

**THE REGULATORY REGIME GOVERNING THE CASINO INDUSTRY
IN KENYA: A NEED FOR REFORMS**

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DECLARATION

I, **MBASI FREDRICK MUTUKU**, do hereby declare that this is my original work, and that the same has not been submitted for the award of a degree in any other university.

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This thesis has been submitted for examination with my approval as University Supervisor

Signed **Date**

MR YASH VYAS

DEDICATION

To my wife Muthina and my daughter Grace Mbithe for their inspiration and support.

ACKNOWLEDGEMENT

First, I acknowledge the guidance and support I received from my supervisor Yash Vyas who dedicated a lot of time, effort and knowledge to enable the success of this study. Secondly, I wish to acknowledge my family, friends, lecturers and classmates at the Law School for their support and encouragement.

ACRONYMNS

| | |
|---------------|---|
| BBBEE | BROAD –BASED BLACK ECONOMIC EMPOWERMENT |
| FATF | FINANCIAL ACTION TASK FORCE |
| FRC | FINANCIAL REPORTING CENTRE |
| G7 | GROUP OF SEVEN |
| HDI's | HISTORICALLY DISADVANTAGED INDIVIDUALS |
| KBS | KENYA BUREAU OF STANDARDS |
| MGEI'S | MEGA GAMING ENTERPRISES |
| MICS | MINIMUM INTERNAL CONTROL STANDARDS |
| NGB | NATIONAL GAMING BOARD |
| PGRA'S | SMALL MEDIUM AND MICRO ENTERPRISES DEVELOPMENT |
| TBVC | TRANSKEI, BOPHUTHASWANA, VENDA AND CISKEI |
| UK | UNITED KINGDOM |
| UN | UNITED NATIONS |
| USA | UNITED STATES OF AMERICA |
| VAT | VALUE ADDED TAX |

DEFINITIONS AND TERMS

| | |
|------------------------|---|
| Betting | This is another term for wagering. It is staking something (usually money) on the outcome of a contest or any uncertain event or matter. The principal forms of betting include racing and sports betting. |
| Casino | It is an arrangement or building whereby people are given an opportunity to participate in one or more casino games. In many jurisdictions the arrangement is defined as a gaming premise. |
| Gambling | This is staking money on uncertain events driven by chance. The major forms of gambling are betting (racing and sports), gaming (casinos, gaming machines) and lotteries. |
| Gaming | This encompasses all games of chance played in casinos. The term excludes betting and lotteries. |
| Gaming Device | It is any device manufactured with the intention of being used for gaming purposes. These include amongst many others gaming machines, monitoring and control systems, data control units and software. |
| Gaming Machines | These are electronic or electromechanical devices or machines for playing a game of chance, being a game which requires no action by a player other than the actuation or manipulation of the machine. These are popularly known as slot machines. They come in two main types, where the player makes no strategic decisions after starting the game, and where the player can make strategic decisions such as in draw card poker machines. |

| | |
|------------------------------|--|
| Lottery | This is a scheme where a person is required to participate in the arrangement where one or more prizes are allocated to one or more of the participants through a series of processes which wholly relies on chance. |
| Odds | The average chances of winning in a game. |
| Pathological Gamblers | The term is used in the United States to refer to persons thought to be suffering from a psychiatric condition due to gaming. The term is related to problem gambling below. |
| Problem Gambling | This refers to a condition where gamblers are unable to control their gambling habits. |
| Regulatory reform | Refers to changes geared towards improving the quality of a regulatory framework to enhance its effectiveness. This can be done through revision, repealing or amending a particular law. |
| Stake | This is the total monetary value of all bets or wagers put at risk to play a single game. |
| Wagering | This is another term for betting. |

ABSTRACT

In the last two decades, the global Casino gaming has expanded in a manner never envisaged. The demand to supply games of chance has proved insatiable in all gaming jurisdictions. The expansion has led into globalization of the industry whose growth has generated billions of revenue for governments while millions have been exposed to its negative consequences. With this exponential growth, there exists a dilemma on whether the current gaming regulatory regimes are effective. In addressing this impasse, different gaming jurisdictions have embarked on a periodic and continuous assessment of the effectiveness of their gaming orders. Regulators further appear to often question and test their frameworks to ensure they achieve their policies for regulating the industry. Where gaming laws are established to and are seemingly inoperative, obsolete and wanting, regulatory actions have been recommended or undertaken. These actions involve both selective and direct overhaul of existing regulatory statutes. The global regulation of Casino gaming has been based on three different regulatory regimes as exists in the United Kingdom, and those of the States of Nevada and New Jersey in the United States of America. Aspects borrowed from these gaming legislations are found in almost all gaming jurisdictions. In Kenya, the Betting Lotteries and Gaming Act, Chapter 131 Laws of Kenya, served the Country well until the early 1990's when the number of Casinos grew. The reasons for the exponential growth has been associated with, a weak and obsolete legislation, the perceived economic size of the industry, lack of a clear gaming policy and political interference of the operations of the regulatory Board amongst other reasons.

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INTRODUCTION

One of the current discussions in the gaming industry is how effective are the existing laws in regulating the industry. Laws are successful if they achieve their legislative objectives. For a gaming law to be effective; the law must protect the integrity of the games, guard against manipulation, fraud, infiltration by organized crime and protect the young and the vulnerable from gambling. The law must also ensure gaming enterprises pay taxes amongst other objectives. Studies on effectiveness of gaming laws are rare and there is no evidence of one in this country since the inception of the industry in 1969. This informed the choice of this area of study which seeks to examine the current regulatory regime governing the casino industry in Kenya with a view of establishing any gaps to inform any future legal reforms in the sector. The basis of studying this subject was informed by the growth of the casino industry in Kenya and in other jurisdictions in the last two decades. This growth has raised serious concerns on whether the existing laws are adequate in regulating and checking the explosion of the industry. In Kenya the number of casinos rose from one in 1969 to forty in 2013. This growth signifies the importance of the industry in foreign investment, generation of revenue and creation of employment opportunities. However, this growth has been exploited by gaming establishments who have invested heavily in the industry. Since different players in the industry hold opposing views on gaming, the State comes in to balance the diverse standpoint. For instance, regulators view the activity as a vice which must be heavily regulated while operators view it as a business which should not attract strict regulation. They view the activity as harmless to their customers while the players themselves view it as a form of entertainment during their initial stages of gaming. Since the enactment of the Betting, Lotteries and Gaming Act Chapter 131 of laws of Kenya in

