

**INTEREST RATES IN KENYA: WHO HAS THE LAST SAY,
THE NATIONAL ASSEMBLY OR THE CENTRAL BANK OF KENYA?**

SUBMITTED BY: ARTHUR KAMWAMI

STUDENT NUMBER: G62/33056/2019

**A THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE
REQUIREMENTS FOR THE AWARD OF THE DEGREE OF MASTER
OF LAWS**

**SCHOOL OF LAW
UNIVERSITY OF NAIROBI**

**SUPERVISOR
DOCTOR CONSTANCE WANGECHI GIKONYO**

2021

Table of Contents

DECLARATION.....	iii
DEDICATION	iv
ACKNOWLEDGEMENT.....	v
ABSTRACT	vi
LIST OF ABBREVIATIONS	vii
LIST OF STATUTES	viii
LIST OF CASES	ix
CHAPTER ONE: ROADMAP AND SUMMARY OF THE STUDY	1
1.1 Context of the study.....	1
1.2 Statement of Problem	4
1.2.1 Key terms and definitions in the Statement of Problem	4
1.3 Research questions	4
1.4 Statement of Aims	4
1.7 Theoretical Framework	6
1.7.1 Agency Theory	6
1.7.2 Public Choice Theory	7
1.7.3 Public Interest Theory of Regulation.....	8
1.7.4 Capture Theory of Regulation	8
1.8 Literature Review	9
1.8.1 Overview	9
1.8.2 CBK.....	9
1.8.3 National assembly	12
1.9 Research Methodology	14
CHAPTER TWO: INTEREST RATES IN KENYA	16
2.1 Introduction	16
2.2 Key Terms and Definitions	16
2.3 The Regulation of Interest Rates	18
2.3.1 History of Regulation of Interest Rates	18
2.3.2 History of Regulation of Interest Rates in Kenya.....	21
2.3.3 Regulation or Deregulation	22
2.4 Regulation of interest rates in Kenya today.....	25
2.5 Conclusion.....	29

CHAPTER THREE: THE ROLE OF THE CBK.....	31
3.1 Overview	31
3.2 Functions of the CBK.....	32
3.3 Powers and Tools of the CBK.....	36
3.4 Autonomy of the CBK.....	40
3.5 Conclusion.....	45
CHAPTER FOUR: THE ROLE OF THE NATIONAL ASSEMBLY OF KENYA	46
4.1 Overview	46
4.2 Functions of the national assembly of Kenya.....	46
4.3 Powers of the national assembly of Kenya.....	49
4.4 Tools of the national assembly of Kenya	52
4.4.1 Oversight role of the national assembly of Kenya.....	52
4.4.2 Legislative role of the national assembly of Kenya.....	55
4.5 Conclusion.....	57
CHAPTER 5: FINDINGS, RECOMMENDATIONS AND CONCLUSION	60
5.1 Overview	60
5.2 Findings of the Study	60
5.3 Importance of the Findings.....	63
5.4 Remedies and Recommendations.....	64
5.5 Final Conclusion.....	66
BIBLIOGRAPHY	68
6.1 Books and Book Chapters	68
6.2 Working Papers	68
6.3 Guidelines.....	68
6.4 Journal Articles.....	68
6.5 Reports.....	70
6.6 Online Sources	70

DECLARATION

I declare that this Research Proposal is my original work and has not been presented to any other college or university for academic credit.




SIGNED BY ARTHUR KAMWAMI



DATE

This research paper has been submitted for examination with my approval as University of Nairobi Supervisor.



SIGNED BY DR. CONSTANCE GIKONYO

30/11/21

DATE

DEDICATION

This Thesis is dedicated to my parents. Thank you for your emotional and financial support on this journey.

ACKNOWLEDGEMENT

I wish to acknowledge the contribution and assistance of my parents. Without their support, this Thesis would not be possible. I also wish to acknowledge the contribution and assistance of my supervisor, Dr. Constance Wangechi Gikonyo. Thank you for your patience, guidance and instruction during this project.

ABSTRACT

It has been argued that there exists a duplication and conflict of roles between the central bank and national assembly over the regulation of interest rates in Kenya. As a consequence, this has created uncertainty and a clash over the hierarchy and delineation of roles between the central bank and the national assembly. In turn, this uncertainty and conflict has discouraged investment in the form of credit from the banking community. The latter are unwilling to invest in an economy governed by unpredictable rules. This has a significant bearing on the economic growth and stability of the country. In spite of attempts by the courts to address this uncertainty and clash, this problem persists. This study relies on doctrinal legal research to solve the above problem. Through an extensive examination of the legal framework governing interest rates in the country, this study attempts to delineate and or demarcate the roles of the central bank and the national assembly over interest rates in Kenya. Consequently, it confirms the existence of the above problem. First, that the legal regime in Kenya mandates the central bank to impose and regulate interest rates over lending institutions in Kenya. Second that the legal regime in Kenya also mandates the national assembly to impose and regulate interest rates over lending institutions in Kenya. Lastly and from the foregoing, that there exists duplication and a conflict of roles between the central bank and the national assembly over the regulation of interest rates in Kenya. This study posits collaboration and consultation between the two parties, as a conclusive solution to the above problem.

LIST OF ABBREVIATIONS

CBK	Central Bank of Kenya
CBR	Central Bank Rate
COFEK	Consumer Federation of Kenya
KBA	Kenya Bankers' Association
MPC	Monetary Policy Committee
MPS	Monetary Policy Statement

LIST OF STATUTES

Constitution of the Republic of Kenya, 2010, Laws of Kenya.

Banking Act, Cap 488, Laws of Kenya.

Banking Amendment Act No.25 of 2016, Laws of Kenya.

Central Bank Act, Cap 491, Laws of Kenya.

Consumer Protection Act No.46 of 2012, Laws of Kenya.

Statutory Instruments Act No. 23 of 2013, Laws of Kenya.

Banking (Increase of rate of banking and other charges) Regulations, 2006, Laws of Kenya.

LIST OF CASES

Boniface Oduor v Attorney General & another; Kenya Banker's Association & 2 others (Interested Parties) [2019] eKLR (14 March, 2019).

Council of Governors & 3 others v Senate & 53 others [2015] eKLR (10 July 2015).

In the Matter of Interim Independent Electoral Commission [2011] eKLR (2 December, 2011).

In the Matter of the National Land Commission [2015] eKLR (2 December, 2015).

Isaac Gachomo & 3 others v Attorney General & another; Central Bank of Kenya & another (Interested parties) [2019] eKLR (18 July, 2019).

Law Society of Kenya v Kenya Revenue Authority & another [2017] eKLR (14 March, 2017).

Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited [2014] eKLR (10 October, 2014).

Ndyanabo v Attorney-General (2002) AHRLR 243 (TzCA 2002)

Njuguna S Ndung'u v Ethics & Anti-Corruption Commission (EACC) & 3 others [2018] eKLR (20 December, 2018).

Shadrack Mwiti Ithinji & 9 Others v Republic [2006] eKLR (6 October, 2006).

CHAPTER ONE: ROADMAP AND SUMMARY OF THE STUDY

1.1 Context of the study

The role of the regulator and arbiter of interest rates among states has traditionally been reserved for central banks, as opposed to the executive or the legislature. The reasoning for this stance being, that the expertise and unbiased perspective offered by the central bank and its staff is a preferred alternative, when compared to the populist and self-serving goals of politicians. In Kenya, the legal framework echoes this position. A reading of Articles 231 (2), 231 (3) and 231 (5) of the *Constitution*¹, sections 33 (4) and 44 of the *Banking Act* Cap.488 Laws of Kenya² and sections 4, 4D and 36 (4) of the *Central Bank Act* Cap.491 Laws of Kenya,³ establish the Central Bank of Kenya ('the CBK'), as the sole institution responsible for imposing and regulating Interest Rates over deposit taking and lending organizations in the state. The Court of Appeal in *Njuguna S Ndung'u v Ethics & Anti-Corruption Commission (EACC) & 3 others* [2018] eKLR⁴ and High Court in *Shadrack Mwiti Ithinji & 9 Others v Republic* [2006] eKLR⁵ in particular, have taken cognisance of this state of affairs.

However, recent enactments by the national assembly in Kenya have shaken the above position. The national assembly has on a number of occasions originated and formulated its own policy regarding interest rates. This has occasioned opposition from the CBK itself and other stakeholders such, as the banking community. These institutions oppose the national assembly's intrusion in the CBK's mandate. Moreover, it has created uncertainty over the hierarchy and demarcation of roles between the CBK and the national assembly. Who is responsible for what and to what extent? This in turn, has discouraged investment in the form of credit from the banking community. The latter are unwilling to

¹'The Constitution of Kenya' <<http://kenyalaw.org/kl/index.php?id=398>> accessed 24 November 2021.

²<<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20488>> accessed 24 November 2021.

³<<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20491>> accessed 24 November 2021.

⁴(20 December, 2018), 'Civil Appeal 333 of 2014 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/164553/>> accessed 24 November 2021 at pg.8.

⁵(6 October, 2006), 'Civil Case 331 of 2002 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/39800>> accessed 24 November 2021 at pg.7.

invest in an economy governed by unpredictable rules. An example of this problem is captured below.

On 28 July, 2016 and 24 August, 2016, the national assembly and the head of state in Kenya, passed as well as assented to the Banking (Amendment Bill), 2015, respectively.⁶ This amendment⁷ had implications on the *Banking Act*, Cap 488.⁸ Chief amongst them section 33(B).⁹ Under this provision, among others, it sought to restrict the interest rates levied by lending institutions to a rate of four per cent (4%) over loans and mortgages.¹⁰

In or about the same year (2016), one Boniface Odour ('the Petitioner'), instituted a case¹¹ against the aforementioned provision, section 33 B. Among his claims, he argued that the impugned provision deprived the CBK of its unique role of drawing up, implementing and regulating the nation's monetary policy, in particular interest rates.¹² The Petitioner was supported in his arguments by the CBK and the Kenya Bankers' Association ('the KBA'), the 2nd Respondent and 1st Interested Party in this matter, respectively.¹³

The Attorney General, the National assembly of Kenya and the Consumer Federation of Kenya ('COFEK'), the 1st Respondent, the 3rd Interested Party and the 2nd Interested Party in this matter, respectively, opposed the case.¹⁴ They argued that the case was a challenge and an infringement to the national

⁶ 'The Laws of Kenya' <<http://kenyalaw.org/8181/exist/kenyalex/index.xql>> accessed 24 November 2021.

⁷ *Banking Amendment Act* No.25 of 2016, Laws of Kenya 'Kenya Law: 2016' <<http://kenyalaw.org/kl/index.php?id=5994>> accessed 24 November 2021.

⁸ The Laws of Kenya' <<http://kenyalaw.org/8181/exist/kenyalex/index.xql>> accessed 24 November 2021.

⁹ Ibid.

¹⁰ *Banking Amendment Act* No.25 of 2016, Laws of Kenya 'Kenya Law: 2016' <<http://kenyalaw.org/kl/index.php?id=5994>> accessed 24 November 2021.

¹¹ *Boniface Oduor v Attorney General & another; Kenya Banker's Association & 2 others (Interested Parties)* [2019] eKLR (14 March, 2019), 'Petition 413 of 2016 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/169536/>> accessed 24 November 2021.

¹² *Boniface Oduor v Attorney General & another; Kenya Banker's Association & 2 others (Interested Parties)* [2019] eKLR (14 March, 2019), 'Petition 413 of 2016 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/169536/>> accessed 24 November 2021 at pgs. 1 to 4.

¹³ Ibid.

¹⁴ *Boniface Oduor v Attorney General & another; Kenya Banker's Association & 2 others (Interested Parties)* [2019] eKLR (14 March, 2019), 'Petition 413 of 2016 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/169536/>> accessed 24 November 2021 at pgs.5 to 6.

assembly's law making role and mandate, established under the Constitution.¹⁵ Moreover, under the Constitution, the national assembly was mandated to legislate on all matters of public interest.¹⁶

The court in its resolution of the case laid down one of issues for determination. Whether section 33B deprives the CBK of its unique role of drawing up, implementing and regulating the nation's monetary policy, in particular interest rates?¹⁷

The court in its determination of the above issue ruled that section 33B did not deprive the CBK of its unique role of drawing up, implementing and regulating the nation's monetary policy, in particular interest rates.¹⁸ It noted that:

- a) The setting of interest rates was a function unique to the CBK.¹⁹
- b) However, it was not clear if the law making powers that enable the CBK to set interest rates were also unique and or attributable only to the CBK.²⁰
- c) The Petitioner had failed to demonstrate that section 33B deprived the CBK of its unique role of drawing up, implementing and regulating the nation's monetary policy.²¹

Subsequent decisions from the courts²² have followed this line of thought.

From the foregoing, the courts' analysis of the above provisions has failed to conclusively answer the most important question. Who is responsible for what and to what extent? Does the CBK's role in setting or formulating interest rates extend to legislating over the same interest rates? Inversely, does the national assembly's legislative role extend to formulating or setting interest rates? This study will assist us in answering these questions.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid at para 38 (i).

¹⁸ Ibid at para 198 (i).

¹⁹ Ibid at para 90.

²⁰ Ibid.

²¹ Ibid.

²² *Isaac Gachomo & 3 others v Attorney General & another; Central Bank of Kenya & another (Interested parties)* [2019] eKLR (18 July, 2019), 'Petition 426 of 2018 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/179226>> accessed 24 November 2021 at paras 74 and 75.

1.2 Statement of Problem

This study will seek to establish whether there exist clear and demarcated roles between the CBK and the national assembly, as regards the setting or formulation of interest rates and or monetary policy.

1.2.1 Key terms and definitions in the Statement of Problem

To understand the statement of problem above, a preliminary discussion of the objects of this study is necessary. These have been raised in the statement of the problem. They are interest rates and monetary policy. Interest rates by definition are described, as the cost a borrower incurs for the funds they obtain from a lender.²³ They have also been described as the cost of money.²⁴ On the other hand, monetary policy has been described as the process through which a state controls the provision and accessibility of the cost of money.²⁵

1.3 Research questions

In line with the above definitions, this study will seek to answer the following research questions:

- a) Whether the legal regime in Kenya mandates the CBK to impose and regulate interest rates over lending institutions in Kenya?
- b) Whether the legal regime in Kenya mandates the national assembly to impose and regulate interest rates over lending institutions in Kenya?
- c) Whether there exists any duplication or conflicts of roles between the CBK and the National assembly?
- d) Whether any possible remedies or solutions to the aforementioned duplication or conflict of roles exist?

1.4 Statement of Aims

These are the aims of the study:

²³ Cecilia Maigua and Gekara Mouni, 'Influence of Interest Rates Determinants on the Performance of Commercial Banks in Kenya' (2016) 6 International Journal of Academic Research in Accounting, Finance and Management Sciences 121 <https://econpapers.repec.org/article/hurijaraf/v_3a6_3ay_3a2016_3ai_3a2_3ap_3a121-133.htm> accessed 29 February 2020 at pg.1.

²⁴ Thammarak Moenjak, *Central Banking: Theory and Practice in Sustaining Monetary and Financial Stability* (Wiley 2014) 44–46.

²⁵ Moenjak (n 24) 44–46.

- a) To examine the legal regime in Kenya that mandates the CBK to impose and regulate interest rates over lending institutions in Kenya.
- b) To examine the legal regime in Kenya that mandates the National assembly to impose and regulate interest rates over lending institutions in Kenya.
- c) To examine whether there exists any duplication or conflicts of roles between the CBK and the National assembly.
- d) To examine any possible remedies or solutions to the aforementioned duplication or conflict of roles.

1.5 Hypothesis

- a) The current legal framework does not adequately delineate or demarcate the roles of the CBK and the National assembly over the regulation of interest rates in Kenya.
- b) The current legal framework has occasioned duplication and conflicts of roles between the CBK and the national assembly over the regulation of interest rates in Kenya.

1.6 Justification of the Study

Interest rates contribute significantly to the economy in a state. Stakeholders, such as banks and governments rely on the prevailing interest rates to invest, plan, strategize and attract investment into the country, respectively. To that end, they rely on the information disclosed by the CBK, as the legally mandated regulator of interest rates in the state. With the uncertainty and clash brought about by the national assembly and CBKs' dual mandates and roles, stakeholders such, as banks will be hard pressed to commit capital in the form of credit to the economy of a country with an unpredictable legal framework. Governments on the other hand, will be unable to attract external investment into the country without a clear legal framework that will instil confidence into investors that there are clear and predictable rules protecting their investments and returns.

Therefore, this study will assist the banking community and the government by addressing the uncertainty and conflict of roles in the legal framework between the CBK and the national assembly, as regards the setting or formulation of

interest rates. It will provide a degree of predictability to banks and the government, as they plan, coordinate, strategize and attract investment into the country. The findings of this study will address and provide possible remedies to any gaps in the legal framework that might arise from the uncertainty and conflict of roles between the CBK and the national assembly. Additionally, the study will also provide a bench mark on how the legislature and the judiciary, as law makers might address any future conflict of roles and uncertainties that might arise in the nation's legal framework, as regards the formulation of interest rates.

1.7 Theoretical Framework

A number of theories have been proposed in support of the CBK and the national assembly's position. These are discussed below.

1.7.1 Agency Theory

With regard to this study, this theory argues that the problems in society are mainly those that require rapid adaptation to changes and expertise in particular circumstances.²⁶ Such problems cannot be efficiently resolved by one body:

- a) analysing the problem;
- b) thereafter, acquainting itself with the know how to resolve the said problem; and
- c) undertaking or issuing the relevant directions or orders to resolve the same²⁷

Therefore, such problems must be left to the people who are familiar with these circumstances.²⁸ Those acquainted with the relevant changes, expertise and the resources immediately available to meet them.²⁹ Hence, the principal and agent relationship.³⁰ Such relationships are created when it is deemed efficient and less costly to use professionals as agents rather than the principals doing everything themselves.³¹ In a nutshell, this theory posits, that it is appropriate and or advised

²⁶ Yoshiharu Oritani, 'Public Governance of Central Banks: An Approach from New Institutional Economics' 17.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

in certain circumstances, for an individual or body (the principal) to delegate their powers and functions to another (the agent).

