International Journal of Law and Policy (IJLP)

Vol . 1, issue 1, 2017

https://www.iprjb.org

Copyright © 2017 by IPRJB
All rights reserved.
This book or any portion thereof may not be reproduced or used in any manner whatsoever without the express written permission of the publisher except for the use of brief quotations in a book review.
Printed in Kenya
First Printing, 2017
International Peer Reviewed Journals and Books (IPRJB)
journals@iprjb.org

Editorial Board

Mr. Raymond Atuguba	University of Ghana, Legon Accra
Mr. Ibrahim Gichuru (LLB)	Advocate of the High Court, Kenya
Mr. Shadrack Mwinzi (MLB)	Advocate of the High Court, Kenya
Mr. Joachim Njagi (LLB)	Advocate of the High Court, Kenya
Ms. Grace Wangui	Advocate of the High Court, Kenya
Dr. Theodore Okonkwo	University of Port-Harcourt
Dr Duncan Elly Ochieng	University of Nairobi
Dr James Rurigi	Jomo Kenyatta University of Agriculture and Technology
Dr Christine Nanjala	KCA University
Dr Simon Ngugi	United States International University

Other Journals by IPRJB

BIOLOGICAL SCIENCES
International Journal of Agriculture
International Journal of Biology
International Journal of Food Sciences
Journal of Animal Health
Journal of Livestock Policy

BUSINESS AND ECONOMICS
European Journal of Business and Strategic Management
International Journal of Economics
International Journal of Entrepreneurship and Project Management
International Journal of Finance and Accounting
International Journal of Supply Chain Management

DEVELOPMENT, POLICY
Journal of Developing Country Studies
Journal of Poverty, Investment and Development
Journal of Public Policy and Administration
International Journal of Law and Policy

EDUCATION
African Journal of Education and Practice
International Journal of History Research
International Journal of Online and Distance Learning

ENGINEERING
Asian Journal of Computing and Engineering Technology
International Journal of Technology and Systems
MEDICAL AND HEALTH SCIENCES
Global Journal of Health Sciences
Journal of Health, Medicine and Nursing

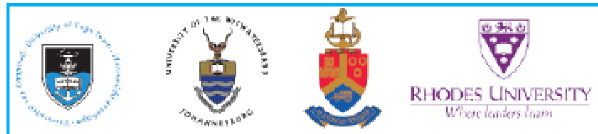
PHYSICAL SCIENCES
American Journal of Physical Sciences
International Journal of Environmental Sciences
International Journal of Natural Sciences
Journal of Statistics and Actuarial Research
International Journal of Climatic Studies

SOCIAL SCIENCES
International Journal of Communication and Public Relation
International Journal of Psychology
Journal of Conflict Management
Journal of Human Resource and Leadership
Journal of International Relations
Journal of Philosophy, Culture and Religion
International Journal of Gender Studies
International Journal of Sociology

Affiliates /Partners

Kenya

South Africa



Tanzania

Morocco

United Arabs Emirates

Nigeria

Ghana

Ethiopia

Tunisia

IPRJB
https://www.iprjb.org

Establishing Liability For Environmental Damage: Toxic Micro-Pollutants and the Risk they Pose to Human Health

[1]Theodore Okonkwo, PhD

ABSTRACT

This article examines the issue of establishing liability for environmental harm in the context of toxic micro-pollutants and the risk they pose to human health. Industrialization has had adverse health and environmental consequences both for the workforce and the general population directly by exposure to safety hazards and harmful agents or indirectly through environmental degradation locally and globally. Environmental health hazards, like occupational health hazards, may be biological, chemical, physical, biomechanical or psychosocial in nature. Environmental health hazards include traditional hazards of poor sanitation and shelter, as well as agricultural and industrial contamination of air, water, food and land. These hazards have resulted in a host of environmental harm and human health impacts which has led to the degradation of the global systems on which the health of the planet depends. In response to these issues, this article pursues the debate and argument on the use of civil liability regime to address some of these problems.

Keywords: toxic micro-pollutants; human health, environmental harm; civil liability; environmental degradation; pollution

[1]Senior Lecturer and Head of Department, Department of Public Law, Faculty of Law, University of Port-Harcourt, Port-Harcourt, Nigeria.
theodore.okonkwo@uniport.edu.ng

I. INTRODUCTION

Establishing civil liability for environmental damage in the context of toxic micro-pollutants[1] and the risk they pose to human health presents some difficulties, "which currently limits its role to environmental protection"[2] and "the difficulties of proving causation in such cases confound environmental tort plaintiffs"[3]. This poses a still considerable and significant "amorphous and sometimes overlapping categories"[4] . The result is that the plaintiff or claimant in certain cases faces vast procedural challenges of establishing liability on the part of the defendant. To establish liability for environmental harm or damage, the plaintiff must show the link between the defendant's behaviour and subsequent harm to the plaintiff. This is known as causation and is a very important legal doctrine required to establish fault. The courts have in certain instances interpreted causation in different ways, particularly in environmental cases, even where the harm caused and the "instigating act" are strikingly similar. Aside, the difficulties of proving causation, this article notes that the use of civil liability in an environmental context also suffers from certain limitation, given the fact that torts are solely concerned with the protection of private interests. Such private interest emanate from the harm or damages caused through deaths, non fatal heart attacks, and hundreds of thousands of asthma, cardiac and respiratory problems resulting daily from thousands of chemical substances that enter our bodies through the air we breathe, the water we drink, the food we eat and the industrial manufactured products and activities. Some of these are harmful with far-reaching unknown and uncertain consequences on human health and the environment[5]. Therefore, in all likelihood, private interests are involved as individuals most often seek compensation from the facilities that cause the emission of these toxic micro-pollutants. According to Wolters Kluwer[6] , this creates two problems: …first, the loss suffered by an individual may not reflect the full costs of the damage to the environment; thus compensation awarded to a claimant may not be sufficient to fund, for example, clean-up costs. Second, as torts are closely tied to the protection of individual rights and interests, there is a limited notion of standing. As a result, in the absence of an individual victim, organizations concerned with environmental protection are generally not in a position to pursue civil claims on behalf of the environment in its own right. These gaps and difficulties, combined with the uncertainty and huge costs of litigation, result in "the systematic under-compensation of environmental tort victims and the systematic under-deterrence of polluters"[7] . Part II of this Article examines the need to establish liability for environment damage. Part III discusses the causation issues, difficulties in establishing causation for environmental damage particularly in toxic micro-pollutant and public health cases. Part IV focuses on recent developments in toxic micro-pollutant cases. Part V reviews the locus standi requirements to pursue an action for environmental damage particularly in addressing or litigating environmental toxic injury. Part VI presents the remedies

1. The term "micropollutants" means organic or mineral substances whose toxic, persistent and bioaccumulative properties may have a negative effect on the environment and/or organisms. They are present in many products that we consume daily such as, drugs, cosmetics, phytosanitary products, insecticides etc., at home or in industry. They are also present in the aquatic environment and are liable to have potentially direct or indirect effects on ecosystems and even on human health.
2. Wilde, M. (2013). *Civil Liability for Environmental Damage. Comparative Analysis of Law and Policy in Europe and the U.S.* (Second Edition). The Netherlands: Kluwer Law International, BV, Wolters Kluwer, p. 73.
3. Lin, A.C. (2005). "Beyond Tort: Compensating Victims of Environmental Toxic Injury". *Southern California Law Review.* Vol. 78. 1439.
4. Note, (2015). "Causation in Environmental Law Lessons from Toxic Torts". *Harvard Law Review.* June 9, 2015. 128 Harv. L. Rev. 2256
5. Schneider, C.G. (2004). *Dirty Air, Dirty Power: Mortality and Health Damage Due to Air Pollution from Power Plants*. Boston, MA: Clean Air Task Force, Mount Vernon Printing. See also, Abt. Associates report, "Power Plant Emissions, Particulate Matter – Related Health Damages and the Benefits of Alternative Emission Reduction Scenaires" (June 2004). www.cleartheair.org/dirtypower.
6. Kluwer, W. (2013). Ibid. p. 73.
7. Lin, A.C. (2005). Ibid. See also, Robin, R.L. (1993). "Some Thoughts on the Efficacy of a Mass Toxics Administrative Compensation Scheme", 52 MD. L. REV. 951, 952-954.

available for environmental harm which are open to the plaintiff. In Part VII, this article concludes that establishing liability for environmental damage in toxic micro-pollutant cases should look beyond tort system.

II. THE NEED TO ESTABLISH LIABILITY FOR ENVIRONMENTAL DAMAGE

The purpose of this section is to consider the main issues which must be addressed in other to attach liability for environmental damage. Principally, the traditional role of tort in an environmental context is still very relevant in this circumstance by reference to common law jurisdictions. The common law systems provide useful and relevant case studies for addressing the main issues associated with the use of tort in an environmental context. According to Wolters Kluwer, this is because the case law is inextricably linked with changing social and economic conditions. To this end, this section identifies the main torts which are relevant in an environmental context with a view to ascertaining in what circumstances a plaintiff may establish prima facie cause of action.

Negligence is the only tort in which fault forms the actual basis of the cause of action. It must however be noted that as a result o "cross contamination between the old forms of action,"[8] fault based liability such as nuisance have now emerged within the tort family[9]. The principal elements of the tort of negligence were stated by Buller[10], who offered a definition which is still relevant today:

Every man ought to take reasonable care that he does not injure his neighbour; therefore, wherever a man receives any hurt through the default of another, though the same were not wilful, yet it be so occasioned by negligence or folly, the law gives him an action to recover damages for the injury so sustained.

In the intervening period between the time of Buller and the present, the definition has found acceptance within the case law and now consists of three elements, to wit: a duty to take care, a breach of that duty, and loss sustained by the plaintiff as a result of the breach of duty. In other words, according to Buller, a duty of care is owed to those persons who are at potential risk from an activity. In effect, such person or persons must foresee that their victim or victims are likely to suffer misfeasance. In the celebrated case of *Donoghue v. Stevenson*,[11] Lord Atkin stated his famous proximity test to assist in ascertaining who the foreseeable victims are likely to be:

You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question[12].

However, from an environmental perspective, the need to establish fault in all cases would place a heavy burden on the plaintiff. In addition to negligence, trespass and nuisance have featured most prominently in litigation arising from pollution. This is so, because most recognized forms of pollution have interfered with neighbouring property. It however, seems that despite some decided cases,[13] liability in trespass and nuisance still remain stricter than in negligence. Establishing liability or fault on the part of the defendant is often a herculean task for the plaintiff. In *Esso Petroleum v. Southport Corporation*[14], negligence was alleged, in addition to the plaintiff's claim in trespass and nuisance. The Court of Appeal's finding that the doctrine of res ipsa loquitur could apply was rejected by the House of Lords. This article argues that much controversy surrounds the concept of *res ipsa loquitur* and whether it constitutes a real legal concept at all. Certainly, modern courts are very reluctant to follow it and are very hostile to the notion that it actually reverses the burden of proof on causation[15].

8. Walden v. Marshal (1367) 7 B. 43 Ed. 3, F. 33, pl. 38; *Esso Petroleum v. Southport Corporation* [1956] A.C. 218, 240; *Cambridge Water v. Eastern Countries Leather* [1994] 2 A.C. 264.
9. Newark, F.H. (1949). "The Boundaries of Nuisance," 65 L.Q. Rev. 480, 482; *Hunter v. Canary Wharf* [1997] A.C. 655; *Rylands v. Fletcher* (1866) L.R. , Ex. 265
10. Buller, F. (1817). *Trials at Nisi Prius*, 25 (6th ed.) Phenery & Sweet.
11. [1932] A.C. 562.
12. [1932] A.C. 562, 580.

Esso Petroleum v. Southport Corporation[16], continues to be one of the most significant cases as it concerned maritime oil pollution damage. It was held that the mere fact that the steering mechanism had developed a fault was not in itself sufficient to raise res ipsa loquitur. According to Earl Jowitt in that case, it would be necessary to adduce evidence of faulty maintenance or installation and this the plaintiff had failed to do[17]. The assertion that the master of the vessel should not have proceeded to navigate a narrow channel knowing that the steering mechanism had developed a fault was also rejected by their Lordships.

This article notes that just a few years after this litigation an international agreement was reached to the effect that the need to establish fault is an unacceptable obstacle to establishing liability[18]. In *Cambridge Water v. Easterm Countries Leather,*[19] the issue of negligence was easily dealt with by the High court, moreso, since PCE in relatively small concentrations was not recognized as being harmful at the material time, the defendant-Eastern Countries Leather was not expected to have taken steps to prevent any spillages from occurring[20]. The case of *Graham and Graham v. Re-Chem International,*[21] centered on whether the problems suffered by the Graham's dairy herd had been caused by a toxin allegedly emitted from the Rechem incinerator in Scotland. More than 80 witnesses of fact were called and 21 experts gave evidence on wide ranging and technical issues as meteorology, toxicology, incinerator operation and environmental monitoring. One of the distinguishing features of such environmental pollution cases, is the difficulty a plaintiff has in establishing the basis of liability and causation. The plaintiff will argue that all he is required to show is that the defendant's activities were capable of causing the harm suffered, whereas, the defendant will argue that the plaintiff must prove the problems were caused by the defendant's activities. The Grahams submitted that the pertinent issue on causation was whether the symptoms exhibited by the Grahams herd were indicative of poly-halogenated aromatic hydrocarbon (PHAH) toxicity. It was further submitted that the standard of proof that would be required by the scientific community was far greater than that required to prove the proposition in a civil action and that the Grahams were only required to show on the balance of probabilities that PHAH toxicosis was a reasonable or probable cause of their problems. The case involved a vast huge of cutting edge scientific evidence[22]. The Grahams argued that it was not necessary to show that the alleged emissions from the incinerator were the sole or dominant cause of damage but it was sufficient to show that they had "materially contributed" to their problems. While this submission was accepted by the court, the judge found that the Grahams had failed to establish that Rechem had in any way been responsible for the damage. The issue of negligence was not an important aspect of this case, as the matter was settled on the basis of causation. However, the point must be made that the case strengthens the fact that in spite of the *Cambridge Water*[23] case, it is still very difficult to establish liability in negligence than in nuisance due to the requirement to establish breach of the duty of care in addition to foreseeability of damage.

13. *Cambridge Water v. Eastern Countries Leather* [1994] 2 A.C. 264.
14 [1956] A.C. 218, 240.
15. *Caroll v. Fearon* [1999] CA; *Barclay v. Dunlop Ltd.* [1999] E.C.C. 73 (15) (Judge L.J.); Blake v. Galloway, [2004] CA.
16. [1956] A. C. 218.
17. [1956] A. C. 218, 237.
18. This gave rise to a new international oil pollution compensation scheme, the 1969 Civil Liability Convention 9 ILM (1970) 45. This established strict liability for oil pollution damage, subject to certain defences and harmonized the types of damage claim and clean-up costs which could be met.
19. 1993] Env. L.R. 116.
20 Ibid., 142 (Kennedy, J.).
21. [1996] Env. L.R. 158, (believed to have been the longest civil trial in English history).
22. The scientific literature referred to at trial filled 25 lever arch files. The lawyers had to have a detailed understanding of the scientific issues before legal arguments could be made. Furthermore, the importance of particular issues changed during the 14-month trial as the lawyers' understanding of science increased.

Notwithstanding the above case, on occasion successful actions have been maintained in negligence in respect of environmentally harmful activities. A classic example is the case of *Tutton v. A.D. Walter Ltd*[24]. The defendant grew oil seed reap which when in full flower he sprayed it with insecticide to get rid of bugs. He did not tell his neighbour. The neighbour had a beehive and the insecticide killed his bees. The defendant claimed that the bees were trespassing. The defendant was held liable for not warning his neghbours. The harmful nature of the chemical was well known to the defendant who had the benefit of the Agricultural and Advisory Service (ADAS) advice and the manufacturer's instructions issued with the product. The advice and instructions recommended that in order to reduce the risk of harming bees, the chemical should be used on cool days or at dusk and never when the crop was in bloom. With these facts within the knowledge of the defendant, it was held that the defendant ought reasonably to have had the plaintiffs in contemplation whilst spraying the crops, thus, a failure to observe the instructions was a clear breach of the duty of care owed to the bee-keepers. In like manner, in the US case of *Shockey v. Hoechst Celenese Corporation*[25], the defendant had delivered drums of waste chemicals to a former employee who operated a chemical reclamation facility across the street from the defendant's property. During his reclamation operations the independent contractor spilled chemicals, which contaminated the groundwater under that property. The court held the defendant Hoechst Celenese Corporation liable. The plaintiff had filed claims in strict liability, negligence, and nuisance, in addition to trespass, and the court was of the opinion that the defendant's knowledge of the "abnormally dangerous nature of the chemicals" was sufficient to establish that the defendant knew or ought to have known of the consequences of the act.

The tort of negligence is also gaining prominence in an environmental context of personal injuries as scientific advances have recently established links between illnesses and certain pollutants. Thus, there has been an increase in the U.K. and the U.S. particularly of personal injury litigation arising from pollution. In Margereson & Hancock v. J.W. Roberts Ltd., the plaintiffs sued the defendants, owners of a factory where the plaintiffs had lived and played as children. They contracted mesothelima due to their exposure to asbestos. The defendant was held liable to the plaintiffs because they knew or ought to have known that asbestos dust was escaping from the factories into the surrounding street and could cause harm to people who were exposed to it. Risk of harm of allowing asbestos dust to escape from the factory was foreseeable. As stated by Lord Lloyd in Page v. Smith, "the test in every case ought to be whether the defendant can reasonably foresee that his conduct will expose the claimant to risk." The plaintiff won. The case is important as it was the first of such claim in which duty of care was extended beyond factory employees, so as to include those who are outside the scope of the factory work place.

23. Ibid.
24. [1985] 3 W.L.R. 797.
25. 793 F. Supp. 670 (D.S.C. 1992), affirmed in relevant part, 996 F. 2d 121 (4th Cir. 1993).
26. Ibid. See, Simons, R. A. (2006). "When Bad Things Happen To Good Property". (Environmental Law Institute).
27. A 2004 study, Schneider, C.G. (2004), *Clean Air Task Force, Dirty Air, Dirty Power; Mortality and Health Damage Due to Air Pollution from Power Plants, ibid.*, estimated that fine particle pollution released by United States power plants causes nearly, 24,000 deaths, 38,200 non fatal heart attacks and hundreds of thousands of asthma, cardiac, and respiratory problems each year.
28. [1996] C.A. Env. L. R. (4) 304.
29. [1995] UKHL 7 is a decision of the House of Lords. It is part of the common law of England and Wales.
30. The Corby toxic waste case was a court case decided by the Hon. Mr. Justice Akenhead at the High Court of Justice, London on 29 July 2009 in the case of *Corby Group Litigation v. Corby Borough Council* [2009] EWHC 1944 (JCC)

As soon as pollutants escape into the environment, "affecting local inhabitants and passers-by," the case becomes a matter of environmental exposure, thus, leading to a class of potential litigants who may want to sue. Environmental exposure of toxic compounds has been held to have caused environmental harm. The Corby toxic waste case stems from the reclamation of a Corby Steelworks in the town of Corby, Northamptonshire, between 1985 and 1997. The Corby Borough Council undertook the demolition, excavation and redevelopment of the site as part of a program of urban regeneration. This involved transporting the waste through populated areas to a quarry north of the site, utilizing up to 200 vehicle movements daily. The toxic waste was carried in open lorries, spilling sludge over the roads and releasing huge amounts of dust into the air. Then, between the late 1980s and 1990s, the rates of upper-limb defects in babies born in Corby were found to be almost three times higher than those of children born in the surrounding area and ten times higher than a town with a population of 60,000 should expect. In all cases initially referred to the courts there were no previous family histories of limb defect. In November 2005, expert evidence was submitted to the High Court in London by the mother of thirty children who claimed that during their pregnancies they were exposed to contamination from the waste removal operations and who sought to bring a legal action to try to prove a link between the mismanagement of the toxic waste and the birth defects suffered by their children. After reviewing the evidence presented by all parties to the case, permission was given for the parents to pursue the claim against Corby Borough Council as a class action involving children born between 1985 and 1999. The case was heard in 2009 and the plaintiffs alleged that toxic waste dumped by Corby Borough Council between 1984 and 1999 was the cause of their deformities. All had serious disabilities, including missing or underdeveloped fingers and deformities of their feet. They alleged that their mothers ingested or inhaled the toxic substances that affected the development of their limbs while they were still in the womb. All of their mothers either lived in or regularly visited Corby between 1984 and 1999 when the work was carried out across the town. In his judgment, the judge found Corby Borough Council liable in negligence, public nuisance and a breach of statutory duty. In his judgment, Mr. Justice Akenhead said it was clear that the Council had permitted toxic waste to disperse into the atmosphere. According to the learned judge, there was a "statistically significant" cluster of birth defects between 1989 and 1999, and that, "toxicologically, there were present on and from the Corby Borough Council sites, over the whole period from 1985 (and possibly before) until 1997, the types of contaminants which could cause the birth defects complained of." The plaintiffs argued that res ipsa loquitur applies, but the court did not pronounce on the applicability of res ipsa, which this article argues may likely be due to the fact that the legal doctrine is not sacrosanct and "is of debatable legal consequence." The fact that the Judge took time to examine the expert evidence presented before the court suggests that he was not persuaded by the argument on res ipsa. Therefore, such negligent acts by the defendant were foreseeable and could have been prevented by the council. The judge said this much when he stated that the:

…Corby Borough Council was extensively negligent in its control and management of the sites which they acquired from British Steel and otherwise used. That negligence and, as from April 1, 1992 breach of statutory duty on the part of CBC permitted and led to the extensive dispersal of contaminated mud and dust over public homes, with the result that the contaminants could realistically have caused the types of birth defects of which complaint has been made by the claimants… Corby Borough Council is liable in public nuisance, negligence and breach of statutory duty… 32

31. Verkaik, R. (2005-11-29). "Parents of 30 Children Sue Over Birth Defects They Blame on Clean-up of Toxic Waste Dumps." *The Independent*.
32. Ibid. *Corby* [2009] EWHC 1944 (TCC); [2010] Env. L.R. D2.
33. Kluwer, W. (2013). Ibid., p. 65. Also, *Corby case*, ibid., p. 683.