1966, little has been done to re-examine whether this law has been effective in regulating the operations of casinos. This study seeks to examine whether this law is effective by identifying the existing regulatory gaps and proposing areas that require reforms. However; the study of any regulatory regime cannot be exhaustive without citing the primary laws regulating the industry. This study sets out the existing legal framework, the distinction and the complexities of defining gambling and gaming, the historical background of the industry, reasons for proliferation of casinos in 1990's in Kenya and the attendant consequences. This work is critical in examining the provisions of the Constitution of Kenya 2010 as relates to the regulation of casinos and other forms of gambling. It also examines the regulatory regimes of two leading gaming jurisdictions, the State of Nevada and South Africa to appreciate their history, strengths and challenges in regulating gaming. The study concludes with recommendations on the areas which require specific legislative reforms.

CHAPTER ONE

GENERAL OVERVIEW

INTRODUCTION

The field of gaming law has not attracted serious scholarly attention amongst legal scholars in this country. In the last thirty years Kenya as well as other countries has witnessed an explosion of casino gaming. In Kenya for instance, casinos have increased from one in 1969 to forty in 2013. This explosion has brought serious challenges to the efficacy of existing gaming laws. To appreciate issues discussed in this work, this chapter lays the background of the study, defines gambling and gaming, cites the basic public policy objectives for legalizing gambling activities, the elements which constitute a gambling transaction and the reasons why the industry is heavily regulated. It also identifies the research problem, the economic analysis of law as the underpinning conceptual framework, justifies the choice of the area under investigation, and discusses the objectives and the hypotheses of the study. In conclusion, a review of the relevant literature, research method, the scope and the limitation of the study are also discussed.

1.0 BACKGROUND OF THE STUDY

The control of betting and gaming activities is a public policy consideration in many jurisdictions. The reasons for its legalization and control are diverse but the key objectives of the regulation in most jurisdictions are to protect the public from the negative social consequences associated with the games of chance, guard the industry from infiltration of criminals, ensure the games are fair and transparent, protect the young and the vulnerable and generate taxes amongst others. This is the reason why gambling in its many forms is heavily controlled and regulated. These activities are governed by constitutions, gaming, wagering, contract, consumer, standards and proceeds of crime and anti-money laundering laws. The core objective of gaming statutes is

to ensure the conduct of gambling activities achieve specific legislative objectives. These objectives vary from one jurisdiction to another. These laws dictate how gaming operators are licensed, regulated and taxed. Since gambling is generally harmful to those who participate in it, the law comes in to legitimize the activity which would ordinarily be viewed by some as a vice, an activity that corrupts, compromises work ethic and has the capacity to attract criminals in its operations. Over indulgence in the activity is known to be destructive to the consumers, their families, employers and a myriad of close relations.

The Laws on Wagering aim at controlling the way wagers are placed while Contract laws regulate the conduct of any contractual obligation, arising from these activities such as the enforceability of gaming contracts. Consumer laws on the other hand, protect the rights of consumers of gaming services while Standard laws aim at setting and enforcing standards of gaming devices and equipments. The proceeds of crime and anti- money laundering laws aim at reducing opportunities for players, criminals, gaming operators and others from using gaming establishments to launder money. This is possible because Casinos handle multiple cash transactions which if not properly regulated and accounted for may offer appropriate opportunities to launder monies generated from illicit activities such as corruption, drug and human trafficking amongst other related activities. The current gaming legislation in Kenya is the Betting, Lotteries and Gaming Act Chapter 131 of Laws of Kenya. What then is gambling and gaming?

Defining Gambling and Gaming and its Complexities

Gambling as an activity is probably as old as the mankind. It is a wide, complex and a controversial subject which this study would not attempt to generally wade into and pretend to fully address, define or trace its origin. This section of the study would only set out the general arguments, definitions and distinctions between the activity and what is referred to as gaming for purposes of clarity and for laying the background of this study. However, this activity as stated above is known to have existed in almost all communities. It is an activity which is not known to

have been encouraged by ancient communities because of its tendency to distract the attention of those who participate in the activity. Gaming as an activity is highly addictive. It is criminalized and prohibited in some countries while in many others it is legalized and marketed as an acceptable form of entertainment. It is an activity where money or something of value is staked on uncertain events generally driven by chance to win a prize. The major forms of gambling are betting, casino gaming and lotteries. It is however a complex subject to define as stated below.

Gambling generally involves two main opposing sides where one party the operator, offers games of chance for play while the opposing party plays the games. The players stake their bets against the operator in anticipation of either winning or losing. The only relationship between the two parties is the stake which offers either of the party's opportunity to win or lose. A lose in gambling is a profit to the operator and vice versa. In instances where a player wins; he is expected to win a sum above the amount staked. Where one wins less than what is staked; the activity would raise doubt as to whether it was a gambling or charity event. The gaming operators are cushioned from excessive loss by percentage edge the games have. Gambling operators do not operate on the hope that they will win money from players; their business depends on the fact that their favorable percentage earns them money on every bet made. The greater the volume of bets the more income they receive.¹ Generally all games of chance are based on odds or edge which favors' operators against the players.

The edge ensures the proprietor of the games stays in business. The operator's percentage is the price a player pays for using his gambling facilities.² This is also the reason why cheating and fraud are criminalized in gaming. The industry relies on chance and where the chances are not favorable, skewed or tampered with to the advantage of either party; the activity cannot be termed as gambling. Gambling is also an activity which heavily relies on goodwill either created by law where the games are legalized or of individuals who participate in the games. Gambling has had many different meanings depending on the cultural and historical context in which it is used. Currently in the western society, it has an economic definition, referring to wagering

¹ John Scarne, Scarne's New Complete Guide to Gambling, Simon & Schuster, Inc, New York, 1974 at pg 24.