In connection to this study, this theory justifies the CBK's overall authority to legislate over the formulation or setting of interest rates. The rationale and assumption being that, owing to the CBK'S expertise, it is more efficient, practical and less costly for it to undertake this role, as opposed to the national assembly.

1.7.2 Public Choice Theory

This theory regards government as an assembly of many individuals with divergent interests and objectives.³² As such, it cannot be assumed to have consistent and clearly defined objectives and policies.³³ To that end, the possibility of failure in government policy is ever present.³⁴ In particular, decisions made by those in power may not reflect the wishes of their electorate or citizenry but other interest groups or those in power.³⁵ Inversely, the above decisions may reflect the wishes of their electorate or citizenry but to their detriment.³⁶ For clarity, those in power may accede to the wishes of their electorate or citizenry for the sake of holding on to power or winning an election, as opposed to their electorate/ citizen's welfare.³⁷

To counter the above issues, this theory advocates, among others, for the engagement of unbiased and independent third parties.³⁸ It is assumed that these parties will competently undertake government policy for the welfare of all.³⁹ Some of the proponents of this theory include James M. Buchanan and Gordon Tullock.

In connection to this study, this theory justifies the CBK's overall authority to legislate over the formulation or setting of interest rates. The rationale and assumption being that, as opposed to the national assembly, it is an unbiased and

³² Oritani (n 26) 33.

³³ Ibid.

³⁴ Ibid at pgs 33-34.

³⁵ Ibid at pgs. 34 -35.

³⁶ Ibid at pg.36.

³⁷ Ibid .

³⁸ Ibid at pgs. 37-38.

³⁹ Ibid.

independent of other interests save for implementing government policy. It is therefore, more efficient and practical for it to undertake this role.

1.7.3 Public Interest Theory of Regulation

According to George Stigler, this theory argues that there exist market failures and or unfair practices that the interplay of the free market cannot resolve on its own.⁴⁰ Further, that in response to public demand for rectification of the said failures and unfair practices, regulation is necessary.⁴¹ Regulation in this case is described as attempts and or mechanisms by a state to control economic activity.⁴² One of the assumptions underpinning this theory holds that the free market is inept. Therefore, government intervention in the form of regulation is necessary to mitigate any failures and or unfair practices that might arise from the operation of the free market.⁴³

In connection with this study, this theory justifies the national assembly's overall authority to legislate over the formulation or setting of interest rates. The rationale and assumption being that, the national assembly has a legislative mandate to effect the wishes of its electorate, as their elected representatives.

1.7.4 Capture Theory of Regulation

According to George Stigler, this theory argues that various groups and entities are in a continuous cycle of competition and or conflict for resources.⁴⁴ Regulation therefore, is a means through which the aforementioned groups can obtain a monopoly over the said resources. It is simply a process by which certain groups seek to promote their interests.⁴⁵ One of the assumptions underpinning this theory holds that, in promoting their welfare, these groups eventually seize control of the institutions regulating their industry or market, to the exclusion of or in competition with other groups.⁴⁶ As such, this theory calls for government intervention in the form of regulation to correct and or mitigate this monopoly of

⁴⁰ Richard Posner, 'Theories of Economic Regulation' (National Bureau of Economic Research 1974) w0041 1 <<http://www.nber.org/papers/w0041.pdf>> accessed 4 November 2021.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid at pg.1.

⁴⁵ Ibid at pgs.11.

⁴⁶ Ibid at pgs.11-12.

interests. Again, regulation in this case is described as attempts and or mechanisms by a state to control economic activity.⁴⁷

In connection with this study, this theory justifies the national assembly's overall authority to legislate over the formulation or setting of interest rates. The rationale being that, the national assembly has a legislative mandate to protect the rights of all its electorate and or citizens irrespective of their economic standing or power.

1.8 Literature Review

1.8.1 Overview

The regulation of interest rates throughout history has been varied.⁴⁸ This obligation around the world is carried out by distinct organs. In Kenya, this role is contested between the national assembly and the CBK. Utilising the theoretical framework discussed above and various literature below, this discussion will help clarify and justify each organ's position.

1.8.2 CBK

1.8.2.1 Literature in support of the CBK

Scholars have argued that the mandate of an autonomous central bank include the power to choose and pick its own goals and aims without any direction and or interference from any other body.⁴⁹ To that end, any limitation to the above power could be viewed as an unwelcome intrusion into the central bank's mandate.⁵⁰

Pursuant to the *public choice theory* discussed in the theoretical framework above, the justification given for the aforementioned position is that, politicians during an election cycle are usually tempted by short term gains.⁵¹ For instance, the short

⁴⁷ Ibid at pg.1.

⁴⁸ Christopher Ndegwa, 'In Duplum Rule in Kenya: A Critical Analysis of the Unaddressed Aspects of Section 44A of the Banking Act' (2016) 1 Strathmore Law Review 1, 3–5 <<https://heinonline.org/HOL/Page?handle=hein.journals/strathlwrv1&id=257&div=&collection=>

⁴⁹ Arthur WS Duff, 'Central Bank Independence and Macroprudential Policy: A Critical Look at the US Financial Stability Framework' (2014) 11 Berkeley Bus. LJ 183, at pg.201. Lorenzo Bini Smaghi, 'Central Bank Independence in the EU: From Theory to Practice' (2008) 14 European Law Journal 446 <<https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1468-0386.2008.00427.x>> accessed 29 February 2020, at pg.448.

⁵⁰ Duff (n 49), at pg.201. Smaghi (n 49), at pg.446.

⁵¹ Duff (n 49), at pg.202; Smaghi (n 49), at pg.447. Marco Goldoni, 'The Limits of Legal Accountability of the European Central Bank' (2017) 24 George Mason Law Review 595 <<http://georgemasonlawreview.org/archives/volume-242-winter-2017/>> accessed 28 February

term gains afforded by the imposition of low interest rates such, as economic growth and rise in employment provide such a temptation.⁵² However, by lowering the interest rates in the short term, they create more problems than they solve in the long term.⁵³ For example, a by-product of such an endeavour is the rise in inflation.⁵⁴ The latter is characterized by a general rise in the cost of consumer products and utilities.⁵⁵ This may limit the economic growth of a nation, as people are discouraged from purchasing goods and services. Additionally, it depreciates the value of the nation's currency.⁵⁶ Therefore, entrusting this function to an autonomous organization removes this temptation.⁵⁷

In line with the *agency theory* highlighted in the theoretical framework above, scholars have also argued that central bank officials alone possess the specialised economic skills and knowledge needed and necessary to ensure economic and financial stability.⁵⁸ Furthermore, monetary policy is a technical aspect that

2020, at pg.597. Chris Land, 'Ultra Vires: The Eurozone Crisis and the European Central Bank's Lost Independence' (Social Science Research Network 2016) SSRN Scholarly Paper ID 2781668 <<https://papers.ssrn.com/abstract=2781668>> accessed 28 February 2020, at pgs.489-490. Peter Conti-Brown, 'The Institution of Federal Reserve Independence' (2015) 32 *Yale Journal on Regulation* 257 <<https://heinonline.org/HOL/Page?handle=hein.journals/yjor32&id=263&div=&collection=>>, at pg.263. Charles I Plosser, 'A Limited Central Bank' (2014) 34 *Cato Journal* 201 <<https://heinonline.org/HOL/Page?handle=hein.journals/catoj34&id=217&div=&collection=>>, at pg.206. Cristina Bodea and Raymond Hicks, 'International Finance and Central Bank Independence: Institutional Diffusion and the Flow and Cost of Capital' (2015) 77 *The Journal of Politics* 268 <<https://www.journals.uchicago.edu/doi/10.1086/678987>> accessed 28 February 2020, at pg.268. Thomas Palley, 'CENTRAL BANK INDEPENDENCE: A RIGGED DEBATE BASED ON FALSE POLITICS AND ECONOMICS' (2019) 78 *Investigación Económica* 67 <<http://www.revistas.unam.mx/index.php/rie/article/view/71547>> accessed 17 February 2020, at pg.70. Canova, 'The Role of Central Banks in Global Austerity' (2015) 22 *Indiana Journal of Global Legal Studies* 665 <<https://www.jstor.org/stable/10.2979/indjglolegstu.22.2.665>> accessed 28 February 2020, at pg.666. Willem Middelkoop, *The Big Reset Revised Edition: War on Gold and the Financial Endgame* (Amsterdam University Press 2015). Annelise Riles, 'The Challenge to the Technocracy', *Financial Citizenship* (Cornell University Press 2018) <<https://www.jstor.org/stable/10.7591/j.ctv43vr8t.4>> accessed 28 February 2020, at pg.10.

⁵² Ibid.

⁵³ Duff (n 49), at pg.202.

⁵⁴ Ibid.

⁵⁵ 'Monetary Policy | CBK' <<https://www.centralbank.go.ke/monetary-policy/>> accessed 29 February 2020.

⁵⁶ Ibid.

⁵⁷ Duff (n 49), at pg.202. Smaghi (n 49), at pg.447. Goldoni (n 51), at 597. Conti-Brown (n 51), at pg.263. Gregory J Hudson, 'Balancing Central Bank Accountability and Independence: The Case of the Federal Reserve's Emergency Powers after Dodd-Frank' (2015) 132 *Banking Law Journal* 161 <<https://heinonline.org/HOL/Page?handle=hein.journals/blj132&id=177&div=&collection=>>. Palley (n 51). Canova (n 51), at pg.666. Middelkoop (n 51). Riles, 'The Challenge to the Technocracy' (n 51), at pg.10.

⁵⁸ Land (n 51), at pgs.489-502. Annelise Riles, 'Culture Clash:: Experts and the Public', *Financial Citizenship* (Cornell University Press 2018) <<https://www.jstor.org/stable/10.7591/j.ctv43vr8t.6>> accessed 28 February 2020, at pg.38.

requires specialised skills and knowledge.⁵⁹ As such, implementation and decision making, as regards monetary policy should be left to the central bank.⁶⁰

Again, in line with the *agency theory* discussed in the theoretical framework above, scholars have posited that independent central banks (most especially in democracies) are keen attractors of investment when compared to regulated central banks.⁶¹ This is so because investors tend to value and appreciate independent central banks, as they signal credibility, policy and institutional stability.⁶² Thus, the recourse to an independent central bank.

In spite of the above justifications, there still remain doubts, as to the position of the central bank in this study. Some of these concerns are addressed below.

1.8.2.2 Criticisms against the CBK

Pursuant to the *public interest theory of regulation* highlighted in the theoretical framework above, scholars have argued that endowing the central bank with a sole mandate over economic policy is unrepresentative and unfair.⁶³ It entrusts this function to a group of unsupervised specialists to the exclusion of other interested parties.⁶⁴ Without any oversight or supervision, there is a risk of abuse of these powers.⁶⁵

Likewise, scholars have also argued that monetary policy does not operate in a vacuum.⁶⁶ Regardless of the specialised know how, monetary policy has wider implications on the political, social and cultural fabric of a society.⁶⁷ As such, it

⁵⁹ Riles, 'Culture Clash' (n 58), at pg.38.

⁶⁰ Ibid.

⁶¹ Bodea and Hicks (n 51), at pgs.268-271. Cristina Bodea and Raymond Hicks, 'Price Stability and Central Bank Independence: Discipline, Credibility, and Democratic Institutions' (2015) 69 *International Organization* 35 <<https://www.cambridge.org/core/journals/international-organization/article/price-stability-and-central-bank-independence-discipline-credibility-and-democratic-institutions/605F4E0E40C7366B2B9413103B409BFA>> accessed 28 February 2020, at pgs.35-37.

⁶² Bodea and Hicks (n 51), at pgs.268-271. Bodea and Hicks (n 61), at pgs.35-37.

⁶³ Duff (n 49), at pg.203. Palley (n 51), at pg.76.

⁶⁴ Duff (n 49), at pg.203. Palley (n 51), at pg.76.

⁶⁵ Middelkoop (n 51).

⁶⁶ Land (n 51), at pg.513. Palley (n 51), at pgs.77-.87.

⁶⁷ Land (n 51), at pg.513.

should not be left to a few to decide for the many.⁶⁸ There needs to be greater participation from the public, as the recipients of these policies.⁶⁹

Moreover, the assumption of an independent central bank devoid of political and economic influence is unrealistic.⁷⁰ The governors of these banks are typically appointed by the executive and most frequently report to the legislature.⁷¹ Therefore, they are in most circumstances beholden to the appointing authority and its interests. Furthermore, if voters dislike a policy introduced by the central bank, they can elect politicians who are committed to overturning the impugned policy through legislation.⁷²

Additionally, in line with the *capture theory of regulation* discussed in the theoretical framework above, scholars argue that most central banks are potentially vulnerable to state capture.⁷³ They are subject to the influence of various stakeholders and may serve these interests to the detriment of the general public.⁷⁴

1.8.3 National assembly

Like the CBK, there exists literature that supports its position. It is captured below.

1.8.3.1 Literature in support of the National assembly

Scholars have noted that the era in which central banks were entrusted with acting devoid of any intrusion by public or elected officials is over.⁷⁵ This appears to have arisen owing to the growing loss of public confidence in the ability of central banks across the world to operate, as neutral and non-political actors in the global economy.⁷⁶ Central banks are now subject to increasingly stringent legislative oversight.⁷⁷ Legislators across the globe have begun to make growing demands

⁶⁸ Ibid.

⁶⁹ Riles, 'Culture Clash' (n 58), at pgs.37-39.

⁷⁰ Land (n 51), at pg.513. Palley (n 51), at pgs.76-77.

⁷¹ Riles, 'The Challenge to the Technocracy' (n 51), at pg.13.

⁷² Palley (n 51), at pgs.76-77. Riles, 'The Challenge to the Technocracy' (n 51), at pg.13.

⁷³ Palley (n 51), at pg.88. Canova (n 51), pg.666.

⁷⁴ Palley (n 51), at pg.88. Canova (n 51) at pg.666). Middelkoop (n 51).

⁷⁵ Riles, 'The Challenge to the Technocracy' (n 51), at pg.19.

⁷⁶ Riles, 'Culture Clash' (n 58), at pg.37. Riles, 'The Challenge to the Technocracy' (n 51), at pg.19. Middelkoop (n 51).

⁷⁷ Riles, 'The Challenge to the Technocracy' (n 51), at pg.19.

for reporting on central bank policies, targets and have even conceptualized legislation targeting these policies.⁷⁸ Examples include the Donde Act and the in duplum Rule in Kenya.

Pursuant to the *public interest theory of regulation* highlighted in the theoretical framework above, scholars have also noted with concern the dangers of an unsupervised and opaque central bank to its citizenry and state.⁷⁹ Decisions made by a central bank regarding monetary policy have far reaching implications on the social and civic state of a community, aside from their economic goals.⁸⁰ In the absence of proper regulation, this otherwise formal economic tool could be used a weapon to leverage or even manipulate concessions from public officials and the public itself.⁸¹ The Eurozone crisis of 2008, specifically the Greek and Italian financial crises, and the response of the European Central Bank provide such a frightful insight.⁸²

Again, in line with the *public interest theory of regulation* highlighted in the theoretical framework above, scholars have also noted that there is a growing call for transparency and accountability by central banks to the public, the executive and the legislature in their dealings.⁸³ It has even been suggested that in democratic countries with independent central banks working alongside transparency and accountability mechanisms, the central banks attract more investment than walled off and isolated Central Banks.⁸⁴

From our earlier discussion of the literature supporting the CBK's position, it is quite apparent that the strengths of CBK's position when reversed indicate the weakness in the position of the national assembly. Nevertheless, this study will continue to examine and analyse both discussions to arrive at an objective finding over the Statement of the Problem.

⁷⁸ Ibid.

⁷⁹ Land (n 51) at pgs. 486 to 512.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Ibid.

⁸³ Safari Kasiyanto, 'Central Bank Transparency in Indonesia: A Law and Economic Perspective' (2017) 7 *Indonesia Law Review* 178
<<https://heinonline.org/HOL/Page?handle=hein.journals/indolawrev7&id=178&div=&collection=>>. Deirdre Curtin, "'Accountable Independence' of the European Central Bank: Seeing the Logics of Transparency: 'Accountable Independence' of the ECB' (2017) 23 *European Law Journal* 28
<<http://doi.wiley.com/10.1111/eulj.12211>> accessed 28 February 2020 at pgs. 179 to 198.

⁸⁴ Bodea and Hicks (n 61), at pgs.35-37. Bodea and Hicks (n 51), at pgs.268-271.

1.9 Research Methodology

The study applied a doctrinal legal research design in its investigation of the Statement of Problem. This mode of research has been described, among others, as research which examines the law in a specific jurisdiction or area.⁸⁵ This mode of research is primarily geared towards an examination of the law and how it is utilized.⁸⁶ The Statement of Problem herein is related to an examination of the law/legal framework governing the regulation of interest rates in Kenya. As such, a doctrinal legal research design was appropriate.

This study analysed its data qualitatively in order to arrive at its findings and answer the Statement of the Problem. It restricted itself to the legal framework applicable to and governing the regulation of interest rates in Kenya from 1989 to 2021. The study had recourse to primary sources such, as the *Constitution*,⁸⁷ Statutes such, as the *Banking Act* Cap.488 Laws of Kenya⁸⁸ and the *Central Bank Act* Cap.491 Laws of Kenya,⁸⁹ among others. The study also had recourse to secondary sources such, as case law, legal texts, encyclopaedias, reports, online journals and articles. In a nutshell, this study involved an analysis of the relevant sources to determine the accuracy of the Statement of the Problem.

1.10 Chapter Summary

1.10.1 Chapter One: Introduction and General Overview

This chapter consists of an examination of the Context of this Study, the Statement of Problem, the Key terms and definitions in the Statement of Problem, the Research Questions, the Statement of Aims, Hypothesis, the Justification for the Study, the Theoretical framework, the Literature Review, the Research Methodology relied on and the Chapter summary.

1.10.2 Chapter Two: Interest rates in Kenya

⁸⁵ Amrit Kharel, 'Doctrinal Legal Research' (Social Science Research Network 2018) SSRN Scholarly Paper ID 3130525 2 <<https://papers.ssrn.com/abstract=3130525>> accessed 4 November 2021.

⁸⁶ Ibid.