Akenhead, J. described the defendant, Corby Borough Council as "extensively negligent in its control and management of the sites." Thus, the judge found that the defendant should have known that toxic dust would pose a health hazard to humans – the unborn child. In this respect, the foreseeability of harm that resulted should not be too restrictively defined "and it would not be necessary to shout that the defendant could have anticipated the precise type of harm," part of been "extensively negligent" on the part of the defendant, include the fact of allowing toxic waste to disperse into the atmosphere. Evidence put forward described how the vehicles that conveyed the toxic waste materials were uncovered, and there was no adherence to procedures such as the wheel washing of the vehicles. The Judge ruled that the defendant's submission that the main fault lay with the independent contractors contracted by the Corby Borough Council could not be sustained. Defendants further argued that they could not be held vicariously liable for the torts committed by an independent contractor. The judge disagreed with this submission as the activities complained of are inherently of "special danger" to another and "hazardous to health." During the trial, an internal report prepared by Corby Borough Council was uncovered which had raised the prospect of residents being exposed to high levels of zinc, arsenic, boron and nickel as a result of the reclamation works, and a separate report, from the council's auditor, complained of incompetence and negligence by the council and said there was a "cavalier approach" to the operation. In this respect, this article argues that Corby Borough Council knew or ought to have known that the substances being transported around the town in the negligent manner which they did could have been hazardous to health as the toxic waste was carried in open lorries, spilling sludge over the roads and releasing huge amounts of dust into the air. Some of the open-backed lorries transported so-called 'wet waste,' containing dioxins and heavy metals such as cadmium, lead and chromium. Sadly enough, the judgment did not discuss or pronounce on the all important issue of causation, which on the basis of the expert scientific evidence, the judge could have found "a causal link between the birth defects and the exposure to toxic dust." The defendant later agreed to settle the matter and dropped intended Appeal. The financial settlement involved 19 families and also encompassed three children not covered by the original ruling. Since the issue of causation was not pursued, the court did not pronounce on it, but if the plaintiffs had been faced with the issue of establishing causation, they would have been trapped, as "it is often extremely difficult" to establish causation, in situations where the pollutant is dispersed into the "wider environment" and exposure to human health resulting from high levels of zinc, arsenic, boron and nickel are claimed.

The judgment has implications for industry. Any industry involved in any activity with possibility of releasing environmentally harmful substances into the environment, must adopt measures to assess the likely adverse and harmful effects that might result. They must employ all necessary best available scientific technology and research to deal with the matter. The principles contained in the judgment do not only apply to redevelopment or reclamation cases, but extends to any activity which has potential for exposure into the atmosphere. Where there is foreseeability for such exposure, then all necessary precaution and safeguards should be put in place to protect not just the "site workforce" and the persons living and working within the area of the activity, but also the natural environment. Unfortunately, the case centered on personal injuries suffered by the defendants and did not canvass the issue of damage caused to the natural environment.

34. "Corby toxic waste case: Court is told of an atmospheric 'toxic soup.'" (2009-02-17). *Northamptonshire Evening Telegraph*.
35. Nick, B. (30-07-2009). "Corby Birth Defect: Ten-year Struggle Ends in Victory that Echoes Erin Brockovich." *The Daily Telegraph*, (London).
36. Andy, D., Allen, V. (30-07-2009). "Victory for Children of Toxic Town: Families Win Ten-year Battle Over Clean-up of Steelworks." *Daily Mail*.
37. Corby case, Ibid., 885.
38. In the U.S. case of *Sterling v. Velsicol Chemical Corporation*, 855 F2d 1188 (6th Cir. 1988), the plaintiffs could not prove to the satisfaction of the court that certain illnesses had been caused by drinking water contaminated by pollutants leaching from a waste burial site.

III. ESTABLISHING CAUSATION FOR ENVIRONMENTAL DAMAGE

The judicial system has struggled to address the issue of establishing causation for environmental harm, as persons injured by environmental pollution often have difficulty identifying a causal link of their injuries to an identifiable defendant. The difficulty of proving causation is a crippling barrier to environmental law suits[39]. This is underscored by the testimony of Robert Gerard before a Select Committee, where he stated:

I might explain that the reason why I have not myself brought actions against the alkali manufacturers at St. Helens has been simply this: I am assured by my solicitor that it is impossible to bring an action with any chance of success unless I can put my finger upon the right man, with all the assistance I can get, when there are a dozen or 20 works all emitting vapours at the same time[40].

This was in 1862, when scientific knowledge was limited or not available with no means of tracing and isolating respective sources of pollution. Michael Garvey, in his evidence before the same Select Committee asserted that it was near impossible to establish liability on the grounds of:

The difficulty of selecting any one of those effluvia and tracing it up to its source, so as to bring it home to the manufacturer by legal evidence. We have always been defeated on this point[41].

The point made by Michael Garvey 154 years ago was a situation where there were several industries in a neighbourhood or locality, each manufacturing "different substances which mixed together." At that time, scientific knowledge was not available to isolate the individual elements and trace them to their respective sources. But today, scientific techniques could be employed to trace pollutants to their source. However, it is still often very difficult to establish causation, because the plaintiff typically must establish two types of causation. First, a plaintiff must prove general causation, which means that a substance is capable of causing the injury at issue. Second, a plaintiff must prove specific causation, that is, that exposure to the substance in fact caused that plaintiff's injury[42]. The scientific uncertainty that surrounds causation can make these burdens insurmountable[43]. As scientific knowledge has increased, the complex links between latent toxins and various types of harm have been discovered. Nevertheless, it is one thing to discover a potential link, and quite another to establish sufficient proof of the link for the purposes of establishing liability for environmentally harmful activities that causes health problems. This "sufficient proof" in most cases is not easy to discharge in that a toxin is often not the only possible cause for a particular illness. In this respect, it becomes the onus of the plaintiff to prove, on a balance of probabilities, that the defendant caused or made a "material contribution" to the loss[44]. In certain cases such as diseases as asbestosis which are far more prevalent in persons exposed to a particular substance, illnesses can be traced to exposure to a specific substance[45].

39. See, Dewees, D.N., Duff, D., and Trebilcock, M. (1996). *Exploring The Domain of Accident Law*: Taking the Facts Seriously, Oxford University Press.
40. The House of Lords Select Committee Report on Inquiry of Noxious Vapours (HL 1862, 486-IX), Minutes of Evidence 17, 161. This record is held by Greater Manchester County Record Office (with Manchester Archives), Reference E17/194/1. Hansard, 9 May 1862.
41. Ibid., 189, 2027.
42. See, Farber, D. A. (1987). "Toxic Causation", 71 *Minn. L. Rev.* 1219, 1227-28.
43. Elliot, E.D. (1988). "The Future of Toxic Torts: of Chemophobia, Risk as a Compensable injury and hybrid Compensation Systems,: 25 *Hous. L. Rev*. 781, 786.

However, illness involving toxic micro-pollutants exposure can often result from multiple causes[46]. For example, a case of lung cancer may be linked to exposure to tobacco smoke, exposure to pollutants from a nearby factory, or exposure to pollutants from traffic on a local highway[47]. This is true, because many forms of cancer associated with pollution are also associated with other factors. In a decided case[48], James McGhee was employed to clean out brick kilns and developed dermatitis from the accumulation of coal dust on his skin. Because there were no shower facilities at his workplace, he would cycle home each day, increasing the risk he would contract dermatitis. Had his employer provided shower facilities, the coal dust could have been washed off before cycling, reducing the risk of contracting dermatitis. Due to the limits of scientific knowledge, it was impossible to rule out the possibility that he had not contracted dermatitis during the non-wrongful exposure to brick dust while working in the kiln. He sued his employer for negligence for breaching its duty to provide proper washing facilities. The issue before the House of Lords was whether the failure to provide the washing facilities had caused the rash. The House of Lords held that the risk of harm had been materially increased by the prolonged exposure to the dust. Lord Reid stated:

The medical evidence is to the effect that the fact that the man had to cycle home caked with grime and sweat added materially to the risk.

The House of Lords treated the material increase in risk as equivalent to a material contribution to damage. The implication of the case was significant as it meant that a plaintiff need not demonstrate that the defendant's actions were the "but for" cause of the injury, but instead that the defendant's actions materially increased the risk of injury, and thus damage, to the plaintiff. However, this article argues that this House of Lord's principle is now limited to cases where there is no doubt concerning the nature or source of the "casual agent" and the only issue is which of the defendant's act caused the exposure leading to the loss or injury.

Thus, in *Wilsher v. Essex Area Health Authority*[49], an English tort law case concerning the "material increase of risk" test for causation, the House of Lords found that there can be no presumption of causation where there are alternative candidates for the loss unrelated to the defendant's activities. According to the House of Lords, it was impossible to say that the defendant\s negligence had caused, or materially contributed, to the injury and the claim was dismissed. It also stated that the *McGhee* case articulated no new rule of law, but was rather based upon a robust inference of fact. This understanding of McGhee was rejected in the case of *Fairchild v. Glenhaven Funeral Services Ltd.*[50]. *Fairchild v. Glenhaven Funeral Services Ltd.*[51], is a leading case on causation in English tort law. It concerned malignant mesothelioma, a deadly diease caused by breathing asbestos fibers. The House of Lords approved the test of "materially increasing risk" of harm, as a deviation in some circumstances from the ordinary "balance of probabilities" under the "but for" standard. Mr. Fairchild had worked for a number of different employers, each of whom negligently exposed him to asbestos fibers. Mr. Fairchild contracted pleural mesothelioma. He died, and his wife sued the employers on his behalf for negligence. The problem was, a single asbestos fibre, inhaled at any time, can trigger mesothelioma. The risk of contracting an asbestos related disease increases depending on the amount of exposure to it. However, because of long latency periods[52] it becomes impossible to know when the crucial moment was. It was impossible therefore for Mr. Fairchild to point to any single employer and say "it was him." Moreover, because the traditional test of causation is to show that "on the balance of probabilities" X has caused Y harm, it was impossible to say that any single employer was the cause at all.

44. *Bonnington v. National Coal Board* [1956] A.C. 613.
45. Menell, P. S. (1991). "The Limitations of Legal Institutions for Addressing Enviornmental Risks." *S. J. ECON PERSP*. Summer.
46. Rosenberg, D. (1984). "The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System," 97 *Harv. L. Rev*. 849, 919.
47. *Menell, P. S.* (1991), ibid.
48. *McGhee v. National Coal Board,* [1972] 3 All E.R. 1008, 1 W.L.R. 1, is a leading tort case decided by the House of Lords. The Lords held that where a breach of duty has a material effect on the likelihood of injury then the subsequent injury will be said to have been caused by the breach.
49. [1988] A.C. 1074.

While it was possible to say "it was one of them" it was impossible to say which. Under the normal causation test, none of them would be found, on the balance of probabilities to have caused the harm.

In this context, another asbestos related case came before the House of Lords in 2006[53]. This time the question was whether, if one of the employers that was responsible for the materially increasing the risk of harm had gone insolvent, should the solvent employers pick up the proportion for which that insolvent employer was responsible? The House of Lords accepted the argument that the solvent employer should not. This outcome is not equitable. This article argues that the solvent employer would only have to pay one third of the full compensation for the plaintiff's disease, in other words, the solvent employer has only "proportionate liability" for that part which he materially increased the risk of the plaintiff's harm. This position as advocated by certain writers. Patrick Atiyah argues that law of torts should be abolished, especially as relates to the law on personal injuries, and should be replaced with a no fault state compensation system. The arguments are in tune with the establishment in the 1870s of such a system in New Zealand. One of Atiyah's main point is his "stinging criticism" of the fault principle. This is the principle that finds the party that is to blame before compensating the victim in personal injury cases. This then implies that if fault cannot be attributed, there can be no attribution of liability, and thus, a victim of an accident may not receive compensation. Atiyah proposed six major criticisms of the system, which suggest that liability in personal injury claims should not focus on the relationship between the plaintiff and defendant, but between the parties and society. However, Ayiyah's examples were primarily concerned with road accidents. After the decision in *Baker*[55] there was "a swift and fierce political backlash", as numerous individuals, workers, families, trade unions and Members of Parliament called for reversal of the judgment. The agitations were on the basis that it would undermine full compensation for working people and their families. Following this outcry, Parliament responded in 2006 and enacted the Compensation Act 2006[56] , which was introduced to specifically reverse the decision in *Baker*[57] . The Act, however, applies only to cases of mesothelioma. The Act brought in specific changes to the law of liability and damages in negligence and breach of statutory duty.[58] In *Brett v. University of Reading,*[59] Lord Justice Sedley in concluding his judgment stated:

It follows that, while the evidence was sufficient to enable the Court to infer that Mr. Brett came into contact with asbestos in the course of his work at Reading University, it was not sufficient to show, or to support an inference, that the University had failed to take necessary steps to protect him from inhaling it. The tragic fact that he eventually developed mesothelioma cannot fill the gap, because for most of his working life he had been in jobs which were equally capable of bringing him into contact with airborne asbestos. If there had been adequate evidence of breach of duty on the part of the University, Mr. Brett's estate and defendants would have recovered the agreed damages in full notwithstanding the possible responsibility of other employers. But without such evidence the action against the University had to fail.[60]

Brett case, significantly shows that in most cases of environmental exposure there "are usually far more uncertainties regarding the nature and source of the harmful element". The problem with environmental exposure cases is that there may be no linkage between the potential sources and the harm may not be directly associated with the substance in issue. Interestingly, until recently, most tort cases which have raised the issue of causation were concerned with industrial diseases or medical negligence and not cases concerning environmental damage.

50. [2002] UKHL 22, [2003], A.C. 32, [2002] 3 WLR 89, [2002] 3 All E.R. 305, [2002] 1 CR 798, [2002] 1 RLR 533.
51. Ibid.
52. It takes 25 to 50 years before symptoms of disease become evident.
53. *Barker v. Corus* [2006] UKHL 20.
54. Cane, P. (2006). *Atiyah's Accidents, Compensation and the Law*. Cambridge University Press.
55. Ibid.

The problem with environmental harm is that a pollutant may mix with other substances already present in the environment with the effect "that the damage pathways become obscured", thus making it difficult to separate the effects of the pollutant from the effect of other possible causes[61]. In such situation, it becomes impossible to establish causation and liability to the accepted standard required by the courts, due to the requirement to establish that the activity of which the plaintiff complain of actually is responsible or materially contributed to the harm alleged. The difficulty is more pronounced in cases involving personal injury allegedly resulting from environmental harm. This is so, because several explanations can be preferred for a certain cause.

In *Sienkiewicz v. Greif (UK) Ltd*[62], the UK Supreme Court considered appeals where defendants challenged the factual basis of findings that they had contributed to the causes of the claimant's mesothelioma, and in particular to what extent a court can satisfactorily base conclusions of fact on epidemiological evidence. The defendants in each case argued that the *Fairchild* exception should not have been applied so as to make them liable, since there was only one defendant in each case. The UK Supreme Court held that both appeals failed. The decision in *Fairchild* case left open what should happen in cases such as these. The *Fairchild* exception applies in mesothelioma cases where only a single defendant was indentified. There is no rule requiring a plaintiff to establish that the defendant's breach of duty doubled the risk of developing the disease. Lord Phillips said this much in his judgment:

I see no scope for the application of the 'doubles the risk' test in cases where two agents have operated cumulatively and simultaneously in causing the onset of a disease. In such a case the rule in *Bonnington* applies. Where the disease is indivisible, such as lung cancer, a defendant who has tortuously contributed to the cause of the disease will be liable in full. Where the disease is divisible, such as asbestosis, the tortfeasor will be liable in respect of the share of the disease for which he is responsible[63].

It is now evident that causation is often determined by judges as a matter of law. Causation however, is treated quite differently in environmental cases compared to tort cases, particularly in those cases where a judge finds that causation does not exist as a matter of law. This article argues that causation in environmental law cases has been forced into "jurisdictional standing analysis". To resolve this problem, courts should adopt tort law principle's distinction between general and specific causation to differentiate causation issues best applicable for standing analysis from causation "questions better left to a fact finder".

IV. RECENT DEVELOPMENTS IN TOXIC MICRO-POLLUTANT CASES

Toxic micro-pollutants emanating from pesticides, radioactive materials, genetically modified organisms, pest control chemicals, nuclear energy, and bio-technology substances are pervasive in modern industrial society. They constitute human health risks and cause ecological and socio-economic disequilibrium. These pose "greater challenge for established legal reasoning". It is therefore very clear that the production, use, management, transportation and disposal of such products poses risk to the environment, public health and safety. The extent of harm and risk caused by these elements to the environment and human health are extremely difficult to quantify and still remains subject to debate, but the prevalence of risk is undeniable. Recent environmental disasters have shown that the risks are real rather than speculative. These events shows that the continuing public concern about these challenges and risks cannot be ignored, glossed over or discounted with slick assurances of scientific expertise or knowledge. The Supreme Court of Canada as far back as 1995 captured this in the case of *R. v. Canadian Pacific Ltd*[64]. :

Recent environmental disasters, such as the Love Canal, the Mississauga train derailment, the Chemical spill at Bhopal, the Chernobyl nuclear

56. The citation of this Act by this short title is authorized by Section 18 of the Act.
57. Ibid.
58. See, *Brett v University of Reading* [2007] EWCA Civ. 88.
59. Ibid.
60. For these reasons, the appeal was dismissed.
61. (2011) 2 WLR 523, (2011) ICR 391, UKSC 2009/0219, (2011) UKSC 10, (2011) 2 AC 229
62. *Willmore v. Knowsley Metropolitan Borough Council* (2009) EWCA Civ. 1211, (2010) ELR 227.

accident, and the Exxon Valdaz oil spill, have served as lightening rods for public attention and concern. Acid rain, ozone depletion, global warming and air quality issues have been highly publicized as more general environmental issues. Aside from high-profile environment issues with a national or international scope, local environmental issues have been raised and debated widely in Canada. Everyone is aware that, individually and collectively, we are responsible for preserving the natural environment[65].

As a result, when potential risks transmits into real or threatening harm, aggrieved persons may turn to the courts for compensation, injunctive relief, punitive damages, or other appropriate remedies. It must however be noted that in the 1800s and early 1900s, these toxic micro-pollutants and the risk they pose to human health were unknown to, and unforeseen by the common law courts. These periods were concerned with traditional tort systems, such as "snails in beverage bottles"[66], or "imposed water flooding upon adjoining properties" and never the complex issues of the effects of toxic micro-pollutants and the risk they pose for human health and the challenges of proving causation in these circumstances.

Generally, the cause of action developed by the common law courts still remain relevant today and a ready remedy to the plaintiff who may suffer injury, loss or damages arising from the effects of these pollutants. Thus, when combined with statutory causes of action created by parliament, these common law causes of action provide the plaintiff with "wide-range theories of liability" to plead and prove against the defendant allegedly responsible for the harm. The question, however, is whether these existing causes of action are capable of obtaining judicial remedy for the plaintiff embroiled in environmental litigation who allege personal injury, property damage or pecuniary loss resulting from exposure to chemical, biological or radiological activities. From a public interest perspective, it is extremely difficult, if not impossible, to establish a definite biological link between the pollutant and the harm in an individual case. An illustration of the problems associated with establishing causation and liability in these circumstances is provided by litigation arising out of claims for loss alleged to have been caused by radiation from nuclear facilities, or where the plaintiff seeks to enjoin future activities which, if undertaken, will expose the plaintiff to contaminants; or the plaintiff seeks compensation for present injury, such as cancer where causation is difficult to establish in the light of prolonged latency periods and/or the existence of other intervening factors; or the plaintiff lacks present injury, but sues in relation to contaminant exposure which increases the risk of incurring disease, future medical expenses, or property value depreciation[68].

Given the above circumstances, one may be wooed into recommending as Atiyah[69] has done that the law of torts should be abolished particularly as it relates to personal injuries[70] or that new causes of action be developed to ensure access to justice for victims of environmental harm. This article argues that the possibility of sweeping or radical changes, mostly along the line suggested by Atiyah appear somewhat unlikely, except in rare cases[71]. This is so because while the common law does evolve over time, judicial developments and statutory changes tend to occur "in a careful, incremental manner". Therefore, prospective plaintiffs should not base all their expectations on urging the courts to immediately adopt revolutionary theories of liability, instead, litigants' lawyers should consider taking the existing causes of action and tailoring them to fit the particular circumstances of their clients.

63. This case cited Compensation Act 2006. This case was cited by *AXA General Insurance Ltd & Others v. Lord Advocate & Others, (2011)* UKSC 46; *Employers' Liability Insurance "Trigger" Litigation: BAI (Run Off) Ltd. v. Durham & Others; (2012)* UKSC 14; *Zurich Insurance Plc. UK Branch v. International Energy Group Ltd. (2013)* UKSC 33. This case cited: *Fairchild case; Baker case; Willmove case; Norvatis Grimsby Ltd. v. Cookson* (2007) EWCA *Civ. 1261; Rolls Royce Industrial Power* (india) *Ltd. v. Cox* (2007) EWCA Civ. 1189.
64. (1995), 17 C.E.L.R. (N.S.) 10 (SCC).
65. Ibid.
66. *Donoghue v. Stevenson* (1932) A.C. 562 (HL).
67. *Rylands v. Fletcher* (1868) L. R 3 H.L 330.
68. Hughes E.L, Lucas, A.R., Tilleman, W.A. (1998) *Environmental Law and Policy,* (2nd ed.), Toronto: Emond Montgomery Publications.
69. Cane, P. (2006) Ibid

In a case concerned with alleged breach of statutory duty under the Nuclear Installations Act of 1965[72] , *Merlin v. British Nuclear Fuels, Plc.*[73], the plaintiffs claimed that their house had been damaged by radioactive material that had been discharged into the Irish Sea from Sellafield which had subsequently become deposited in their house as duct. The Court held that the 1965 Act required them to establish that there had been damage to property, meaning tangible property. The Court rejected the plaintiffs' claim that the house included the air space within the walls, ceilings and floors and that it had been damaged by the presence of radioactive material which had resulted in the house being rendered less valuable. All that had happened was that the house had been contaminated and that did not amount to damage to property which was the type of damage for which the Act provided compensation. The fact that the house was less valuable was the economic result of the presence of radioactive material, not the result of damage to the house from the radioactive properties of the material[74] . The strict interpretation of "property damage" has been criticized and subsequent cases have widened its scope.