² *Ibid* at pg 24.

money or something of material value on an event with an uncertain outcome with the primary intent of winning money or material goods.³

For gambling scholars and practitioners, the activity consists of risking something one possesses in the hope of obtaining something better.⁴ It has also been defined as the wagering of money or something of material value to win a Prize. Generally, the standard definition of gambling identifies it as an activity where, two or more parties place at risk something of value (the stakes) in the hope of winning something of greater value (the prize) where who wins or loses depends on the outcome of events that are unknown to the participants at the time of the bet (result).⁵ The activity basically consists of the elements of chance, consideration and an opportunity to win a prize. In the gambling frame of reference the player must pay money, the consideration to the promoter of a gambling activity to be authorized to participate in the game.⁶ A prize on the other hand is the pay-out a winner is paid.

Use of Gambling and Gaming: Is there any Difference?

Gambling, gaming, betting and wagering are terms which are often used *synonymously*, gambling being regarded as embracing all the above forms of the activity. This is the definition adopted by the 1949-51 Royal Commission on Betting, Lotteries and Gaming to include not only betting and gaming, but also lotteries.⁷ Due to the negative association of the word '*gambling*' casinos operators and regulators often use the euphemism '*gaming*' to describe the recreational gambling activities they offer. The concept is on the other hand generally used to denote playing at any game whether of chance or skill for money or money's worth.⁸

³ Definition of gambling by the Free Online Dictionary, Thesaurus and Encyclopedia, Available at www.thefreedictionary.com. (Accessed on 6th July 2013).

⁴ Supra note 2 at pg 14.

⁵ Peter Collins, *Gambling and the Public Interest*, Praeger Publishers, Westport, USA, 2003 at Pg 15.

⁶ See *California Gasoline Retailer V Regal Petroleum Corporation of Fresno*, 50 Cal 2d 844; 330 p2d 778 [1958].

⁷ Chenery J.T, *The Law and Practice of Bookmaking, Betting ,Gaming and Lotteries*, 2nd Edition Sweet& Maxwell, London, 1963 at pg 1.

⁸ *Ibid.*

The term is defined by statute as the playing of a game of chance for winnings in money or money's worth, a 'game of chance' including a game of chance and skill combined,⁹ and a pretended game of chance, or of chance and skill combined, but not any athletic game or sport.¹⁰ The Betting, Lotteries and Gaming Act Chapter 131 Laws of Kenya also define gaming as "the playing of a game of chance for winnings in money or money's worth."¹¹ The statute also defines a game of "chance" to include a game of chance and skill combined and a pretended game of chance or of chance and skill combined, but does not include an athletic game or sport.¹²

The United Kingdom Gambling Act 2005 also defines '*Gambling*' to mean *gaming, betting* and participating in a *lottery*.¹³ In this rather complex manner of defining the subject; gaming under the Act means "*playing a game of chance for a prize.*" A game of chance under the Act includes- "a game that involves both an element of chance and an element of skill, a game that involves an element of chance that can be eliminated by superlative skill, and a game that is presented as involving an element of chance, but does not include a sport."¹⁴ According to this legislation, a person plays a game of chance if he participates in a game of chance whether there are other participants in the game, and whether or not a computer generates images or data taken to represent the actions of other participants in the game.¹⁵

The distinction between casino gaming and other forms of gambling is noted by the Fourth Schedule of the Constitution of Kenya, 2010 where it differentiates casinos and other forms of gambling. The different forms of gambling are distinct and they raise different regulatory obligations. For both gambling and gaming, the activities must involve both the concepts of chance of gain and risk of loss.¹⁶ Gaming does not include the making of bets by way of pool

⁹ Games of chance are those which do not involve any element of skill while games of skill are those which the element of chance is nonexistent. Games of chance and skill on the other hand are games where both these elements are present in a game.

¹⁰ *Supra* note 7 at pg 2.

¹¹ See section 2 of the Betting, Lotteries and Gaming Act Chapter 131 Laws of Kenya.

¹² *Ibid.*

¹³ See section 3 of the UK Gambling Act 2005.

¹⁴ *Ibid* section 6.

¹⁵ *Ibid.*

¹⁶ Lipton D. Michael and Lazarus C. Morden et al, Games of Skill and Chance in Canada, Gaming Law Review, Volume 9 Number 1, 2005, Mary Ann Liebert Inc, at pg 14.

betting, or participation in certain lotteries.¹⁷ For the purpose of this study where gambling and gaming are used interchangeably they refer to casino gaming unless the context makes specific reference to the generic term.

THE HISTORICAL BACKGROUND OF THE GAMING INDUSTRY IN KENYA

The historical background of the industry in Kenya is traced to certain recommendations made to the Colonial government by the Jockey Club of Kenya in 1952 concerning the setting up of a Betting Control Board to be the main licensing body to control betting, gaming and lotteries in Kenya. The proposed board was also to account for its funds to the Minister of Finance.¹⁸ The recommendations by the Club were actualized by the formation of the Committee on Betting, Gambling and Lotteries by the Colonial government in 1952 to look into the existing law and practice of betting, gambling and lotteries and report what changes, if any would be necessary and practicable.¹⁹

The Committee submitted its report in December 1953 and its recommendations were accepted by the government on 11th September, 1954.²⁰ The Committee held eight meetings and considered written submissions from eleven witnesses and oral evidence from twelve witnesses. On the existing law and practice of gambling in Kenya, gaming in public and in the gaming houses was prohibited. The existing law was the Gambling Ordinance (Chapter 26 Laws of Kenya) whose intention was for the suppression of common gaming houses and gambling in public places.²¹ The ordinance prohibited the keeping, managing, use or permitting other persons to use any building, enclosure, vessel or place either as an owner or occupier for the purpose of gaming.²²

¹⁷ Supra note 7 at pg 2.

¹⁸ Republic of Kenya, Official Report, House of Representatives, Third Session, Vol. VIII, Nairobi, Government Printer, January 1966 at Column 27.