⁸⁷ 'The Constitution of Kenya' <<http://kenyalaw.org/kl/index.php?id=398>> accessed 24 November 2021.

⁸⁸ <<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20488>> accessed 24 November 2021.

⁸⁹ <<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20491>> accessed 24 November 2021.

This chapter further examines and defines the concept of interest rates. It expounds on the role played by interest rates, their importance and or relevance. It discusses the need for the regulation of interest rates and the history behind this regulation both outside and in Kenya. It also highlights the arguments in support of and against the regulation of interest rates in Kenya. Lastly, it discusses the regulation of interest rates in Kenya today.

1.10.3 Chapter Three: The Role of the CBK

This chapter discusses the legal framework governing the CBK, its powers, roles, functions and limitations in its regulation of interest rates in Kenya. This includes its functions, powers, tools and limitations. It also avails literature justifying the role of the CBK, as a regulator of interest rates in Kenya.

1.10.4 Chapter Four: The Role of the National assembly

This chapter examines the legal framework governing the national assembly in its regulation of interest rates in Kenya. This includes its functions, powers, tools and limitations. It also avails literature justifying the role of the national assembly, as a regulator of interest rates in Kenya.

1.10.5 Chapter Five: Findings, Recommendations and Conclusion

This chapter answers the Statement of Problem from an analysis of the previous chapters. It reveals to the reader that there exists a conflict of roles between the CBK and the national assembly. It also attempts to demarcate and delineate the distinctive roles of the national assembly and the CBK over the regulation of interest rates in the country. Lastly, this chapter recommends possible solutions that may assist in solving or mitigating the problems encountered in the study.

CHAPTER TWO: INTEREST RATES IN KENYA

2.1 Introduction

The previous chapter highlighted the statement of problem with regard to interest rates in Kenya. Who is responsible for what and to what extent? Who has more say, the CBK or the national assembly? It explored the theoretical framework and literature review in support of and against the respective institutions. The discussion revealed that there exist a number of gaps in the law with regard to interest rates in Kenya. First, the current legal framework does not adequately delineate or demarcate the roles of the CBK and the national assembly over the regulation of interest rates in Kenya. Second, it has occasioned duplication and a conflict of roles between the CBK and the national assembly over the regulation of interest rates in Kenya.

This chapter, will examine the what and why instead of the who. What are interest rates? Why are they important? Do they need to be regulated? Is the current level of regulation sufficient? This analysis is necessary to facilitate an understanding of the gaps stated in the paragraph above. In order for there to be a duplication of or conflict of roles, the subject matter itself of that duplication or conflict of roles must come into play. Therefore, the aim in this chapter is to delve into the concept of interest rates in Kenya.

In order to fulfil the above goal, this chapter begins with a discussion of the key terms and definitions with regard to interest rates. Thereafter, it will proceed to discuss the need for the regulation and the history of regulation of interest rates both outside and in Kenya. This will be followed by an analysis of the arguments in support of and against the regulation of interest rates in Kenya. Finally, it will discuss the regulation of interest rates in Kenya today.

2.2 Key Terms and Definitions

As discussed in the first chapter, interest rates are described, as the cost a borrower incurs for the funds they obtain from a lender.¹ The underlying rationale

¹ Cecilia Maigua and Gekara Mouni, 'Influence of Interest Rates Determinants on the Performance of Commercial Banks in Kenya' (2016) 6 International Journal of Academic Research in Accounting, Finance and Management Sciences 121

being that the lender shares in the risk of the borrower's venture.² As such, the lender is entitled to remuneration for the risk encountered.³ They have also been described as the cost of money.⁴

The Consumer Protection Act⁵ defines a borrower to mean a consumer who is or may become a party to a credit agreement and who receives or may receive credit or a loan of money from another party.⁶ On the other hand, it⁷ defines a lender to mean a supplier who is or may become a party to a credit agreement and who extends or may extend credit or may lend money to the borrower.⁸

The Consumer Protection Act⁹ also defines a credit agreement as an agreement wherein a lender offers money or such other consideration to a borrower.¹⁰ In such an agreement or an arrangement, the borrower undertakes to return the same amount of money or consideration of the same quantity and quality to the former in addition to a fee for the money or other consideration so offered by the borrower.¹¹

The aforementioned lender usually entails an institution whose sole business revolves around such credit or loan contracts or arrangements. The *Banking Act*¹²

<https://econpapers.repec.org/article/hurijaraf/v_3a6_3ay_3a2016_3ai_3a2_3ap_3a121-133.htm> accessed 29 February 2020 at pg.1.

² Christopher Kiragu Ndegwa, 'In Duplum Rule in Kenya: A Critical Analysis of the Unaddressed Aspects of Section 44A of the Banking Act' <<https://su-plus.strathmore.edu/handle/11071/4884>> accessed 28 February 2020 at pg.5.

³ Ibid.

⁴ Thammarak Moenjajak, *Central Banking: Theory and Practice in Sustaining Monetary and Financial Stability* (Wiley 2014) 44–46.

⁵ Section 2 No.46 of 2012, Laws of Kenya

<<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2046%20of%202012>> accessed 24 November 2021.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

⁹ Section 2 No.46 of 2012, Laws of Kenya

<<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2046%20of%202012>> accessed 24 November 2021.

¹⁰ Ibid.

¹¹ Giuseppe Settanni, 'Loans and Negative Interest Rates' (2016) 27 *European Business Law Review* 697

<<https://heinonline.org/HOL/Page?handle=hein.kluwer/eblr0027&id=711&div=&collection=>>, at pg 698.

¹² Section 2 Cap. 488, Laws of Kenya

<<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20488>> accessed 24 November 2021.

likens such an organization to a bank or a mortgage finance company that carries on financial or banking business.¹³ The latter, among others, entails:

- a) Receiving deposits from the public and
- b) Investing the above funds, as loans to third parties at an interest.¹⁴

2.3 The Regulation of Interest Rates

As discussed in the previous chapter, it has been argued that interest rates are a major economic factor that influences the economic growth of countries.¹⁵ They are an economic tool used by the central banks and other financial institutions all over the world to monitor the performance and health of their economies and respective institutions.¹⁶ Furthermore, they exert significant influence on the performance and investment decisions of most financial institutions.¹⁷ As such, the level of interest rates in an economy may determine the level of investment and growth. The discussion therefore, on the need for or lack thereof of regulation and deregulation, respectively, will add to this debate.

2.3.1 History of Regulation of Interest Rates

Interest rates and their regulation have always been controversial issues all through history.¹⁸ A noted consequence of the imposition of interest rates is the practice of usury. This refers to the practice of extending credit to people at exorbitant rates of return.¹⁹ In order to combat and prevent the above practice, the regulation of interest rates levied on loans has over the years been deemed to be necessary if not mandatory.²⁰ Regulation is therefore necessary to ensure that the borrower is not extorted or exploited by unscrupulous individuals and institutions.²¹

¹³Section 2 of the Banking Act Cap. 488, Laws of Kenya
<<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20488>> accessed 24 November 2021.

¹⁴ Ibid.

¹⁵ Maigua and Mouni (n 1).

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸Christopher Ndegwa, 'In Duplum Rule in Kenya: A Critical Analysis of the Unaddressed Aspects of Section 44A of the Banking Act' (2016) 1 Strathmore Law Review 1 <<https://heinonline.org/HOL/Page?handle=hein.journals/strathlwrv1&id=257&div=&collection=>>> at pgs.3 to 4.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

This trend of regulation traces its roots back to the Code of Hammurabi dated 1750 BC which regulated the interest that could be charged on a loan.²² The Greeks shared similar sentiments regarding the regulation of interest.²³ Both Plato and Aristotle believed usury was immoral and unjust.²⁴ During the period of 800 - 600 BC the Greeks regulated interest charged on loans.²⁵ The Roman senator Cato reported that it was less disreputable to have your father considered a thief than a usurer.²⁶

This aversion to the practice of usury and the need for regulation of the interest charged on loans was not only restricted to scholars and academics of the time. It has also been denounced by religious and political leaders, as well as states throughout history.²⁷ The prophet Ezekiel equated usury to rape, murder, robbery and idolatry.²⁸ The Roman Catholic Church in 325 AD citing Psalm 15 passed a law forbidding usury by clerics.²⁹ Pope Leo the Great banned clerics from engaging in it.³⁰ Furthermore, he castigated those who took part in it as being guilty of shameful gain.³¹ The Romans in 533 AD laid down a maximum rate of interest of Eight point Three per cent (8.3%) for loans to ordinary citizens.³² Charlemagne in 800 AD forbade interest in his kingdom.³³

Despite such formidable opposition, usury has proven impossible to eradicate.³⁴ Medieval England is such an example. In 1500 AD, English commerce was on the

²² Ibid.

²³ Ibid at pg.4.

²⁴ Ibid.

²⁵ Ibid.

²⁶ James M Ackerman, 'Interest Rates and the Law: A History of Usury' (1981) 1981 Arizona State Law Journal 61

<<https://heinonline.org/HOL/Page?handle=hein.journals/arzj11981&id=79&div=&collection=>>, at pg.61.

²⁷ Christopher Ndegwa, 'In Duplum Rule in Kenya: A Critical Analysis of the Unaddressed Aspects of Section 44A of the Banking Act' (2016) 1 Strathmore Law Review 1 <<https://heinonline.org/HOL/Page?handle=hein.journals/strathlwrv1&id=257&div=&collection=>> at pgs.3 to 4.

²⁸ Ibid.

²⁹ Ibid at pg.4.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ Ibid.

³⁴ James M Ackerman, 'Interest Rates and the Law: A History of Usury' (1981) 1981 Arizona State Law Journal 61

<<https://heinonline.org/HOL/Page?handle=hein.journals/arzj11981&id=79&div=&collection=>>, at pg.62.

rise.³⁵ The ruling government at the time, the Tudors, were allied to the merchant class.³⁶ They were aware and recognized that trade was a significant factor in domestic and international relations.³⁷ In addition, customs and import duties provided a substantial source of revenue for the state.³⁸ Under these circumstances, the medieval prohibition on interest did not make much sense economically.³⁹ As such, in 1545 AD, a business minded legislature passed a new law, "An Act against Usury."⁴⁰ The Act permitted the charging of interest to a rate of ten per cent (10%).⁴¹ However, owing to strong opposition, this law was later repealed in 1555 AD.⁴² Interest was later banned throughout the reign of the Queen Mary, but was legalized again under Queen Elizabeth in 1570 AD.⁴³

By the seventeenth century, interest rates were tolerated but subject to legislative restraints on the interest chargeable.⁴⁴ In 1624, the maximum rate of interest was at 8%.⁴⁵ In 1660, the maximum rate of interest was at 6%.⁴⁶ In 1713, the maximum rate was at 5%, courtesy of the Statute of Anne.⁴⁷ Thereafter, the focus of engagement moved from the morality of levying interest rates to the need for a maximum rate of interest.⁴⁸ As early, as 1682 some commentators and scholars alike began arguing for abolition of the maximum statutory rate of interest altogether.⁴⁹

In 1787, the utilitarian philosopher Jeremy Bentham published his Letters in Defence of Usury.⁵⁰ In it, he argued for the prevalence of the general rule of freedom of contract in society.⁵¹ He saw no compelling reason for making interest rates an exception to this rule.⁵² Furthermore, he questioned why sober men who

³⁵ Ibid at pg.80.

³⁶ Ibid at pg.80.

³⁷ Ibid at pg.80.

³⁸ Ibid at pg.80.

³⁹ Ibid at pg.80.

⁴⁰ Ibid at pg.80.

⁴¹ Ibid at pg.80.

⁴² Ibid at pg.81.

⁴³ Ibid at pg.82.

⁴⁴ Ibid at pg.82.

⁴⁵ Ibid at pg.82.

⁴⁶ Ibid at pg.82.

⁴⁷ Ibid at pg.82.

⁴⁸ Ibid at pg.82.

⁴⁹ Ibid at pg.83.

⁵⁰ Ibid at pg.83.

⁵¹ Ibid at pg.83.

⁵² Ibid at pg.83.

freely entered into a contract should be constrained or unfairly advantaged, as the case may be, by outside factors they did not agree to?⁵³ Subsequently, England in 1854 repealed all acts against usury.⁵⁴ Most of Europe soon followed suit.⁵⁵

From the foregoing, it is quite clear that the social-economic goals and proposals for and against interest cannot be wholly appreciated in the absence of any knowledge of the historical, legal and economic developments that created them.⁵⁶

2.3.2 History of Regulation of Interest Rates in Kenya

Prior to 1989, the regulation of interest rates in Kenya was a role unique to the CBK.⁵⁷ It prescribed the rates of interest to be levied over loans and advances.⁵⁸ The CBK's powers were derived from section 39(1) of the *Central Bank of Kenya Act*, now repealed.⁵⁹ It read as follows:-

“The bank may from time to time acting in consultation with the Minister, determine and publish the maximum rates of interest which specified banks or specified financial institutions may pay for the deposits and charge for loans or advances....”⁶⁰

Pursuant to the above mandate, the CBK published two gazette notices in 1989 and 1990.⁶¹ These imposed the maximum rate of interest on loans and advances.⁶²

⁵³ Ibid at pg.83.

⁵⁴ Ibid at pg.84.

⁵⁵ Ibid at pgs.84 and 85.

⁵⁶ Ibid at pg.63.

⁵⁷ *Boniface Oduor v Attorney General & another; Kenya Banker's Association & 2 others (Interested Parties)* [2019] eKLR (14 March, 2019), ‘Petition 413 of 2016 - Kenya Law’ <<http://kenyalaw.org/caselaw/cases/view/169536/>> accessed 24 November 2021 at para 51.

⁵⁸ Ibid.

⁵⁹ Ibid. Section 39 of the Central Bank of Kenya Act, ‘Cap. 491’ Laws of Kenya <<http://kenyalaw.org:8181/exist/kenyalex/actview.xml?actid=CAP.%20491>> accessed 24 November 2021.

⁶⁰ Section 39 of the Central Bank of Kenya Act, ‘Cap. 491’ Laws of Kenya <<http://kenyalaw.org:8181/exist/kenyalex/actview.xml?actid=CAP.%20491>> accessed 24 November 2021.

⁶¹ *Boniface Oduor v Attorney General & another; Kenya Banker's Association & 2 others (Interested Parties)* [2019] eKLR (14th March, 2019), ‘Petition 413 of 2016 - Kenya Law’ <<http://kenyalaw.org/caselaw/cases/view/169536/>> accessed 24 November 2021 at para 52.

⁶² *Boniface Oduor v Attorney General & another; Kenya Banker's Association & 2 others (Interested Parties)* [2019] eKLR (14th March, 2019), ‘Petition 413 of 2016 - Kenya Law’ <<http://kenyalaw.org/caselaw/cases/view/169536/>> accessed 24 November 2021 at para 52.

However, in 1990, the CBK sought to reverse the previous gazette notices through a fresh gazette notice.⁶³

Owing to a change in government policy, from the need for regulation of interest rates to the need for deregulation of the same, the mandate established under section 39(1) of the *Central Bank of Kenya Act* was subsequently overturned.⁶⁴ On 17 April, 1997, section 39(1) of the *Central Bank of Kenya Act* was repealed and substituted with the *Central Bank of Kenya (Amendment) Act, 1996*.⁶⁵

Again, owing to a change in government policy, from the need for deregulation of interest rates to regulation of the same, the position prior to 1997 with regard to interest rates was undertaken.⁶⁶ An Amendment to section 39(1) of the *Central Bank of Kenya Act, the Central Bank of Kenya (Amendment) Act, 2000*, came into force, on 7 August 2001.⁶⁷ This Amendment sought to adjust interest rates to Treasury bill rates published by the CBK on the last Friday of each month.⁶⁸ Unfortunately, this too was later repealed.⁶⁹

2.3.3 Regulation or Deregulation

From the foregoing, it is quite clear, that throughout history, governments outside and in Kenya have made repeated attempts though not consistent to maintain some form of regulation over interest rates. Inversely, numerous governments outside and in Kenya have also made attempts to deregulate interest rates. As such, the need for regulation or deregulation is very important in this discussion.

Anti-usury laws are common worldwide.⁷⁰ Numerous states possess legislation imposing the maximum and minimum rates of interest that institutions may levy.⁷¹

⁶³ Ibid at para 52.

⁶⁴ Ibid at para 53.

⁶⁵ Ibid, at para 53.

⁶⁶ Ibid at para 54.

⁶⁷ Ibid, at para 54.

⁶⁸ Ibid, at para 54. Ndegwa (n 18) at pg.5.

⁶⁹ Ibid at para 54. Ndegwa (n 18) at pg.5. Section 39 of the Central Bank of Kenya Act, 'Cap. 491' Laws of Kenya <<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20491>> accessed 24 November 2021.

⁷⁰ Carlos Madeira, 'The Impact of Interest Rate Ceilings on Households' Credit Access: Evidence from a 2013 Chilean Legislation' (2019) 106 *Journal of Banking & Finance* 166 <<http://www.sciencedirect.com/science/article/pii/S0378426619301463>> accessed 28 February 2020, at pg.166.

⁷¹ Ibid.

These often take the form of interest rate caps or ceilings.⁷² As discussed above, these laws have the singular goal of consumer protection.⁷³ They are usually aimed at countering predatory lending practices.⁷⁴

Additionally, high interest rates are seen by governments in developing countries as an obstacle.⁷⁵ They hinder investment both external and internal.⁷⁶ States in developing countries require this investment to achieve economic growth, among other goals.⁷⁷ Potential entrepreneurs, businessmen or women would be hard pressed to take on credit or loans at unfair or unnecessarily high interest rates. As such, there is limited growth in the economy. Hence, the need for legislation advocating for interest rate caps or ceilings

On the other hand, it has been suggested that interest rate caps or ceilings do not serve the object of their creation. Instead of promoting greater investment and in turn economic growth, they attract the exact opposite. The literature on interest rate ceilings or caps suggests they create several potential problems. These are captured below.

