECOWAS Parliament is only a forum for dialogue, consultation and consensus on matters pertaining to the promotion of integration but has no legislative function.

¹⁹⁴ Section 12 (b) of the Administration of the East African Legislative Assembly Act, 2011 provides that one of the main functions of the Office of Clerk is to render expert advice to Members of the Assembly on parliamentary procedure and practice.

¹⁹⁵ Article 59(2).

¹⁹⁶ Article 63(4) Treaty

¹⁹⁷ EALA Strategic Plan 2019-2024 pg 13.

The Protocol Establishing the Pan-African Parliament does not provide for a legislative role among this African Union organ's powers and functions.

LEGISLATIVE ACHIEVEMENTS

The Assembly's broad role in legislating for the Community over the years it has been in existence, is already on record and needs to be appreciated in the context of the Partner States ambitions in advancing the integration agenda. To start with and consistent with the pillars of integration in the Treaty, the Community has already established a Customs Union, a Common Market and made substantial progress with the Monetary Union. This state of affairs therefore requires the laying of a strong and effective legislative mechanism to support the developments and further operationalization of these pillars of integration. The Assembly plays a critical role in this endeavor. It is on this basis that the Assembly has since inauguration in 2001 been able to enact a number of basic fundamental laws such as:

- a) *The East African Community Interpretation Act 2003*; An Act of the Community to make provision in regard to the construction and interpretation of any enactment of the Community, and to make certain general provisions with regard to such law and for other like purposes;
- b) *The Acts of the Community Act 2003*; An Act that provides for the form and Commencement of Acts of the East African Community, for the Procedure following passing of Bills and for other related matters; and
- c) *The East African Community Emblems Act 2003*. An Act of the Community that provides for Emblems of the Community, use and protection against disrespect and misuse.

In respect of organizational development, the laws that have been enacted in this regard include:

- a) *The East African Legislative Assembly (Powers and Privileges) Act 2003*; An Act that declares and defines powers, privileges and immunities of the Assembly and of the Members of the Committees of the Assembly, regulate admittance to the precincts of the Assembly, secure freedom of speech in the Assembly, provide for summoning of witnesses and protection of officers of the Assembly and provide for related matters;
- b) *The Summit (Delegation of Powers and Functions) Act 2007*; an Act of the Community that makes provision for the delegation of the powers and functions of the Summit;
- c) *The East African Legislative Assembly Members Election Act 2011*; An Act of the Community that makes provision for election of the members of the and provide for other related matters; and
- d) *The East African Community Parliamentary Institute Act, 2012*; An Act to establish the East African Parliamentary Institute and provide for other related matters ; and

- e) the annually enacted *Appropriation Acts* that make appropriation out of the East African Community Budget to the service of the financial year ending 30th June as approved by the Assembly on the recommendations of the Council.

Besides the foregoing, the Assembly has also enacted laws to support Partner States' policy and legal harmonization with the integration agenda. These laws include:

- a) *The East African Community Customs Management Act 2004*; an Act of the Community that makes provisions for the management and administration of customs and related matters;
- b) *The East African Community Competition Act 2006*; An Act of the Community to promote and protect fair competition in the Community, to provide for consumer welfare, to establish the East African Community Competition Authority and for related matters;
- c) *The East African Community Standardization, Quality Assurance, Metrology And Testing Act 2006*; an Act of the Community to make provision for ensuring standardization, quality assurance, metrology and testing of products produced or traded in the Community in order to facilitate industrial development and trade; to make provision for ensuring the protection of the health and safety of society and the environment in the Community; to establish the East African Standards Committee and the East African Accreditation Board and to provide for related matters;
- d) *The East African Community Vehicle Axle Load, Act*; an Act of the Community to make provision for the control of vehicle loads, harmonized enforcement, institutional arrangements for the Regional Trunk Road Network within the Community and to provide for other related matters;
- e) *The East African Community One Stop Border Posts Act 2016*; An Act of the Community to provide for the establishment and implementation of one stop border posts in the Community, and for other related matters;
- f) *The East African Community Elimination of Non-Tariff Barriers Act, 2017*. An Act of the Community to provide for the elimination of non-tariff barriers in the Community and to provide for other related matters; and
- g) *The East African Community Budget Act 2008*: an Act of the Community that provides for and regulates the budgetary process of the Community and for other related matters.