¹⁹ *Ibid.*

²⁰ Report of the Committee on Betting, Gambling and Lotteries, Government Printer, 1954 at pg 1.

²¹ See the preamble of the Gambling (Ordinance) Act Cap.26 (1948). This Act was repealed in 1966 after the enactment of The Betting, Lotteries and Gaming Act No. 9 of 1966.

²² See Sec.4 of the Gambling (Ordinance).

It also criminalized advancing or furnishing money for the purpose of gaming with persons frequenting any common gaming –houses.²³ It also prohibited gaming in common gaming houses as well as in public places. Under the Ordinance, casino gaming was illegal. This covered gaming machines except those which constituted or could be used to operate a lottery and those which were authorized by the Commissioner of Police for use in members clubs.²⁴ During this period, gambling in the colony was under the police.

Some of the witnesses who appeared before the Committee were concerned with the extent of gambling, particularly among young persons in parks and in open places and the resultant bad effect on their character.²⁵ The Committee recommended strengthening of the existing law to help it withstand assaults would that be made in the future. The Committee was not seized with any evidence on whether gambling had any economic effect on the community.²⁶ However, the Committee noted that although gambling was not a major social evil, it could become one if allowed to develop unchecked and recommended that it be brought under control without delay.²⁷

In its conclusion, the Committee foresaw a possibility in the future of suggestions or agitation for the legislation of some forms of large–scale gaming such as casinos, amusement parks or fun fairs which were prohibited as common gaming houses. The Committee was strongly opposed to any relaxation of existing law to legalize casinos. On the other hand, the Committee recommended that, if there was any such relaxation, any such discretionary power to permit public gaming, this was to be exercised by the yet to be formed Betting Control Board. On slot machines, the Committee recommended prohibition of importation and use of gaming machines which were popularly known as “*fruit*” *machines*.” This prohibition was to cover even those placed in private clubs because their odds were so heavily in favour of the owners and at the same time; they provided so insidious a temptation to the citizenry.²⁸

²³ *Ibid*.

²⁴ See Sec.5 of the Ordinance.

²⁵ *Supra* note 20 at pg 2.

²⁶ *Ibid* at Pg 5.

²⁷ *Ibid* at pg 6.

²⁸ *Supra* at pg 17.

The Committee further recommended that the provision of all forms of legal gambling should be subject to Licenses issued by a Betting Control Board, which was to have powers to withhold or cancel those licenses. The Board was to be empowered to impose on licensees conditions relating to the publication of their accounts, to the conduct of gambling and to the premises where gambling was to take place. These conditions were to be strictly enforced by the Police.²⁹ In signaling the direction the government was to take on raising revenue from gambling activities, the government in 1963, introduced the Betting Tax Ordinance to tax bets made on horseracing.³⁰ Further, in laying down the basis of the country's tax structure and identifying other sources of government revenue from reliance of import duties which were predicted to become less important as a source of revenue, the government identified the elimination of foreign gambling pools and the like from Kenya and collection by the government of a larger share of such gains as one of the main future ways to increase tax collection. Other sources identified to increase revenue included excise duties on selected commodities, sales and entertainment taxes amongst others.³¹

The report by the Committee took eleven years to be implemented. However, during this period considerable amount of work was carried out by the government in consortium with the Jockey Club of Kenya before the presentation of the Betting, Lotteries and Gaming Bill before Parliament in 1965. The Bill was read for first time on 12th October 1965³² and subsequently read for the second time on 25th January 1966. The Bill was read for the third time and passed on 27th January 1966.³³ It was subsequently assented to on 11th March 1966 as the Betting, Lotteries and Gaming Act No.9 of 1966. The enactment of this legislation repealed the Gambling Act Cap.26 (1948), Sections 176 to 180 and Sections 182 (c) of the Penal Code, Cap.63, and the Pools Act Cap. 478, The Betting Tax Act, 1963 and the amendment of

²⁹ *Ibid.*

³⁰ See, The Betting Tax Act No. 11 of 1963 [Legal Notice No. 50 of 1963].

³¹ Government of Kenya, African Socialism and Its Application to Planning in Kenya, 1965, Government Press, Pg 33.

³² Republic of Kenya, The National Assembly, House of Representatives Official Report, First Parliament Second Session, Vol.VI, 14th September 1965 to 22nd October 1965, Government Printer, Nairobi at Column 953.

³³ Republic of Kenya, The National Assembly, House of Representatives Official Report, First Parliament Third Session, Vol. VIII, 25th January 1966 to 10th March 1966, Government Printer, Nairobi at Columns 26 and 178.

regulation 162 (f) of the Local Government Regulations 1963 by deleting the words games of chance open to the public.³⁴

The commencement date was by Order with the effective date of Part II of the Act which deals with the Control and Licensing of Betting being 1st November 1966 while the remainder commenced its operations on 1st January 1967.³⁵ The inaugural Betting Control and Licensing Board were set up on 12th May, 1966.³⁶ This legislation has been in existence for the last forty six years without any fundamental amendments on the regulation of casino gaming and other forms of gambling in Kenya. The only amendments which have occasionally been effected on the Statute have been to insert and delete some regulations and enhance fees for licenses and permits under the Second Schedule. In all nothing substantial has been made on this law to cure its deficiencies in the four decades of its existence. There is no particular reason why the law has not been reviewed.

The above challenge has been worsened by the provisions of Article 186 of the Constitution of Kenya 2010, which under sub-Article (1) provides that ‘except otherwise provided by this Constitution, the functions and powers of the national government and the county governments, respectively, are as set out in the Fourth Schedule.’ Under sub - Article (2), ‘a function or power that is conferred on more than one level of government is a function or power within the concurrent jurisdiction of each of those levels of government.’ while under (3), a ‘function or power not assigned by this Constitution or national legislation to a county is a function or power of the national government. This complicates the manner in which gambling will be regulated in the new constitutional dispensation.

The Constitution now places gambling activities into the concurrent jurisdiction of both the National and the County governments. The functions of the National Government in respect to

³⁴ See section 71 of the Betting, Lotteries and Gaming Act No.9 of 1966.