Owing to interest rate caps or ceilings, banks are less likely to offer credit to Small Market Enterprises (SMEs) and individuals.⁷⁸ Such loans tend to be riskier and costlier compared to the low returns, courtesy of the interest rate caps or ceilings.⁷⁹ Consequently, financial institutions will move their business to the government and large private sector borrowers.⁸⁰ This leads to limited access to credit for certain groups.⁸¹ Limited access to credit leads to limited capital for investment. Limited investment leads to limited economic growth. Limited economic growth leads to limited employment opportunities. The latter in turn can lead to an increase in crime and civil strife in extreme circumstances.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ *Do Interest Rate Controls Work? Evidence from Kenya* (INTERNATIONAL MONETARY FUND 2019), at pg.4.

⁷⁵ Ibid at pg.3.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid at pg.4.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Ibid.

As a consequence of the inaccessibility to credit mentioned above, potential borrowers may be forced to turn to informal lenders that might expose them to exorbitant and often illegal rates of interest.⁸² Hence, the rise in predatory lending practices.⁸³

Owing to interest rate caps or ceilings, the costs of extending credit often rise.⁸⁴ To mitigate and or offset these costs, financial institutions will often institute additional charges over their original credit offers.⁸⁵ This not only increases the cost of accessing credit but also lowers the bargaining power of the borrower.⁸⁶ The latter is unable to make an informed decision.⁸⁷ They are unable to fully assess and compute the accurate cost of the product being offered.⁸⁸

Owing to interest rate ceilings or caps, small and medium sized financial institutions cannot viably expand and or subsist.⁸⁹ They cannot extend credit vis a vis the low rates of interest nor can they attract deposits from customers with the low rates of interest offered.⁹⁰ This not only lowers access to credit and capital available for expansion but the investment confidence both internally and externally in the economy.⁹¹ This in turn can threaten the financial stability of the economy.⁹²

From the foregoing, the laws on interest rate controls seem to have the opposite effect of what their originators intended.⁹³ These include:⁹⁴

- a) Lower access to credit;
- b) Limited economic growth;
- c) Rise in predatory lending practices; and
- d) Financial Instability.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid.

⁹³ *Do Interest Rate Controls Work? Evidence from Kenya* (n 74), at pg.3.

⁹⁴ Ibid at pg. 4.

Simply stated, it is quite apparent that from the foregoing, the need for regulation or deregulation of interest rates is a mixed bag. Too much regulation stifles an economy. Too little leaves the consumers of credit vulnerable and at risk. Therefore, a balanced approach is necessary if we are to achieve the desired levels of regulation and deregulation.

2.4 Regulation of interest rates in Kenya today

On 28 July, 2016 and 24 August, 2016, the national assembly and the head of state in Kenya, passed as well as assented to the Banking (Amendment Bill), 2015, respectively.⁹⁵ This amendment⁹⁶ had implications on the *Banking Act*, Cap. 488.⁹⁷ Chief amongst them section 33(B).⁹⁸ Under this provision, among others, it sought to restrict the interest rates levied by deposit taking and lending institutions, respectively. It provided for;⁹⁹

- a) a maximum rate of interest of four per cent (4%) over that set by the CBK and levied over loans and mortgages by financial institutions;
- b) a minimum rate of interest of seventy per cent (70%) over that set by the CBK on deposits from customers; and
- c) sanctions for violation of (a) and (b) above by a Chief Executive Officer of a financial institution including imprisonment for a year or a fine not below Kenya Shillings One Million (KShs. 1,000,000/=).¹⁰⁰

In or about the same year (2016), one Boniface Odour ('the Petitioner'), instituted a case¹⁰¹ against the aforementioned provision, section 33 B. Among his claims, he argued that the impugned provision deprived the CBK of its unique role of drawing up, implementing and regulating the nation's monetary policy, in

⁹⁵ 'The Laws of Kenya' <<http://kenyalaw.org:8181/exist/kenyalex/index.xql>> accessed 24 November 2021.

⁹⁶ *Banking Amendment Act* No.25 of 2016, Laws of Kenya 'Kenya Law: 2016' <<http://kenyalaw.org/kl/index.php?id=5994>> accessed 24 November 2021.

⁹⁷ 'The Laws of Kenya' <<http://kenyalaw.org:8181/exist/kenyalex/index.xql>> accessed 24 November 2021.

⁹⁸ *Banking Amendment Act* No.25 of 2016, Laws of Kenya 'Kenya Law: 2016' <<http://kenyalaw.org/kl/index.php?id=5994>> accessed 24 November 2021.

⁹⁹ 'Regulation of Interest Rates: Where Are We?' (*Bowmans*) <<https://www.bowmanslaw.com/insights/finance/regulation-of-interest-rates-where-are-we/>> accessed 1 May 2020.

¹⁰⁰ *Ibid.*

¹⁰¹ *Boniface Oduor v Attorney General & another; Kenya Banker's Association & 2 others (Interested Parties)* [2019] eKLR (14 March, 2019), 'Petition 413 of 2016 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/169536/>> accessed 24 November 2021.

particular interest rates.¹⁰² The Petitioner was supported in his arguments by the CBK and the Kenya Bankers' Association ('the KBA'), the 2nd Respondent and 1st Interested Party in this matter, respectively.¹⁰³

The Attorney General, the National assembly of Kenya and the Consumer Federation of Kenya ('COFEK'), the 1st Respondent, the 3rd Interested Party and the 2nd Interested Party in this matter, respectively, opposed the case.¹⁰⁴ They argued that the case was a challenge and an infringement to the national assembly's law making role and mandate, established under the Constitution.¹⁰⁵ Moreover, under the Constitution, the national assembly was mandated to legislate on all matters of public interest.¹⁰⁶

Those in support of section 33B¹⁰⁷ averred that:

- a) Regulation was essential to curb exploitative lending.¹⁰⁸
- b) Prior to regulation, the rates of interest levied in Kenya were exorbitant, unpredictable and exploitative.¹⁰⁹

Those against section 33B¹¹⁰ responded that:

- a) It does not consider the cost of credit and its access.¹¹¹
- b) It had lowered access to credit and economic growth.¹¹²
- c) It interfered with the CBK's unique role of regulating interest rates.¹¹³

The court in its analysis of the case looked at the arguments the CBK and the national assembly proposed. They are briefly recapped below. The CBK reiterated

¹⁰² *Boniface Oduor v Attorney General & another; Kenya Banker's Association & 2 others (Interested Parties)* [2019] eKLR (14 March, 2019), 'Petition 413 of 2016 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/169536/>> accessed 24 November 2021 at pgs. 1 to 4.

¹⁰³ *Ibid.*

¹⁰⁴ *Boniface Oduor v Attorney General & another; Kenya Banker's Association & 2 others (Interested Parties)* [2019] eKLR (14 March, 2019), 'Petition 413 of 2016 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/169536/>> accessed 24 November 2021 at pgs.5 to 6.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ *Banking Amendment Act No.25 of 2016*, Laws of Kenya 'Kenya Law: 2016' <<http://kenyalaw.org/kl/index.php?id=5994>> accessed 24 November 2021.

¹⁰⁸ Regulation of Interest Rates: Where Are We?' (n 99).

¹⁰⁹ *Ibid.*

¹¹⁰ *Banking Amendment Act No.25 of 2016*, Laws of Kenya 'Kenya Law: 2016' <<http://kenyalaw.org/kl/index.php?id=5994>> accessed 24 November 2021.

¹¹¹ Regulation of Interest Rates: Where Are We?' (n 99).

¹¹² *Ibid.*

¹¹³ *Ibid.*

its independence under Article 231 (2) of the *Constitution*.¹¹⁴ It went on to rationalize the relevance of this independence.¹¹⁵ The said protection was necessary to restrain the state that had in Kenya's past repeatedly bulldozed and interfered with the proper function of Government.¹¹⁶ However, this protection was not a carte blanche for the CBK to be detached, isolated and disengaged from other stakeholders in the State.¹¹⁷ Thus, there was need for co-operation and coordination between the CBK and other arms and organs of the state.¹¹⁸

The CBK thereafter discussed the process involved in the formulation of monetary policy.¹¹⁹ It stressed that this was a consultative process that involved the CBK, the cabinet secretary for the Treasury and the national assembly.¹²⁰ It also resolved that there was a delineation of functions among the different parties. The CBK originated policy while the national assembly acted, as oversight.¹²¹

Flowing from the above, the court's recap of the CBK's argument was accurate. The role of the CBK was to originate policy. The national assembly, as a representative of the people of Kenya, on the other hand was responsible for overseeing the CBK's policy and ensuring that it was in line with the democratic ideals of its constituents.

It is inevitable that conflict will ensue where two or more bodies have the same function. Like individuals, organisations do not share the same goals or ideals. They are thus bound to differ and interfere with the policy of another organisation. This was discussed in detail with regard to the goals of politicians (national assembly) and technocrats (CBK) in the first chapter. Additionally, two bodies doing the same thing is wasteful. There tends to be a duplication of functions and

¹¹⁴ *Boniface Oduor v Attorney General & another; Kenya Banker's Association & 2 others (Interested Parties)* [2019] eKLR (14 March 2019), 'Petition 413 of 2016 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/169536/>> accessed 24 November 2021 at para 39.

¹¹⁵ *Ibid*

¹¹⁶ *Ibid*.

¹¹⁷ *Ibid*.

¹¹⁸ *Ibid*.

¹¹⁹ *Ibid* at paras 40-44.

¹²⁰ *Ibid* at para 45.

¹²¹ *Ibid* at para 45.

roles. As such, the court's reiteration of the CBK's argument was not only accurate but is relevant in this discussion.

The national assembly on its part argued that it was within the ambit of its powers granted under Articles 94, 95, 97 and 186 (4) of the *Constitution* to legislate on any matter.¹²² The national assembly argued that the rationale of section 33B¹²³ was to protect consumers from exploitative and unregulated interest rates.¹²⁴ Further, that the CBK had failed in its role of regulating the interest rates in the country.¹²⁵ Hence, the national assembly's legislative role was necessary.¹²⁶

The court's rendition of the national assembly's legislative powers was also accurate. However, the national assembly's assertion that it has wide legislative powers over any matter is an overreach. If we are to accept this argument, why then do we have the CBK in place? What is its role in this scenario? The CBK and the national assembly cannot have the same function and role. Each party must have its own distinct role or function in this process. Otherwise, there is confusion and chaos.

The court in its final resolution of the case laid down one of issues for determination. Whether section 33B¹²⁷ deprives the CBK of its unique role of drawing up, implementing and regulating the nation's monetary policy, in particular interest rates?¹²⁸

¹²² Ibid at para 49 and 59.

¹²³ *Banking Amendment Act* No.25 of 2016, Laws of Kenya 'Kenya Law: 2016' <<http://kenyalaw.org/kl/index.php?id=5994>> accessed 24 November 2021.

¹²⁴ *Boniface Oduor v Attorney General & another; Kenya Banker's Association & 2 others (Interested Parties)* [2019] eKLR (14 March 2019), 'Petition 413 of 2016 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/169536/>> accessed 24 November 2021 at paras 56-57.

¹²⁵ Ibid at para 57.

¹²⁶ Ibid.

¹²⁷ *Banking Amendment Act* No.25 of 2016, Laws of Kenya 'Kenya Law: 2016' <<http://kenyalaw.org/kl/index.php?id=5994>> accessed 24 November 2021.

¹²⁸ *Boniface Oduor v Attorney General & another; Kenya Banker's Association & 2 others (Interested Parties)* [2019] eKLR (14 March 2019), 'Petition 413 of 2016 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/169536/>> accessed 24 November 2021 at para 38 (i).

The court in its determination of the above issue ruled that section 33B¹²⁹ did not deprive the CBK of its unique role of drawing up, implementing and regulating the nation's monetary policy, in particular interest rates.¹³⁰ It noted that:

- a) The setting of interest rates was a function unique to the CBK.¹³¹
- b) However, it was not clear if the law making powers that enable the CBK to set interest rates were also unique and or attributable only to the CBK.¹³²
- c) The Petitioner had failed to demonstrate that section 33B deprived the CBK of its unique role of drawing up, implementing and regulating the nation's monetary policy.¹³³

Subsequent decisions from the courts¹³⁴ have followed this line of thought.

From the foregoing, the courts' analysis of section 33B¹³⁵ has failed to conclusively answer the most important question. Who is responsible for what and to what extent? Does the CBK's role in setting or formulating interest rates extend to legislating over the same interest rates? Inversely, does the national assembly's legislative role extend to formulating or setting interest rates? Therefore, this chapter has set the stage for this discussion in the subsequent chapters.

2.5 Conclusion

As highlighted in the overview, the aim of this chapter was to answer the questions of what and why. What are interest rates? Why are they important? Do they need to be regulated? Is it sufficient? To this end, it looked at the key terms and definitions with regard interest rates, the history and rationale behind the

¹²⁹ *Banking Amendment Act* No.25 of 2016, Laws of Kenya 'Kenya Law: 2016' <<http://kenyalaw.org/kl/index.php?id=5994>> accessed 24 November 2021.

¹³⁰ *Boniface Oduor v Attorney General & another; Kenya Banker's Association & 2 others (Interested Parties)* [2019] eKLR (14 March 2019), 'Petition 413 of 2016 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/169536/>> accessed 24 November 2021 at para 198 (i).

¹³¹ *Ibid* at para 90.

¹³² *Ibid*.

¹³³ *Ibid*.

¹³⁴ *Isaac Gachomo & 3 others v Attorney General & another; Central Bank of Kenya & another (Interested parties)* [2019] eKLR (18 July, 2019), 'Petition 426 of 2018 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/179226/>> accessed 24 November 2021 at paras 74 and 75.

¹³⁵ *Banking Amendment Act* No.25 of 2016, Laws of Kenya 'Kenya Law: 2016' <<http://kenyalaw.org/kl/index.php?id=5994>> accessed 24 November 2021.

regulation of interest rates both outside and in Kenya, the arguments for and against regulation and the current position in Kenya with regard to regulation of interest rates.

From the review of the discussion above, it is clear that a balanced approach is required from all stakeholders in this discussion. Sufficient argument has been made for and against the need for regulation and deregulation of interest rates, in Kenya, respectively. As such, a balance is required between the needs and concerns of the consumers and their service providers. To that end, all the stakeholders should be involved in any future legislation that seeks to regulate interest rates in Kenya.

Having dealt with the questions of what and why, the subsequent chapter will delve into the question of who? It will look at the laws underpinning the CBK's regulation of interest rates. Are the interest rates set by the CBK rules of law or mere guidelines? In particular, it will examine the legal framework concerning interest rates, the CBK's role in this process, its powers, functions and limitations.

CHAPTER THREE: THE ROLE OF THE CBK

3.1 Overview

The previous chapter addressed the what and why with regards to interest rates. It explored the meaning, relevance, history and rationale behind the regulation of interest rates in and outside Kenya, the need for regulation and deregulation of interest rates. At its conclusion, a number of questions were posed. Does the CBK's role in setting or formulating interest rates extend to legislating over the same interest rates? Inversely, does the national assembly's legislative role extend to formulating or setting interest rates?

This chapter will discuss the former. Does the CBK's role in setting or formulating interest rates extend to legislating over the same interest rates? If so, to what extent? Are there any limits, checks or balances? Simply put, it will discuss the question of who, as opposed to the what and why.

In order for this discussion to proceed, this chapter will discuss in detail, the legal framework governing the CBK. It will discuss in sequential order, the laws establishing the CBK, its functions, powers, tools/instruments, autonomy and the extent of the latter. In the absence of the above discussion, this chapter will be unable to conclusively answer the question posed in the second chapter. Does the CBK's role in setting or formulating interest rates extend to legislating over the same interest rates?

Principle 1 of the Basel Core Principles for Effective Banking Supervision asserts that an effective system of banking supervision must:

- a) possess distinct and unambiguous goals.¹
- b) possess an effective legal framework that provides the regulator with the requisite authority to achieve its goals.²

¹Principle 1 'Core Principles for Effective Banking Supervision'
<<https://www.bis.org/publ/bcbs230.htm>> accessed 7 July 2020 at pg.10.

²Ibid.

This discussion therefore, will examine whether the CBK meets this threshold. Does it have distinct and unambiguous goals? Does its legal framework imbue it with the requisite authority to achieve its goals?

3.2 Functions of the CBK

The *Constitution*³ sets up the CBK. It affirms the CBK is responsible for drawing up, applying and regulating monetary policy, among others.⁴ The CBK's authority in turn is derived from the *Central Bank of Kenya Act (Cap.491)* ('the Act').⁵ The Act identifies the primary goal of the CBK as drawing up, applying and directing monetary policy in Kenya.⁶ In addition to the above, the Act has also assigned the CBK with the following functions:

- a) drawing up and applying foreign exchange policy;
- b) storing and controlling its foreign exchange reserves;
- c) approving and overseeing other financial institutions;
- d) drawing up and applying such policies as necessary to ensure the formation, management and administration of competent and capable payment, clearing and settlement systems;
- e) acting as a financial institution, agent and adviser to the Government; and
- f) supplying currency.⁷

With regard to this discussion, this chapter will restrict itself to the primary goal of drawing up, applying and directing monetary policy. According to the Act,⁸ this function of drawing up, applying and directing monetary policy is geared towards obtaining and holding stability in the general level of prices.⁹ So, how does monetary policy relate to maintaining the stability in the general level of prices? What is monetary policy? How is it related to interest rates? How do interest rates affect the general level of prices? Why is the CBK the preferred

³ Article 231 (1) of the Constitution of Kenya, Laws of Kenya
<<http://kenyalaw.org/kl/index.php?id=398>> accessed 24 November 2021.

⁴ Article 231 (2) Ibid.

⁵ Section 4(1) Central Bank of Kenya Act, 'Cap. 491' Laws of Kenya
<<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20491>> accessed 24 November 2021.

⁶ Section 4(1) Ibid.

⁷ Section 4A (1) Ibid.

⁸ Section 4(1) Ibid.

⁹ Section 4(1) Ibid.

institution to carry out this role? These questions must be discussed before we can proceed any further. These are addressed below.