PRECEDENCE OF COMMUNITY LEGISLATION

The precedence of Community legislation is set out in the provisions of the Treaty. Accordingly, Article 8 (4) of the Treaty provides that *Community organs, institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of the Treaty*. It follows that once enacted, published and gazetted Community laws when in force become binding on the Partner States and override national laws in matters related to the implementation of the Treaty.

CHALLENGES

Notwithstanding the achievements at least with regard to the legislative mandate, a few hurdles still persist. These hurdles include logistical shortcomings to enable the Assembly and relevant Committees discharge work strictly in conformity with annual legislative programmes; and the perceived Council's slow and protracted initiation of Bills¹⁹⁸. There is also the perceived Partner States' reluctance in conferring precedence of Community laws over similar national laws.

Beyond that, the Assembly has been criticized for the gaps in the electoral procedures of its representatives. This is because the elections of members is carried out by National Parliaments of the Partner States as prescribed in the Treaty but this puts into question the legitimacy of the representatives. Besides that, there is no Community-wide uniformity in the electoral process because each Partner State is empowered to employ its own electoral laws, rules and regulations when electing the representatives¹⁹⁹.

The indirect electoral process of the elected members of the Assembly, in a liberal democracy such that of the Community, is perceived to undermine the principles of popular participation and individual sovereignty²⁰⁰. Relatedly, the implementation of such indirect elections has overtime given rise to litigation. As an example, in *Application 8/2017 arising from Reference 5 /2017- Wani Santino Jada Vs. Attorney General of the Republic of South Sudan, Speaker of the Parliament of the Republic of South Sudan and Secretary General of the East African Community*,²⁰¹ the East African Court of Justice was petitioned by the Applicant over concerns that Article 50(1) of the Treaty may not have been followed in the election of the nine Republic of South Sudan nominees' to the 4th Assembly.

The Court consequently issued an injunctive order restraining the Assembly from administering the oath of office or recognizing the nominees from the Republic of South Sudan pending the hearing of the application inter parties.

Litigation relating to the implementation of Article 50 of the Treaty is not unique to the Republic of South Sudan nominees, for in the case of the *Democratic Party and Mukasa Mbidde v Secretary General of the East African Community & Attorney General of Uganda*²⁰² the Applicants alleged inaction of the Government of the Republic of Uganda and its Parliament to amend the Rules of Procedure of Parliament, 2006 for the election of Uganda's representatives to the Assembly as earlier directed by the Constitutional Court of Uganda²⁰³. The Applicants further contended that the intention to conduct elections of the Assembly Members under those un-amended Rules contravened the Treaty in as far as the rules discriminated and limited the freedom and right of the Democratic Party and its members to associate in vying for election as representatives of the Assembly. They sought orders to have the Government of the Republic of Uganda and its Parliament conform to the provisions of Article 50 of the Treaty. The East African Court of Justice found that Uganda's 2006 Rules did not conform to the Treaty and restrained the Parliament of the Republic of Uganda from conducting the elections unless and until it amended the impugned Rules to conform to Article 50 of the Treaty.

The ground breaking litigation on the import of Article 50 of the Treaty, however, was the case of *Prof. Peter Anyang' Nyong'o & 10 others v Attorney General of Kenya & 2 Others*²⁰⁴, the Claimants sought an interpretation and application of the Treaty, regarding the validity of the nomination and election of Kenya's nine (9) representatives to the Assembly. The Claimants contended that Kenya's National Assembly did not undertake an election within the meaning of Article 50 of the Treaty and that the Election Rules made by Kenya's National Assembly (*The Treaty for the Establishment of the East African Community (Election of Members of the Assembly) Rules 2001*) for the purpose of conducting the said elections infringed the provisions of Article 50. Evidence was adduced to show that the National Assembly only approved names submitted by two political parties. The East African Court of Justice held that the bottom line for compliance with Article 50 is that the decision to elect is a decision of and by the National Assembly; however the evidence adduced led to only one conclusion, namely that the National Assembly of Kenya neither undertook nor carried out an election within the meaning of Article 50 of the Treaty.

198 The Council has a legislative programme, however, the process of initiating Council Bills is very consultative and involves interactions with various stakeholders. As a result the Council is perceived to be relatively slow in generating Bills for the Assembly to enact.

199 See East African Legislative Assembly at <http://www.internationaldemocracywatch.org/index.php/east-african-legislative-assembly>

200 It is the electorates who should confer sovereign rights on elected representatives who, in turn, make laws on behalf of the electorates as is the case in the European Parliament.