³⁵ The Betting, Lotteries and Gaming Act Chapter 131 Laws of Kenya.

³⁶ See Betting Control Board Set Up, Daily Nation Friday, May 13, 1966 at Pg 3. The Members of the Board included Mr.J.M Kariuki,MP,as the Chairman, and Mr. A. Arap Soi,MP, Mr.J.M Shikuku, MP, Mr. Bechgaard, Mr.D.C. Bowden, Mr. J. N. Michuki, and Mr .J. Omanga. See also Kenya Gazette, Legal Notice No.1991 of 7th June, 1966.

gaming are set out in function 34 of part 1 of the Fourth Schedule of the Constitution as National betting, Casinos and other forms of gambling while the functions of the County Governments are provided for under function 4 of Part 2 of the same schedule as betting, casinos, racing and other forms of gambling. The growth of this industry is rapid in Kenya and elsewhere and there is need to examine the existing law and determine whether there is any need to review the existing regulatory framework. The review of the law is urgent and this study will attempt to examine the law with a view of establishing whether there is need for any regulatory reforms.

1.1 STATEMENT OF THE PROBLEM

Since the enactment of the Betting, Lotteries and Gaming Act Chapter 131 Laws of Kenya in 1966 and Commencement of Casino business in 1969, little effort has been put in place to review the legislation to effectively regulate the Casino industry. The failure to initiate necessary reforms to the law over the years has rendered the law obsolete and ineffective leading to regulatory challenges and unexplained explosion of Casinos in the Country since the early 1990s. This has been further complicated by the promulgation of the Constitution of Kenya 2010, which has placed the operations of gaming activities to the concurrent jurisdiction of both the National and County governments. This new Constitutional dispensation and the attendant devolution are likely to impact strongly on Casino regulation and complicate the current regulatory regime. This challenge is likely to demand for a new regulatory mechanism tailored to address the deficiencies of the past order and introduce some new and effective regulatory structures. The new structures must be designed to address the demands of the future gaming because the current law is deficient in achieving the dictates of the new Constitutional order and mandate.

The existence of an inoperative legislation is unable to effectively achieve the objectives of regulating gaming activities. The accepted objectives of gaming laws as indicated above aim at controlling the proliferation of gaming activities, protection of the underage and the vulnerable from harmful effects of gambling and exploitation from casino operators. They also ensure gambling is conducted in a verifiably fair and open manner to protect the interests of the consumer and Prevent gambling in licensed establishments from being or becoming a source of crime or disorder. This is done by ensuring gaming establishments are not infiltrated, used or

operated for purposes of money laundering, and supporting criminal activities. They also seek to prevent excessive gaming and rehabilitation of gaming addicts; ensure compliance with and adherence to socially and internationally acceptable operational requirements and standards.

They also aim at ensuring transparent and democratic administration of the gaming industry, efficient and effective management of gaming activities and generation of taxes. These objectives are achieved through different mechanisms such as capping the number of casino licenses in a jurisdiction, conducting due diligence on applicants, future directors and setting out the manner in which games of chance are offered. Regulators also stipulate the timings which licensed gaming operators may conduct their businesses. Others include keeping books of accounts, gaming records, and setting operational standards of gaming equipments and devices amongst others. The gains expected from gaming activities where these objectives are compromised or threatened by an ineffective legislation are known to be minimal and poses risks to the stakeholders in the industry.

The legal regime governing casino industry in Kenya is contained in not more than eleven sections of the seventy sections of the Act. It is opinioned that these sections are not extensive enough to adequately regulate the industry. This coupled with the spread and emergence of new forms of gambling has rendered the administration of the law obsolete and inoperative. This study will attempt to examine whether the regulatory regime governing the Casino industry in Kenya is adequate and if not what regulatory reforms should be undertaken to address any inadequacies.

1.2 JUSTIFICATION OF THE STUDY

The global gaming industry is a multi-billion dollar industry. In Kenya, the number of Casinos has grown from one in 1969, eight in 1990 and forty-four in 2011. The total annual value of the industry is estimated to be about two billion Kenya shillings. The industry employs an average of five thousand people, which signifies its increased importance to the economy. With increased demand and expansion of gaming in the Country, there is need to review the existing legislation to reflect the emerging technological, constitutional and social attitudes towards gaming to reduce the emerging regulatory challenges. Globally, different gaming jurisdictions have

embarked on exercises of reviewing their gaming legislations. It is important therefore, that similar studies are conducted locally to identify the reasons for such activities and point out specific areas requiring review. There is no evidence of any studies conducted to examine the efficacy of the current regulatory regime governing the casino industry in Kenya. Since an effective law in regulation of casino gaming is critical, this study will therefore fill the existing vacuum and set the stage for future studies in this area.

1.3 THE CONCEPTUAL FRAMEWORK

The current regulation of gaming is based on the classic economic analysis of law. The economic analysis of law emphasizes the objective of law is to ensure wealth maximization in economic relations and create efficiency in the market. This theory informed the enactment of the Betting, Lotteries and Gaming Act Chapter 131 Laws of Kenya, whose main objectives are to control and license betting, lotteries, gaming and imposition of a tax on betting and gaming activities. Since these activities are harmful to the gamblers and their close relations, the society in this realization ensures operators and in some instances, those who participate in casino gaming to pay an entry fee to access the games while in some jurisdictions gamblers are required to pay taxes from their winnings.

Since different gaming jurisdictions have different objectives for licensing and regulating casinos and other forms of gambling, the core public policy considerations are normally geared towards limiting the supply and setting up mechanisms to protect citizens from externalities caused by these activities. These is therefore the likely reason why gambling activities in many jurisdictions are heavily regulated and taxed as part of enforcing gaming policies and compensate the society for offering these harmful activities. Taxation of gaming activities is based on different theories but the most appropriate is the regressive theory, which levies punitive taxes to the socially morally offending economic activities as a form of controlling these enterprises.