As discussed in the first chapter, Interest rates by definition are described, as the cost a borrower incurs for the funds they obtain from a lender.¹⁰ They have also been described as the cost of money.¹¹ On the other hand, monetary policy has been described as the process through which a state controls the provision and accessibility of the cost of money or rate of interest.¹²

The Act¹³ infers that the CBK uses the rate of interest or cost of money, as a tool to manipulate the general level of prices. So, how does the cost of money or rate of interest affect the general level of prices? The lowering of interest rates increases the supply and availability of money for credit and in turn consumption.¹⁴ This in turn leads to a general increase in the level of prices of consumer products and utilities.¹⁵

The increase of interest rates occasions the exact opposite. Too much money in the economy occasions high prices which may limit the economic growth of a nation, as people are discouraged from purchasing goods and services.¹⁶ On the other hand, too little money in the economy may also stifle the economic growth of a nation, as there are limited funds available with which to purchase goods and services. The role of the CBK therefore, is to maintain a balance and stability in the general level of prices.

Interest rates play a major role in the economy of the country. As discussed in the second chapter, stakeholders such, as banks and the government rely on the prevailing interest rates to invest, plan, strategize and attract investment into the

¹⁰ Cecilia Maigua and Gekara Mouni, 'Influence of Interest Rates Determinants on the Performance of Commercial Banks in Kenya' (2016) 6 International Journal of Academic Research in Accounting, Finance and Management Sciences 121 <https://econpapers.repec.org/article/hurijaraf/v_3a6_3ay_3a2016_3ai_3a2_3ap_3a121-133.htm> accessed 29 February 2020 at pg.1.

¹¹ Thammarak Moenjok, *Central Banking: Theory and Practice in Sustaining Monetary and Financial Stability* (Wiley 2014) 44–46.

¹² Ibid.

¹³ Section 4 (1) Central Bank of Kenya Act 'Cap. 491' Laws of Kenya <<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20491>> accessed 24 November 2021..

¹⁴ 'Monetary Policy|CBK' <<https://www.centralbank.go.ke/monetary-policy/>> accessed 29 February 2020.

¹⁵ Ibid.

¹⁶ Ibid.

country, respectively. To that end, they rely on the information disclosed by the CBK, as the legally mandated regulator of interest rates in the country.

Why is the CBK the preferred institution to carry out this function? Are there no other bodies within the executive or legislature of the state that can ably carry out this function? This question was examined and addressed in the first chapter. However, a recap of this information is necessary to further expound on and stress the rationale behind this position. The arguments in support of the CBK's position are captured below.

Scholars have argued that politicians during an election cycle are usually tempted by short term gains afforded by the imposition of low interest rates such, as economic growth and rise in employment.¹⁷ However, by lowering the interest rates in the short term, they create more problems than they solve in the long term.¹⁸ For instance, a by-product of such an endeavour is the rise in inflation.¹⁹ The latter is characterized by a general rise in the cost of consumer products and utilities.²⁰ This may limit the economic growth of a nation, as people are discouraged from purchasing goods and services. Additionally, it depreciates the

¹⁷ Arthur WS Duff, 'Central Bank Independence and Macroprudential Policy: A Critical Look at the US Financial Stability Framework' (2014) 11 Berkeley Bus. LJ 183 at pg.202; Lorenzo Bini Smaghi, 'Central Bank Independence in the EU: From Theory to Practice' (2008) 14 European Law Journal 446 <<https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1468-0386.2008.00427.x>> accessed 29 February 2020 at pg.447 ; Marco Goldoni, 'The Limits of Legal Accountability of the European Central Bank' (2017) 24 George Mason Law Review 595 <<http://georgemasonlawreview.org/archives/volume-242-winter-2017/>> accessed 28 February 2020 at pg.597; Chris Land, 'Ultra Vires: The Eurozone Crisis and the European Central Bank's Lost Independence' (Social Science Research Network 2016) SSRN Scholarly Paper ID 2781668 <<https://papers.ssrn.com/abstract=2781668>> accessed 28 February 2020 at pg.489-490; Peter Conti-Brown, 'The Institution of Federal Reserve Independence' (2015) 32 Yale Journal on Regulation 257 <<https://heinonline.org/HOL/Page?handle=hein.journals/yjor32&id=263&div=&collection=>> at pg.263; Charles I Plosser, 'A Limited Central Bank' (2014) 34 Cato Journal 201 <<https://heinonline.org/HOL/Page?handle=hein.journals/catoj34&id=217&div=&collection=>> at pg.206; Cristina Bodea and Raymond Hicks, 'International Finance and Central Bank Independence: Institutional Diffusion and the Flow and Cost of Capital' (2015) 77 The Journal of Politics 268 <<https://www.journals.uchicago.edu/doi/10.1086/678987>> accessed 28 February 2020 at pg.268; Thomas Palley, 'CENTRAL BANK INDEPENDENCE: A RIGGED DEBATE BASED ON FALSE POLITICS AND ECONOMICS' (2019) 78 Investigación Económica 67 <<http://www.revistas.unam.mx/index.php/rie/article/view/71547>> accessed 17 February 2020 at pg.70; Canova, 'The Role of Central Banks in Global Austerity' (2015) 22 Indiana Journal of Global Legal Studies 665 <<https://www.jstor.org/stable/10.2979/indjglolegstu.22.2.665>> accessed 28 February 2020 at pg.666; Willem Middelkoop, *The Big Reset Revised Edition: War on Gold and the Financial Endgame* (Amsterdam University Press 2015) at pg.10.

¹⁸ Duff (n 17), at pg.202.

¹⁹ Ibid.

²⁰ 'Monetary Policy | CBK' (n 14).

value of its currency.²¹ Therefore, entrusting this function to an autonomous third party removes this temptation.²²

Scholars have also argued that central banking officials alone possess the specialised economic skills and knowledge needed and necessary to ensure economic and financial stability.²³ Furthermore, monetary policy is a technical aspect that requires specialised skills and knowledge.²⁴ As such, implementation and decision making, as regards monetary policy should be left to the central bank.²⁵

Scholars have argued that independent central banks (most especially in democracies) are keen attractors of investment when compared to regulated central banks.²⁶ This is so because investors tend to value and appreciate independent central banks, as they signal credibility, policy and institutional stability.²⁷

Flowing from the above discussion, the function of drawing up and applying monetary policy, specifically interest rates, should appropriately fall within the ambit of the CBK. In line with above position, the courts in Kenya have affirmed the role and function of the CBK in formulating and regulating interest rates in the Country. The High Court in *Boniface Oduor v Attorney General & another; Kenya Banker's Association & 2 others (Interested Parties)*²⁸ noted that the role of setting interest rates was a role uniquely attributable to the CBK.²⁹ The High Court in *Isaac Gachomo & 3 others v Attorney General & another; Central Bank*

²¹ Ibid.

²² Duff (n 17), at pg.202. Smaghi (n 17), at pg.447. Goldoni (n 17), at 597. Conti-Brown (n 17), at pg.263. Hudson (n 17). Palley (n17). Canova (n 17), at pg.666. Middelkoop (n 17). Riles, 'The Challenge to the Technocracy' (n 17), at pg.10.

²³ Land (n 17), at pgs.489-502. Annelise Riles, 'Culture Clash:: Experts and the Public', *Financial Citizenship* (Cornell University Press 2018) <<https://www.jstor.org/stable/10.7591/j.ctv43vr8t.6>> accessed 28 February 2020, at pg.38.

²⁴ Riles, 'Culture Clash' (n 23), at pg.38.

²⁵ Ibid.

²⁶ Bodea and Hicks (n 17), at pgs.268-271. Cristina Bodea and Raymond Hicks, 'Price Stability and Central Bank Independence: Discipline, Credibility, and Democratic Institutions' (2015) 69 *International Organization* 35 <<https://www.cambridge.org/core/journals/international-organization/article/price-stability-and-central-bank-independence-discipline-credibility-and-democratic-institutions/605F4E0E40C7366B2B9413103B409BFA>> accessed 28 February 2020, at pgs.35-37.

²⁷ Bodea and Hicks (n 17), at pgs.268-271. Bodea and Hicks (n 26), at pgs.35-37.

²⁸ [2019] eKLR 'Petition 413 of 2016 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/169536/>> accessed 24 November 2021 at para 90.

²⁹ Ibid.

*of Kenya & another (Interested parties)*³⁰ reiterated the position stated in *Boniface Odour*.

From the foregoing, it is clear that the CBK has the exclusive function of setting and directing interest rates in the country. However, does this function extend to the legislating over the same? The discussion on the powers and tools of the CBK will address this question.

3.3 Powers and Tools of the CBK

What can the CBK do? Where does it derive its authority from and to what extent? How does it go about its day to day operations with regard to setting and regulating interest rates? These questions will be addressed below.

The Constitution asserts that consumers, among others, are entitled to:

- a) products and services of an appropriate standard; and
- b) the protection of their wellbeing, safety and economic interests.³¹

Furthermore, the national assembly in view of the above has an obligation to enact legislation to provide, maintain and protect the above entitlements. The national assembly can carry out this obligation by:

- a) Directly enacting laws by passing bills (principal legislation);³² and or
- b) Conferring authority on other bodies (state organs) to enact legislation (subsidiary legislation) to that effect.³³

With regard to our discussion, these entitlements relate to the drawing up and application of monetary policy, specifically interest rates. The CBK in its function of drawing up and applying monetary policy uses a number of tools. These

³⁰ *Isaac Gachomo & 3 others v Attorney General & another; Central Bank of Kenya & another (Interested parties)* [2019] eKLR (18 July, 2019), 'Petition 426 of 2018 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/179226>> accessed 24 November 2021 at para 74.

³¹ Articles 46 (1) (a), 46 (1) (c) and 46 (3) of the 'Constitution of Kenya' Laws of Kenya <<http://kenyalaw.org/kl/index.php?id=398>> accessed 24 November 2021.

³² Article 109 (1) *Ibid*.

³³ Article 94 (5) *Ibid*.

include the cash reserve ratio, discount window operations, open market ratio, central bank rate and forex exchange market operations.³⁴

This discussion will limit itself to the central bank rate.³⁵ Section 36 (1) of the Act³⁶ allows the CBK to extend credit for fixed periods not exceeding six (6) months to specified financial institutions. Pursuant to this, the CBK can dictate the terms and conditions under which it chooses to extend credit to the said financial institutions.³⁷ Among these terms and conditions, the CBK can dictate and make known the rate of interest it will levy over the credit extended to the said financial institutions.³⁸

The above rate of interest is known, as the central bank rate ('the CBR').³⁹ The CBR is the rate at which the CBK would take in commercial assets and securities in exchange for cash or the rate it charges to lend money.⁴⁰ It is the rate at which the CBK would loan out funds to other banks.⁴¹ The CBR assists financial institutions in Kenya in assessing and computing the rate of interest applicable in their day to day transactions.⁴²

In line with the above, the Act⁴³ requires the CBK to set up a specialized committee, the Monetary Policy Committee ('the MPC'). One of the goals of the

³⁴ *Boniface Oduor v Attorney General and Another: Kenya Bankers Association and 2 Others (Interested Parties)* [2019] eKLR (14 March 2019), 'Petition 413 of 2016 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/169536/>> accessed 24 November 2021 at para 42.

³⁵ *Ibid.*

³⁶ Central Bank of Kenya Act 'Cap. 491' Laws of Kenya <<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20491>> accessed 24 November 2021.

³⁷ Section 36 (3) of the Central Bank of Kenya Act 'Cap. 491' Laws of Kenya <<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20491>> accessed 24 November 2021.

³⁸ Section 36 (3) and (4) *Ibid.*

³⁹ Section 36 (4) *Ibid.*

⁴⁰ Mary Mellor, *Debt or Democracy: Public Money for Sustainability and Social Justice* (Pluto Press 2015) <<http://www.jstor.org/stable/10.2307/j.ctt18gzdmr>> accessed 9 July 2020, at pg.127.

⁴¹ John Kenneth Galbraith, *Money: Whence It Came, Where It Went* (Princeton University Press 2017) <<http://www.jstor.org/stable/10.2307/j.ctt1vwmh9g>> accessed 9 July 2020 at pg.46.

⁴² *Boniface Oduor v Attorney General and Another: Kenya Bankers Association and 2 Others (Interested Parties)* [2019] eKLR (14 March 2019), 'Petition 413 of 2016 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/169536/>> accessed 24 November 2021 at para 43.

⁴³ Section 4D (1) Central Bank of Kenya Act 'Cap.491' Laws of Kenya <<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20491>> accessed 24 November 2021.

MPC is to review and assess the CBR.⁴⁴ The MPC consists of the Governor of the CBK, the Deputy Governor of the CBK, two staff members appointed by the Governor, four appointees of the Cabinet Secretary and the Permanent secretary or representative.⁴⁵ The MPC is obliged to convene a meeting at least once every two months wherein the CBR is assessed and reviewed.⁴⁶

In line with the authority derived from the national assembly,⁴⁷ the Act⁴⁸ permits the CBK pursuant to its goals, to prepare and enact any subsidiary legislation, for the purpose of fulfilling its goals.⁴⁹ Likewise, the *Banking Act*⁵⁰ also permits the CBK to prepare and issue directions and guidelines to banks with respect to their standards of conduct, reporting requirements and operating procedures. To that end, the CBK has enacted a number of regulations and guidelines. An example includes the Central Bank of Kenya Prudential Guidelines on Consumer Protection, 2013. These guidelines oblige banks to:

- a) explain to a consumer the key features of the product or service that the consumer is interested in, prior to a consumer choosing a product or service;⁵¹

⁴⁴ *Boniface Oduor v Attorney General and Another: Kenya Bankers Association and 2 Others (Interested Parties)* [2019] eKLR (14 March 2019), 'Petition 413 of 2016 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/169536/>> accessed 24 November 2021 at para 75.

⁴⁵Section 4D (2) Central Bank of Kenya Act 'Cap.491' Laws of Kenya <<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20491>> accessed 24 November 2021.

⁴⁶Section 4D (5) Ibid; *Boniface Oduor v Attorney General and Another: Kenya Bankers Association and 2 Others (Interested Parties)* [2019] eKLR (14 March 2019), 'Petition 413 of 2016 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/169536/>> accessed 24 November 2021 at para 75.

⁴⁷Article 94 (5) of the 'Constitution of Kenya' Laws of Kenya <<http://kenyalaw.org/kl/index.php?id=398>> accessed 24 November 2021.

⁴⁸Section 57 (1) Central Bank of Kenya Act 'Cap.491' Laws of Kenya <<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20491>> accessed 24 November 2021.

⁴⁹ *Isaac Gachomo and 3 Others v Attorney General and Another: Central Bank of Kenya and Another (Interested Parties)* [2019] eKLR (18 July 2019), 'Petition 426 of 2018 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/179226/>> accessed 24 November 2021 at para 72.

⁵⁰Section 33 (4) Banking Act 'Cap.488' Laws of Kenya <<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20488>> accessed 24 November 2021.

⁵¹ Paragraph 3.2.3 (a) (i) Central Bank of Kenya Prudential Guidelines on Consumer Protection 2013 (CBK/PG/22).

- b) notify a consumer within a reasonable time of any changes in the terms and conditions of a product or service offered and taken by the consumer, prior to implementing the same;⁵²
- c) highlight to a consumer in the terms and conditions of a product or service offered, the fees, charges, penalties, relevant interest rates and any other consumer liabilities or obligations applicable;⁵³
- d) disclose to a consumer all charges and fees to be levied for a product or service that a consumer is interested in;⁵⁴ and
- e) disclose to a consumer all charges and fees to be levied for a product or service that a consumer has chosen.’’⁵⁵

Consequently, the Act⁵⁶ pursuant to the authority derived from the national assembly,⁵⁷ authorizes the CBK to enact any subsidiary legislation required for its operations. The courts⁵⁸ have defined statutory instruments or subsidiary legislation to describe:

‘‘ [A]ny rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, bylaw, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued.’’⁵⁹

In view of the above, it is inevitable that the CBK’s authority to enact such legislation can be extended to the function of setting and regulating interest rates. The CBK, as the legally mandated regulator of interest rates can enact legislation

⁵² Paragraph 3.2.9 (a) Ibid.

⁵³ Paragraph 3.4.4 (i) Ibid.

⁵⁴ Paragraph 3.4.4 (ii) Ibid.

⁵⁵ Paragraph 3.4.6 (i) Ibid.

⁵⁶ Section 57 (1) Central Bank of Kenya Act ‘Cap.491’ Laws of Kenya
<<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20491>> accessed 24 November 2021.

⁵⁷ Article 94 (5) of the ‘Constitution of Kenya’ Laws of Kenya
<<http://kenyalaw.org/kl/index.php?id=398>> accessed 24 November 2021.

⁵⁸ *Isaac Gachomo and 3 Others v Attorney General and Another : Central Bank of Kenya and Another (Interested Parties)* [2019] eKLR(18 July 2019), ‘Petition 426 of 2018 - Kenya Law’
<<http://kenyalaw.org/caselaw/cases/view/179226>> accessed 24 November 2021 at para 73.

⁵⁹ Ibid.

to regulate it. The High Court⁶⁰ in Kenya has reaffirmed this position. However, it should be noted that this authority is derived from the national assembly.⁶¹ Moreover, the legislation itself is subsidiary in nature.

From the foregoing, it is quite clear that the management and regulation of interest rates is a specialized function that requires an autonomous and specialized institution to manage this function. Furthermore, it is beyond doubt that the CBK can and is empowered to legislate over the setting and regulation of interest rates. However, to what extent is the CBK allowed to legislate over interest rates? Are there any checks and balances? Is there any oversight? What are the limits of this oversight? Therefore, this discussion will move to the autonomy of the CBK and its limits with regard to the setting and regulation of interest rates.

3.4 Autonomy of the CBK

Principle 2 of the Basel Core Principles for Effective Banking Supervision requires the regulator possess a degree of autonomy, sufficient resources, sound transparency and accountability mechanisms in order to achieve its goals.⁶² In line with the above, it is a standard rule that institutions such, as the CBK must possess a degree of autonomy or independence in order for them to carry out their functions successfully. There must be little or no interference in their operations from other bodies or organs of the state. The Supreme Court of Kenya has extensively discussed this rule and its rationale. *In the Matter of Interim Independent Electoral Commission*,⁶³ the court noted that:

“ [T]he real purpose of the “independence clause”, with regard to Commissions and independent offices established under the Constitution, was to provide a safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of government. Such a provision was incorporated in the Constitution as an antidote, in the light of regrettable memories of an all-powerful Presidency that, since

⁶⁰ *Isaac Gachomo and 3 Others v Attorney General and Another: Central Bank of Kenya and Another (Interested Parties)* [2019] eKLR (18 July 2019), ‘Petition 426 of 2018 - Kenya Law’ <<http://kenyalaw.org/caselaw/cases/view/179226>> accessed 24 November 2021 at para 72.