In *Blue Circle Industries Plc v. Ministry of Defence*[75] , plutonium escaped from the Atomic Weapons Establishment at Aldermaston when storm waters caused ponds on that site to overflow and contaminate a neighbour's marshland. Once the contamination came to light, the claimant had to spend considerable sums of money in decontaminating the soil and the vegetation. The defendant argued that, following *Merlin*, there had been no change to the molecular structure of the land and therefore no damage had been caused pursuant to the statutory tort. The Court of Appeal did not accept the defendant's arguments. Instead, it accepted that there had been physical damage to the soil as it had become radioactive waste and was therefore less valuable. *Merlin* was distinguished as being a pure economic loss case concerning the devaluation of the house. There is some dispute as to whether *Merlin* was truly a case of pure economic loss. Nevertheless, the Court of Appeal's decision has widened the category of physical damage that is recoverable and now includes the costs incurred in decontamination.

Magnohard Ltd. & Others v. UKAEA & Another[77] , is a case heard in the Court of Session. This case confirmed Blue Circle definition of property damage. The claimant owned a private beach that was being polluted by radioactive material from the defendant's nuclear power station. The claimant sought a declaration that the United Kingdom Atomic Energy Authority (UKAEA) was in breach of its statutory duty. It also wanted the court to order the implementation of a more stringent monitoring programme for the presence of radioactive particles on the beach. It reserved the right to claim damages and pursue a claim under the Human Rights Act 1998 at a later stage. The Court granted the declaration that there had been a breach of duty and, applying the *Blue Circle* definition, held that this breach had resulted in property damage to the claimant's property. However, because the 1965 Act did not precisely describe the nature of the duty, the court did not grant an order for the performance of a new monitoring programme. This judgment allowed the claimant to return to court with its claim for damages, and also with its Human Rights Act claim.

In respect of attempting to overcome the problems associated with establishing a biological link in an individual case, an attempt was made to rely on epidemiological evidence in the joined cases of Reay and *Hope v. British Nuclear Fuels, Plc.*[77] . This case of Reay demonstrates the difficulty in proving causation despite the strict statutory liability imposed by the 1965 Act. The claimants alleged that paternal pre-conception irradiation had mutated the fathers' sperm and was a material contributory cause of their daughters' leukaemia and non-Hodgkin's lymphoma. The claimants relied on epidemiological research showing pockets of the illness in the locality of the plant. However, the judge was critical of the survey and found it difficult to isolate the effects and exposure to radioactivity from the other potential causes of cancer in the environment. He held that the claimants had failed to prove the necessary causal link on the balance of probabilities. This article argues that claims for personal injury of this sort brought pursuant to this statutory tort may be difficult as the causes of illness such as leukaemia are not easy to prove.

70. Ibid.
71. The Compensation Act 2006 (UK), which brought in specific changes to the law of liability and damages in negligence and breach of statutory duty.
72. Sections 7, 8, 9, 10, 11, 12.
73. (1990) 2 Q.B. 557, (1991) CLY 2662, (1990) 3 WLR 383.
74. This case is cited by *Transco Plc. v. Stock-port Metropolitan Borough Council*, (HL) [2003] UKHL 61, [2004] 1 ALL ER 589, [2004] 2 AC 1.
75. [1999] Ch 289.

The cancers may have been caused by independent causes notwithstanding the pre-natal exposure. All that the epidemiological evidence showed was that the pre-natal exposure had materially increased the risk of the harm, and the Courts are only prepared to determine liability on the basis of a material increase in risk where there is no doubt regarding the substance which caused the harm. There is therefore the need for proof of causation in such cases. For the causation prong, courts generally find causation when the injury is "fairly traceable" to the defendant's conduct. In other words, there must be a causal connection, that is, the alleged injury must be seen to be a direct result of the defendant's action. In such cases, the court has to consider whether the defendant's conduct has made a "meaningful contribution" to the pollution or activity. In the US case of *Connecticut v. American Electric Power Co.*[80] , the second circuit concluded that the five defendants' emissions sufficiently contributed to the plaintiff's injuries, noting that they were the largest utility emitters of carbon dioxide in the United States. Studies have shown that asbestos particles in the air can cause mesothelioma, lung cancer, and lung disease asbestosis. To establish liability in such cases, the lawyers representing the plaintiffs must carefully consider other important legal, evidentiary and strategic issues, such as, costs; causation, limitations, expert witness, epidemiological studies, class proceedings, and concurrent liability in contract amongst others. The plaintiff also must convince the judge that his evidence substantiates what it purports to prove. When epidemiology convincingly establishes causation, courts have generally accepted epidemiologic evidence, though not always explicitly[81] . For Dove[82] , although epidemiology has played an obvious role in tort law, its exact legal status remains the subject of debates. Dove argues that statistical reasoning cannot apply to an individual plaintiff and that epidemiologic evidence therefore is in sufficient, by itself to sustain a plaintiff's verdict[83]. Others have argued that epidemiology is far more than statistics and that good epidemiology evidence ought to suffice when measured against the preponderance of the evidence rule. When a single factor and a single disease are at issue, epidemiologic evidence dovetails very well the standard preponderance of the evidence rule. In more complex cases involving multiple chemicals and perhaps several diseases, continued evolution can be expected in both epidemiology and the law.[84] The bottom line in all these cases is whether the epidemiological evidence submitted by the plaintiff clearly proves the causal relationship between the pollution or activity and disease as required by civil law. Proving causation as stated earlier, in environmental damage cases is difficult because factors other than environmental pollution or activity are involved in the development of a disease, and also because of the lapse of time between the environmental harm or activity and the manifestation of the disease. The reason the plaintiff would usually attempt to pr[85]ove causation with epidemiological evidence is because the types of evidence presented in other tort lawsuits are not useful in proving the causal relationship in environmental lawsuits. Proving the casual relationship in micro-pollutant or pollution cases in environmental context is much more complicated. The plaintiff can develop a disease 20 to 30 years after the exposure to the harm or activity and during this 20 to 30 year period, various factors, including, among others, an unhealthy lifestyle, workplace stress and environmental factors, may all play a part in the development of the disease. It is in an effort to overcome these difficulties in proving causation, that plaintiffs in environmental lawsuits have been actively utilizing epidemiological research results to demonstrate a causal relationship between a risk factor and a disease by showing that there is

76. [2004] Env. LR 19.
77. [1994] Env. LR 320.
78. See, Gardner, M.J. *et al* (1990). "Results of a Case-Control Study of Leukaemia and Lymphoma Among Young People near Sellafield Nuclear Plant in West Cumbria", 300 *Brit. Med. J.* 423; *Morris, J. A.* (1990). "Leukaemia and Lymphoma among Young People near Sellafield". 300 *Brit. Med. J.* 676.
79. *Hamilton v. Miller,* 2014 NY Slip Op 04230, Ct. App.; *Giles v. A.G; Y: 2013, 105 AD 3d 1313.*
80. 564 U.S (2011).
81. Soskolone, C. L. , Lilienfeld, D. E., Black, B. (1985). *Epidemiology in Legal Proceedings in the United States.* Based on the proceedings of a symposium, "The Epidemiologist in Court", Fourth Annual Meeting, American College of Epidemiology, Santa Monica, California.
82. Dove, M. (1983). "A Commentary on the Use of Epidemiological Evidence in Demonstrating Cause-in-Fact." *Harvard Environmental Law Review*, 7: 429-440.
83. Dove, M. (1982). Ibid.
84. Black, B., Lilienfeld, D.E. (1984). "Epidemiologic Proof in Toxic Tort Litigation," *Fordham Law Review* 52: 732-785.
85. See, Lee, S. G. (2016). "Proving Causation with Epidemiological Evidence in Tobacco Lawsuits." *Journal of Prevention Medicine, and Public Health*, 49(2) ; 80-96. The Korean Society for Preventive Medicine, Korea

a substantial probability of a certain disease developing in a certain group of people exposed to a risk factor, and that the plaintiffs themselves belong to that group and have developed the disease after being exposed to the risk factor.[86]

V. LOCUS STANDI REQUIREMENT TO PURSUE AN ACTION FOR ENVIRONMENTAL DAMAGE

The doctrine of *locus standi*, or standing, determines the competence of a plaintiff to assert the matter of his complaint before the court. *Locus standi* to pursue an action for environmental damage or harm is generally limited to the plaintiffs who have suffered some form of loss such as personal injury, property damage, or an interference with the rights and benefits which result from an interest in land. There are however, exceptions where class actions are maintainable[87]. Traditionally, only a plaintiff whose own right is in jeopardy is entitled to seek a remedy. When extended to environmental lawsuits, this meant that a plaintiff asserting an environmental right or interest has to show that he or she has suffered some special injury over and above what members of the public has generally suffered. Thus, diffuse environmental harms, such as air pollution affecting a large number of persons or community were difficult to redress. This traditional view or rule on standing[88], constituted a major problem in that it became a draw-back in the bid to protect the environment in its own right, and thus, raises major issues relating to access to justice. In certain cases, pollution may result in a multitude of similar personal injury claims, but the plaintiffs may likely in an environmental context be denied standing.

This article however, argues that there is seldom a direct connection between environmental harm and "widespread" personal injury. Several pollution incidents are "of an on-going and chronic nature" which damages the environment in an "insidious manner." Damage of this type generally, comprises negligence, "property torts," trespass, nuisance and *Rylands v. Fletcher.*[89] In this respect, it is a notorious fact, that in common law there is no procedure for allowing environmental interest groups, such as environmental Non-governmental Organizations (NGOs), to acquire standing and bring claims where the damage does not correlate with interference with property rights or where the plaintiff in question lacks the financial resources to institute lawsuit. However, this position in common law sharply contrasts with developments in the field of public law, of which environmental law domain belongs. Here, environmental NGOs have made remarkable input in establishing locus standi in judicial review proceedings. In the case of *R. v. Pollution Inspectorate exp. Greenpeace (No. 2)*[90], the court introduced the concept of "associational standing" in which Greenpeace was allowed to issue claim on behalf of its local members who might be affected by the commissioning of a new nuclear reprocessing facility. In this case, Greenpeace objected to the authorization given by the Inspectorate of Pollution to discharge nuclear waste from the Thorp site in Cumbia. The issue arose as to whether Greenpeace has sufficient standing to bring the action. The court held, that it had, but the claim failed. Greenpeace was granted standing, because unlike in the *Rose Theatre Trust Case,*[91] its individual members would be affected by the decision, and Greenpeace also had legal expertise on the matter. The action did fail as the decision was in fact not unlawful on its merits. In *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd.,*[92] standing was further extended to include considerations of public interest.

86. Gordis, L. (2009). *Epidemiology,* 4th ed., Philadelphia: Elsevier/Saunders.
87. *R. v. Inspectorate of Pollution, exp. Greenpeace No. 2.* [1994] 4 All E.R. 329, where Greenpeace was awarded standing in part because it had members living in the neighbourhood of the Thorp re-processing plant.
88. But see, *Ganga Pollution (Municipalities) Case (M.C. Mehta v. Union of India),* A.I.R. 1988, S.C. 111C) where the Supreme Court of India upheld the standing of Sri M.C. Mehta, a Delhi resident to sue the government agencies whose prolonged neglect had resulted in severe pollution of the river.
89. Ibid.
90. [1994] 4 All E.R. 329.
91. *Regina v. Secretary of State for the Environment, Exparte Rose Theatre Trust Co.* [1990] 2 WLR 186; [1990] 1 All E.R. 754; [1990] 2 QB 504.
92. [1995] 1 WLR 386.
93. [2007] EWHC 2558 (Admin).
94. Betlem, G., (1995). "Standing for Ecosystems-Going Dutch." 54(1) *Cambridge Law Journal 153*, 154.
95. *R. v. Pollution Inspectorate, exp. Greenpeace* [1994] 4 All E.R. 329; *Residents Against Waste Site Ltd. v.* L.C.C. (2007) EWHC

The requirement for locus standi and the need to act promptly in a case, for judicial review featured prominently in the case of *Residents Against Waste Site Ltd. v. Lancashire County Council*[93]. Lancashire County Council (LCC) granted planning permission to itself for a large waste facility that would divert municipal waste from landfill. The proposal gave rise to considerable local opposition. Residents Against Waste Site Ltd. (RAWS), a company limited by guarantee, was incorporated on 14 February 2007 to represent the interests of the objectors. Its officers and members are local residents and borough councilors who had previously acted together in the same respect through an unincorporated association with a similar name. Irwin J., held that RAWS had the necessary standing to sue.

There are several reasons why courts draw distinction between private damages lawsuits and lawsuits for judicial review[94]. This is also reflected in ascertaining standing requirements in the purview of public and private law, on the basis that public interest is usually the hallmark of judicial review proceedings, thus it becomes logical to grant standing to those associations which are concerned with the protection of such interests. It has however, been argued that, in an environmental context, this distinction between public and private law remains a mirage, as Betlem has argued:

[M]ost legal systems purport to allocate general interests to the field of public law and limit private law to concrete, individual interest. However, this distinction breaks down in environmental law in that diffuse environmental damage is closely related to individual health interests, which are, of course, typical concrete private interest. Accordingly, private law remedies should be available alongside public law remedies such as judicial review.

There are circumstances in which an association is entitled to bring lawsuits on behalf of members. This is so where its members would otherwise themselves have standing to sue or the interests it seeks to protect are germane to the organization's purpose or neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. This article argues that the courts should recognize that in environmental lawsuits, a *bona fide* plaintiff with an arguable case which is not vexatious, frivolous nor an abuse of the process of the court ought not to be denied standing if they are sufficiently informed to mount an effective challenge within the adversarial system.

VI. JUDICIAL REMEDIES FOR ENVIRONMENTAL DAMAGE

The remedies available for the plaintiff in environmental lawsuits comprise of statutory as well as common law remedies. The common law remedies available for environmental damage are, nuisance, trespass, negligence and *Rylands v. Fletcher*[96]. Every plaintiff who files a lawsuit seeks a remedy. As defined in Black's Law Dictionary, a remedy is "the means by which a right is enforced or the violation of a right is prevented, redressed, or compensated.[97]" The word "remedy" in a legal context has virtually the same meaning in a medical context, namely, to cure. In a legal context, a remedy cures the violation of a legal right. Generally, in the common law system, there are two types of remedies, legal remedies and equitable remedies. The plaintiff will therefore, only proceed to file a lawsuit if he considers that apart from having a cause of action, that an appropriate remedy is available.

96. *United Food and Commercial Workers Union Local 7511 v.* Brown Group Inc., United States Supreme Court, (May 13th 1996) No. 95-340 U.S.L.W. 4330; *Royal College of Nursing of the UK v.* DHS [1981] AC 800. Note, that one ground on which Greenpeace succeeded was the potential harm suffered by its members living near Thorp re-processing plant.
97. *Black's Law Dictionary* (the d. 2009). Westlaw Publishing.
98. *M.C. Mehta v. Union of India* (1987) SCR (1) 819, which laid down the principle of absolute liability and the concept of deep pockets.
99. *Union Carbide Corporation v. Union of India & Ors.* JT 1989(1) 296; 1989 SCALE(1) 380. The Bhopal Gas Leak Tragedy occurred at midnight of 2nd December, 1984, by the escape of deadly chemical fumes from Union Carbide's factory.
100. *Livingstone v. Rawyards Coal Co.* (1880) 5 App. Cas. 25, 39.
101. *Marquis of Granby v. Bakewell U.D.C.* (1923) 87 J.P. 105.

A few words about the development of law and equity. As is well-known, England and most of her former colonies operate under a common law system, and this means that in the absence of a statute or other legislation or regulation, judges have the power to decide what the law is on a particular issue, thus, the evolution of common law remedies which seek to compensate for any loss sustained, prevent future infringements of proprietary interests or rectify damage which has already occurred as a result of such infringements. The courts do this by means of award of damages, the granting of various types of injunction, or the award of damages in lieu of injunction. From an environmental context, it is necessary to consider the extent to which these remedies coincide with environmental protection.

i. Damages

The purpose of damages in environmental lawsuits is to compensate the victim for the loss suffered, thus, we can say that like tort, environmental damages are compensatory in nature, though it may in certain situations also punish a defendant for his actions. Generally, the quantum of damages awarded must be proportionate to the capacity and magnitude of the defendant to pay.[98] However, this position is not sacrosanct as courts in appropriate cases have deviated from this test[99]. The rule is restoration to original condition, which is one of the primary guiding principles behind the awarding of damages in common law negligence claims. This principle is usually expressed in Latin term *restitutio ad integrum*. The general rule, as the principle implies, is that the amount of compensation awarded should put the successful plaintiff in the position he or she would have been had the tortuous action not been committed[100]. In a decided case, where the operator of a gas works had discharged poisonous effluent into a river over which the plaintiff had fishing rights, the compensation received equaled the cost of restocking the river in addition to an amount for the loss of food supply for the other stocks.

The first ever UK High Court case on environmental damage under the Environmental Liability Directive[102] is *R. (on the application of Seiont, Gwyrfai and Llyfni Anglers' Society) v. Natural Resources Wales*[103]. This case has a more general application than to Wales only, as the 2009 Welsh ED Regulations are very similar to the Environmental Damage (Prevention and Remediation) (England) Regulations 2015 currently in force in England. The case was a judicial review challenge by Seiont, Gwyrfai and Llyfni Anglers' Society (Claimant) to a decision by Natural Resources Wales (NRW) regarding whether there had been any "environmental damage" at Llyn Padam, a lake designated as SSSI in Snowdonia. This case has clarified some key definitional areas of the regime, in particular the restriction of environmental damage to a deterioration or worsening of the existing state, and has dealt with some important practical points on the notification process. It will however, be interesting in future, as cases come forward in Wales or in England, how the courts deal with the test for environmental damage to EU protected species or natural habitats which are within SSSI.

Damages may be exemplary or punitive[104], or intangible environmental values[105], or for pure economic loss[106].

ii. Nuisance

Nuisance means the act which creates hindrance to the enjoyment of the person in form of smell, air, noise, etc. Nuisance is anything done in tort to hurt or annoyance of lands, tenements of another and not amounting to trespass. Nuisance can be divided into two categories private nuisance, which is a substantial and unreasonable interference with the use and enjoyment of one's land; and public nuisance which is an unreasonably interference with a general right of the public. Actions in public nuisance may be brought on behalf of the community by the Attorney-General, or by a person who has suffered damage over and above that suffered by the public in general. Under both private and public nuisance, the plaintiff must prove that the defendant's activity unreasonably interfered with the use and enjoyment of a protected interest and caused the plaintiff substantial harm[107].

102. 2004 (ELD 2004) and the Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009 (2009 Welsh ED Regulations).
103. [2015] EWHC 3578 (Admin), 17 December, 2015.
104. *Gibbons v. South West Water Services Ltd.* [1992] 4 All E.R. 574.
105. See, Hanley, N., Shogren, J.F. and White, B. (1997), *Environmental Economics in Theory and Practice,* 384-401. Macmillan.
106. *Sparton Steels and Alloys Ltd. v. Martin & Co. (Contractors) Ltd.* [1973] Q.B. 27; *Hedley, Byrne v. Heller* [1964] A.C. 465; *Muirhead v. Industrial Tank Specialists* [1986] Q.B. 507; *Simaan General Contractors Co. v. Pilkington Glass Ltd.* (No. 2) [1988] Q. B. 758; *Blue Circle Industries, Plc. v. Ministry of Defence* [1998] 3 All ER 385 (CA).

The most significant UK nuisance case of 2012, was the Court of Appeal's decision in Barr v. Biffa. The judgment marked a new chapter in the story on quantum of damage awards in nuisance by providing for a range of awards assessed according to odour modeling which had been done to establish the likely odour impact on a range of claimant[108].

iii. Trespass

Trespass is distinguished from nuisance in that trespass is interference with the possession of property, whereas nuisance is interference with the use and enjoyment of property. Trespass to land is the type of trespass action that is generally used in pollution control cases. In the case of *Martin v. Reynolds Metal Co*[110]. the deposit on Martin's property of microscopic fluoride compounds, which were emitted in vapour form from the Reynolds' plant, was held to be an invasion of this property, and so, a trespass. The line between trespass and nuisance is thin and sometimes difficult to determine.

iv. Negligence

"Negligence" is "the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would not do". Negligence is that part of the law of torts which deals with acts not intended to inflict injury. The standard of care required by law is that degree which would be exercised by a person of ordinary prudence under the same circumstances. This is often defined as the "reasonable man" rule, what a reasonably man or person would do under all the circumstances. In order to ground liability, the defendant's act must be the proximate cause of injury. Proximate cause is that which in the natural and continuous process, if unbroken by an efficient intervening act, produces injury and without which the result would not have happened. *Nissan Motor Corp. v. Maryland Shipbuilding and Drydock Company*[111], shows a negligence action in an environmental case. The shipbuilding company's employees failed to follow company regulations when painting ships, allowing spray paint to be carried by the wind onto Nissan cars. The shipbuilders had knowledge of the likely danger of spray painting, yet failed to exercise due care in conducting the painting operations in question. This failure to exercise due care was held as amounting to negligence.

Persons who suffer damage as a result of careless and improper disposal or handling of hazardous waste can recover for their losses under negligence cause of action. Where negligence is established, it is not open for the defendant to argue that he has complied with all government regulations and permit conditions. Negligence can therefore, be used as a cause of action to address environmental harm. To plead negligence, the plaintiff must be able to prove that: the defendant owed the plaintiff a 'duty of care'; the defendant breached this duty; and the breach of duty caused damage to the plaintiff. A defendant's liability in negligence will be reduced if he can establish or prove that the plaintiff contributed to the loss in some manner.