The theory of classic economic analysis of law assumes the control of economic enterprises through controlling their economic participation by determining for instance the amount of gaming services offered in a jurisdiction through a rigorous licensing regime which includes background checks to determine the suitability of persons applying for gaming licenses and a

close supervision and control on how and when to offer their services. This theory enforces the public policy, which requires holders of casino licenses to be fit and proper persons. This theory in achieving its many objectives limits entry and exit in this industry and determines who participates or consume gaming products and services. It also offers the necessary protections and sanctions to both the operators and customers of gaming enterprises.

The licensees and their key employees are also closely regulated by gaming regulators through licensing of key employees in casinos and close supervision on the manner in which the licensees conduct their businesses. The law also protects the under age and the vulnerable from participating in gambling and limits an operator's choice on what games, time and location they can offer games of chance without any prohibitions. These laws also emphasize on the integrity of the licensee and the instruments of his trade. Basing gambling laws on this theory ensures the state benefits from legalizing gaming and consequently it offers the necessary protections to all other players in the industry against any loses and limits the adverse effects of gaming to the society.

1.4 OBJECTIVES OF THE STUDY

The study seeks to examine the following general and specific objectives:

GENERAL OBJECTIVE:

The general objective of the study is to examine whether the regulatory regime governing the casino industry in Kenya is adequate to regulate the industry.

THE SPECIFIC OBJECTIVES:

- i) To examine whether the law regulating casinos in Kenya requires any legislative reforms;
- ii) To examine whether casino licensing procedures in Kenya are adequate;

- iii) To examine whether Kenya possesses a framework to govern the importation, sale and use of gaming machines and devices;
- iv) To examine whether the Control exercised by the Board in regulating casino operations in Kenya are effective.

1.5 HYPOTHESES

The Hypotheses to be tested in this study are whether:

- i) **The regulatory framework governing the casino industry in Kenya is adequate and does not require any reforms:**

A regulatory framework is a legal structure set up to regulate a particular economic activity. Regulatory reforms on the other hand are changes designed to improve, streamline and strengthen effectiveness of a regulatory framework. The adequacy of a regulatory framework is measured by effectiveness of a statute to achieve its legislative objectives. A gaming regulatory regime is adequate if it achieves its public policy objectives. These as stated earlier include preventing gambling from being a source of crime and disorder, ensuring games of chance are free, fair and the governments obtain their share of income generated by casinos. The system of regulation which this study examines is one set out by the Fourth schedule of the Constitution of Kenya 2010, the provisions of the Betting, Lotteries and Gaming Act Chapter 131 Laws of Kenya and other enabling laws which establish the legal framework in Kenya. This hypothesis will test whether the framework is adequate to regulate the industry and if confirmed, no recommendations for reforms will be made. However, in the event any inadequacy is established; recommendations would be suggested to improve the adequacy and effectiveness of the regulation.

ii) Procedures of licensing Casinos in Kenya are inadequate and ineffective:

A procedure is a formal process. Licensing bodies have elaborate procedures for issuance of licenses and permits. However, the complexity and nature of these procedures depend on the type of the activity being licensed. Due to the public policy considerations surrounding gambling; the process of issuing public gaming licenses is elaborate and intrusive in many gaming jurisdictions. The licensing process is held as the central pillar in regulation of casino gaming. Where the process is flawed and inadequate, control of gaming is compromised. This hypothesis will test whether the licensing process is adequate and effective to regulate the industry. If the study establishes any inadequacy in the procedure; the study would recommend for the necessary reforms to ensure the process is updated to meet acceptable international standards for licensing casinos.

iii) There is no framework to govern importation, testing, sale and use of gaming machines and devices in Kenya;

Since gaming is driven by technology; the importation, testing, sale and use of gaming machines is critical in maintaining integrity in gaming. In an environment where illegal gaming is in competition with the legal establishments, policies on importation, testing, sale and use of gaming equipments is critical in preventing their access to unlicensed operators. The manufacture, testing, importation, sale and distribution of gaming equipments are regulated in many gaming jurisdictions. The objective of this regulation is to ensure gaming devices are handled by licensed operators, meet the minimum technical standards, enhance and protect their safety, integrity, security and accountability. This hypothesis would be seeking to establish the existence of such a framework in Kenya. If the hypothesis is not supported, the study would recommend for its development.

iv) The controls exercised by the Board to regulate the operations of casinos in Kenya are inadequate and ineffective.

Gaming regulators use different controls to regulate casino operations. These include control on ownership, physical location, games, gaming equipments, operating hours, opening and closing of gaming tables. Others include confirmation of jackpots, fills, handling and accounting of casino

chips, cash and tokens amongst other controlled gaming activities. These controls determine the effectiveness of a regulator to police a myriad of casino activities. The objective of these controls is to ensure the gaming public is protected from harm arising from gambling and the state benefits from income casinos generate. This hypothesis will attempt to examine whether these controls are adequate and effective.

1.6 LITERATURE REVIEW

While review of the available literature is not exhaustive, it is expected it would nevertheless help shed light on the various issues generated by regulation of Casino gaming. Gambling in its generic comprises of three major but distinct activities of; Betting, lotteries and casino gaming. Each of these forms of gambling is operated for different reasons. The thread which binds these three activities is the three elements which constitute any gambling transaction; the element of consideration, chance and an opportunity to win a prize. With the spread and legalization of gambling, reform of entire gaming laws has been the norm rather than the exception where legal reforms in gaming have been effected. There is no reason advanced for not reforming specific parts of gaming laws.

This study is directed on the legal reforms in the casino gaming in Kenya. The reason for selecting this area of gaming is because it is the most developed and promising gambling activity when compared with the other two prominent forms of gambling in this country. The casino sector is the only category of gambling in Kenya which the government directs most of its resources to regulate. This sector is regulated for eighteen hours a day by the enforcement arm of the Board. Gaming Inspectors oversee the operations of casinos from opening to closure of business. This signifies the importance of this industry to the Board.