⁶¹ Article 94 (5) of the ‘Constitution of Kenya’ Laws of Kenya <<http://kenyalaw.org/kl/index.php?id=398>> accessed 24 November 2021.

⁶² Principle 2 ‘Core Principles for Effective Banking Supervision’ <<https://www.bis.org/publ/bcbs230.htm>> accessed 7 July 2020 at pg.10.

⁶³ [2011] eKLR (2 December 2011), ‘Constitutional Application 2 of 2011 - Kenya Law’ <<http://kenyalaw.org/caselaw/cases/view/77634/>> accessed 24 November 2021. at paras 59 and 60.

Independence in 1963, had emasculated other arms of government, even as it irreparably trespassed upon the fundamental rights and freedoms of the individual... The several independent Commissions and offices are intended to serve as 'people's watchdogs' and, to perform this role effectively, they must operate without improper influences, fear or favour: this, indeed, is the purpose of the "independence clause"... the Commissions and independent offices, in carrying out their functions, are not to take orders or instructions from organs or persons outside their ambit."⁶⁴

The Supreme Court was very clear in its analysis. Kenya's political history is rife with examples of political and quite often unlawful interference from the executive into the affairs of other organs and institutions of the state. This has in turn hampered the goals of those organs and institutions to the detriment of the general populace. As such, any undue and illegal influence over organs like the CBK must be discouraged. The Supreme Court of Kenya⁶⁵ has echoed these sentiments.

In this situation what does independence mean? Again, the Supreme Court of Kenya has addressed this question. It has categorised independence into four subsets including, functional independence, operational independence, financial independence and perception of independence.⁶⁶ This discussion will limit itself to functional independence with regard to the CBK. This form of independence has been described as having bodies exercising their mandate devoid of any intrusions and or influence from other organs or bodies.⁶⁷

In carrying out, its functions, the CBK must be free of any interference from any other body or organ of the state that is not prescribed by the law. The Constitution⁶⁸ has reaffirmed this position. Furthermore, the High Court in Kenya in *Boniface Odour*⁶⁹ and *Isaac Gachomo*⁷⁰ has taken cognizance of this position.

⁶⁴ Ibid.

⁶⁵ *In the Matter of the National Land Commission* [2015] eKLR (2 December 2015), Advisory Opinion Reference 2 of 2014 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/116512/>> accessed 24 November 2021 at para 177.

⁶⁶ Ibid at para 184.

⁶⁷ Ibid at para 184.

⁶⁸ Article 231 (3) of the 'Constitution of Kenya' Laws of Kenya <<http://kenyalaw.org/kl/index.php?id=398>> accessed 24 November 2021.

⁶⁹ *Boniface Oduor v Attorney General and Another: Kenya Bankers Association and 2 Others (Interested Parties)* [2019] eKLR (14 March 2019), 'Petition 413 of 2016 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/169536/>> accessed 24 November 2021 at para 69.

It has been established in this chapter that the setting and regulation of interest rates falls squarely within the purview of the CBK. Further, that this purview extends to enacting legislation over the same. However, this purview is not total nor is the CBK's autonomy or independence all encompassing. This chapter will elucidate.

The courts have been very clear. Independent or autonomous bodies must resist any attempts at undue influence or unlawful intrusion in their mandate.⁷¹ Simply put, they must not permit any interference that is not prescribed by the law. What happens where there is interference that is prescribed by the law or necessity? How are bodies like the CBK to respond? This chapter will address these questions.

The Supreme Court of Kenya *in the Matter of Interim Independent Electoral Commission*⁷² and *in the Matter of the National Land Commission*⁷³ noted that:

“ [T]he Commissions and independent offices, in carrying out their functions, are not to take orders or instructions from organs or persons outside their ambit. These Commissions or independent offices must, however, operate within the terms of the Constitution and the law: the “independence clause” does not accord them carte blanche to act or conduct themselves on whim; their independence is, by design, configured to the execution of their mandate, and performance of their functions as prescribed in the Constitution and the law. For due operation in the matrix, “independence” does not mean “detachment”, “isolation” or “disengagement” from other players in public governance... Indeed, for practical purposes, an independent Commission will often find it necessary to co-ordinate and harmonize its activities with those of other institutions of Government, or other Commissions, so as to maximize results, in the public interest. Constant consultation and co-ordination with other organs of Government, and with civil society as may be necessary, will ensure a seamless, and an efficient and effective rendering of service to the people in whose name the Constitution has instituted the safeguards in question.”⁷⁴

⁷⁰ *Isaac Gachomo and 3 Others v Attorney General and Another: Central Bank of Kenya and Another (Interested Parties)* [2019] eKLR (18 July 2019), ‘Petition 426 of 2018 - Kenya Law’ <<http://kenyalaw.org/caselaw/cases/view/179226>> accessed 24 November 2021 at paras 66 and 72.

⁷¹ *In the Matter of the Interim Independent Electoral Commission* [2011] eKLR (2 December 2011), ‘Constitutional Application 2 of 2011 - Kenya Law’ <<http://kenyalaw.org/caselaw/cases/view/77634/>> accessed 24 November 2021 at paras 59 and 60; *In the Matter of the National Land Commission* [2015] eKLR (2 December 2015), Advisory Opinion Reference 2 of 2014 - Kenya Law’ <<http://kenyalaw.org/caselaw/cases/view/116512/>> accessed 24 November 2021 at para 177.

⁷² *In the Matter of the Interim Independent Electoral Commission* [2011] eKLR (2 December 2011) ‘Constitutional Application 2 of 2011 - Kenya Law’ <<http://kenyalaw.org/caselaw/cases/view/77634/>> accessed 24 November 2021 at pars 59 and 60.

⁷³ *In the Matter of the National Land Commission* [2015] eKLR (2 December 2015) Advisory Opinion Reference 2 of 2014 - Kenya Law’ <<http://kenyalaw.org/caselaw/cases/view/116512/>> accessed 24 November 2021 at para 177.

⁷⁴ *Ibid.*

From the foregoing, it is clear that the autonomy or independence of the CBK is not a blanket cover for all its decisions and operations. The latter must be backed by the law. Where there is interference permitted by the law, the CBK must adhere to it. Furthermore, where it is necessary, the CBK is expected to collaborate and co-ordinate with other organs of the state to further its goal of regulating and controlling the monetary policy in the country. A perusal of the CBK's legal framework reflects such a position.

The *Constitution*⁷⁵ provides that monetary policy, among others, is a function of the national government. It is therefore implicit that there must be some degree of influence exerted by the executive and or legislature, (as arms of the national government) over the affairs of the CBK and vice versa. This state of affairs is highlighted below.

The Act⁷⁶ provides that there will be regular consultations between the cabinet secretary responsible for Finance and the Treasury ("the cabinet secretary") and the CBK on monetary policy. Likewise, the CBK is obliged to advise the cabinet secretary on any matter likely to affect the achievement of the CBK's primary goal.⁷⁷ Additionally, the cabinet secretary is at liberty to seek advice from the CBK on any matters within his or her purview.⁷⁸

Within 3 months after the close of the financial year, the CBK is obliged to render to the cabinet secretary a report on its operations throughout that year along with the balance sheet and the profit and loss account.⁷⁹ In addition to the above requirement, the CBK's MPC, pursuant to the Act,⁸⁰ is obliged every six (6) months to submit to the cabinet secretary a monetary policy statement ("the MPS") for the next 12 months indicating:

- a) The goals the CBK intends to achieve and the methods it will rely on;
- b) The rationale behind the aforementioned goals and methods; and

⁷⁵ Article 186 (1) and paragraph 10 of the Fourth Schedule to 'the Constitution of Kenya' Laws of <<http://kenyalaw.org/kl/index.php?id=398>> accessed 24 November 2021.

⁷⁶Section 4C (1) Central Bank of Kenya Act 'Cap.491' Laws of Kenya <<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20491>> accessed 24 November 2021.

⁷⁷ Section 50 (1) and (2) Ibid.

⁷⁸ Section 50 (3) Ibid.

⁷⁹ Section 54 Ibid.

⁸⁰ Section 4B (1) Ibid.

c) A progress report on the current goals.⁸¹

Thereafter, the cabinet secretary is obliged to transmit the MPS to the appropriate committee in the national assembly for their review.⁸²

Similarly, the CBK is obliged to forward to the national assembly every 3 months, a report on the state of the economic and banking sector, including the prevailing CBR.⁸³ From the foregoing, it is clear that the role of the national assembly is one of oversight. The High Court in *Isaac Gachomo*⁸⁴ stated as much.

Notwithstanding the above, the cabinet secretary has the authority to direct the CBK to adopt such monetary policy, as he or she feels is appropriate following consultations with the CBK and upon a resolution of the cabinet for a period of 6 months or such shorter period.⁸⁵ Likewise, the *Banking Act*⁸⁶ provides that no bank can increase its rate of interest unless the cabinet secretary approves it.⁸⁷ In line with this provision, the *Banking (Increase of rate of banking and other charges) Regulations, 2006*, highlight the procedure that banks are required to follow in their application to increase their rate of interest. Any application to increase the rate of interest must be forwarded to the CBK who then assess, review and in turn forward their recommendations to the cabinet secretary for his or her final decision.⁸⁸

From the foregoing, it is quite apparent that the executive holds a significant influence over the CBK. Their relationship could be described, as one of a principal (executive) and agent (CBK). Ordinarily, this could be construed to be an infringement of the CBK's autonomy or independence. However, from a

⁸¹ Section 4B (1) Ibid.

⁸² Section 4B (2) Ibid.

⁸³ Section 36B Ibid.

⁸⁴ *Isaac Gachomo and 3 Others v Attorney General and Another : Central Bank of Kenya and Another (Interested Parties)* [2019] eKLR(18 July 2019), 'Petition 426 of 2018 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/179226>> accessed 24 November 2021 at paras 72 -75.

⁸⁵ Section 4C (2) Central Bank of Kenya Act 'Cap.491' Laws of Kenya <<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20491>> accessed 24 November 2021.

⁸⁶ Section 44 Banking Act 'Cap.488' Laws of Kenya <<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20488>> accessed 24 November 2021.

⁸⁷ *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited* [2014] eKLR (10 October 2014), 'Civil Appeal 282 of 2004 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/102367>> accessed 24 November 2021, at paras 24 and 25.

⁸⁸ Regulation 2, 3, 4, 5 and 7 Banking (Increase of Rate of Banking and other Charges) Regulations 2006 Laws of Kenya.

perusal of the CBK's legal framework, this influence is lawful and in line with the Supreme Court in *the Matter of Interim Independent Electoral Commission*⁸⁹ and *in the Matter of the National Land Commission*.⁹⁰ In a nutshell, it meets the threshold establishing the CBK's independence. On the other hand, the national assembly's influence over the CBK is clearly one of oversight, as compared to the role of the executive.

3.5 Conclusion

In line with its objectives indicated at its introduction, this chapter has sought to answer one of the two questions posed at the end of the previous chapter. Does the CBK's role in setting and regulating interest rates extend to legislating over the same interest rates? It has answered in the affirmative. However, it also noted that this authority to legislate was derived from the national assembly. Furthermore, the legislation enacted was subsidiary in nature. It has looked at the functions, powers, tools and the autonomy of the CBK to rationalize its answer to the above question. However, a second question which this chapter could not address lingers. Does the national assembly's legislative role extend to setting and regulating interest rates? If so. Why? What are the implications? The next chapter will decisively deal with this question. However, to sum up this chapter the CBK though an independent and autonomous body is subject to oversight and review by the executive and the national assembly, as prescribed by the law of the land.

⁸⁹ *In the Matter of the Interim Independent Electoral Commission* [2011] eKLR (2 December 2011), 'Constitutional Application 2 of 2011 - Kenya Law'

<<http://kenyalaw.org/caselaw/cases/view/77634/>> accessed 24 November 2021 at paras 59 and 60.

⁹⁰ *In the Matter of the National Land Commission* [2015] eKLR (2 December 2015), 'Advisory Opinion Reference 2 of 2014 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/116512/>> accessed 24 November 2021 at para 177.

CHAPTER FOUR: THE ROLE OF THE NATIONAL ASSEMBLY OF KENYA

4.1 Overview

The previous chapter sought to answer one of the two questions posed in the first and third chapter. Does the CBK's role in setting and regulating interest rates extend to legislating over the same interest rates? It answered this question in the affirmative. This chapter will deal with the second question posed in the first and third chapter. Does the national assembly's legislative role extend to setting and regulating interest rates? How and why? What are the implications?

In order to do so, this chapter, will discuss in detail, the legal framework governing the national assembly. It will discuss in sequential order, the laws establishing the national assembly of Kenya, its functions, powers and tools/instruments. This is necessary in order to address the second question posed in the first and third chapter. This discussion therefore, will examine whether the National assembly meets this threshold.

4.2 Functions of the national assembly of Kenya

The *Constitution*¹ establishes the national assembly of Kenya. It is made up of 290 members each elected by the registered voters of single member constituencies, 47 women each elected by the registered voters of the counties, 12 members nominated by parliamentary political parties subject to their numbers and representing special interests and the Speaker.²

The *Constitution* provides that the national assembly of Kenya shall be solely responsible for making laws within the Republic.³ In turn, this authority to make laws is derived from and rests with the citizenry.⁴ They exercise their will and this power by voting in their representatives to the national assembly.⁵ These representatives are then expected to draw up and create legislation that expresses

¹ Article 93 (1) of the Constitution of Kenya, Laws of Kenya
<<http://kenyalaw.org/kl/index.php?id=398>> accessed 24 November 2021.

² Article 97 (1) Ibid.

³ Articles 94 (5) and 95 (3) Ibid.

⁴ Articles 1 (1), 1 (2), 1 (3) 94 (1), 94 (2) and 95 (1) of the Constitution of Kenya, Laws of Kenya
<<http://kenyalaw.org/kl/index.php?id=398>> accessed 24 November 2021.

⁵ Ibid.

the will, aspirations and desires of their electorate. Hence, the national assembly's composition.⁶ This relationship by design and in theory reflects the will and desire of the people who elect their representatives to the national assembly. In effect, the national assembly and its members are required to reflect the desires and will of their electorate. In a nutshell, this is akin to a social contract between the electorate and their representatives in the national assembly.

Briefly, the electorate surrender some of their rights in order to become members of a society and benefit from the protections, rights, privileges and certainties afforded by this society.⁷ To this end, they expressly and implicitly assent to the laws, direction and policy of the state.⁸ The latter in consideration for this gesture, undertakes to avail and protect the aforementioned protections, rights, privileges and certainties to the best of its abilities and pursuant to its contract with the electorate.⁹

It should be noted that the legislative function of the national assembly is not its sole function. It is also tasked with:

- a) Debating and settling issues of public interest;¹⁰
- b) Dictating the apportionment of resources between the levels of government;¹¹
- c) Allocating resources for use by the government and other state organs;¹²
- d) Supervising and overseeing the national revenue and its use;¹³
- e) From time to time, assessing the eligibility and capacity of the President, the Deputy president and other state officers to hold office;¹⁴ and
- f) Overseeing state organs.¹⁵

⁶Article 97 (1) of the Constitution of Kenya, Laws of Kenya
<<http://kenyalaw.org/kl/index.php?id=398>> accessed 24 November 2021

⁷ Feldmann, 'A Social Contract and Rules of Practice for the Fed' (2016) 99 Soundings: An Interdisciplinary Journal 1 <<http://www.jstor.org/stable/10.5325/soundings.99.1.0001>> accessed 28 February 2020, at pgs.1 and 18.

⁸ Ibid, at pg.18.

⁹ Ibid, at pg.18.

¹⁰Article 95 (2) of the Constitution of Kenya, Laws of Kenya
<<http://kenyalaw.org/kl/index.php?id=398>> accessed 24 November 2021.

¹¹Article 95 (4)(a) Ibid.

¹²Article 95 (4)(b) Ibid.

¹³Article 95 (4)(c) Ibid.

¹⁴ Article 95 (5) (a) Ibid.

¹⁵ Article 95 (5) (b) Ibid.

With regard to this discussion, this chapter will restrict itself to the legislative¹⁶ and oversight¹⁷ function of the national assembly of Kenya. As discussed in the third chapter, the Constitution provides that consumers among others are entitled to:¹⁸

- a) products and services of an appropriate standard; and
- b) protection of their wellbeing, safety and economic interests.¹⁹

Furthermore, the national assembly in view of the above rights has an obligation to enact legislation to provide, maintain and protect the above rights. The national assembly can carry out this obligation by:

- c) Directly enacting laws by passing bills;²⁰ and or
- d) Conferring authority on other bodies (state organs) to enact legislation to that effect.²¹

With regard to our discussion, these services include the regulation and setting of interest rates levied for deposit taking and lending institutions. The pervious chapter discussed the role of the CBK in setting and formulating interest rates. Additionally, it examined the rationale behind this state of affairs. It concluded that the CBK had legislative authority to enact laws regulating and setting interest rates in the country.²² Given the CBK's role in setting, regulating and legislating over interest rates in the country:

- a) Does the national assembly have a role to play?
- b) If so, what is the rationale behind this thinking?

This chapter will address these questions when it examines the powers of the national assembly.

¹⁶ Articles 94 (5) and 95 (3) Ibid.

¹⁷ Article 95 (5) (b) Ibid.

¹⁸ Article 46 (1) (a), 46 (1) (c) and 46 (3) Ibid.

¹⁹ Article 46 (1) (a), 46 (1) (c) and 46 (3) Ibid.

²⁰ Article 109 (1) Ibid.

²¹ Article 94 (5) Ibid.

²² Article 231 (2) Ibid and Section 57 (1) Central Bank of Kenya Act 'Cap.491' Laws of Kenya <<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20491>> accessed 24 November 2021.