The case of *Dodson v. Environment Agency*[112], turned on the issue whether the Agency owed a duty of care to those affected by particular operational responsibilities in relation to an otter enhancement programme and is of interest given the wide-ranging role of the Agency. The plaintiff owned a fishery that stocked carp, which all disappeared between 2004-2008. The fishery was adjacent to the River Ceign. The plaintiff alleged that the fish disappeared because of the predatory action of otters and that the Environment Agency's otter enhancement programme in the area was to blame. The plaintiff's case was that the Agency owed him a duty of care to advise him and that its otter habitat enhancement activities gave rise to harm to his property/financial interests. The judge held that he Agency did not owe a duty of care in the circumstances of the case and the nature of its role.

107. In Boomer *et al. v. Atlantic Cement Company,* 257 N. E. 2d 870 (N.Y. 1970), the property owners were awarded permanent damages in lieu of an injunction or closing. The court weighed the economic effect of closing the cement plant that cause the dirt, smoke and vibrations against the harm to the individual plaintiff's land, and concluded that the cement company could pay permanent damages in lieu of an injunction or closing.
108. [2012] EWCA Civ. 312.
109. See, *Anslow v. Norton* [2012] EWHC 2610; R. *(Fullers Farming Limited) v. Milton Keynes Council* [2012] Env. L. R. 17; *Bentley-Thomas v. Winkfield Parish Council* [2013] EWHC 356; *Lawrence v. Fen Tigers* [2014] UKSC 13; *Manchester Ship Canal Company Ltd. v. United Utilities Water Plc.* [2014] UKSC 40; *Austin v. Miller Argent (South Wales) Ltd.* [2014] ECWA Civ. 1012.
110. 224, F. Supp. 978 (D. Or. 1963), 86, 342 p. 2d 790.
111. 544 F. Supp. 1104.
112. [2013] EWHC 396.

v. Rylands v. Fletcher doctrine

The Court handed down a locus classicus judgment in the case of *Rylands v. Fletcher,*[114] which has been applied to cases involving the escape of fire. The case of *Mark Stannard (Ha Wyvern Tyres) v. Gore*[115], provides further confirmation that the *Rylands v. Fletcher* doctrine is now very limited. The court cited the House of Lords decision in *Transco Plc. v. Stockpork,*[116] as the seminal authority for the test to be applied in a classic case of *Rylands v. Fletcher,*[117] including fire and citing the "proper approach" as being that "the defendant must bring, keep, or collect an exceptionally dangerous or mischievous thing onto his land" and "there is an exceptionally high risk of danger or mischief if that thing should escape." In appropriate case, damage caused by fire emanating from an adjoining property could fall within the doctrine, but the appropriate case is likely to be rare. This is because fire itself is unlikely to be an exceptionally dangerous thing on land, unless perhaps it is started intentionally and escapes.

The doctrine has been adopted by courts on frequent occasions on cases involving the apportionment of liability for environmental damage. In *State v. Ventron Corp,*[117] the State of New Jersey sought to recover clean up and removal costs from several chemical companies in respect of contamination of a tidal estuary by mercury emanating from land upon which the companies had carried on operations. The land beneath the site was described as being "saturated" by 268 tons of toxic waste the bulk of which consisted of mercury. The interaction of the mercury with other elements created a highly toxic compound known as ethylmercury which had wiped out all fish in the creek and deoxygenated the water. Pollock, J., in the Supreme Court of New Jersey held the defendants strictly liable for the clean-up costs under the rule in *Rylands v. Fletcher*[118].

vi. Injunctions

The purpose of injunction is to prevent continuous wrong. Injunctions are discretionary remedies of the court compelling a person to do or stop doing a particular act. The plaintiff must prove that he will suffer harm from the defendant's actions and in such cases, the court can order an injunction even if the plaintiff has not yet suffered the harm. Injunctions can be awarded to restrain an environmental damage from occurring or at the conclusion of the case if damages will not adequately compensate the plaintiff for the loss that they have suffered. Injunctions may be prohibitory[119], *quia timet*[120], mandatory[121], and there may be damages awarded to the plaintiff in lieu of an injunction[122].

Before a court issues an interlocutory injunction, it usually requests that the plaintiff give the court an undertaking that the plaintiff can pay for the losses which the defendant will suffer if the interlocutory injunction is granted but the plaintiff does not eventually succeed in the case.

113. The judgment contains a useful assessment of why the judge came to that conclusion.
114. (1866) L. R. Ex. 265.
115. [2012] EWCA Civ. 1248.
116. [2003] UKHL 61.
117. [1983] 94 N.J. 473, 468 A. 2d 150.
118. Ibid
119. *Shelfer v. City of London Electric Lighting Co.* [1895] 1 Ch. 287, 315-316; *St. Helens Smelting v. Tipping (1865) ii* H.L.C. 642; *Goldsmith v. Turnbridge Wells Improvement Commissions [*1866] 1 Ch. App. 349; *Farmworth v. Manchester Corp.* [1930] AC 171.
120. *Szabo v. Esat Digifone Ltd. Unreported,* 6th February 1998, Case note in 51) 1. P. E. L. J. 35 (1998).
121. *Redland Bricks Ltd. v. Morris* [1970] A.C. 652; Jordon v. Norfolk County Council & Anor. (1994) 1 W.L.R. 1353.
122. *Shelfer v. City of London Electric Lighting Co.* ibid; *Jaggard v. Sayer* [1995] 1 W.L.R. 269; *Miller v. Jackson [*1977] 1 Q.B. 966; *Anchor Brewhouse Developments Ltd. v. Berkley House (Docklands Developments) Ltd.* [1987] 38 B.L.R. 87.

VII. CONCLUSIONS

The tort system has to a very large extent proven inadequate to appropriately address the problem of environmental toxic injury, despite overwhelming and compelling evidence that exposure to common pollutants causes significant numbers of fatalities and human diseases. The difficulties that plaintiffs face in establishing liability for environmental damage in toxic micro-pollutant cases, harshly restricts the place of civil liability in an environmental context. The requirements by the courts that the plaintiff in an action based on negligence establish fault on the part of the defendant in order to ground liability for environmental damage is a very difficult one, in that this entails proving that, not only was the defendant aware of the danger or risk created by his activity, but that he also failed to take adequate steps to make ineffective or nullify the danger or risk. The complicated and intricate nature of modern industrial operations which have the potential to cause pollution, makes it a herculean task for the plaintiff to prove that the defendant failed to act as required by law. Whatever the situation, the plaintiff is further required to prove a causal link between the defendant's activity and the damage caused. This poses two problems first, once pollution spreads into the environment it becomes very complex in tracing the polluters and the source of pollution. The second problem is the difficult issue of the plaintiff having to lead scientific evidence. These difficulties become much more complicated in the case of micro-pollutants "where the harmful substances are invisible and their effects insidious."

The tort system, however, seems inadequate to correct these problems and its failure to compensate the injured plaintiff in an action for environmental damage. The existing common law principles and requirements for establishing causation have failed to keep pace with modern scientific methods for pinpointing links between micro-pollutants and the risk they pose to human health. Therefore, the requirement to prove "fault" and causation" places a heavy financial burden on the plaintiff and it is unlikely that the tort system will one day help internalize these costs of litigation and the costs to human health of these environmental toxic injuries.

There is yet another issue, using tort to address environmental damage claims suffers from a serious defect. Torts focuses on the loss or harm suffered by the plaintiff rather than the loss suffered by the environment. Environmental restoration issues are hardly addressed by the tort system. This being the case, although the plaintiff is compensated for personal injuries suffered in terms of award of monetary damages, no adequate funds or process is made available for ecological or environmental remediation of a damaged resource.

Another difficulty in seeking to establish liability for environmental damage is the limitation placed on the civil society groups and environmental Non-governmental organizations to have access to the courts to seek remedies on behalf of the damaged environment. Lack of legal personality will be a conclusive bar to standing of the group or organization. However, a public interest group such as an environmental group could sue in its own right if it possessed the "special interest" requirement through its own legal personality. Thus, upon such situations, it becomes necessary for the plaintiff to rely on environmental statutes and regulations to establish liability for injury due to environmental damage.

The establishment of liability for environmental damage in toxic micro-pollutant cases will continue to be a source of discomfort to researchers and practitioners as the proof and estimation of damages remains subject to large legal, scientific and economic uncertainties. The administrative compensation system and risk-based system are hereby proposed as a more effective approach. They can provide the proper signals that can enable the plaintiff to respond to or mitigate risks and it can promote corrective justice. This article therefore, concludes that the use of tort system in protecting the environment remains limited and requires a foundational change from the focus on the loss suffered by the plaintiff to the need to restore the natural environment adversely polluted and damaged by the activity of the defendant. This is the only practical way forward and must be implemented.

An African Redefinition of Popular Democratic and

Development Nomenclature

[1]Raymond A. Atuguba

To achieve a more in-depth intellectual debate on major contemporary issues, including the issues of governance and sustainable development, we need to start from nomenclature, the real meaning, from an African perspective, of key words and terminologies that are bandied around in the global development and governance milieu, and which are determinative of how Africans are viewed, the choices they make, and the choices they are compelled to make. Without this, a radical, nuanced, and progressive awareness of the deep transformations, challenges and opportunities currently taking place on the African continent will elude us, and with it the final opportunity to end the paradox of the richest Continent living in dire poverty. This Paper takes a first stab at this by exploring key terminologies such as Governance, Government, Democratic Governance, Good Governance, People Oriented Governance, Constitution, Constitutionalism, Constitutionality, Administration, Institutions, and Globalization. The Paper proposes that a particular Africanist understanding and perspective of these words is the beginning of a deeper understanding of what they mean and what they should mean. Despite an increasing convergence towards governance principles, it is evident that African states have faced challenges in the implementation of these said governance principles. There are still many inconsistencies between governance concepts and implementation of good governance strategies. It is recommended that that Africans will need to redefine governance terminologies as illustrated above, so they not only capture the essence in theory but also translate into practical working definitions for the purpose of effective implementation and sustainable development. If this is done, then only would Africans start benefiting from the economic, social and cultural dividends truly associated with "good governance" and that would be the beginning of a "good governance", "people-centred administration" and "sustainable development" revolution in Africa. Understanding crowds out the frills and illuminates the core essence of the words, so that Africa's Development Challenge may be addressed on a sounder and more intelligent foundation.

Key words: *Popular Democratic, Development Nomenclature, governance*

[1]Senior Lecturer, School of Law, University of Ghana, Legon Accra
atugubaatuguba@yahoo.com

I. INTRODUCTION

As I frantically created space to write this paper in early 2016, it had not stopped. The international media conglomerates were still at it. An infinitesimal dirge was still being sung about the continent on which life itself begun; the richest continent on the face of the earth; a continent three times the size of the United States; and the continent with the second largest population on earth-and that is only because China belongs to another continent; and above all, the happiest continent on earth.[1]

What is amazing, almost astounding, about this dirge is that it is hardly placed side by side the worthy life Africa has led: her survival of holocaust after holocaust; euphemistically called slavery, colonialism, neo-colonialism, resource curse, energy crises, now climate change, and all those other nice words. Second, the dirge is hardly paired with the diagnoses of the diseases that kill Africa: the insatiable desire of others for oil, gold, diamond, aluminum, titanium; their rabid need for military bases; their deep want to control policy spaces. Lastly, the dirge is almost exclusive of Africa Rising.

And so the familiar story is that after more than fifty years of independence, many African countries are still struggling to provide for the basic needs of their citizens; decent education, healthcare, jobs and prospects for the youth. And in the midst of civil strife, resource conflicts, a huge disease burden, a population spiraling out of control, dwindling primary commodity prices, and a disproportionate burden of the ills of a climate change it did not create, Africa's future is a huge challenge. Her Development Partners are quick to add that all these problems will go away if only there was Good Governance in Africa and for 25 years have poured in billions of dollars in aid of that enterprise. However, there are more poor people in Africa today than when the Good Governance agenda was deployed, just as there are more and newer diseases, civil strife and less sustainable jobs. Something is not adding up.

In this paper, I seek to examine the different concepts relating to governance and development as they are understood, defined and deployed by Africa's Development Partners and whether they are sufficient to tackle the African governance and developmental challenge. Whilst some of the understandings of the concepts are terribly wrong, I propose that the formal definitions used by the United Nations, International Financial Institutions and other development agencies are in themselves sufficient to provide the necessary framework for all actors charged with exercising good governance to do so in a manner which is both inclusive and also manages the economic, social and human resources for the benefit and development of Africa. The issue however, is in the implementation of the governance terms; development agencies have often reduced governance terminologies to focus on issues of corruption, politics or central government, to the exclusion of all other critical issues and actors in the governance process. It is this reductionism of the governance terminologies, which I argue has kept much of Africa in a paradox of poverty in the midst of plenty.

The World Bank and other actors have persuaded Africa to focus on extremely narrow elements of governance, focusing much time and resources on programmes and projects which by themselves, cannot lift Africa from the status quo. The paper concludes by proposing that Africa must develop its own governance concepts, free from the impediment of donor agencies-which will seek to encompass a broad definition for governance suitable to her needs. It is only by Africa realizing that governance is more than periodic elections, free speech, anti-corruption, and effective police and judiciary services can it develop, as true governance relates to effective resource management.

1 Check the world happiness index and confirm and cite the 11th March Telegraph Newspaper catalogue of African Woes.

II GOVERNANCE

The concept of "governance" is not new, it is as old as civilization but lately it has been defined and redefined unto confusion. Indeed it is a concept that has many meanings and moreover means different things to different groups of people. It can be described as the most commonly used yet least understood concept.[2]

The term first made an appearance in development circles in the World Bank's 1989 report: "Sub-Saharan Africa: From Crisis to Sustainable Growth,"[1] and soon after it gathered popularity amongst development agencies.[3] Again, in the World Bank's 1991 report "Managing Development: The Governance Dimension," governance was defined as "the manner in which power is exercised in the management of a country's economic and social resources for development".[4] The Bank goes further to illustrate a broader point: that good governance is central to creating and sustaining an environment which fosters strong and equitable development, and is an essential complement to sound economic policies. Governments therefore play a key role in providing two sets of public goods: the rules to make markets work efficiently, and, more problematically, correcting for market failure. In order to play this role, they need revenues, and "agents" to collect revenues and produce the public goods. This in turn requires systems of accountability, adequate and reliable information, and efficiency in resource management. Therefore, though the Bank had historically focused on stabilisation and state reforms that overwhelmingly focused on civil service retrenchment and privatization during the 1980s, the early 1990s saw a change of focus[5]. The Bank came to realise that most of the crises in developing countries were of a governance nature. Hence, the contemporary adjustment package emphasised governance issues such as transparency, accountability and judicial reform. In this context, the Bank had introduced a new way of looking at governance; good governance.[6] In its 1997 policy paper, The United Nations Development Programme (UNDP), defined governance as "the exercise of economic, political and administrative authority to manage a country's affairs at all levels. It comprises the mechanisms, processes and institutions through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations and mediate their differences".[7] This definition was endorsed by the Secretary-General's inter-agency sub-task force to promote integrated responses to United Nations conferences and summits. And the number of country level programmes on governance supported by the United Nations system expanded considerably.[8]

According to Fredrik Soderbaum (2004), governance must not be confused with government (although it encompasses the government).[9] "Unlike government, governance should be viewed as a phenomenon away from hierarchy and the central government to more inclusive decision-making that is aimed at problem-solving and includes a variety of actors with different levels of authority, power, competences and responsibilities".[10]

Generally, the concept of "governance" has been captured from different perspectives by development agencies, political leaders, and national and international communities, and represents a key item in the major international agendas. Thousands of publications are issued on governance and numerous initiatives are taken on it on a daily basis, both in the international arena and at national level.[11] It is also true, that "governance" is not a one-size fits all model, it must be implemented and evaluated within country specific contexts and also within the framework of international commitments, such the Brussels Programme of Action, the New Partnership for Africa's Development (NEPAD), the Heavily Indebted Poor Countries Initiative (HIPC), the Millennium Development Goals (MGDs) and now the Sustainable Development Goals (SDGs).[12]

---

2. Bevir, M. (2012). *Governance*. Oxford: Oxford University Press, pp. 1-10

3. World Bank. (1989). From crisis to sustainable growth - sub Saharan Africa: a long-term perspective study. Washington, DC: The World Bank [online] pp. 1-5Available at: http://documents.worldbank.org/curated/en/498241468742846138/From-crisis-to-sustainable-growth-sub-Saharan-Africa-a-long-term-perspective-study [accessed 17 August 2016]

4. Kale, N.K. (1999) Democracy and Good Governance, Decentralization, media and good governance. *Proceedings of ICASSRT Regional Conference* [online] pp76-96. Yaounde, Cameroon. Available at http://www.ethnonet-africa.org/pubs/p95kale.htm# [Accessed 24 August 2016]

5. World Bank. (1991). Managing development: the governance dimension, Washington, DC: The World Bank [online] pp.1. Available at http://documents.worldbank.org/curated/en/884111468134710535/pdf/34899.pdf [accessed 19 August 2016]

6. *Supra* note 5.

The way in which "governance" has been formally defined in all the nice publications development agencies are so good at producing is actually very good. Like Wikipedia, they acknowledge that there are types and levels of governance, but broadly speaking it can be referred to as "all processes of governing, whether undertaken by a government, market or network, whether over a family, tribe, formal or informal organization or territory and whether through laws, norms, power or language".[13] If they get the definition of "governance" dead right, then it should be easy to employ that definition in the thousands of governance projects they support around Africa, and the governance situation in Africa should improve, not deteriorate. Before we examine the reasons for this misalignment, let us look at the kindred terminologies of "Democratic Governance" and "Good Governance".

"Democratic Governance" has been described by the UN as advancing development, by bringing its "energies to bear on such tasks as eradicating poverty, protecting the environment, ensuring gender equality, and providing for sustainable livelihoods. It ensures that civil society plays an active role in setting priorities and making the needs of the most vulnerable people in society known."[14] According to UNDP, democratic governance relates "to developing institutions and processes that are more responsive to the needs of ordinary citizens, including the poor, and that promote development. UNDP helps countries in this regard by strengthening electoral and legislative systems, improving access to justice and public administration and developing a greater capacity to deliver basic services to those most in need."[15]

The Organization for Security and Co-operation in Europe (ODIHR) says that democratic governance is the bedrock of the OSCE's system of values and standards. "It is a system of government where institutions function according to democratic processes and norms, both internally and in their interaction with other institutions."[16] ODIHR's work on democratic governance is anchored in the standards that OSCE participating States have agreed, including political pluralism, institutional accountability and responsiveness, an active civil society, human rights, the rule of law, and democratic elections.

Good Governance has also been defined in different ways. We have already noted that the World Bank's definition encompasses the form of political regime, the process by which authority is exercised in the management of a country's economic and social resources for development, as well as the capacity of governments to design, formulate and implement policies and discharge functions.[17]

Some of the many issues that are treated under the governance programmes of various donors include election monitoring, political party support, combating corruption, building independent judiciaries, security sector reform, improved service delivery, transparency of government accounts, decentralization, civil and political rights, government responsiveness

7. UNDP (1997) Governance for Sustainable Human Development: A UNDP Policy Document . New York: United Nations Development Programme [online] pp. 1-40. Available at http://www. pogar.org/publications/other/undp/governance/ undppolicydoc97-e.pdf [Accessed 24 August 2016]
8. Ibid???????
9. Söderbaum, F. (2004) Modes of Regional Governance in Africa: Neoliberalism, Sovereignty-boosting and Shadow Networks, *Global Governance: A Review of Multilateralism and International Organizations*, [Online] Vol. 10, No. 4 (November), pp 35. Available at http://gup.ub.gu.se/records/ fulltext/40730/40730.pdf [Accessed 20 August 2016]
9. Alemazung, J. (2012) Government and the process of governance in Africa, *Global Governance Institute* [online] 10. GGI Analysis Paper 6/ 2012, pp. 3 Available at http://www. globalgovernance. eu/wp-content/uploads/2015/02/GGI-Analysis- Government-and-the-process-of-governance-in-Africa-Alemazung.pdf [Accessed 20 August 2016]

11. Evidence?

12. Mekolo. A and Resta, V. (November 2005). Governance Progress in Africa: *Challenges and Trends: Division for Public Administration and Development Management United Nations Department of Economic and Social Affairs* [online] pp.5 Available at http://unpan1.un.org/intradoc/ groups/public/ documents/un/unpan021509.pdf [Accessed 21 August 2016]

and "forward vision", and the stability of the regulatory environment for private sector activities (including price systems, exchange regimes, and banking systems).[18]

According to the United Nations (UN) good governance promotes equity, participation, pluralism, transparency, accountability and the rule of law, in a manner that is effective, efficient and enduring. In translating this into practice, the holding of free, fair and frequent elections, representative legislatures, and independent judiciaries are what embody notions of good governance.[19]

From the above, it is apparent that there is an abundance of governance terminologies and whilst all are valid, one can deduce that there is no single and exhaustive definition of "good governance," nor is there a delimitation of its scope that commands universal acceptance. The term is used with great flexibility; creating both advantages, but also some level of difficulty in operationalizing the concept. Depending on the context and the overriding objective sought, good governance has been said at various times to encompass: full respect of human rights; the rule of law; effective participation; multi-actor partnerships; political pluralism; transparent and accountable processes and institutions; an efficient and effective public sector; economic governance; access to social services; legitimacy; access to knowledge, information and education; political empowerment of people; equity; sustainability; and attitudes and values that foster responsibility, solidarity and tolerance.[20] It is clear that like the word "development", "good governance" in the words of Robert? Frank is "a whore of a word"[21]. It generally appears that development agencies get the concept of governance; that they acknowledge it is a broad, complicated and contextual concept; and then they proceed to engage in huge reductionism in order to contain the concept within their programming and their budgets. The way in which the examples from the World Bank[22], the UN, the UNDP, and the OHCHR elaborated above[23] move from very good and elaborate definitions of "governance" to narrow programming on just elections, anticorruption and judicial systems is startling. Therein lies the bane of Africa's development through development assistance. In the next two sections, I reflect deeper on "Africa's Challenge".