In many jurisdictions, the review of gambling legislations as stated have been undertaken to address the entire aspects of the activity. However, this study attempts to fill a gap which many gaming jurisdictions and scholars have not addressed. This is of examining the effectiveness of a specific part of a gaming legislation dealing with the regulation of a particular form of gambling

with an objective of revising the law. Legal reforms have been carried out to address inadequacies arising from ineffective gaming laws. The identification of the need to reform gambling legislations has been through different flat forms such as Taskforces, independent and parliamentary oversight committees and government lead studies amongst others. However studies geared towards examining specific aspects of gambling laws have been rare. Authors in this area have concentrated on writing or examining gaming laws in their entirety but not specifically examining the regulatory regime governing the casino industry.

The gap which this study attempts to fill is to demonstrate that it is possible to reform a particular part of a gaming law dealing with one of the many forms of gambling if it has proved inadequate to regulate the sector rather than waiting to overhaul the entire legislation to address the shortcomings of the law. This is the costly path which most of the gaming jurisdictions have taken. The literature reviewed and developed lays a basis on the issues surrounding the industry to assist regulators in dilemma of reforming provisions of a specific form of gambling to do so by examining and revising the inoperative parts of their gambling laws. There is no literature on specific legal reform of one of the three major forms of legalized gambling in Kenya.

This study will add to the area of gaming law that it is possible to reform a gaming legislation in piecemeal to address the shortcomings of the law rather than wait to mount major reforms to review the entire legislation. This has been the practice in many jurisdictions. This has proved costly to the industry because of delay in decision making and availability of resources. These decisions always depend on political goodwill even where regulators have identified the shortcomings of a particular provision of a gaming law. Due to its nature; gaming legislations are critical in regulating the conduct of games, protecting the youth and the vulnerable from harm resulting from gambling. However, the following review of the following literature lays a basis on the issues surrounding the gaming industry which are critical to the subject under study.

In her book *Gambling Cultures, Studies in History and Interpretation*, Jan McMullen, observes gambling in one form or another has been a feature of all cultures but it has been legalized and

commercialized on a grand scale only in 1960s.³⁷ She further observes in her book, *Gambling as an Industry*, that in the last decade, the legitimacy of gambling regulation has been challenged in four major gambling Nations, (Australia, United States, United Kingdom, Canada and New Zealand) due to a congruence of factors. The identified factors include increased affluence, commercialization of the gambling industry modeled on United States (USA) Corporations, and revenue pressures on governments during and after the global recession of the 1980's as some of the factors fueling the growth of the industry.³⁸

She further notes that inquiries in the four jurisdictions identified common policy failures in all countries. The identified failures included lack of a clearly defined and consistent rationale for government policies, which were driven mainly by fiscal problems, revenue dependency, and pressure from industry groups. This also included limited community consultation in policy processes. The inquiries also identified close relationships between rapid industry growth and the social costs experienced by individuals and communities.³⁹

Anthony Cabot, in his book the *International Casino Law*, observes that the explosion in gambling in the 1980s and in 1990's was a worldwide phenomenon, which no one could have predicted. He quotes Grant Sawyer the governor of Nevada (1959-1967), who observed that the history of the world would view the 1990's as the world's great experiment with Casino gaming because during that period only a few Casinos existed worldwide.⁴⁰ Grant Sawyer, in a forward in Anthony Cabot's book, *International Casino Law*, observes that with this expansion, came the confusion particularly in the area of regulation. Jurisdictions that rushed and blindly adopted the regulatory systems of Nevada, New Jersey, or Great Britain found that they had created more

³⁷ Jan McMullen, *Gambling Cultures, Studies in History and Interpretation*, Routledge, Taylor & Francis, London, 1996, at pg 1.

³⁸ In their article with John. S. F. Wright, *Re-regulating the Gambling Industry: Regulatory Reform in Victoria and New South Wales, 1999–2006*; *Australian Journal of Political Science*, Vol.43, No.2, June 2008, pp. 277 – 300, the Australian National University, 2008. They identified the inquiries into gambling policies and the Impacts to include the Australian Productivity Commission 1999; National Gambling Impact Studies 2001; Gambling Review Report 2001; Markland 2002; Miers 2002; 2004; Campel, Hartnagel and Smith 2005.

³⁹ McMullen, J. 1996, 'Gambling as an Industry,' in *Place Your Bets: Gambling in Victoria*, eds, M. Cathcart & K. Darian-Smith; the Australian Centre: University of Melbourne.

⁴⁰ Anthony Cabot, *International Casino Law*, Institute for the Study of Gambling and Commercial Gaming, University of Nevada, 1993.

problems than they solved. He observes that While Nevada, New Jersey, and Great Britain had effective regulatory systems; their authors had designed their respective systems to reflect unique policy goals, capabilities, expertise, and history. To Sawyer, “little chance exists that a new jurisdiction will have the same circumstances as an existing jurisdiction to allow mere copying of a regulatory system”⁴¹

Peter Adams, in his book *Gambling, Freedom and Democracy* argues that contemporary gambling threatens political systems. He identifies three ways in which the threat can be actualized. First, it is through government-industry alliances to promote gambling despite public opposition; secondly through the collective global influence of the gambling industry; and thirdly, by engaging “more and more people in a web of benefits and privileges that... progressively compromises their ability to openly question the way gambling is being provided.”⁴² Adams identifies the power of the gambling industry to block, manipulate or dilute policy reforms in Australia. The author observes that in Australia, the main, action by governments or direct regulatory intervention was required before all operators accepted that changes to past practices were necessary.⁴³

He observes that industry representatives often articulate the rhetoric of responsible gambling while simultaneously seeking to achieve regulations conducive to profitable markets. Others continue to demand “scientific” evidence to support policy change, or they distort research evidence to play down any adverse findings.⁴⁴ The writer further observes that democratic governments have a primary duty to ensure that legalized gambling operates for public benefit and to protect communities from gambling-related harm. Governments also have a responsibility to respond to public concerns and to foster public scrutiny of the factors that influence their decisions. He notes that if the community has reason to doubt the capacity of government to

⁴¹ Grant Sawyer, forward in Anthony Cabot, *International Casino Law*, Institute for the Study of Gambling and Commercial Gaming, University of Nevada, 1993.

⁴² Peter J Adams, *Is democratic gambling reform possible?*, Australian Review of Public Affairs, March 2009, Available at www.australianreview.net.