201 EACJ Application 8 of 2017.

202 EACJ Ref No 6 of 2011.

203 Uganda Constitutional Court Petition No 28 of 2006 : Jacob Oulanyah v Attorney General of the Republic of Uganda.

204 EACJ Ref No 1 of 2006.

Recent challenges for the Assembly, however, have related to issues within its own rules more so because it is a rule based organization that is expected to abide with all applicable laws. To this extent in *Hon. Dr. Margaret Nantongo Zziwa Versus the Secretary General of the East African Community Appeal No. 2 of 2017*-The Appellate Division of the East African Court of Justice ruled in favour of the former Speaker of the Assembly, Hon. Dr. Margaret Nantongo Zziwa (Appellant) and ordered that she be awarded special damages with interest. This was a result of her illegal removal from the office of the Speaker of the Assembly by her peers but which the Court found was an infringement of Articles 53 and 56 of the Treaty. By way of background, the Appellant, was in June 2012 elected as the Speaker but subsequently removed from that office by her peers. She contested the legality of her purported removal from office.

When addressing the doctrine of separation of powers, the Court was in complete agreement with the jurisprudence from the superior courts of the Partner States, from which may be distilled the principle that *the doctrine of separation of powers is only sacrosanct where the independent organs of the State concerned are acting within the law. That any State organ or institution that marches out of step with the law is liable to be brought in line by the courts with the sword of checks and balances.*

The above case addressed a number of procedural issues that the Assembly had not followed and as such, it is hoped that this will prevent any such irregularities from being occasioned again. In its judgement, the Court also clarified that: *“We are of the firm opinion that the full effectiveness of East African Community Laws including the Treaty and the protection of the rights granted by such laws requires the Court to grant effective relief by way of appropriate remedies in the event of breach of such laws.”* In addition, the Appellate Court held that Articles 23(1) and 27(1) of the Treaty do not confine the Court’s mandate to mere interpretation of the Treaty and the making of declaratory orders but confer on the Court, being an international judicial body, as an aspect of its jurisdiction, the authority to grant appropriate remedies to ensure adherence to law and compliance with the Treaty.

In *the Attorney General of the Republic of Burundi versus the Secretary General of the East African Community & Hon. Fred Mukasa Mbidde (Intervener)*, *EACJ Reference No. 2 of 2018*, the Applicant sought *inter alia* declarations that: the Speaker of the 4th Assembly was elected in violation of Rule 12(1) of the Assembly Rules of Procedure and Articles 6(d), 7(2), 53(1) and 57(1) of the Treaty; nullification of the said election; and an order for re-election of the Speaker in accordance with the Rules of Procedure, especially relating to quorum. This case gravitated around the Assembly’s compliance with the legal regime applicable to the election of a Speaker and as such the bone of contention between the parties was what (if any) was the quorum of the House for purposes of the election of a Speaker. The Court found that such matter depicted a question of fact that must be established by cogent evidence.

The Court having scrutinized evidence adduced by parties in support of their respective cases, faulted the Applicant’s advocate for producing evidence deposed by himself which offended the rules of evidence. In the premise, the Court held that such evidence amounted to hearsay evidence which could not be relied upon in the determination of the matter before it. Given the foregoing, the Court found that the Reference was not supported by any evidence. In the result, the Court was not satisfied that the election of the Speaker contravened Articles 53(1) or 57 (1) of the Treaty, or Rule 12 (1) of the Assembly’s Rules of Procedure and therefore, the Reference was dismissed.

CONCLUSION

The East African Legislative Assembly Strategic Plan 2019-2024 that was launched by the Rt Hon Speaker of the Assembly proclaims as its theme: *“Timely legislation, representation and oversight by a strong and vibrant Assembly in order to effectively contribute to accelerating a people centered and market-driven integration.* Given such a bold Strategic Plan, a lot is now expected of the Assembly in executing its mandate. It may be recalled, though, that at paragraph 119 of the Judgement in *EAC Reference 17 of 2014 Hon Margret ZZiwa Vs Secretary General of the East African Community*, the East African Court of Justice observed in its conclusion of that matter that *there is need for the Assembly to relook at its House and Committee procedural rules and address lacunas that could cause confusion in its legislative function.* It may be high time that the Assembly, to better achieve its mandate, does such a relook not only in respect of the legislative but also its oversight and representative functions as well.



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