4.3 Powers of the national assembly of Kenya

The answer to the first question above is yes. The *Constitution* provides that the national assembly may make laws for the state on any issue.²³ Furthermore, the 4th schedule of the *Constitution*, paragraph 11 describes monetary policy, as a function of the national government. The role of monetary policy and its relation to interest rates was discussed in the previous chapter. Briefly, it has been described as the process through which a state controls the provision and accessibility of the cost of money or rate of interest.²⁴

As discussed in the previous chapter, it is implied that the CBK uses the rate of interest or cost of money, as a tool to manipulate the general level and stability of prices. In turn, the CBK derives its legislative authority to set and regulate interest rates in the country from the national assembly.²⁵ As such, it is only natural that the body which confers legislative authority on the CBK to carry out its functions have an oversight role in the process. Monetary policy and therefore the regulation and setting of interest rates fall within the purview of the national assembly.

Additionally, the implications and effects of interest rates to the everyday citizenry and or consumer of credit necessitate the intervention of the national assembly. This too, was discussed in the previous chapter. Briefly, the lowering of interest rates increases the supply and availability of money for credit and in turn consumption.²⁶ This in turn, leads to a general rise in the level of prices of consumer products and utilities.²⁷ The increase of interest rates occasions the exact opposite.

Too much money in the economy occasions high prices which may limit the economic growth of a nation, as people are discouraged from purchasing goods

²³ Article 186 (4) of the Constitution of Kenya, Laws of Kenya
<<http://kenyalaw.org/kl/index.php?id=398>> accessed 24 November 2021.

²⁴ Thammarak Moenjok, *Central Banking: Theory and Practice in Sustaining Monetary and Financial Stability* (Wiley 2014) 44–46.

²⁵ Article 94 (5) and 231 (2) of the Constitution of Kenya, Laws of Kenya
<<http://kenyalaw.org/kl/index.php?id=398>> accessed 24 November 2021.

²⁶ 'Monetary Policy | CBK' <<https://www.centralbank.go.ke/monetary-policy/>> accessed 29 February 2020.

²⁷ Ibid.

and services.²⁸ On the other hand too little money in the economy may also stifle the economic growth of a nation, as there are limited funds available with which to purchase goods and services.

Therefore, the economic interests of the populace envisaged under the Constitution²⁹ must be defended and promoted. To that end, the fifth schedule of the Constitution highlights legislation pertaining to consumer protection, as one that the national assembly can enact. Therefore, the legislative intervention of the national assembly is necessary to promote and defend the economic rights of the people enshrined under the Constitution.

As to the second question, the rationale for the above position was highlighted in the first chapter. However, a recap of this is necessary to further expound on and address the above question. This is captured below.

Scholars have noted that the era in which central banks were entrusted with acting devoid of any intrusion by public or elected officials is over.³⁰ This appears to have arisen owing to the growing loss of public confidence in the ability of central banks across the world to operate, as neutral and non-political actors in the global economy.³¹ Central banks are now subject to increasingly stringent legislative oversight.³²

Legislators across the globe have begun to make growing demands for reporting on central bank policies, targets and have even conceptualized legislation targeting these policies.³³ Examples in Kenya include the Donde Act and the in duplum Rule (section 44A of the Banking Act).

²⁸ Ibid.

²⁹ Article 46 (1) (c) of the Constitution of Kenya, Laws of Kenya <<http://kenyalaw.org/kl/index.php?id=398>> accessed 24 November 2021

³⁰ Annelise Riles, 'The Challenge to the Technocracy', *Financial Citizenship* (Cornell University Press 2018) <<https://www.jstor.org/stable/10.7591/j.ctv43vr8t.4>> accessed 28 February 2020 at pg.19.

³¹ Annelise Riles, 'Culture Clash: Experts and the Public', *Financial Citizenship* (Cornell University Press 2018) <<https://www.jstor.org/stable/10.7591/j.ctv43vr8t.6>> accessed 28 February 2020 at pg.37; Riles (n 29); Willem Middelkoop, *The Big Reset Revised Edition: War on Gold and the Financial Endgame* (Amsterdam University Press 2015).

³² Riles (n 30).

³³ Ibid.

Scholars have also noted with concern the dangers of an unaccountable and opaque central bank to its citizenry and state.³⁴ Decisions made by a central bank regarding monetary policy have far reaching implications on the social and civic state of a community, aside from their economic goals.³⁵ In the absence of proper regulation, this otherwise formal economic tool could be used, as a weapon to leverage or even manipulate concessions from public officials and the public itself.³⁶ The Eurozone crisis of 2008, specifically the Greek and Italian financial crises and, the response of the European Central Bank provide such a frightful insight.³⁷

Scholars contend that there is a growing call for transparency and accountability by central banks to the public, the executive and the legislature in their dealings.³⁸ It has even been suggested that in democratic countries with independent central banks working alongside transparency and accountability mechanisms, the central banks attract more investment than walled off and isolated Central Banks.³⁹

From the foregoing, the national assembly in spite of the CBK has a role to play in the regulation and setting of interest rates in the country. This could be in an oversight or legislative role, as discussed above. So how does it go about it? This chapter will address this question when it examines the tools of the national assembly.

³⁴ Chris Land, 'Ultra Vires: The Eurozone Crisis and the European Central Bank's Lost Independence' (Social Science Research Network 2016) SSRN Scholarly Paper ID 2781668 <<https://papers.ssrn.com/abstract=2781668>> accessed 28 February 2020 at pgs. 486 to 512.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Safari Kasiyanto, 'Central Bank Transparency in Indonesia: A Law and Economic Perspective' (2017) 7 *Indonesia Law Review* 178

<<https://heinonline.org/HOL/Page?handle=hein.journals/indolawrev7&id=178&div=&collection=>>. Deirdre Curtin, "'Accountable Independence" of the European Central Bank: Seeing the Logics of Transparency: "Accountable Independence" of the ECB' (2017) 23 *European Law Journal* 28 <<http://doi.wiley.com/10.1111/eulj.12211>> accessed 28 February 2020 at pgs. 179 to 198.

³⁹ Cristina Bodea and Raymond Hicks, 'Price Stability and Central Bank Independence: Discipline, Credibility, and Democratic Institutions' (2015) 69 *International Organization* 35 <<https://www.cambridge.org/core/journals/international-organization/article/price-stability-and-central-bank-independence-discipline-credibility-and-democratic-institutions/605F4E0E40C7366B2B9413103B409BFA>> accessed 28 February 2020 at pgs.35 to 37. Cristina Bodea and Raymond Hicks, 'International Finance and Central Bank Independence: Institutional Diffusion and the Flow and Cost of Capital' (2015) 77 *The Journal of Politics* 268 <<https://www.journals.uchicago.edu/doi/10.1086/678987>> accessed 28 February 2020 at pgs. 268 to 271.

4.4 Tools of the national assembly of Kenya

4.4.1 Oversight role of the national assembly of Kenya

The national assembly plays an oversight role in the management and setting of interest rates in the country. It confers law making powers unto entities such as the CBK. These laws include:

“ [A]ny rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, bylaw, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued.”⁴⁰

As such, it is entitled to say in how the CBK uses these powers. To that end, it uses tools such, as departmental committees to scrutinize and review the legislation proposed by law making entities such, as the CBK in carrying out their functions.⁴¹ The courts have stated as much. The High Court in *Isaac Gachomo & 3 others v Attorney General & another; Central Bank of Kenya & another (Interested parties)* echoed these sentiments.⁴² The court noted that the legislature had an obligation to oversee, supervise and ensure that all proposed legislation observe the prevailing law.⁴³ The latter refers to section 13 of the *Statutory Instruments Act*.⁴⁴

The draft laws envisaged in this scenario must:⁴⁵

- a) have a straight forward or considerable implication on economic activities;
- b) limit competition; and or
- c) impose significant costs on a community.⁴⁶

⁴⁰Section 2 Statutory Instruments Act ‘No. 23 of 2013’ Laws of Kenya
<<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2023%20of%202013>>
accessed 24 November 2021.

⁴¹ Sections 2 and 4 Ibid.

⁴² *Isaac Gachomo and 3 Others v Attorney General and Another : Central Bank of Kenya and Another (Interested Parties)* [2019] eKLR (18 July 2019), ‘Petition 426 of 2018 - Kenya Law’
<<http://kenyalaw.org/caselaw/cases/view/179226>> accessed 24 November 2021 at para72.

⁴³ Ibid.

⁴⁴ ‘No. 23 of 2013’ Laws of Kenya
<<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2023%20of%202013>>
accessed 24 November 2021.

⁴⁵ Sections 5(1) and 6 Statutory Instruments Act ‘No. 23 of 2013’ Laws of Kenya
<<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2023%20of%202013>>
accessed 24 November 2021.

Interest rates have a straight forward and or substantial implication on economic activities. By extension, they affect the welfare of the public. As such, any proposed legislation over them by the CBK will require oversight by the national assembly. So where does the process begin and end? This will be explained below.

Entities such, as the CBK are required prior to enacting laws to get feedback from persons who are likely to be the recipients of the proposed legislation.⁴⁷ Such feedback may include the expertise and knowledge of persons in the relevant fields and comments from persons likely to be recipients of the laws.⁴⁸ This may also take the form of notices or regulatory impact statements about the proposed legislation to persons or entities likely to be affected indicating:⁴⁹

- a) the goals of the draft laws and their rationale;
- b) the impact of the draft laws;
- c) possible alternatives to achieving those goals;
- d) advantages and disadvantages of the draft laws and any other methods of achieving the same goals;
- e) justification for why other methods are not appropriate; and
- f) when they can submit their comments on the same or participate in a public forum over the draft laws at an appointed time.⁵⁰

The cabinet secretary responsible for the law making entity will then arrange for all the feedback to be reviewed and assessed before the draft law is published.⁵¹ Further, that a copy of all feedback will be forwarded to the responsible departmental committee, as soon as possible after the draft law is brought before the national assembly or when sought by the departmental committee.⁵²

⁴⁶ Ibid.

⁴⁷ Section 5 (1) Ibid.

⁴⁸ Section 5 (2) Ibid.

⁴⁹ Sections 5(3), 6, 7 and 8 Ibid.

⁵⁰ Sections 5(3), 6, 7 and 8 Ibid.

⁵¹ Sections 7 and 8 Ibid.

⁵² Sections 7 and 8 Ibid.

Thereafter, the cabinet secretary responsible for the law making entity will in 7 days after disclosure of the draft law, arrange for a copy of the same to made available to the responsible clerk for submission before the national assembly.⁵³

The departmental committee in reviewing the draft law will rely on the principles of good governance, rule of law and specifically, will assess if the draft law:⁵⁴

- a) observes the Constitution;
- b) threatens the basic entitlements and freedoms of the public;
- c) contains an issue not within its scope of authority;
- d) contains tax related matters;
- e) challenges the jurisdiction of the courts;
- f) involves expenses and revenues from the consolidated fund or other public revenues;
- g) is flawed in its construction or requires further elaboration ;
- h) is perceived to make some unforeseen use of powers delegated by the Constitution or the Act pursuant to which it is made;
- i) is perceived to have had an unjustifiable delay in its disclosure or submission before the national assembly;
- j) renders rights, liberties or obligations subject to unchallengeable decisions;
- k) renders rights, liberties or obligations subject to inadequately defined administrative powers;
- l) improperly assigns its legislative powers;
- m) unlawfully imposes a fine, imprisonment or other penalty;
- n) threatens the rule of law;
- o) inadequately subjects the exercise of legislative power to parliamentary scrutiny; and
- p) accords any other reason that the committee considers fit to examine.⁵⁵

The departmental committee having conferred with law making authority will then submit a report over the proposed legislation along with its resolutions and

⁵³ Section 11 Ibid.

⁵⁴ Section 13 Ibid.

⁵⁵ Section 13 Ibid.

proposals to the national assembly.⁵⁶ In turn, the national assembly may adopt or reject the above resolutions and proposals of the departmental committee or make any other decision it deems fit.⁵⁷

From the foregoing, the result of this process has the unintentional effect of giving the national assembly a stake in the operations of the law making authority. By virtue of its legally mandated supervisory function, the national assembly becomes part and parcel of the law making authority's process. Simply put, the latter cannot legislate over interest rates without oversight from the national assembly.

4.4.2 Legislative role of the national assembly of Kenya

The national assembly also has a legislative role in the regulation of the interest rates in the country. As discussed above, the national assembly's legislative powers are derived from the people of Kenya and the *Constitution*.⁵⁸ As such, it has an obligation to protect and maintain the economic interests of its electorate.⁵⁹ Therefore, it is obliged to reflect and support the desires and will of the people of Kenya.

The courts in Kenya have echoed this position severally. The High Court in *Boniface Oduor v Attorney General & another; Kenya Banker's Association & 2 others (Interested Parties)*⁶⁰ asserted the national assembly's legislative role reflects the will and democratic choice of the people of Kenya enshrined under the Constitution.⁶¹ Even, the courts are bound to respect this choice.⁶²

In view of the above, any interpretation or construction of the Constitution must afford the national assembly some latitude in order to allow it to carry out its

⁵⁶ Sections 15, 16 and 17 Ibid.

⁵⁷ Section 18 Ibid.

⁵⁸ Articles 1 (1), 1 (2), 1 (3) 94 (1), 94 (2) and 95 (1) of the Constitution of Kenya, Laws of Kenya <<http://kenyalaw.org/kl/index.php?id=398>> accessed 24 November 2021.

⁵⁹ Articles 46 (1) (c) and 46 (3) Ibid.

⁶⁰ [2019] eKLR/14 March 2019) Petition 413 of 2016 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/169536/>> accessed 24 November 2021 at para 60.

⁶¹ *Boniface Oduor v Attorney General and Another: Kenya Bankers Association and 2 Others (Interested Parties)* [2019] eKLR/14 March 2019), 'Petition 413 of 2016 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/169536/>> accessed 24 November 2021 at para 60.

⁶² Ibid.

legislative role.⁶³ Again, the courts have supported this argument. The courts have argued that until proven otherwise, legislation is deemed to be lawful.⁶⁴ Furthermore, the court asserted that were possible, legislation should be construed with the intent to promote its operation.⁶⁵

However, the above presumption is not absolute. Where an aggrieved party can demonstrate that the said provision or legislation is unconstitutional or unlawful, the same will be annulled.⁶⁶ The courts have stated as much.⁶⁷ The High Court in *Law Society of Kenya v Kenya Revenue Authority & another*⁶⁸ noted that the rule of presumption in favour of constitutionality is operative only till the time when the aggrieved party adduces evidence demonstrating that the impugned law or provisions beyond reasonable doubt, have infringed or violated the Constitution.⁶⁹

The High Court in *Isaac Gachomo & 3 others v Attorney General & another; Central Bank of Kenya & another (Interested parties)*⁷⁰ also noted that the CBK's independence provided for under the Constitution, does not limit the national assembly's legislative powers.⁷¹ Further, the High Court in *Boniface Oduor v Attorney General & another; Kenya Banker's Association & 2 others (Interested*

⁶³ Ibid.

⁶⁴ *Council of Governors & 3 others v Senate & 53 others* [2015] eKLR (10 July 2015), 'Petition 381 & 430 of 2014 (Consolidated) - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/111616/>> accessed 24 November 2021 at para 77 and 78; *Boniface Oduor v Attorney General & another; Kenya Banker's Association & 2 others (Interested Parties)* [2019] eKLR(14 March 2019), 'Petition 413 of 2016 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/169536/>> accessed 24 November 2021 at para 62; *Tanzania: Ndyanabo v Attorney-General (2002) AHRLR 243 (TzCA 2002)* (14 February, 2002) at para 20.

⁶⁵ Ibid.

⁶⁶ *Tanzania: Ndyanabo v Attorney-General (2002) AHRLR 243 (TzCA 2002)* (14 February, 2002) at para 20; *Law Society of Kenya v Kenya Revenue Authority & another* [2017] eKLR(14 March, 2017) at pg.2.

⁶⁷ Ibid.

⁶⁸ eKLR (14 March 2017), 'Petition 39 of 2017 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/132569/>> accessed 24 November 2021 at pg.2.

⁶⁹ *Law Society of Kenya v Kenya Revenue Authority & another* [2017] eKLR(14 March 2017) 'Petition 39 of 2017 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/132569/>> accessed 24 November 2021 at pg.2.

⁷⁰ [2019] eKLR (18 July, 2019), 'Petition 426 of 2018 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/179226/>> accessed 24 November 2021 at para 72.

⁷¹ *Isaac Gachomo and 3 others v Attorney General and Another: Central Bank of Kenya and another (Interested Parties) High Court Constitutional Petition No. 426 of 2018* (18 July 2019), 'Petition 426 of 2018 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/179226/>> accessed 24 November 2021 at paragraphs 72.

Parties)⁷² asserted that the CBK's role in fixing and setting interest rates should not be arbitrary⁷³

From the above, the legislative role of the national assembly is not to be overlooked given its special connection to the people of Kenya. As indicated under the Constitution, the national assembly may legislate on any matter.⁷⁴ So how does the national assembly carry out this function? This is expounded on below.

Again, the national assembly exercises its legislative power through bills passed by parliament and assented to by the President.⁷⁵ These are usually introduced by a member or a committee in the national assembly⁷⁶. They are passed in accordance with the standing orders of the national assembly and a majority of the members present and voting.⁷⁷

From the foregoing, the above provisions have the intentional effect of giving the national assembly the ability to formulate, dictate and set policy on interest rates alongside and or over the CBK. By virtue of its legally mandated legislative role, the national assembly can enact its own legislation setting or regulating interest rates on par with the CBK. Like the CBK, the national assembly has oversight from the people of Kenya and the Constitution. Therefore, as long as its legislation reflects the will of the people and complies with the Constitution, all is well.

4.5 Conclusion

In line with its objectives indicated at its introduction, this chapter has sought to answer one of the two questions posed at the end of the previous chapter. Does the national assembly of Kenya's role in legislating over interest rates extend to setting the same interest rates? The answer is yes. This chapter has looked at the

⁷² [2019] eKLR (14 March, 2019), 'Petition 413 of 2016 - Kenya Law'

<<http://kenyalaw.org/caselaw/cases/view/169536/>> accessed 24 November 2021 at para 205.

⁷³ *Boniface Oduor v Attorney General and Another: Kenya Bankers Association and 2 Others (Interested Parties)* [2019] eKLR (14 March 2019), 'Petition 413 of 2016 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/169536/>> accessed 24 November 2021 at para 205.