13. Wikipedia, Governance [online] Available at https://en.wikipedia.org/wiki/Governance [Accessed on 20 August 2016] quoted from Bevir, M. (2013)
14. United Nations, *Global Issues: governance* [online] Available at http://www.un.org/en/ globalissues/governance/ [Accessed 21 August 2016]
15. UNDP (2016) Democratic governance [online] Available at http://www.undp.org/content/undp/en/ home/ourwork/ democraticgovernance/overview. html [Accessed 21 August 2016]
16. Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights [online] Available at http://www. osce.org/odihr/104416?download=true [Accessed 21 August 2016]
17. Santiso, C. (2001). Good Governance and Aid Effectiveness: The World Bank and Conditionality, Paul H Nitze School of Advanced International Studies. Johns Hopkins University, *The Georgetown Public Policy Review* [online] Volume 7, pp 1-22, Available at: http://www.eldis.org/fulltext/ conditionality.pdf [Accessed 22 August 2016]
18. Gisselquist. R. M, (2012) Good Governance as a Concept, and Why This Matters for Development Policy, *UNU-WIDER*, [online] Working Paper No. 2012/30 pp. 14 Available at http://www19.iadb. org/intal/intalcdi/PE/2012/11046.pdf [Accessed 22 August 2016] [the problem here is that an overwhelming majority of the projects are in the area of political governance, to the neglect of economic and social governance, and even those which border on economic and social governance seek to reach these two through the instrumentation of political governance.
19. *Supra note 4.*
20. OHCHR, Good Governance and Human Rights [online] Available at http://www.ohchr.org/EN/ Issues/Development/ GoodGovernance/Pages/ GoodGovernanceIndex.aspx [Accessed 22 August 2016]
AGAIN: [the problem here is that an overwhelming majority of the projects are in the area of political governance, to the neglect of economic and social governance, and even those which border on economic and social governance seek to reach these two through the instrumentation of political governance. We need to prove this by doing a count of governance projects in a number of African countries or in one African country or by a set of elite donors. Or we find out if this has already been done and use the info from that.
21. Frank, L. (1997) The Development Game in the *Post Development Reader*. R. Majid, ed., The Post- Development Reader, 1st ed. London: Zed Books, pp.263

III. AFRICA'S DEVELOPMENT CHALLENGE

It has been said that Africa has made remarkable progress in its socio-economic development in recent years.[25] Contrary to this view, in 1992, Tony Killick stated that "It is widely believed that, by comparison with other developing regions, Africa's post-Independence development record has been one of failure."[26] Nonetheless, the immediate years following many African countries liberation from colonial rule resulted in high expectations for the newly independent states that had per capita real incomes comparable to those of other developing countries such as the 'Asian Tigers.'[27] According to Professor Lehmann, throughout the 1960s to the early 1970s, Africa was viewed by many foreign multinationals as the most promising continent of the third world..[28] He further adds that business connections were encouraged by many European governments, particularly the, British and French, amongst others.[29,] In contrast, East Asia was a region many investors would not go near as it was engulfed in wars, revolutions, and poverty. However, he writes that by the mid-1970s, the African dream was unraveling, just as the East Asia economic miracle was taking off.[30] According to the World Bank (2008) ,[31] since 1950, out of the approximately 200 economies of the world, only 13 have achieved an average annual growth rate of 7% for a period of 25 years or more and out of the 13,[32] no less than nine are East Asian and only one, Botswana represents the African continent.[33] This represents a disastrous picture, which is admittedly far from the promising prospects that engulfed Africa soon after independence. This tragedy is as a result of many factors and according to Africa's development partners poor governance underpins them all.

One can, however, assert that governance or good governance is not dependent upon nor is it a prerequisite for economic growth, in fact, you can have one without the other as many East Asian countries have illustrated. Dictators and autocrats such as Lee Kuan Yew in Singapore, Tun Dato' Seri Dr Mahathir bin Mohamad in Malaysia, Haji Mohamed Suharto in Indonesia, and Park Chung-hee in South Korea who achieved and sustained impressive economic growth in their respective countries are testimony to the notion that economic growth is not dependent on democratic regimes.[34] In his book False Economy: A Surprising Economic History of the World (2009), Alan Beattie poses the question: "Why did Indonesia prosper under a crooked ruler and Tanzania stay poor under an honest one?"[35] Referring to the 32 years of Suharto's rule in Indonesia and the 24 years of Julius Nyerere's rule in Tanzania. So while it is thought that Nyerere was a noble man, his nobility did not translate into sustained economic growth for his country and the same degree of economic pragmatism as displayed by his autocratic counterparts in East Asia was deficient in his case.

It is clear that the problem lies somewhere else. I propose that African leaders and her development partners are not able to properly operationalise the concepts of "governance" and "good governance" that they so beautifully define. We must begin to question the governance terminologies that have dominated the development space for the past several decades as well as their operationalisation. As stated above, the World Bank says that governance is "the manner in which power is exercised in the management of a country's economic and social resources for development." However, in recent years, International Financial Institutions such as the World Bank, the IMF as well as donors such as the UK's Department for International Development (DFID), the European Union (EU) and other development agencies have, in their various project proposals, documents and business cases provided a diluted notion of governance, different from what they define it to be. In the search for appropriate guidelines to assist in aid allocation, the development assistance debate was diminished to embracing mostly the political dimension of governance, with governance becoming firmly tied to democracy. Major western countries together with the International Financial institutions began stressing

22. *Supra note 4.*
23. Ensure that this is really elaborated above
24. W., A., Seidman, R.B. and Mbana, P. (2007) Africa's Challenge: *Using Law for Good Governance and Development*. Trenton NJ: Africa World Press. See, Seidman and Pumzo, "Africa's Challenge…", a deep illustration of this challenge from multiple country and subject matter perspectives.
25. Manley, P. (2015) Why building resilience is key to Africa's future, *World Economic Forum* [online]. Available at https://www.weforum.org/agenda/2015/06/why-building-resilience-is-key-to-africas-future/ [Accessed 23 August 2016]
26. Killick, T. (1992) Explaining Africa's post-independence development experiences, *ODI annual reports*, working and discussion papers [online] pp1. Available at https://www.odi.org/publications/5586-sub-saharan-africa-post-independence-development-record [Accessed 24 August 2016]

the need to create a more facilitative socio-political context for structural adjustment in the developing world, particularly in Africa. As the World Bank observed, efforts to create an enabling environment and to build capacities would be wasted if the political context were not favorable. “Ultimately, better governance required political renewal and this meant a concerted attack on corruption at all levels.”[36]

These weakened, narrowly focused governance terminologies are what many African countries implement when seeking multilateral or bilateral support from these agencies which in turn has hampered their quest to deepen governance in their respective countries. For example, the EU Country Strategy Paper for support to Nigeria (2008-2013) captures governance and human rights and seeks to enhance the following: “supporting anti-corruption activities by upgrading the competence of the anti-corruption bodies and by supporting advocacy and prosecution” and “supporting the electoral process in the context of the 2011-2015 electoral cycle and deepening democratic governance”.[37]

The reduction of “governance” and “good governance” to periodic elections and anti-corruption activities is very common in development assistance allover Africa. The 2012 DFID-Rwanda business case, notes that “governance indicators shows the government to be strong and capable. Transparency International ranks Rwanda as the fourth least corrupt nation in Africa.”[38] Similarly, the World Bank Ghana Project Document for 2016 points to governance risks being the “2016 election [which] could shift policy priorities in favour of short-term goals”[39]

From the examples it is clear that we are no longer working with the World Bank’s original definition of governance, which so aptly encompassed all of the different dimensions. Rather, in the various development agencies and financial institutions practical workings, these suitably defined terminologies suffer at the implementation stage and in practice, are reduced to issues surrounding corruption or in some cases, the predictable electoral cycle, which in the case of democracies, will culminate in routine elections. If this trend continues, African countries will continue to fall behind in development terms vis-à-vis developed nations as they commit resources to focus on anti-corruption and holding elections every four to seven years. Ultimately, this reductionist form of governance has failed and will continue to fail in addressing Africa’s challenges. According to Paul Collier, “dysfunctional governance is why some countries remain poor.”[40] He goes further to add that elections are not a true test of a nations ability to govern effectively, as elections can be put together within a relatively short space of time whereas institution-building takes considerably more time. Moreover, the popular expectation that elections would produce social order, bring legitimacy to governments, and churn out sound economic policies does not always pan out. In most Africa countries these indicia of good governance does not automatically follow elections and “good governance” remains an uphill struggle. In societies that were and continue to be deeply divided along ethnic, class, and rural-urban lines, elections easily degenerate into an ethnic poll and seek to reinforce ethnic identities.[41] Below is a detailed case study of how an excellent definition of governance became a horrible governance experience when it was operationalized.

27. The Asian Tigers: South Korea, Taiwan, Singapore and by the early 1960s their GDP per capita was lower than that of countries such as Ghana, Kenya, Nigeria and Zambia

28. *Lehmann. J.P. (2009)* Africa In The 21st Century’s Global Economic Paradigm, The good governance challenge, *IMD* [online] pp2-5. Available at https:// www.imd.org/research/challenges/upload/TC0046_ AFRICA_IN_THE_21ST_ CENTURYS_GLOBAL_ ECONOMIC_PARADIGM.pdf [Accessed 22 August 2016]

29. *Supra note 29*

30. *Ibid.* .

31. World Bank (2008). Growth Report: Strategies for Sustained Growth and Inclusive Development, [online] Washington, DC: World Bank, pp.1-2 Available at http:// documents. worldbank.org/curated/en/120981468138262912/ pdf/449860PUB0Box3101OFFICIAL0USE0ONLY1. pdf [Accessed 24 August 2016]

32. They were China, Hong Kong, Indonesia, Japan, South Korea, Malaysia, Singapore, Taiwan and Thailand. (The other three are Brazil, Malta and Oman)

33. *Supra note 32 at 19.*

34. *Supra note 29.*

35. Beattie, A. (2009) False Economy: A Surprising Economic History of the World. New York: Penguin Publishing Group pp.223

36. *Supra note 4.*

IV. CASE STUDY IN REDUCTIONISM OF GOVERNANCE THE WAY FORWARD: REDEFINING GOVERNANCE CONCEPTS FOR AFRICA

How do we ensure that the current democratic system of governance being implemented across the continent is productive to Africa in its quest for sustained economic growth and development? How do we ensure that Africa's system of governance translates into positive socio-economic and development outcomes?42 To do this we need to chuck the reductionist operational definitions of "governance" and "good governance" that is drummed into the heads of African leaders, written into the budgets of African economies, and embedded in various African social systems by Development Partners. Those operational definitions have not resulted in the substantial institutional and economic transformation that Africa needs to really rise. Absent this, Development Partners have presided over election after election in Africa and cried themselves hoarse about deep corruption in Africa leading to musical chairs of dominant parties in African polities. These political leaders by the hour find innovative ways of assisting Multinational Companies to bleed Africa of her wealth, whilst securing for themselves and their children a small piece of the pie in Switzerland when they leave the chair at the stop of the music.

We cannot continue governing Africa in this way. Africa must therefore seek to redefine her governance terminologies both at the level of conceptualization and operationalization. In the word of the Head of the Moroccan Academy when he spoke at their 43rd Session in 36 December 2015 in Rabat, and on the thought provoking theme: "Africa as a Horizon for Thought", "we need an Africa that will think on her own, for her own".43 Yet, Africa cannot achieve this unless she can change the language and the meaning of the words that her children use to communicate their thoughts, inform their actions, and assess their progress as a people. We need to ride ourselves of what someone else in that conference called "linguistic intoxication", and which I will call "etymological intoxification". In the rest of this section I will like to discuss the meaning that is popularly assigned to various governance terminologies that frame our thoughts and actions as Africans, and suggest to you that those popular meanings need to be changed, and changed now. I will also suggest new meanings for the words that would better serve African thought, practice and progress. The words I would analyse are: governance; government; democratic governance; good governance; people oriented administration; constitutionalism; administration; institutions; globalisation.

It is appropriate at this point to sound a not of caution. I am not asking for pointless African exceptionalism. I am not blindly favouring thought and etymological autarky and cloisteredness. I am asking for an African self-realisation and self-actualisation. A knowledge of the self, intellectually, in thought, in words, in order to be. And to be ourselves. Without this, the blind pursuit of the dreams of others, who have encapsulated those dreams in the words they craft, assign meaning to, and then foist on us to imbibe, think with, and act by, will lead us where we do not want to go.

37 The European Commission (2009) European Community-Federal Republic of Nigeria: Country Strategy Paper and National Indicative Programme 2008-2013 [online] pp.6. Available at https://ec.europa.eu/europeaid/sites/devco/files/csp-nip-nigeria-2008-2013_en.pdf [Accessed 24 August 2016]

World Bank, Governance: The World Bank Experience 5-6 (1994)

38 DFID-Rwanda (2012) Growth and Poverty Reduction Grant to the Government of Rwanda (2012/13-2014/15), *Business Case*, V.36. [online] pp.6. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/67320/DFID-Rwanda-business-case.pdf [Accessed 25 August 2016] see also Transparency International, 2011 Corruption Perceptions Index

39World Bank (2015) Ghana Sankofa Gas Project, [online] Washington DC: World Bank Available at http://wwwwds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2015/07/13/090224b082ff2246/1_0/Rendered/PDF/Ghana000Sankofa0Gas0Project.pdf [PAGE CURRENTLY UNAVAILABLE]

They certainly mention corruption in there-check.

40 Collier, P. (2010) Development Models Revisited: European Democracy Vs. Asian Autocracy, Social Europe [online] Available at https://www.socialeurope.eu/2010/09/development-models-revisited-european-democracy-vs-asian-autocracy/ [Accessed 24 August 2016]

41 In the case of Kenya during the 2008 elections, the violence which ensued was as a result of ethnic clashes.

Beginning with the term "Governance", this beautiful concept has been all but reduced to "political governance". As so mis-defined, the word has operationally meant that as long as we run elections every couple of years, and ensure that our leaders do not steal what is left of our resources, we are fine. Thus, Economic, Social, and Cultural Governance have been extracted away from the popular definition of the word. This ensures that we do not ask how our economies are governed and where all our resources are going. We would not ask why our hitherto close knit and supportive societies are fractured; and we would not ask why our airwaves are saturated with the cultures of everyone, but ourselves.

Rather than live this dangerous definition of Governance, we need to redefine it. First we need to realise that Governance actually means the rules of the game for generating resources; distributing resources; and resolving resultant conflicts. Second, we need to realise that by "resources" we mean everything from: political power resources; through economic and natural resources; to social, cultural, and spiritual resources. This way we would not concentrate only on how political power resources are distributed through the ballot box, but how economic and natural resources are distributed through transfer pricing by multinational companies; and we would start rebasing our GDP by calculating in there the immense cultural and spiritual resources we have a comparative advantage in. Rethinking "governance" this way would be the beginning of a real governance revolution in Africa, a revolution that is so badly needed.

The myopic definition of "governance" that is rammed into our heads implicates the definition of the kindred term "Government". By defining "Government" to mean those who "govern", we are made to import the narrow definition of "governance" to the definition of "Government". Thus, "Government" in the final analysis is a group of top-level political operatives in the modern African State. Such a definition ignores economic governance, and then excludes from "Government" those who control the levers of the economy and who have the political governors at their beck and call. It ignores lawyers and judges who say what the law is, and with one stroke of the pen may make you rich or impoverished. Similarly, such a definition excludes all those with huge social and other capital that they can deploy to mobilise the citizenry for whatever purpose they wish: religious leaders, chiefs, youth leaders, are just a few examples. The definitions ignore all those who change and determine cultures: celebrities, popular artists, and the like. And of course, the definition ignores regional and local governments who can both facilitate their lives or terrorise ordinary citizens. The point I seek to convey is this: all those who determine the rules of the game for the generation and distribution of resources and the management of resulting conflicts at all levels, is the Government.

Another kindred terminology is "Democratic Governance". Again, this term is presented as a good thing in the literature[44], when in fact it is a very bad thing, and very un-African. This term actually means: a situation where everyone has their say, but the government or majority has their way. Invariably, it is defined to include "the Rule of Law", but the content of the "Rules" that constitute the "Law" are hardly questioned, leading to the "tyranny of the majority", the neglect and terrorisation of minorities, and little consideration for future generations. Hiding under the cloak of Democratic Governance, civilised nations consistently oppress minorities; racial, political, ethnic, sexual, and still retain the accolade, "civilised". It is critically important for the ugly term democratic governance to be completely exterminated from the governance lexicon of African countries. A less ugly term is "good governance", meaning a situation where the Government takes all the input of the governed regarding how to generate and distribute resources and manage resulting conflicts and chooses and implements the best options for the collective. It is the Government which determines what is "best", and so this system of governance is only useful if independent institutional mechanisms or arrangements exist to compel or shame the Government into implementing inclusive, equitable, just, policies as articulated during consultations with the people. Without such mechanisms, good governance could be as bad as democratic governance.

42. These are questions many scholars of Africa have asked for decades. See, for example, Yevugah, L. M. (2016) Africa in search of governance. [online] The BFTonline. Available at http://thebftonline.com/features/opinions/16747/africa-in-search-of-governance.html [Accessed 23 August 2016]

43. The 43rd session of the Academy of the Kingdom of Morocco in Rabat on 8 December 2015 under the theme "Africa as a horizon of thought."

It is a system of people-oriented governance or administration that is fashioned to automatically govern in the interest of the people. In such a system, the Government and majority choose and implement only the options for generating and distributing resources and managing resultant conflicts that are inclusive, equitable, just and for the betterment of the people, even if this involves redistribution and affirmative action. This is what governance should mean for Africans.

The confusing of democratic governance for good governance and people-centred governance also happens in the strictly legal domain of constitution making. Whilst it is generally clear that a "Constitution" is a document that contains the most basic, fundamental, even sacrosanct and mostly inderogable rules for governance of a Nation-State or other entity, the meaning of "Constitutionality" and "Constitutionalism" are less clear and are often conflated.

The mere existence of a Constitution is not enough for proper governance. A Constitution can lead to Constitutionality or Constitutionalism. Constitutionality is rule of law at a Constitutional level; no matter what the content of the Law is that Rules. Constitutionalism on the other hand is good governance or people-centred Governance at a Constitutional level. With Constitutionalism there is limited government, people-centred-ness, protection of minority and other rights, fairness, justice, equity.

It is important to note that Governments needs a conduit to govern, that is, to do the good or the bad that it does. That conduit is "the Administration". In the African context, the Administration has at least three levels. The first level is the administration of a particular President or leader or party, that is the policy direction of a particular leader or leadership which seeps through the pores of a Nation by consistent oral, documentary, pictoral and other forms of expression. That policy direction at its core expresses how resources will be generated and distributed, and how resultant conflicts will be managed. The second level of the administration is the labyrinth of rules, procedures, processes, that a leader uses for enacting their particular policy direction, broken down at this level into various programmes and projects. The final level of the administration is the set of institutions that monitor or audit the work of the leadership and the implementers of the programmes and projects. The most familiar of these institutions in the African polity are the Government auditor, generally established as independent institutions of state. There are, however, many other institutions in this genre: the Parliament during question time and during inquiries; commissions or committees of inquiries; and special monitoring bodies.

As the administration is so heavily dependent on institutions, it is also important to reflect on the definition of that term. It is tempting to think of institutions as commissions, boards, committees, authorities, buildings, human beings. However, institutions are but repetitive patterns of human interaction, which condition further patterns of interaction.[45] It is, therefore, the processes and procedures and interactions of the Administration and more, that produce the patterns of human behaviour which, when repetitive, constitute institutions. Thus, we can have institutions at play in the absence of established Commissions and authorities. Part of the African problematique is to view institutions as Commissions and similar bodies and to keep creating more Commissions to solve governance problems. As long as the structure of a commission meant to solve a governance problem does not conduce to attacking the problematic repetitive patterns of behaviour that are sought to be changed, the effort will be for naught. Conversely, it is possible to disrupt dysfunctional repetitive patterns of human behaviour and orient those behaviours positively without establishing a commission to do so.

It will be inappropriate to omit the now global and globalised word "globalisation" from this articulation of a new African governance lexicon. The word is so beautiful, almost enticing, and is so popular that it will certainly be missed in the array of governance terminologies above. The catch about modern day beauty is that it can easily be overdone. A screaming haircut of an over zealous boy, the heavily applied make-up of a schoolgirl in her prime, are

44 Organization for Security and Co-Operation in Europe, Democratic Governance [online] Available at http://www.osce.org/odihr/demgov [Accessed 25 August 2016] see also

45 Supra note 25.

all easy to find nowadays. And so Globalisation is generally presented as a good thing, a beautiful thing. Everyone and everything is allowed to move about the globe freely, the world becomes one big happy family. It is believed that the "widespread availability of global goods, services, and ideas positively impacts the lifestyles of citizens." [46] Thus, the general stance is that the benefits of globalization outweigh any perceived disadvantages.[47] What the global definers of globalisation fail to add is that: things; goods, money, capital are free to move about any where, with the aid of "Panama Papers" arrangements.[48] They also fail to add that when "things" move around, they extract value as they move about Africa, and take the value away.[49] Yet, human beings are not free to move about that way. And Africans are not allowed to move where their value has been taken.

It is important for Africans to continue to insist that a definition of Globalisation which privileges "things" over human beings is jaundiced and un-African. Globalisation, unless it is first to underline the basic fact that human beings are more important and valuable than "things" is a great disservice to the continent and to humanity. It is only when this simple, basic, primary, elementary fact is understood and factored into the definition of Globalisation that a conversation on whether it is a good thing or a bad thing can begin.