⁷⁴ Article 186 (4) of the Constitution of Kenya, Laws of Kenya

<<http://kenyalaw.org/kl/index.php?id=398>> accessed 24 November 2021.

⁷⁵ Article 109 (1) Ibid.

⁷⁶ Article 109 (3) Ibid.

⁷⁷ Articles 109 (5) and 122 Ibid.

functions, powers and tools of the national assembly to rationalize its answer to the above question. Additionally, this chapter and its previous counterpart have revealed that both the CBK and the national assembly are interdependent. Whereas, the CBK relies on the national assembly for its authority and oversight, the national assembly relies on the CBK's expertise and informed advice with regard to interest rates.

However, there remain questions to be addressed? If both the CBK and the national assembly can legislate, dictate and set policy with regard to interest rates, is there a clear demarcation between the roles of the CBK and national assembly? Alternatively, is there duplication in the roles carried out by the CBK and the national assembly? The answer to the above questions from this chapter and its previous counterpart, is no and yes, respectively.

As such, are there any solutions to the above problems? The next chapter will address this question. However, to sum up this chapter the national assembly like the CBK has the legal authority to legislate, dictate and set policy over interest rates in the country but subject to the law of the land.

CHAPTER 5: FINDINGS, RECOMMENDATIONS AND CONCLUSION

5.1 Overview

As discussed in the first chapter, it was argued that the preserve of regulating and setting interest rates among states, has always been afforded to central banks, as opposed to the executive or legislature. The above position was based on the notion that central banks offer an unbiased and skilled perspective when compared to the populist and self-serving goals of politicians. In Kenya this is the ideal position, pursuant to its legal framework.

However, recent enactments by the national assembly in Kenya seem to have weakened this position. The national assembly has on a number of occasions originated and formulated its own policy, as regards the setting or formulating of interest rates. This has brought it into direct conflict with the CBK and the banking community. These institutions oppose the national assembly's intrusion in the CBK's mandate. Moreover, it has created uncertainty, as to the hierarchy and delineation of roles between the CBK and the national assembly. As a consequence, this uncertainty and clash has discouraged investment in the form of credit from the banking community, as they are unwilling to invest in an economy governed by unpredictable rules.

In spite of attempts by the courts to address this uncertainty and clash, the problem persists. Therefore, this study sought to establish whether there existed clear and demarcated roles between the CBK and the national assembly, as regards the setting or formulation of interest rates. Furthermore, it sought to answer the question, who is responsible for what and to what extent? To that end, this study proposed a number of questions which were addressed in the subsequent chapters. The findings, how this study arrived at them and their implications are described below.

5.2 Findings of the Study

This study proposed to answer the following questions:

- a) Whether the legal regime in Kenya mandates the CBK to impose and regulate interest rates over lending institutions in Kenya?

- b) Whether the legal regime in Kenya mandates the national assembly to impose and regulate interest rates over lending institutions in Kenya?
- c) Whether there exists any duplication or conflicts of roles between the CBK and the National assembly?
- d) Whether any possible remedies or solutions to the aforementioned duplication or conflict of roles exist?

In line with the above, this study posed a number of specific questions:

- a) Whether the CBK's role in setting and regulating interest rates extends to legislating over the same interest rates?
- b) Inversely, whether the national assembly of Kenya's role in legislating over interest rates extends to setting the same interest rates?
- c) From the foregoing, whether both the CBK and the national assembly can legislate, dictate and set policy with regard to interest rates?

In order to answer the above questions, this study while relying on doctrinal legal research methods, addressed the following areas.

- a) The concept of interest rates, their relevance and the need for and history behind their regulation.
- b) The legal framework governing the CBK in the regulation of interest rates in Kenya and literature justifying its role.
- c) The legal framework governing the national assembly in the regulation of interest rates in Kenya and literature justifying its role.

In addition to (b) and (c) above, the study paid particular attention to the legal framework governing the functions, powers, tools and limitations imposed on the CBK and the national assembly, respectively, with respect to interest rates.

Consequently and from the foregoing, this study revealed that:

- a) The CBK's role in setting and regulating interest rates extends to legislating over the same interest rates. As discussed in the third chapter, the role of the CBK is not limited to the setting and formulation of interest

rates.¹ This study concluded that the CBK's powers include legislating over the same interest rates.² This power was derived from the national assembly³ and included the power to enact subsidiary legislation. However, this power is not absolute. Again, as discussed in the third chapter, the CBK in its operations is subject to oversight from both the executive and the national assembly.⁴ With regard to the national assembly's role in the CBK's mandate, this was discussed in more detail in the subsequent chapter. The latter among others, examined the oversight role of the national assembly. This included the national assembly's power to review any proposed laws by organs, such as the CBK.⁵ This study answered the first question posed in its first and second chapters. Whether the CBK's role in setting and regulating interest rates extends to legislating over the same interest rates? Yes, it does. As such, the legal regime in Kenya mandates the CBK to impose and regulate interest rates over lending institutions in Kenya.

- b) The national assembly of Kenya's role in legislating over interest rates extends to setting the same interest rates. This study concluded that, as a consequence of the national assembly's oversight role over the CBK (briefly discussed above and in chapters three and four of this study) and its traditional legislative role,⁶ it had the intended or unintended outcome of becoming part and parcel of the process. As such, the national assembly, like the CBK could set or formulate policy over interest rates in the country. This study answered the second question posed in its first and second chapters. Whether the national assembly of Kenya's role in

¹ *Boniface Oduor v Attorney General and Another: Kenya Bankers Association and 2 Others (Interested Parties)* [2019] eKLR (14 March 2019), 'Petition 413 of 2016 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/169536/>> accessed 24 November 2021 at para 90.

² Section 57 (1) of the Central Bank of Kenya Act Cap 491, Laws of Kenya.

³ Article 94 (5) of the Constitution of Kenya, Laws of Kenya <<http://kenyalaw.org/kl/index.php?id=398>> accessed 24 November 2021.

⁴ Article 186 (4) Ibid. Sections 4B, 4C, 36B, 50 and 54 of the Central Bank of Kenya Act Cap 491, Laws of Kenya.

⁵ Sections 2, 5, 6, 7, 8, 11, 13, 15, 16, 17 and 18 of the Statutory Instruments Act 'No. 23 of 2013' Laws of Kenya <<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2023%20of%202013>> accessed 24 November 2021.

⁶ Articles 1 (1), 1 (2), 1 (3) 94 (1), 94 (2) and 95 (1) of the Constitution of Kenya, Laws of Kenya <<http://kenyalaw.org/kl/index.php?id=398>> accessed 24 November 2021.

legislating over interest rates extends to setting the same interest rates? Yes, it does. As such, the legal regime in Kenya also mandates the national assembly to impose and regulate interest rates over lending institutions in Kenya.

- c) From the foregoing, both the CBK and the national assembly can legislate, dictate and set policy with regard to interest rates. As a consequence of this finding, it is evident that there are no clear demarcations or delineations between the roles and hierarchy of the CBK and the national assembly, with regard to interest rates. Who is responsible for what and to what extent? This study cannot avail a definitive answer. There are no clear lines setting out the distinct roles of the CBK and the national assembly with regard to interest rates in the country. Both parties are legally endowed with powers and authority that give them the ability to legislate, dictate and set policy over interest rates in the state. Simply stated, both parties have identical functions, powers and authority over the same subject matter. As such, there exists a duplication and conflict roles between the CBK and the national assembly, with regard to interest rates. Therefore, this study answered the third question posed in its first and second chapters. Whether there exists any duplication or conflicts of roles between the CBK and the national assembly? Yes, there is.

Apart from the above contributions, what are the implications and or relevance of the above findings to stakeholders and this study? These are described below.

5.3 Importance of the Findings

As discussed in the first and second chapters, interest rates play a major role in the economy of the country. Stakeholders, such as banks and governments rely on the prevailing interest rates to invest, plan, strategize and attract investment into the country, respectively. To that end, they rely on the information disclosed by the

CBK, as the legally mandated regulator of interest rates in the country. The courts in Kenya recognize this position.⁷

With the uncertainty and clash brought about by the national assembly and the CBK's dual mandates and roles, stakeholders such, as banks, will be hard pressed to commit capital in the form of credit, to the economy of a country with an unpredictable legal framework. Governments on the other hand, will be unable to attract external investment into the country, without a clear legal framework that will instil confidence into the investors, that there are clear and predictable rules protecting their investments and returns.

Therefore, this study and its findings were necessary. They will assist the government in addressing and diagnosing the uncertainty and conflict of roles in the legal framework between the CBK and the national assembly, with regard to the setting or formulation of interest rates. The findings of this study therefore, will address and provide possible remedies and recommendations to any gaps in the legal framework that might arise from the uncertainty and conflict of roles between the CBK and the national assembly. Again, these remedies are described below.

5.4 Remedies and Recommendations

At the end of the fourth chapter, this study posed a number of questions.

- a) If both the CBK and the national assembly can legislate, dictate and set policy with regard to interest rates, is there a clear demarcation between the roles of the CBK and National assembly?
- b) Furthermore, is there duplication in the roles carried out by the CBK and the national assembly?

The answer to the above questions was no and yes, respectively. As discussed in the previous chapters, this study sought to address the question of who is responsible for what and to what extent with regard to interest rates in the country. From the findings above, it is clear that the roles of the CBK and the national

⁷ *Boniface Oduor v Attorney General & another; Kenya Banker's Association & 2 others (Interested Parties)* [2019] eKLR (14 March 2019), 'Petition 413 of 2016 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/169536/>> accessed 24 November 2021 at Para 205.

assembly over interest rates in the state are not demarcated. There is no distinctive hierarchy of roles that separates the functions of these organs. Simply stated, there is a conflict and duplication of roles. To that end, are there any solutions to the above problems? This study will now attempt to address this query. As noted above, there is:

- a) A clear duplication and conflict of roles between the CBK and the national assembly in Kenya over the setting and regulation of interest rates.
- b) Little or no demarcation between the roles of the CBK and the national assembly in Kenya over the setting and regulation of interest rates.

The above concerns have manifested themselves in a number of cases brought before the High Court in Kenya. These in turn, have been discussed in the previous chapters.

From the above, judicial interpretation by the courts is inferred as one possible solution to the above problems. Such an approach would in the short term suffice to arbitrate and solve any imminent conflict of roles that may occur or arise between the CBK and the national assembly over the setting and regulation of interest rates in the country. However, such an approach would not suffice in the long term. Nor would it deal with the underlying roots of this problem.

Alternative approaches to the policy and operations of the CBK and the national assembly would however, suffice for any possible long term solution to these problems. The courts themselves have taken cognizance of this position. The Court in *Boniface Oduor v Attorney General & another; Kenya Banker's Association & 2 others (Interested Parties)*⁸ asserted that:

“ [A] framework that regulates interest rates charged by banks and financial institutions has far reaching consequences. For that reason, the setting of an interest rate cap or any other regulations on interest rates could be enriched by a consultative and/or collaborative framework that draws input from stakeholders not in the least CBK. We see merit in the argument by CBK that the fixing of interest rates caps and we may add the entire regulatory framework, should not be arbitrary. But of course these are matters within the remit of the national assembly and we can only make our observations.”⁹

⁸ [2019] eKLR (14 March, 2019), ‘Petition 413 of 2016 - Kenya Law’

<<http://kenyalaw.org/caselaw/cases/view/169536/>> accessed 24 November 2021 at para 205.

⁹ *Boniface Oduor v Attorney General & another; Kenya Banker's Association & 2 others (Interested Parties)* [2019] eKLR (14 March 2019), ‘Petition 413 of 2016 - Kenya Law’ <<http://kenyalaw.org/caselaw/cases/view/169536/>> accessed 24 November 2021 at Para 205.

As opposed to:

- a) judicial settlements which are costly in time and resources, subject to appeal or review and vary on a case by case basis;
- b) legislative amendments and revisions which, too, are costly in time and resources and may further complicate the roles of the CBK and the national assembly;

A consultative or collaborative approach, as indicated above, that seeks for input from both the CBK and the national assembly over interest rates in the country would suffice as a long term solution to these problems. As to the nature, mode, procedure of this collaboration and or consultation between the two, further research might be appropriate.

5.5 Final Conclusion

The title of this study reads:

“ Interest rates in Kenya: who has the last say, the national assembly or the CBK?”

This study has attempted to answer the above question. It has reviewed the legal framework governing the CBK and the national assembly. Neither party has a determinant or dominant role over the other. By contrast, the two parties are interdependent. They cannot operate in isolation. Whereas the CBK relies on the national assembly for its authority and oversight, the national assembly relies on the CBK for its expertise and informed advice over interest rates. Moreover, there is no clear demarcation of their roles with regard to interest rates from their legal frameworks, a problem that persists to date. Simply put, they need each other. As such, it cannot be said that one party has the last say over the other.

BIBLIOGRAPHY

6.1 Books and Book Chapters

Galbraith JK, *Money: Whence It Came, Where It Went* (Princeton University Press 2017) <<http://www.jstor.org/stable/10.2307/j.ctt1vwmh9g>> accessed 9 July 2020.

Mellor M, *Debt or Democracy: Public Money for Sustainability and Social Justice* (Pluto Press 2015) <<http://www.jstor.org/stable/10.2307/j.ctt18gzdmr>> accessed 9 July 2020.

Middelkoop W, *The Big Reset Revised Edition: War on Gold and the Financial Endgame* (Amsterdam University Press 2015).

Moenjak T, *Central Banking: Theory and Practice in Sustaining Monetary and Financial Stability* (Wiley 2014).

Riles A, 'Culture Clash: Experts and the Public', *Financial Citizenship* (Cornell University Press 2018).

—, 'The Challenge to the Technocracy', *Financial Citizenship* (Cornell University Press 2018).

6.2 Working Papers

C. Emre Alper, Benedict Clements, Niko Hobdari, and Rafel Moyà Porcel: *Do Interest Rate Controls Work? Evidence from Kenya* (INTERNATIONAL MONETARY FUND 2019).

6.3 Guidelines

Central Bank of Kenya Prudential Guidelines on Consumer Protection 2013 (CBK/PG/22).

6.4 Journal Articles

Ackerman JM, 'Interest Rates and the Law: A History of Usury' (1981) 1981 *Arizona State Law Journal* 61.

Bodea C and Hicks R, 'Price Stability and Central Bank Independence: Discipline, Credibility, and Democratic Institutions' (2015) 69 *International Organization* 35.

—, 'International Finance and Central Bank Independence: Institutional Diffusion and the Flow and Cost of Capital' (2015) 77 *The Journal of Politics* 268.

Canova, 'The Role of Central Banks in Global Austerity' (2015) 22 *Indiana Journal of Global Legal Studies* 665.

Conti-Brown P, 'The Institution of Federal Reserve Independence' (2015) 32 *Yale Journal on Regulation* 257.

Curtin D, "'Accountable Independence" of the European Central Bank: Seeing the Logics of Transparency: "Accountable Independence" of the ECB' (2017) 23 *European Law Journal* 28.

Duff AW, 'Central Bank Independence and Macroprudential Policy: A Critical Look at the US Financial Stability Framework' (2014) 11 *Berkeley Bus. LJ* 183.

Feldmann, 'A Social Contract and Rules of Practice for the Fed' (2016) 99 *Soundings: An Interdisciplinary Journal* 1
<<http://www.jstor.org/stable/10.5325/soundings.99.1.0001>> accessed 28 February 2020

Goldoni M, 'The Limits of Legal Accountability of the European Central Bank' (2017) 24 *George Mason Law Review* 595.

Hudson GJ, 'Balancing Central Bank Accountability and Independence: The Case of the Federal Reserve's Emergency Powers after Dodd-Frank' (2015) 132 *Banking Law Journal* 161.

Kasiyanto S, 'Central Bank Transparency in Indonesia: A Law and Economic Perspective' (2017) 7 *Indonesia Law Review* 178.

Land, Chris. "The Ultra Vires: The Eurozone Crisis and the European Central Bank's Lost Independence." *Minn. J. Int'l L.* 25 (2016): 483.

Madeira C, 'The Impact of Interest Rate Ceilings on Households' Credit Access: Evidence from a 2013 Chilean Legislation' (2019) 106 *Journal of Banking & Finance* 166.

Maigua C and Mouni G, 'Influence of Interest Rates Determinants on the Performance of Commercial Banks in Kenya' (2016) 6 *International Journal of Academic Research in Accounting, Finance and Management Sciences* 121.

Ndegwa C, 'In Duplum Rule in Kenya: A Critical Analysis of the Unaddressed Aspects of Section 44A of the Banking Act' (2016) 1 *Strathmore Law Review* 1.

Palley T, 'Central Bank Independence: A rigged debate based on false politics and economics' (2019) 78 *Investigación Económica* 67.

Plosser CI, 'A Limited Central Bank' (2014) 34 *Cato Journal* 201.

Settanni G, 'Loans and Negative Interest Rates' (2016) 27 *European Business Law Review* 697.

Oritani Y, 'Public Governance of Central Banks: An Approach from New Institutional Economics'.

6.5 Reports

Amrit Kharel, 'Doctrinal Legal Research' (Social Science Research Network 2018) SSRN Scholarly Paper ID 3130525 2 <<https://papers.ssrn.com/abstract=3130525>> accessed 4 November 2021.

Richard Posner, 'Theories of Economic Regulation' (National Bureau of Economic Research 1974) w0041 1 <<http://www.nber.org/papers/w0041.pdf>> accessed 4 November 2021.

6.6 Online Sources

Basel Committee on Banking Supervision 'Core Principles for Effective Banking Supervision' <<https://www.bis.org/publ/bcbs230.htm>> accessed 7 July 2020.

'Monetary Policy | CBK' <<https://www.centralbank.go.ke/monetary-policy/>> accessed 29 February 2020.

Dominic Indokhomi, Cornelius Kigera, Kamami Christine Michira 'Regulation of Interest Rates: Where Are We?' (*Bowmans*) <<https://www.bowmanslaw.com/insights/finance/regulation-of-interest-rates-where-are-we/>> accessed 1 May 2020.

'Kenya Law Cases Database' <<http://kenyalaw.org/caselaw/>> accessed 24 November 2021.

'The Laws of Kenya' <<http://kenyalaw.org:8181/exist/kenyalex/index.xql/>> accessed 24 November 2021.