V. CONCLUSION

Despite an increasing convergence towards governance principles, it is evident that African states have faced challenges in the implementation of these said governance principles. There are still many inconsistencies between governance concepts and implementation of good governance strategies. Africa still has to work hard to have the "state and public sector institutions working inclusively in a holistic manner with the private sector institutions, the civil society, the citizens, the funding agencies and the others development partners to address priority issues following the same guiding principles. All actors need to improve the convergence of their actions which need to complement each other and align with agreed priorities and aim at achieving development goals focused on the public interest and the common good" of all citizens.[50]

I go further by adding that for Africa to really witness the level of development that is needed to lift itself out of the tragedy that has bequeathed it: the paradox of poverty in the midst of plenty, she will need to redefine governance to suit her history, conditions, cultures and peoples. Africa has for a long time imbibed and imitated foreign concepts and practices which in the end have not met the needs and aspirations of its people.[51]

It is my firm belief that Africans have every tool at their disposal necessary to implement good governance, however, being the perceived weaker subject, Africa has often found itself at the mercy of much stronger institutions which have sought to determine Africa's terms from afar. Therefore the mission is simple: Africans will need to redefine governance terminologies as illustrated above, so they not only capture the essence in theory but also translate into practical working definitions for the purpose of effective implementation and sustainable development. If this is done, then only would Africans start benefiting from the economic, social and cultural dividends truly associated with "good governance" and that would be the beginning of a "good governance", "people-centred administration" and "sustainable development" revolution in Africa.

46. Boundless. Benefits of Globalization. (2016) Boundless Management. *Boundless*, 26 [online] Available at https://www.boundless.com/management/textbooks/boundless-management-textbook/globalization-and-business-14/globalization-101/benefits-of-globalization-470-3958/ [Accessed 25 August 2016]
47. *Ibid.*
48. Harding, L. (2016) https://www.theguardian.com/news/2016/apr/03/what-you-need-to-know-about-the-panama-papers .
49. Anderson, M. (2014) Aid to Africa: donations from west mask '$60bn looting' of continent, *The Guardian*, [online] Available at https://www.theguardian.com/global-development/2014/jul/15/aid-africa-west-looting-continent [Accessed 24 August 2016]
50. According to Mekolo, A. and Resta, V. (2005) Governance Progress in Africa: Challenges and Trends: DPADM Discussion paper *UNDESA* [online] pp. 17. Available at http://unpan1.un.org/intradoc/groups/public/documents/un/unpan021509.pdf [Accessed 24 August 2016]

Challenges Facing Legality and Functionality of Collective Bargaining Agreement (CBA) in Kenya

[1]Ibrahim Gichuru, LLB;

ABSTRACT

The main purpose of this study was to analyze challenges facing legality and functionality of collective bargaining agreement (CBA) in Kenya.The study employed a desktop descriptive survey research design thus presenting a methodological gap. The study concluded that legal framework and structures, successes and perceived weaknesses had a significant effect on collective bargaining agreement (CBA) in Kenya. The study also recommended that future studies should be carried out on trade unions role of enhancing better CBAS. Collective bargaining is very important and it brings positive agreements between employer and employees. When trade unions perform this function effectively, it normally brings positive implications to the workplace in general. It increases the bargaining capacity of employees as a group; they restrict management's freedom for arbitrary action against the employees. Moreover, unilateral actions by the employer are also discouraged as everything will be agreed collectively. Effective collective bargaining machinery strengthens the trade unions movement, workers feel motivated as they can approach the management on various matters and bargain for higher benefits. The study thus recommended that future studies should be carried out on trade unions role of enhancing better CBAS.

Keywords: Collective Bargaining Agreement, challenges, legality, functionality

[1]Advocate of the High Court, Kenya; Partner, Nyiha Mukoma Advocates

Ibra@Nyihamukoma.Com

I. INTRODUCTION

Any country's employment relations system is shaped by its history and various socio-political, economic and technological forces both inside and outside the country. It is the legislative framework in particular that helps to shape employment relations paradigms. In turn, the employment relations system helps to shape a country's history, simultaneously affecting other subsystems both inside and outside a country (Nel, 2002:55).

In an attempt to defuse the generation of conflict, most societies have developed rules, institutions and procedures for the regulation of conflict. Some rules are prescribed by the state in various labour laws, other rules have been developed through agreements between employers and unions. These institutionalize the process of collective bargaining, which is accepted by many Western countries as being the best means of resolving conflict between employers and workers (Le Grange, 1996:8)

Kenya aspires to become a globally competitive and prosperous country with high quality of life by the year 2030 (Republic of Kenya, 2007c). There is no doubt that labor and employment sector will have to play a crucial role if the country's aspiration is to be achieved. One of the labor market reforms that the Kenya government has sought to achieve over time is to remove labour market rigidities and other impediments to employment creation. Specifically, the government has been aiming to align wage determination to labour market mechanisms (Republic of Kenya, 2006; 2007c; 2008a; 2008b).

Efficiency in the determination of wages and that of the labour market in general has been a subject of policy debate in Kenya, especially among government, industrialists, investors, trade unions and development partners (Pollin et al., 2007)

In Kenya, minimum wages are statutory and serves as a base for other wage formation approaches. Wage determination under collective bargaining is, for example, modeled on the framework that it (collective bargaining) should improve on the minimum wages and other statutory terms and conditions of employment (Jaffer, 2005).

Collective bargaining in Kenya is grounded on the provisions of the ILO Convention No. 98 of 1949 on the Right to Organize and Collective Bargaining. Each country that has ratified the Convention is required to encourage and promote the full development and utilization of machinery for voluntary negotiation between employees, employers and/or their representatives in the regulation of the terms and conditions of employment for workers. Kenya ratified the Convention in 1964 and has attempted to domesticate the provisions of the Convention through Section 80 of the National Constitution and the Industrial Relations Charter 1957 (1984 revised). While Section 80 of the Constitution guarantees freedom of association, which is a critical element of collective bargaining, the Industrial Relations Charter defines the boundaries for trade union organization and recruitment, including guidelines on the categories of workers, who by nature of their work, qualify to join a trade union.

While almost all African countries have ratified ILO's Convention on the right to bargain freely, there are large differences across countries in terms of enforcement of the right to collective bargaining. In Burkina Faso, Burundi, Côte d'Ivoire, Namibia, Niger, Senegal and South Africa collective bargaining agreements are in effect in many formal major business enterprises and sectors of the civil service. In several countries there are significant differences between the public and the private sectors. For instance, in Benin, Gambia, Mauritius, Mozambique, Tanzania, Zambia and Zimbabwe, public sector workers are excluded from the right to bargain collectively. On the other hand, in Guinea- Bissau and in Rwanda the right to bargain collectively does not apply to the private sector.

The requirement for voluntary negotiations and collective bargaining are also reinforced through the Employment Act (2007), Labour Institutions Act (2007) and Labour Relations Act (2007). The Employment Act (2007) specifies the minimum terms and conditions of employment, which constitutes the benchmark for collective bargaining. The Labour Institutions Act (2007) governs establishment of staff associations, employees' associations and employers' organizations besides establishing institutions for labour administration. The Labour Relations Act (2007) establishes the general framework for interaction between an employer, employees and organized labour in terms of collective bargaining, registration and enforcement of collective agreements, and dispute resolution (Republic of Kenya, 2007b).

Kenya's industrial relations machinery provide for collective bargaining between employers and workers' representatives (trade unions). While labour unions in the country are mainly affiliated to COTU, some employers are repre-sented by FKE. The ensuing Collective Bargaining Agreements (CBAs) usually involve staggered long-term contracts, conditions of employment, fringe benefits and union membership drives

Effectiveness of collective bargaining as an approach to wage determination depends on the strength and bargaining powers of trade unions. In a 2007 study on wage determination in the civil service in Kenya, Omolo (2007) argued that trade unions had a positive but statistically insignificant influence on the civil service wages.

II. PROBLEM STATEMENT

One of the labour market reforms that the Kenya government has sought to achieve over time is to remove labour market rigidities and other impediments to employment creation. The government has, particularly since the advent of structural adjustment programs in 1980s, consistently articulated the need to align wage determination to labour market mechanisms, so as to make Kenya globally competitive (Republic of Kenya, 1989a; 1997; 2006; 2007c; 2008b). Minimum wage regulation, collective bargaining, administered and flexible approaches to wage fixing, are the wage determination methods applicable in Kenya. Minimum wage regulation has particularly continued to be used as a benchmark for wage setting in all sectors of the economy since independence.

Collective bargaining is very important and it brings positive agreements between employer and employees. When trade unions perform this function effectively, it normally brings positive implications to the workplace in general. It increases the bargaining capacity of employees as a group; they restrict management's freedom for arbitrary action against the employees. Moreover, unilateral actions by the employer are also discouraged as everything will be agreed collectively. Effective collective bargaining machinery strengthens the trade unions movement, workers feel motivated as they can approach the management on various matters and bargain for higher benefits (Shashank 2012).

Labour law in a voluntary system will provide the framework for the conduct of the collective labor relationship. Legislation will provide for freedom of association, freedom from victimization and the right to engage in industrial action. To promote labour peace, dispute settlement procedures may also be provided. Furthermore, it may happen that each party is protected from unfair practices by the other and that collective bargaining is promoted by the body of labour legislation (Bendix, 2001:89).

Collective bargaining has traditionally been concerned with wage/salary determination; its scope has widened considerably over the years and today encompasses working hours, holiday's entitlement, sick pay, promotion policies and pensions. All these expectations should be met by the employer and it is the duty of union leaders to ensure that they are met. Union leaders need a reasonable membership to have their needs addressed by the employer. Membership of KNUT in the early days was mandatory for the newly employed teachers in Kenya; this enabled the union to have the numbers required by TSC to enable collective bargaining. However, despite the several CBAS signed by the government and trade unions a lot needs to be done to stem down the ever increasing scenarios of sit-ins, strikes, fidgeting in both the private and the public sector. Thus this study seeks to contexualise this by to analyzing challenges facing legality and functionality of collective bargaining agreement (CBA) in Kenya

Research Objectives

1. To determine the legal framework and structures of collective bargaining agreement (CBA) in Kenya
2. To determine successes of collective bargaining agreement (CBA) in Kenya
3. To determine weaknesses facing legality and functionality of collective bargaining agreement (CBA) in Kenya

Research Questions

1. What are the legal framework and structures of collective bargaining agreement (CBA) in Kenya?
2. Which successes can be pegged on the collective bargaining agreement (CBA) in Kenya?
3. What are the perceived weaknesses facing legality and functionality of collective bargaining agreement (CBA) in Kenya?

III. LITERATURE REVIEW

Theoretical review

A theory is a set of interrelated concepts, definitions, and propositions that present a systematic view of events or situations by specifying relations among variables, in order to explain and predict the events or situations (Van Ryn & Heaney, 1992). Theories are formulated to explain, predict, and understand phenomena and, in many cases, to challenge and extend existing knowledge, within the limits of the critical bounding assumptions.

Monopoly Union Model

There are three main theories that attempt to explain the determination of wages under the collective bargaining approach. The first is the Monopoly Union Model, which was advanced by Dunlop in 1944 (Smith, 1994; Lundborg, 2005). According to this theory, the monopoly union has power to unilaterally maximize the wage rate while the firm chooses the level of employment also on a unilateral basis. This arrangement signals the absence of joint negotiations or bargaining between the union and the firm. Vogel (2007) argues that the Monopoly Union Model is a special case of the Right-to-Manage Model.

Right-to-Manage Model

The second model is the Right-to-Manage Model, which was developed by Leontieff in 1946 (Heijdra, 2007). In this model, the labour union and the firm are assumed to bargain over the wage rate according to a typical Nash Equilibrium Maximin(Vogel, 2007). The fundamental proposition of this model to trade union behaviour is that while the union has an influence on the wage rate through collective bargaining negotiations, the firm is free to set the level of employment, which will maximize profits at any level of the wage rate.

Efficient Bargain Model

The third model is the Efficient Bargain Model. This model of collective bargaining was advanced by McDonald and Solow in 1981 (Smith, 1994). In this case, the union and the firm bargains over both the wages and the level of employment. The assumption here is that the level of wages and employment that maximizes the objective function of the union is in conformity with the level of wages and employment that is required to facilitate the firm to maximize its objective function. It is noted, however, that in most cases, the objective of the union is in conflict with the objective of the firm. This may lead to an inefficient outcome. The model is thus rarely used in the contemporary world.

IV. CONCEPTUAL FRAMEWORK

According to Bogdan and Biklen (2003) a conceptual Framework is a basic structure that consists of certain abstract blocks which represent the observational, the experiential and the analytical/synthetically aspects of a process or system being conceived. It is a concise description of the phenomenon under study accompanied by a graphical or visual depiction of the major variables of the study (Mugenda, 2008). According to Young (2009), conceptual framework is a diagrammatical representation that shows the relationship between the dependent variable and independent variables. The purpose of a conceptual framework is to assist the reader to quickly see the proposed relationship and hence its use in this study.

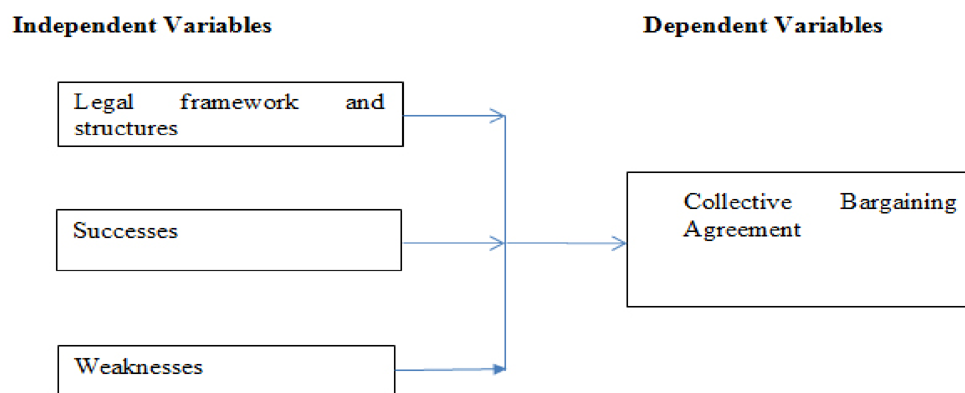


Figure 1: Conceptual Framework

V. EMPIRICAL LITERATURE

Manda et al. (2001) concluded that trade unions in Kenya do help formal sector workers to obtain a wage premium in addition to getting protection from excessively long hours of work and from arbitrary job loss. This means that collective bargaining improves on the statutory minimum terms and conditions of employment

Owoye (1994) used a bargaining model to analyse wage determination in Nigeria's civil service where bi-partite collective bargaining co-exists with government appointed wage commissions. Owoye (1994) expressed the wage level as a function of one year lagged wage rate, consumer price index, unemployment rate, strike frequency, union density and a dummy variable representing the presence or absence of the government's wage commissions. The study established that the parameter estimates of the lagged wage, consumer price index, union density and the wage commissions were positive and statistically significant. The study by Owoye (1994), inclusive of the variables considered and the findings are relevant to the Kenyan situation where wage formation through collective bargaining co-exists with administered approach of wage setting within the civil service and the larger public service.

Omolo(2007) estimated a double log wage model to establish the determinants of civil service wages in Kenya using time-series data for the period 1970to 2005. The main variables specified in the wage equation included employment, productivity, changes in the consumer price indices, minimum wages, one year lagged wage rate, and dummy variables to capture the influence of trade unions and politics in the determination of civil service wages. The study established that employment, productivity, changes in the consumer price indices and politics were the key civil service wage determinants in Kenya.

Trade unions seems to have remained weak in their major objectives; wages,salaries and working conditions have not been improved by the employers, job security and social policies are not fair to the employees, retired employees get very little retirement benefits from the social security funds and this has led to poor living standards by many retired employees. (Gundula, 2011). The collective bargaining is not fair, the employers have been more powerful in negations and sometimes, coercion is used to threaten the trade unions from demanding better pays and working conditions.

Another barrier to the growth of trade unions is the lack of strong leaders. Ibreck, (2009) emphasized that it is the role a leader to show the organizational mission. Whether or not; trade unions are effectively influencing the positive response of the employers, depending on the smartness of these leaders. However as Babeiya, 2011 commented, the experience in Tanzania shows that trade unions have had weak leadership. It is only two unions; Tanzania Railway Workers Union (TRAWU) and Teachers trade union (CWT) leaders who seem to be at least active in challenging government decisions and actions. The leaders of the two unions have used various means to influence the government; they use boycott, strikes and sometimes media to enable their voice to be heard.

According to Nkomo & Cox (1996) the presence of labour union in an organization results in less management autonomy and flexibility in design and implementation of human resource management policies. Trade unions have been used to settle disputes between members and management, the implementation of changes and securing adequate representation of members in government, public and private sector. Legal assistance to members has been part and parcel of their duty. Mathis & Jackson (2008) assert that the primary determinant of whether employees unionize is management. If management offers competitive compensation, good working environment, effective management and supervision, fair and responsible treatment of workers, they can act as antidote to unionization efforts.

McKenna & Beech (2002) state that the tradition of employee representation through trade unions and collective bargaining as the focus of engagement between the management and unions is being replaced by new relationships in the workplace, but the replacement is not a single type. It is made up of a number of different trends. In some cases the traditional model is retained, in others increased individualism, and yet in other cases a partnership approach is adopted in which unions take some of the concerns of the organisation and work with management in order to maintain the profitability and longevity of the firm.

The view of collective bargaining as a conflict-control mechanism is probably the most dynamic (Finnemore & Van der Merwe, 1994). It is based on the principle of participation and the pro- active regulation of the workplace relationship. Collective bargaining alleviates tension by making employers and employees participate with one another. Collective bargaining, therefore, regulates the relationships at the workplace.

VI. SUMMARY OF RESEARCH GAPS

Manda et al. (2001) concluded that trade unions in Kenya do help formal sector workers to obtain a wage premium in addition to getting protection from excessively long hours of work and from arbitrary job loss. This means that collective bargaining improves on the statutory minimum terms and conditions of employment

Trade unions seems to have remained weak in their major objectives; wages, salaries and working conditions have not been improved by the employers, job security and social policies are not fair to the employees, retired employees get very little retirement benefits from the social security funds and this has led to poor living standards by many retired employees. (Gundula, 2011). The collective bargaining is not fair, the employers have been more powerful in negations and sometimes, coercion is used to threaten the trade unions from demanding better pays and working conditions. Our study however will delve in analyze challenges facing legality and functionality of collective bargaining agreement (CBA) in Kenya.

Methodological Gap

Conceptual Gap.

Omolo (2007) estimated a double log wage model to establish the determinants of civil service wages in Kenya using time-series data for the period 1970to 2005. The main variables specified in the wage equation included employment, productivity, changes in the consumer price indices, minimum wages, one year lagged wage rate, and dummy variables to capture the influence of trade unions and politics in the determination of civil service wages. The study established that employment, productivity, changes in the consumer price indices and politics were the key civil service wage determinants in Kenya. The current study used desktop study research design. Kenya. The study employed a desktop descriptive survey research design thus presenting a methodological gap.

Scope Gap

Owoye (1994) used a bargaining model to analyse wage determination in Nigeria's civil service where bi-partite collective bargaining co-exists with government appointed wage commissions. Owoye (1994) expressed the wage level as a function of one year lagged wage rate, consumer price index, unemployment rate, strike frequency, union density and a dummy variable representing the presence or absence of the government's wage commissions. The study established that the parameter estimates of the lagged wage, consumer price index, union density and the wage commissions were positive and statistically significant. The study by Owoye (1994), inclusive of the variables considered and the findings are relevant to the Kenyan situation where wage formation through collective bargaining co-exists with administered approach of wage setting within the civil service and the larger public service. However, our study will encompass all the CBAS signed by the Jubilee government.

VII. METHODOLOGY

The study adopted a desktop descriptive research design.

VIII. CONCLUSION AND POLICY IMPLICATION FOR FURTHER STUDY

Conclusions

The study concluded that legal framework and structures, successes and perceived weaknesses had a significant effect on collective bargaining agreement (CBA) in Kenya. The study also recommended that future studies should be carried out on trade unions role of enhancing better CBAs.

Any country's employment relations system is shaped by its history and various socio-political, economic and technological forces both inside and outside the country. It is the legislative framework in particular that helps to shape employment relations paradigms. Effectiveness of collective bargaining as an approach to wage determination depends on the strength and bargaining powers of trade unions.

Recommendations

This study provides implications for both policy and practice. Collective bargaining is very important and it brings positive agreements between employer and employees. When trade unions perform this function effectively, it normally brings positive implications to the workplace in general. It increases the bargaining capacity of employees as a group; they restrict management's freedom for arbitrary action against the employees. Moreover, unilateral actions by the employer are also discouraged as everything will be agreed collectively. Effective collective bargaining machinery strengthens the trade unions movement, workers feel motivated as they can approach the management on various matters and bargain for higher benefits

Area for Future Studies

The general objective of the study was to analyze challenges facing legality and functionality of collective bargaining agreement (CBA) in Kenya. The specific objectives were to analyse legal framework and structures of collective bargaining agreement (CBA), successes that could be pegged on the collective bargaining agreement (CBA) and perceived weaknesses facing legality and functionality of collective bargaining agreement (CBA) in Kenya. The study also recommended that future studies should be carried out on trade unions role of enhancing better CBAS.

REFERENCES

BENDIX, S. (2001). Industrial relations in South Africa. 4" ed. Lansdowne : *Juta Developments, Committee on Employment and Social Policy,GB.304/ ESP/3 304thSession*, Geneva.DP 2007-009, SFP 649, Humboldt-Universitat zu Berlin, http://sfb649.wiwi.hu-berlin.de Economies, Vol.3 No.3, pp.447-480

Finnemore, M., Van Der Merwe, R. (1994). Introduction to industrial relations in South Africa. 3d ed. Natal: Lexicon Publishers

Heijdra, B.J (2007). "Trade Unions and the Labour Market"in Foundations of Modern Macroeconomics, Department of Economics, University of Groningen

International Labour Organization (2009a). Key Indicators of the Labour Market, KILM 2009 ISSN 1860-5664, 9/11/2009

Manda, D.K, Bigsten, A and Mwabu, G (2001)."Trade Union Membership and Earnings in Kenya Manufacturing Firms", Working Papers in Economics, No. 50, Department of Economics, Goteborg University.

Mathis, R. L. & Jackson, J. (2008).*Human resource management*, 12th Edition Thomson South Western

McKenna, E. and Beech, N. (2002). *Human resource management,* Prentice Hall

NEL, P.S. 2002. South African Employment Relations. 4" ed. Pretoria : Van Schaik

Nkomo, S. & Cox, T. (1996). *Diverse identities in organizations* In Clegg, S.R., Hardy, C. and Nord, W.R. (eds) Handbook of Organization Studies, pp. 338–56. London: Sage.

Omolo, O.J (2001). "Wage Determination in the Unionized Private Sector in Kenya, 1980-97" Maseno University. *Journal of Education, Arts and Sciences*, Vol. 4.No.1, pp 74-85.

Omolo, O.J (2002).An Overview of Incomes and Wage Policy in Kenya: Effectiveness and Constraints to Productivity Enhancement, A paper presented during a Productivity Policy and Legal Framework Workshop, Kenya: Mombasa

Owoye, O (1994). "Wage Determination and Strike Activity in Nigeria", Journal of African

Republic of Kenya (2007a). The Labour Institutions Act (2007), Kenya Gazette Supplement No. 108 (Act No. 12).Nairobi: Government Printer.

Smith, S. W(1994). Labour Economics. Routledge: London.

Vogel, T (2007). "Union Wage Compression in a Right-to-Manage Model", SFB 649

Legal Gaps Facing Implementation of Eacc Mandate on Weeding out Corruption Cases

[1]Joachim Njagi (LLB)

ABSTRACT

The main purpose of this study was to determine the Legal Gaps Facing Implementation of EACC Mandate on Weeding out Corruption Cases. The study employed a desktop descriptive survey research design thus presenting a methodological gap. The results conclude that lack of EACC based courts, lack of prosecutorial powers, lack of general good will, bureaucracy had a significant effect on EACC mandate on weeding out corruption cases. The study thus recommends for more rigorous revaluation for its mandate. Thus further studies should be based on the role of parliament in strengthening EACC Mandate on Weeding out Corruption Cases. The study thus recommends for more rigorous revaluation for its mandate. Thus further studies should be based on the role of parliament in strengthening EACC Mandate on Weeding out Corruption Cases.

Keywords: *EACC*, Legal Gaps, implementation, corruption

[1]Advocate of the High Court, Kenya

joachim.njagi@gmail.com

I. INTRODUCTION

Corruption remains a major problem affecting the political, social and economic development in Kenya. It is identified under Vision 2030 and Medium Term Plan (2008-2012) together with governance as one of the challenges besetting socio-economic transformation. Corruption stifles growth and investment and has disproportionate distortionary effects on all productive and service sectors of the economy. It distorts public sector choices and decision making with undesirable consequences such as poor service delivery. By its very nature, corruption is hidden and entails deception and unethical conduct. Furthermore, uncertainty associated with economic transition, unstable social safety nets, and widespread state capture by various interest groups, has created an open environment for corrupt practices (Kenya Anti-Corruption Commission Strategic Plan 2009-2013).

While corruption was once a taboo subject, in the last decade fighting corruption has emerged as a worldwide movement encompassing a range of organizations and tools. NGOs such as Transparency International (TI) and Global Witness exert influence through advocacy efforts, corruption indices, and broad awareness building, while bilateral and multilateral efforts like the U.N. Convention against Corruption, the Organization for Economic Cooperation and Development (OECD), and the World Bank Institute (WBI) have heightened global commitment to anti-corruption work. Existing resources that influence corporate work against corruption include TI's National Integrity System framework, WBI's Business Fighting Corruption portal, and the joint publication-Business against Corruption: A Framework for Action. Further, collective action efforts, such as the United Nations Global Compact (UNGC), the World Economic Forum's Partnering Against Corruption Initiative (PACI), and the Extractive Industries Transparency Initiative (EITI) have emerged within the last 10 years and succeeded in getting countries and corporations to sign on to efforts for reform and collaboration (Hills, Fiske & Mahmud, 2009).

Since Kenya gained independence from Britain in 1963 and until the political violence that followed the disputed2007 elections exposed the fragility of the state, the country was considered one of the most stable in Africa (IDASA country profile). After independence, founding President Jomo Kenyatta (1963/1978) and his successor Daniel Arap Moi (1978/2002) established and sustained an increasingly corrupt one-party authoritarian rule under the Kenya African National Union (KANU (Lansner, 2012).

The commitment to fight corruption was strongly articulated by the National Rainbow Coalition (NARC) during the electoral campaign that brought it to power in December 2002, and featured prominently immediately after the elections. In May 2003, the Parliament passed Kenya's main anti-corruption legislation, that is, Anti-Corruption and Economic Crimes Act (ACECA) establishing the defunct Kenya Anti-Corruption Commission (KACC). The speedy enactment of the legislation, the establishment of an anti-corruption department within the government (under the Permanent Secretary/Presidential Advisor, Ethics and Governance) and Kenya being the first country to sign and ratify the UNCAC in December 2003, were all cited as evidence of renewed commitment to the fight against corruption

Since independence, the regime has been largely characterized by a centralized state with a dominant executive presiding over a patronage network that benefits mostly ethnically defined elites (IDASA country profile). The regime was further characterized by, systematic looting of state's assets, economic mismanagement and authoritarian rule, respecting few civil liberties and civil rights and occasionally violently suppressing opposition (Lansner, 2012). A report by international risk consultants Kroll commissioned by the government to investigate claims of corruption carried out by Mr Moi's regime and delivered in April 2004 alleges that more than £1 billion of government money was stolen during his 24-year rule and details assets still allegedly owned by the Moi family in 28 countries1 (The Independent, 2007).

In the 1990s, Kenya transitioned towards a functional but weak multi-party democracy, but it was not until2002 that the opposition party, the National Rainbow Coalition (NARC) managed to win the elections against Moi and nominated Mwai Kibaki, a former top KANU leader as President. Mwai Kibaki was elected on an anti-corruption platform and the regime change raised tremendous hope in the country for ending corruption and impunity in Kenya. In January 2003 Kibaki appointed John Githongo, formerly of Transparency International, as his personal advisor on Anti-Corruption and Good Governance.

In 2010, a constitutional referendum overwhelmingly approved the radical revision of the Constitution, strengthening systems of checks and balances, significantly constraining executive powers and enhancing the protection of basic rights. The new constitution promotes principles of transparency, integrity and accountability and has raised hopes for inaugurating a new era of democratic rule in the country. However, implementation has been slow, uneven and incomplete, including with regards to anticorruption efforts that still meet elite resistance (Lansner, 2012).

Kenya Ethics and Anticorruption Commission

The Ethics and Anti-Corruption Commission (EACC) is a statutory body established under the Ethics and Anti-Corruption Act, No. 22 of 2011(hereinafter referred to as ―the EACC Act‖). It replaced the Kenya Anti-Corruption Commission (KACC) after the Constitution of Kenya, 2010 provided for the establishment of an independent Ethics and Anti-Corruption Commission (Matemu, 2012-2013). Parliament enacted the Ethics and Anti-Corruption Commission Act 2011 and Leadership and Integrity Act, 2012. These Acts provide for the functions and powers of the Ethics and Anti-Corruption Commission (EACC) inter alia implementation of Chapter Six of the

Constitution. The Acts are being implemented alongside the Anti-Corruption and Economics Crimes Act (ACECA) of 2003. The mandate of the EACC is to combat corruption and economic crime in Kenya through law enforcement, prevention, public education and promotion of sound ethical standards and practices (Matemu, 2012-2013)

According to the Kenya Anti-Corruption and Economic Crimes Act 2003, corruption means an offence that involves bribery, fraud, embezzlement or misappropriation of public funds, abuse of office, breach of trust; or an offence involving dishonesty- in connection with any tax, rate or import levied under any Act; or under any written law relating to the elections of persons to public office; (The Anti-Corruption and Economic Crimes Act, 2003:4f).

II. PROBLEM STATEMENT

As noted in the background to this study, continued cases of corruption in Kenya are causing great concern. Despite the numerous anti-corruption initiatives, cases of corruption continue to abound. According to Njoroge (1988), nations have been observed to falter in their development, not because of lack of knowledge and technology, but due to defects in human character.

According to Transparency International's Global Corruption Report 2009, the cost of corruption is a serious deterrent to potential investors and a major impediment for existing and new businesses (Global Corruption Report, 2009). Accordingly, business executives continue to perceive corruption as a major obstacle for business operations, with 21% of the companies interviewed within the framework of the World Economic Forum's Global Competitiveness report 2011-2012 naming corruption at the top of the list of obstacles for doing business in the country. This is consistent with findings from the World Bank and IFCE enterprise survey 2007, in which 38% of the companies surveyed reported corruption to be a major constraint to their operations

Kumba (2013) assessed the challenges of curbing corruption in Kenya especially over the period from 2008 to 2012 with a focus on how the Ethics and Anti-Corruption Commission has positioned itself to overcome those challenges. Results revealed that EACC faces a number of challenges ranging from lack of political will and government commitment to lack of prosecutorial powers to manage any given case from beginning to its logical conclusion.

According to the United Nations (2001), corruption can be found in all walks of life. It hinders economic development, diverts investments in infrastructure, institutions and social services and also undermines efforts to achieve other country specific targets. As a result, the UN notes that the international community has become increasingly concerned with the problem of corruption and its negative impact on economic growth and poverty alleviation (UN, 2001:112).

As observed by Heidenheimer and Michael (2002), there is now increasing recognition throughout the public and private sector that corruption is a serious obstacle to effective government, economic growth and stability. Consequently, effective anti-corruption policies and legislations are urgently required at the national and international level.

In spite of the anti-corruption body taking many forms and names subject to enhance its core mandates the commission has only netted the so called small fish, on top of that the public confidence is low. Thus the study wants to address this shortcomings by determining the Legal Gaps Facing Implementation of EACC Mandate on Weeding out Corruption Cases.

III. Research Objectives

The general objective of the study was to determine the Legal Gaps Facing Implementation EACC of Mandate on Weeding out Corruption Cases.

Specific Objective

The specific objective of the study was to:

i. To determine the effect of lack of EACC based courts system on the Implementation of EACC Mandate on Weeding out Corruption Cases.

ii. To determine the effect of lack of prosecutorial powers by the chief commissioner on the Implementation of EACC Mandate on Weeding out Corruption Cases.

iii. To determine the lack of general good will by the judiciary on the Implementation of EACC Mandate on Weeding out Corruption Cases.

iv. To determine the effect of bureaucracy in the judiciary on the Implementation of EACC Mandate on Weeding out Corruption Cases.

IV. LITERATURE REVIEW

Theoretical review

A theory is a set of interrelated concepts, definitions, and propositions that present a systematic view of events or situations by specifying relations among variables, in order to explain and predict the events or situations (Van Ryn & Heaney, 1992). Theories are formulated to explain, predict, and understand phenomena and, in many cases, to challenge and extend existing knowledge, within the limits of the critical bounding assumptions.

Principal-Agent Model

The predominant theory of corruption within both political science and economics today is the *Principal-agent model*, popularized especially by the work of Susan Rose-Ackerman (1978) and Robert Klitgaard (1988). The principal-agent theory situates the analysis of corruption in the interaction and interrelations that exist within and without public bodies and is based on two key assumptions: 1) that a goal conflict exists between so-called *principals* (who are typically assumed to embody the public interest) and *agents* (who are assumed to have a preference in favor of corrupt transactions insofar the benefits of such transactions outweigh the costs), and; 2) that agents have more information than the principals, which results in an *information asymmetry* between the two groups of actors (Klitgaard 1988; Williams 1999). More specifically, according to this view, a collective body of actors is assumed to be the principal who delegate the performance of some government task to another collective body of actors; the agents. As in any situation where authority is being delegated, the problem from the perspective of the principal is that the agents may acquire specific information about the task at hand that they are not willing to disclose to the principal, or that they have private motivations other than the goal of performing the delegated task. Thus, in short, from the perspective of the principal-agent framework, corruption occurs when an agent betrays the principal's interest in the pursuit of his or her own self-interest. This betrayal is in turn made possible by the information asymmetry between the two groups of actors.

Depending on perspective, who is the agent and who is the principal in the principal-agent model may differ. In the classical treatment – which refers to situations of bureaucratic corruption – rulers are the principal and the bureaucracy the agent (Becker & Stigler 1974; Van Rijckeghem and Weder 2001). The problem here arises when the ruler cannot perfectly observe which lawenforcers behave honestly since they do not possess all the relevant information that the agents have. For example, tax collectors are often better informed about the revenue potential of a particular tax base than is the top management of the Treasury. This, in turn, opens up for the opportunity for bribery. In line with the less classical perspective, on the other hand, it is not primarily the bureaucrats who need to be controlled, but the ruling elite.

In this model – which mainly refers to situations of political corruption – rulers are hence modelled as agents and citizens as principals (Persson & Tabellini 2000; Adserà *et al.* 2003; Besley 2006).

Institutional Theory

Institutional theory attends to the deeper and more resilient aspects of social structure. It considers the processes by which structures, including schemas, rules, norms, and routines, become established as authoritative guidelines for social behavior. It inquiries into how these elements are created, diffused, adopted, and adapted over space and time; and how they fall into decline and disuse. Although the ostensible subject is stability and order in social life, students of institutions must perforce attend not just to consensus and conformity but to conflict and change in social structures. The basic concepts and premises of the institutional theory approach provide useful guidelines for analyzing organization-environment relationships with an emphasis on the social rules, expectations, norms, and values as the sources of pressure on organizations. This theory is built on the concept of legitimacy rather than efficiency or effectiveness as the primary organizational goal. McAdam and Scott, 2004). The environment is conceptualized as the organizational field, represented by institutions that may include regulatory structures, governmental agencies, courts, professionals, professional norms, interest groups, public opinion, laws, rules, and social values. Institutional theory assumes that an organization conforms toits environment. There are, however, some fundamental aspects of organizational environments and activities not fully addressed by institutional theory that make the approach problematic for fully understanding NGOs and their environment: the organization being dependent on external resources and the organization s ability to adapt to or even change its environment (McAdam and Scott, 2004).Researcher such as Meyer and Rowan (1991), DiMaggio and Powell (1983) are some of the institutional theorists who assert that the institutional environment can strongly influence the development of formal structures in an organization, often more profoundly than market pressures. Innovative structures that improve technical efficiency in early-adopting organizations are legitimized in the environment. Ultimately these innovations reach a level of legitimization where failure to adopt them is seen as "irrational and negligent" (or they become legal mandates). At this point new and existing organizations will adopt the structural form even if the form doesn't improve efficiency.

V. Conceptual Framework

According to Bogdan and Biklen (2003) a conceptual Framework is a basic structure that consists of certain abstract blocks which represent the observational, the experiential and the analytical/synthetically aspects of a process or system being conceived. It is a concise description of the phenomenon under study accompanied by a graphical or visual depiction of the major variables of the study (Mugenda, 2008). According to Young (2009), conceptual framework is a diagrammatical representation that shows the relationship between the dependent variable and independent variables. The purpose of a conceptual framework is to assist the reader to quickly see the proposed relationship and hence its use in this study.

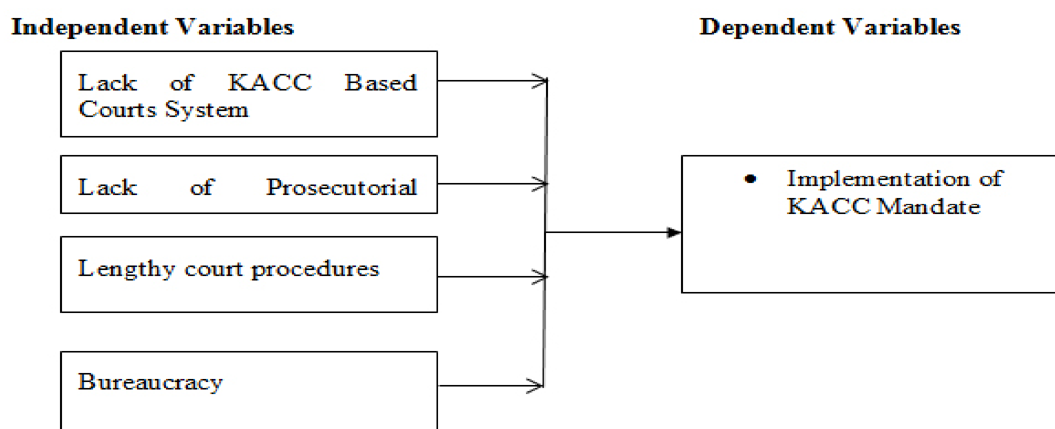


Figure 1: Conceptual Framework

VI. EMPIRICAL LITERATURE

The EACC may also continue face similar impediments encountered by the KACC during its existence, especially, in the areas of systemic and self-inflicted bottlenecks encountered by the KACC in its quest to fulfill its mandate. For instance, the apathy of the executive and the legislature to allow the EACC autonomy over its operations is bad signal that portends failure (Kwayera, 2012). Moreover, the manoeuvring of parliamentary bills to reduce any powers and by ensuring that the new agency does not have the powers that might make the law makers susceptible to investigations for alleged corrupt practices is an ominous sign. It has been observed that the goal is to "clip the commission's wings even before its establishment" (Kwayera, 2012). As a matter of this fact, the EACC's lack of prosecutorial power parading it as a toothless bulldog like its predecessor remains the most serious impediment to its anti-corruption strategies. Therefore, any remedial policies must firstly tackle how to overcome this snag by ensuring that the EACC is granted prosecutorial powers protected by the constitution.

KACC (2008) notes that efforts towards capacity building to combat corruption are still in their infancy stages in most countries, and reliable information about the nature and extent of domestic and transnational corruption is difficult to obtain. The problems of corruption are compounded by the very broad nature of the phenomenon and lack of consensus about legal or criminological definitions that could form the basis of international comparative research.

In spite of the various accomplishments of the KACC, there were major impediments on its way which prevented it from reaching its potentials and its bid to fully fulfill its mandate. Absence of policy and legislative framework was one of such impediments. Lack of a national anti-corruption policy to guide the fight against corruption and economic crimes cannot be overlooked. In addition, the anti-corruption legislative framework remained weak in various aspects, particularly the lack of power by the Commission to prosecute persons for crimes falling within its ambit. Many constitutional references filed by persons charged with corruption and those against whom the Commission had instituted civil suits continued to delay the finalization (Lasner 2012)

Absence of prosecutorial and enforcement preventive recommendations is also a major setback. Lack of prosecutorial powers by the defunct KACC hampered the crusade against graft. Upon identification of corruption loopholes after examining systems, the Commission ordinarily made recommendations for remedial measures to be undertaken by the concerned institutions. The lack of legal sanction and powers to ensure compliance with the recommendations thus hampered the agency's efforts in preventing corruption (KACC, 2012)

Aside the judicial challenges presented earlier relating to the recovery of assets of corruption, the judiciary presented a profound challenge in the enforcement of anti-corruption laws generally. The agency found itself on the receiving end of adverse judicial interpretations of its powers. The first assault on the agency was the Judiciary's interpretation of the effect of the repeal of the Prevention of Corruption Act (Cap 65) with respect to offences committed before the ACECA came into force varied and the courts did not interpret the law correctly on the matter. Although Section 42(k) of Limitations of Actions Act was introduced, it could not help the Commission in cases which were already before the courts before it was enacted.

Constitutional references impediments could also be viewed as an impediment to the KACC's anti-corruption strategies. KACC often cited the multiplicity of constitutional references filed by corruption suspects as a hindrance to its work. In its view, Constitutional Courts, which should be the courts of last reference, were often misused by corruption suspects to delay and ultimately subvert justice. The 2007/08 Annual Report listed over 37 such applications. In 2008/09, the Commission reported nine significant cases. Again, the poor presentation of information from year to year made it difficult to make conclusive assessments on the number and impact of these challenges.

Just like the defunct KACC, the EACC Act gives the anti-corruption body no teeth to bite and hesitates on the question of fines and penalties denying the organisation prosecutorial powers. In Section 11 of the Act, the Commission is empowered only to do such mundane things as developing and promoting standards and best practices; developing a code of ethics; receiving complaints; investigating and recommending to the Director of Public Prosecutions any acts of corruption…also advise; oversee and raise public awareness; establish strategic linkages and partnerships…Where is action here? To paraphrase Winston Churchill, the answer remains a riddle, wrapped in a mystery, inside an enigma!

Finally, the KACC's anti-corruption was criticised for being a 'grafting' approach, referring to the weak institutional and legislative ties between the anti-corruption efforts and other parts of the public system. The numerous shifting of anti-corruption agencies during the last decade points to a symptom of this absence of lack of institutional anchorage. Contending agency mandates also led to antagonistic relationships between KACC and other quasi anti-corruption bodies that desperately required the opposite if they were to be result oriented. What is to be added here is that the EACC needs to go all out to ensure that the spillover effects of the identified impediments that have frustrated the KACC operations do not affect its anti-corruption strategies. This can be done by addressing all the contending issues raised that are begging for attention.

VII. SUMMARY OF RESEARCH GAPS

Conceptual Gap

As observed by Heidenheimer and Michael (2002), there is now increasing recognition throughout the public and private sector that corruption is a serious obstacle to effective government, economic growth and stability. Consequently, effective anti-corruption policies and legislations are urgently required at the national and international level.

Methodological Gap

Kumba (2013) assessed the challenges of curbing corruption in Kenya especially over the period from 2008 to 2012 with a focus on how the Ethics and Anti-Corruption Commission has positioned itself to overcome those challenges. Results revealed that EACC faces a number of challenges ranging from lack of political will and government commitment to lack of prosecutorial powers to manage any given case from beginning to its logical conclusion. The study used secondary data. The current study used desktop study research design.

Scope Gap

The general objective of the study was to determine the Legal Gaps Facing Implementation of EACC Mandate on Weeding out Corruption Cases. This study primarily looked at EACC. However there are other oversight authorities in Kenya.

VIII. RESEARCH METHODOLOGY

The study employed a desktop descriptive survey research design thus presenting a methodological gap.

IX. CONCLUSION AND POLICY IMPLICATION FOR FURTHER STUDY

Conclusions

Based on the study it was concluded that of lack of EACC based courts system hampered the Implementation of EACC Mandate on Weeding out Corruption Cases.) Moreover, the manoeuvring of parliamentary bills to reduce any powers and by ensuring that the new agency does not have the powers that might make the law makers susceptible to investigations for alleged corrupt practices is an ominous sign. It has been observed that the goal is to "clip the commission's wings even before its establishment

Based on the study it was concluded that lack of prosecutorial powers by the chief commissioner hampered the Implementation of EACC Mandate on Weeding out Corruption Cases. In addition, the anti-corruption legislative framework remained weak in various aspects, particularly the lack of power by the Commission to prosecute persons for crimes falling within its ambit. Many constitutional references filed by persons charged with corruption and those against whom the Commission had instituted civil suits continued to delay the finalization

Based on the study it was concluded that the lack of general good will by the judiciary on the Implementation of EACC Mandate hampered Weeding out Corruption Cases. The agency found itself on the receiving end of adverse judicial interpretations of its powers. The first assault on the agency was the Judiciary's interpretation of the effect of the repeal of the Prevention of Corruption Act (Cap 65*)* with respect to offences committed before the ACECA came into force varied and the courts did not interpret the law correctly on the matter. Although Section 42(k) of Limitations of Actions Act was introduced, it could not help the Commission in cases which were already before the courts before it was enacted.

Finally the study concluded that the effect of bureaucracy in the judiciary on the Implementation of EACC Mandate affected Weeding out Corruption Cases. The numerous shifting of anti-corruption agencies during the last decade points to a symptom of this absence of lack of institutional anchorage. Contending agency mandates also led to antagonistic relationships between KACC and other quasi anti-corruption bodies that desperately required the opposite if they were to be result oriented.

Recommendations

This study provides implications for both policy and practice. What is to be added here is that the EACC needs to go all out to ensure that the spillover effects of the identified impediments that have frustrated the KACC operations do not affect its anti-corruption strategies. This can be done by addressing all the contending issues raised that are begging for attention.

Area for Future Studies

The general objective of the study was to determine the Legal Gaps Facing Implementation of EACC Mandate on Weeding out Corruption Cases. The specific objective of the study was to: determine the effect of lack of EACC based courts system on the Implementation of EACC Mandate on Weeding out Corruption Cases, to determine the effect of lack of prosecutorial powers by the chief commissioner on the Implementation of EACC Mandate on Weeding out Corruption Cases, to determine the lack of general good will by the judiciary on the Implementation of EACC Mandate on Weeding out Corruption Cases and finally to determine the effect of bureaucracy in the judiciary on the Implementation of EACC Mandate on Weeding out Corruption Cases. In addition, the study examined only four government incentives affecting performance of SMEs. Further studies should expand the scope and consider the effect of other government incentives affecting performance of SMEs. Thus further studies should be based on the role of parliament in strengthening EACC Mandate on Weeding out Corruption Cases.

REFERENCES

Adserà,K., Alícia,C., Carles Boix,. & Mark Payne (2003). Are You Being Served? Political Accountability and Quality of Government. The Journal of Law, Economics, & Organization 19 (2): 445-490.And Anti-corruption Commission. Unpublished MBA Project. University of Nairobi.

Becker, Gary S., and George J. Stigler. (1974). Law Enforcement, Malfeasance, and Compensation of Enforcers. *Journal of Legal Studies 3* (1): 1-18. February, New York.

Githongo, J., Mboya, M. Lumumba, P. (2014). An open letter on the state of the nation and corruption. Retrieved from http://www.jamiiforums.com/kenyan-politics/593826-an-open-letter-on-the-state-of-the-nation-and-corruption.htm

Hills, G., Fiske, L. & Mahmud, A. (2009). Anti-corruption as Strategic CSR: A Call to Action for Corporations.

Kenya Anti-Corruption Commission (2007). Press statement on the performance

Kenya Anti-Corruption Commission dated 18 September 2007. Retrieved from http://www.kacc.go.ke /archives/pressreleases/ performance-statement.pdf.

Kenya Anti-Corruption Corruption. 2005. Annual Report and Accounts Financial Year 2004

Klitgaard, J.,Robert C.,. (1988). Controlling Corruption. Berkeley: University of California Press.

Kumba, S. (2013). The Challenges of Curbing Corruption in Kenya: A Case of The Ethics

Lansner , T, (2012). Freedom House‘s Countries at crossroads–Kenya country profile. Retrieved from http://www.freedomhouse.org/report/countriescrossroads/countries-crossroads-2012EACC, Ethics and Anticorruption Commission, Annual Report, 2012/2013

Matemu, M. (2012-2013).Ethics and Anti-Corruption Commission: Annual Report for the 7th EACC AGM.

McAdam, D., & Scott, P. (2004). Organizations and movements: In Social Movements and Organization Theory.
Meyer, J. & Rowan, B. (1991). Institutionalized organizations: Formal structure as myth and ceremony. *American Journal of Sociology*,83, 340-363.

Meyer, J. & Rowan, B. (1991). Institutionalized organizations: Formal structure as myth and ceremony. *American Journal of Sociology*,83, 340-363. Organization Theory,Cambridge University Press.

Factors Influencing Performance Of The Judicial System In Kenya, The Case Of Delayed Court Rulings

[1]Grace Wangui (LLB)

ABSTRACT

The purpose of the study was to establish factors influencing performance of the judicial system in Kenya, the case of delayed court rulings. The paper adopted a desk top research design. The design involves a review of existing studies relating to the research topic. In this case, the researcher collected information relating to the topic of the study. Based on existing literature the study concluded that information technology, court rules and procedures, and collaboration between government agencies have significant impact on performance of the judicial system. Based on the study findings the study recommends that there is need to initiate full IT integration in the entire court system. The judicial Service Commission should put in place rules or formulate rules and procedures limiting the number of mentions and adjournments in cases and further cause amendment of Civil Procedure Rules and Criminal Procedure Code by introducing a provision specifying how long certain matters should take between filing and determination to ensure management of case backlog, as has been done in election petitions which have a limited period of hearing and determination of six months from the date of filing by Election Courts. Further, there is need to build stronger relationship and cooperation between the judiciary and other government agencies.

Keywords: performance, the judicial system, delayed court rulings

[1]Advocate of the High Court, Kenya; Partner, Nyiha Mukoma Advocates
wangui@nyihamukoma.com

1. INTRODUCTION

Background of the Study

According to International Commission for Justice Kenya report (ICJ 2005), the existence of independent judiciary is at the heart of judicial system that guarantees human life in full conformity with international standards. The ICJ report on strengthening judicial reforms in Kenya further states that it is the obligation of every state to ensure that the judiciary is indeed an independent arm of the government. It continues to state that while a claim can therefore be made that the primary task of the justice sector is to deliver the rule of law, it should immediately be appreciated that various factors affect service delivery in our judicial systems.

According to Kameri (2011), for the rule of law to be realized, there must be suitable 'application mechanisms', including an independent and professional judiciary, easy access to litigation and reliable enforcement agencies. Its realization also depends on access to power and economic resources, and this explains why the rich and the powerful tend to have better access to the rule of law (Kameri, 2011).

For effective service delivery in the judicial system, various factors need to be considered. Tudor (1992) observes that the Judiciary was such that the Office of the Chief Justice operated as a judicial monarch supported by the Registrar of the High Court. Power and authority were highly centralized. Accountability mechanisms were weak and reporting requirements absent. The Judiciary institution had: weak structures, inadequate resources, diminished confidence, deficient in integrity, weak public support and literally incapacitated to deliver justice. Most recently, the Task Force on Judicial Reforms, which was appointed pursuant to a stakeholders' meeting in May 2009 and reporting in July 2010, identified weak administrative structures, lack of operational autonomy and independence of the judiciary as factors that undermine the effective administration of courts (Mwanzia & Kanina, 2009).

Over the past few decades, judicial reform has become an integral part of the process of economic, political, and administrative development according to (Baar, 1999) In the United States and throughout the world, there is a growing recognition that economic and social progress cannot be achieved on a sustainable basis without respect for the rule of law (Dakolias, 1999). James (2000) observes that historical events create opportunities for governmental, including judicial, reform. The collapse of the Soviet Union resulted in a collection of independent states, each newly responsible for its own government. He further noted that Judges and court administrators in these socialist systems, previously unfamiliar with even the most basic concepts of the functioning o f a judiciary i n a democracy, were suddenly faced with the responsibility of creating new institutions.

The Kenyan Judiciary continues to perform below the expectation of the people and various demands have been made for comprehensive reforms and more specifically to resolve and/or deal with the ever increasing backlog of cases in the Judiciary. Case backlog in Kenya has negative effect on the Judiciary and has resulted to low public confidence leading to lack of access to and effective administration of justice especially among the poor, vulnerable and marginalized(GOK 2009). An efficient reliable and ascertainable legal system is key in ensuring thriving business enterprises and thus, a vibrant economy. Investors need to have confidence that an investment destination guarantees them the right to property, and in the event of any commercial dispute, expediency in the resolution of commercial dispute (World Economic Forum, (2011).

Problem Statement

In Kenyan Judiciary case backlog and delays in delivery of justice has been one of the main indictment against the judiciary. Cases have been piling up between the time of filing and the time of determination; as result of which billions of shillings continue to sink in case backlog and delays and as many people languish in prison as cases remain unheard in spite of having a well-established Judicial system and a democratic government that believes in the Rule of law and application of administrative justice system.

The study sought to establish why the judicial system has not been effective enough at ensuring that the public enjoys swift judgments in Kenya. In particular the delays in determination of cases have resulted in a huge case backlog thereby confirming the famous Maxim "justice delayed is justice denied."

Mutunga (2011) pointed out that in 2011 there were 2,015 pending criminal cases some of which had not been heard for as long as 20 years. Mutunga (2012) acknowledge case backlog constitute the single most important source of public frustration with the Judiciary. Koome (2011) stated the greatest challenge facing Judiciary today is case backlog. Mutunga (2014) acknowledges backlog of cases upto 2014 were more than 650,000 cases in all courts. There is therefore a problem in that case backlog in Kenya are not reducing but increasing from year to year. This paper, therefore, sought to establish factors influencing performance of the judicial system in Kenya, the case of delayed court rulings.

Research Objectives

i. The general objective of the study was to establish factors influencing performance of the judicial system in Kenya, the case of delayed court rulings.

Specific Objective

i. To determine the influence of information technology use on delivery of court rulings in Kenya

ii. To establish the influence of court rules and procedures on delivery of court rulings in Kenya

iii. To assess the influence of collaboration between government agencies and judicial officers on delivery of court rulings in Kenya

Research Questions

i. What is the influence of information technology use on delivery of court rulings in Kenya?

ii. Do court rules and procedures affect the delivery of court rulings in Kenya?

iii. How does collaboration between government agencies and judicial officers influence delivery of court rulings in Kenya?

II. LITERATURE REVIEW

Theoretical Framework

A theory is a set of interrelated concepts, definitions, and propositions that present a systematic view of events or situations by specifying relations among variables, in order to explain and predict the events or situations (Van Ryn & Heaney, 1992). Theories are formulated to explain, predict, and understand phenomena and, in many cases, to challenge and extend existing knowledge, within the limits of the critical bounding assumptions.

Theory of change

The theory of change model was developed by International Network on Strategic Philanthropy (2005). According to INSP, this tool was designed for use by organizations such as Foundations, Trustees, NGOs, and individuals such as donors, philanthropists or consultants to facilitate development. A theory of change is the articulation of the underlying beliefs and assumptions that guide a service delivery strategy and are believed to be critical for producing change and improvement. Theories of change represent beliefs about what is needed by the target population and what strategies will enable them to meet those needs. They establish a context for considering the connection between a system's mission, strategies and actual outcomes, while creating links between who is being served, the strategies or activities that are being i implemented, a and the desired outcomes."

A theory of change has two broad components. The first component of a theory of change involves conceptualizing and operationalizing the three core frames of the theory. These frames define: Populations: who you are serving, Strategies: what strategies you believe will accomplish desired outcomes, Outcomes: what you intend to accomplish. The second component of a theory of change involves building an understanding of the relationships among the three core elements and expressing those relationships clearly.

Conceptual Framework

According to Bogdan and Biklen (2003) a conceptual Framework is a basic structure that consists of certain abstract blocks which represent the observational, the experiential and the analytical/synthetically aspects of a process or system being conceived. It is a concise description of the phenomenon under study accompanied by a graphical or visual depiction of the major variables of the study (Mugenda, 2008). According to Young (2009), conceptual framework is a diagrammatical representation that shows the relationship between the dependent variable and independent variables. The purpose of a conceptual framework is to assist the reader to quickly see the proposed relationship and hence its use in this study.

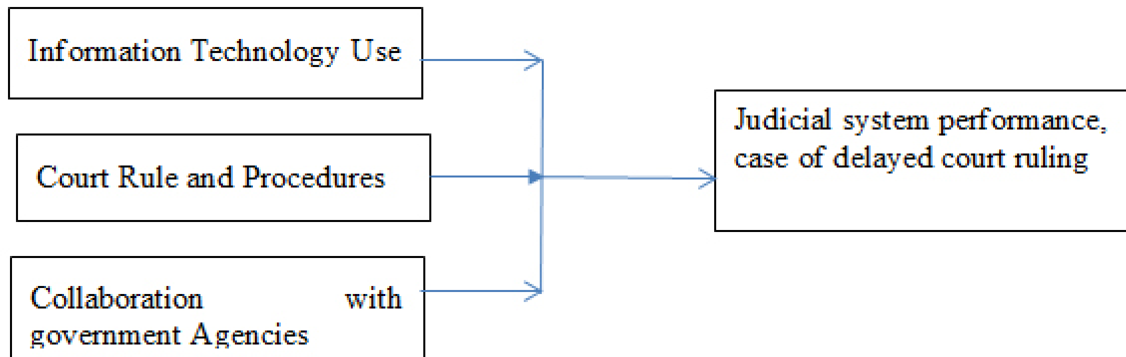


Figure 1: Conceptual Framework

Empirical Review

Makau (2014) study investigated the factors influencing management of case backlog in judiciary in Kenya: a case of courts within Meru and Tharaka Nithi Counties. The objectives of the study were to establish how availability of Judicial staff influence management of case backlog in Judiciary in Kenya, to establish how use of ICT influences management of case backlog in Judiciary in Kenya, to determine how availability of physical infrastructure influences management of case backlog in Judiciary in Kenya: to establish how judicial organizational structure influences management of case backlog in Judiciary in Kenya and to establish how court rules and procedures influences management of case backlog in Kenya. The study adopted descriptive design. The target population was all judicial officers and staff of courts within Meru and Tharaka Nithi Counties. The target population for this study was 200 respondents from seven courts within the two counties.

The findings of this study showed that the management of case backlog in the Judiciary in Kenya is affected by a number of elements varying from, availability of Judicial staff, use of ICT, availability of physical infrastructure, judicial organizational structure, court's rules and procedures and many others, including manual management of court records. The study recommended that the Judicial Service Commission needs to address the issue of shortage of Judicial Officers and other staff by ensuring adequate staff is employed in the Judiciary. The Judiciary should ensure continuous learning and training of judicial officers and other staff in the Judiciary. The Judicial Service Commission should ensure that each staff has an appointment letter specifying terms of employment.

Mutunga (2012) acknowledge case backlog constitute the single most important source of public frustration with Judiciary which opens a door for fugitives from justice to seek refuge in the courts by turning them into a playground for the rich and corrupt. This he noted was due to inefficiencies in judiciary's case management system and shortage of Judges and Magistrates. Mutunga (2011) acknowledges that it is not surprising that Judiciary would be swamped by close to one million case backlogs. The huge backlog cast doubt on the confidence and trust of the country's judicial system. Mutunga (2011) pointed out that at the High Court alone, there were 2015 pending criminal appeal cases, some of which had not been heard for as long as 20 years because the files were missing, or the records were incomplete. In his address of 31/5/2012 he stated that the backlog at Court of Appeal stood at 3800 cases with an average waiting period of 6 years.

The availability of technology is an independent variable that influences performance of the judicial system. The indicators on the availability of technology are ICT facilitates data processing, speed retrievals, archiving information, data storage, authentication and recording of proceedings (Coopers & hybrand, 2004).

Records Management involves vital records preservation which is one of the key to prompt delivery of justice. By ignoring records management policies, employees and companies can potentially end up facing criminal penalties due to inappropriate shredding of records which are supposed to be self-retained. Coopers and hybrand (2004), established that forty to sixty percent of office workers' working time is spent handling paper, which translates to 20-45 percent of an organizations labour costs and 12-15 percent of organization's expenses. The adoption of digital systems of document management reduces the operational costs substantially as compared to managing hardcopy documents.

Rules and procedures is an independent variable that influences performance of the judicial system. The indicators on rules and procedure variable are civil and criminal procedure, rules and guidelines, writing procedures, legal position, preparing records and filing records. The existence of good policies and regulatory framework is crucial for the provision of efficient legal services in the country. Set down rules and procedure in litigation gives certainty to what is expected of a litigant. Legal frameworks provide a very important foundation upon which the operations including the mandate of an organization are anchored (OECD, 2006).

The frameworks define the scope of mandate including functions, organization structure and composition among others. Legal and regulatory framework governs the relationship between parties, businesses, and organizations. It provides a general platform within which two or more parties can legally operate and transact. A rigid framework may not only constrain the operations of judiciary but can also expose them to unnecessary high levels of risks detrimental to functioning and long term service delivery. Problems facing most judiciaries in the developing countries are the lack of a well elaborate and functional regulatory framework. Legal uncertainties in the judiciary occasioned by poor legal framework are problematic for parties in developed countries as they are for the developing countries. Most of the developing countries are gradually enacting laws and judicial reforms to facilitate fast dispensation of justice however, legal impediments still remain in most countries like Kenya. Steps are being taken to remove such impediments (OECD, 2006).

III.Summary of Research Gaps

Conceptual Gap

Makau (2014) study investigated the factors influencing management of case backlog in judiciary in Kenya: a case of courts within Meru and Tharaka Nithi Counties. The objectives of the study were to establish how availability of Judicial staff influence management of case backlog in Judiciary in Kenya, to establish how use of ICT influences management of case backlog in Judiciary in Kenya, to determine how availability of physical infrastructure influences management of case backlog in Judiciary in Kenya: to establish how judicial organizational structure influences management of case backlog in Judiciary in Kenya and to establish how court rules and procedures influences management of case backlog in Kenya. The study presents a conceptual gap since it addressed different objectives from the ones being addressed in the current study.

Methodological Gap

Makau (2014) study investigated the factors influencing management of case backlog in judiciary in Kenya: a case of courts within Meru and Tharaka Nithi Counties. The study adopted descriptive design. The study presents a methodological gap since it employed a descriptive research design while the current study used desktop research design.

Scope Gap

Makau (2014) study investigated the factors influencing management of case backlog in judiciary in Kenya: a case of courts within Meru and Tharaka Nithi Counties. The study presents a scope gap since it focused on two Counties only while the current study focused on Kenya as a whole.

IV. METHODOLOGY

The paper adopted a desk top research design. The design involves a review of existing studies relating to the research topic. Desk top research is usually considered as a low cost technique compared to other research designs (Beal et al., 2012). In this case, the researcher collected information relating to the topic of the study. The purpose of the study was to establish the

factors influencing performance of the judicial system in Kenya, the case of delayed court rulings.

V. CONCLUSION AND POLICY IMPLICATION FOR FURTHER STUDY

Conclusions

Based on the findings, the study concluded that information technology has not been applied sufficiently in the administration of justice; it is underutilized thus undermining the quality, speed and efficiency of court services.

Also, the study concluded that court rules and procedures influence performance of the judicial system in Kenya. The Kenyan judicial system is marred by inappropriate court rules and procedures.

Further, the study concluded that there is poor working relationship between government agencies such as police, prison and judiciary.

Recommendations

The study recommends that there is need to initiate full IT integration in the entire court system. The new staff with expertise to facilitate comprehensive and sustainable implementation of IT infrastructure in the judiciary should be considered.

The judicial Service Commission should put in place rules or formulate rules and procedures limiting the number of mentions and adjournments in cases and further cause amendment of Civil Procedure Rules and Criminal Procedure Code by introducing a provision specifying how long certain matters should take between filing and determination to ensure management of case backlog, as has been done in election petitions which have a limited period of hearing and determination of six months from the date of filing by Election Courts.

Further, there is need to build stronger relationship and cooperation between the judiciary and other government agencies. For example, there is need to initiate joint periodic seminars and workshops by these agencies to promote and enhance genuine dialogue, understanding and discussions on ways of improving service delivery in justice sector. High premium should be placed on educational qualification and professionalism to reduce the acute shortage of well-trained and qualified professionals in the judiciary and the related agencies.

Area for Future Studies

The study focused on performance of the judicial system in Kenya only, thus other studies should focus on other countries. This would facilitate comparison between different judicial systems.

REFERENCES

Beal, C. D., Sharma, A., Gardner, T., & Chong, M. (2012). A desktop analysis of potable water savings from internally plumbed rainwater tanks in South-East Queensland, Australia. *Water resources management*, 26(6), 1577-1590.

Coopers & Lybrand (2004).*Facts regarding document handling*: *Profitability Bulletin*. Ernst & Young publishers, PC Magazine

Dakolias, M. (1999), "Court performance around the world," A comparative perspective: World Bank publication.

GoK (2009). An Assessment of the Needs of the Justice System in the Republic of Kenya. The IBA-ILAC Report, Government printers.

James D. (2000). "Comprehensive Development framework", mimeographed, World bank.

Kameri, M (2011). "Kenya Justice sector and the rule of Law", open Society Initiative f or Eastern Africa Johannesburg, South Africa.

Makau, J. A. (2014). *Factors influencing management of case backlog in judiciary in Kenya: a case of courts within Meru and Tharaka Nithi counties* (Doctoral dissertation, University of Nairobi).

Mutunga (2011). Progress reports on transformation of the Judiciary published by the National Council for Law Reporting, Kenya.

Mutunga (2012). The launch of the Judiciary Transformation Framework published by the National Council for Law Reporting, Kenya.

OECD (2006). CELE Organizing Framework on Evaluating Quality systems. Organization for Economic Co-operation and Development.

https://www.iprjb.org