⁴³ *Ibid.*

⁴⁴ *supra* note.

regulate in the public interest, or to question the integrity of policy-makers, government and industry run the risk of public protest and a legitimating crisis.⁴⁵

In his article *Ethical and Policy Considerations in the Spread of Commercial Gambling*, William R. Eadington, observes that in spite of its increased presence and acceptance, gambling has remained quite controversial as an activity and a Commercial enterprise. He further observes that, for most part, public policy attitudes towards gambling throughout the industrialized world has shifted from viewing gambling as a vice to seeing it as an opportunity to be exploited.⁴⁶ He identifies this as perhaps the main reason why there was and continues to be such a strong trend towards legalization of new forms of commercial gaming. The author further observes that the trend in recent years to exploit the opportunities associated with the changing social acceptance of gambling has led to a variety of experiments with legalization and regulation of commercial gaming. He further notes that there is evidence that operators in the gambling industry are always unwilling to have existing weak laws, which serve their interests reformed and observes that such attempts are often encountered by vociferous opposition.⁴⁷

The author concludes that there is a strong asymmetric nature to regulatory and statutory commitments regarding the operation of authorized commercial gambling. He argues that it is difficult to increase constraints on a legally created commercial gaming industry. This is particularly when it has been established, generally accepted and under increasing competitive pressures from other gaming jurisdictions.⁴⁸ The author proposes that the major constraints must be well thought of and set out before rolling out a new regulatory regime.

The Centre for Regulation and Competition in its article *Designing Regulatory Institutions*, notes that imported regulation models copied from the west have not succeed in most African countries. This is because they were strategies designed for western contexts and often they did not work as expected when they were transplanted to different economic, social and political

⁴⁵ *Ibid.*

⁴⁶ William R. Eadington, *Ethical and Policy Considerations in the Spread of Commercial Gambling*, Institute for the Study of Gambling and Commercial Gaming, University of Nevada, 1993 at Pg 243.

⁴⁷ *Ibid.*

⁴⁸ *Supra* at 260.

cultures. Although this is well recognized, the most common response is to simply carry on as well as possible in the circumstances.⁴⁹ This is what Kenya and many other gaming jurisdictions have done.

The growth of the gaming industry has continued to grow in Kenya and elsewhere since the eighties. This growth is what Nelson I. Rose, in his book, *Gambling and the Law*, equates to a virtual explosion a departure from his earlier observation in his article, *The Rise of the Third Wave* where he referred the expansion of gambling activities in the late 60s and 70s worldwide as a wave.⁵⁰ He further observes in his article *Legalization and Control of Casino Gambling*⁵¹ that gambling is in fact, one of the fastest growing industries in the world and almost every sign [as was in the eighties] points to a continued expansion of legal gambling. He further notes that the temptation to legalize casino gambling is great but once a state legalizes gambling; it is extremely rare to rescind its decision to decriminalize gambling games.⁵² It is even extremely difficult to review these laws because of the opposition from the players in the industry.

The explosion of casinos in this period and after, has called for a continuous scrutiny of gaming legislations in many gaming jurisdictions. For instance in Australia, *the Productivity Commission Inquiry* in 1999 which attracted international attention in suggesting the reform agenda for its gaming industry, made it clear that a more restricted and regulated industry was required to achieve the social and integrity objectives of its gambling policy. It identified poor industry practices and poor government regulation as one of the reasons which contributed into poor outcomes in the industry. It further identified gaming machines as the biggest reform agenda for Australia amongst other key findings.⁵³

⁴⁹ The University of Manchester Centre on Regulation and Competition, Designing Regulatory Institutions, Brief Number 13, 2006, Available at www.competition-regulation.org.uk (Assessed on 28 February 2010).

⁵⁰ I. Nelson Rose, *The Rise of The Third Wave: Gambling Will be outlawed In Forty Years*, *Gambling and Public Policy International Perspectives*, Institute for the Study of Gambling and Commercial Gaming, University of Nevada, Reno, 1991.

⁵¹ I. Nelson Rose, *Legalization and Control of Casino Gambling*, *Fordham Urban Law Journal* Volume 8, Issue 2, Article 1, 1979 at pg 245.

⁵² *Ibid* at pg 246.

⁵³ *supra* note 42.

In UK for instance reforms in the gaming sector has been carried out on several occasions with the latest in 1999. The reforms initiated in 1999 culminated in the current UK Gambling Act 2005. In Africa for instance, Botswana is in the process of reviewing its gaming legislation which was enacted in 1971. This is after the country realized that its current regulatory regime was outdated and inadequate to regulate its gambling industry. The reasons advanced for the review include technological advancements as well as development trends and changes in the regional and global environment. The reform seeks to consolidate, with amendments, the laws regulating gambling in order to ensure compliance with, and adherence to, socially and internationally acceptable operational requirements and standards.⁵⁴

The *PricewaterhouseCoopers (PwC)* in its report on the global market of gaming activities notes that the industry has been a unique source of entertainment for its customers and often a focus of government's regulatory spotlight.⁵⁵ However, Raymond D. Sauer in his article *The Political Economy of Gambling Regulation* observes that gambling is opposed because it is a non-productive and inherently harmful activity. This is because the activity is financially ruinous to individuals, and corrosive to communities. It is also if not properly regulated yields nothing substantial to the economy while at the time opens doors to organized crime.⁵⁶

Laws set out to regulate casinos are essential in guaranteeing public confidence in the operation and integrity of the games of chance. They are also geared towards increasing public acceptance by removing any perception that criminals have ownership interests in the casinos and reduce the social costs associated with gambling. Governments should also be aware that regulation could inadvertently stifle the growth of an industry and jeopardize its regulatory objectives. For instance **Jean Friedman-Rudovsky** in his article, *Casino Gambling: Russia's Export to Latin America*, he observes that inefficient laws can lead to unwarranted explosion of the gaming

⁵⁴ Botswana Ministry of Trade and Industry, Gambling Bill 2011, Available at <http://www.mti.gov.bw/legislation>. (Accessed on 25th July 2012).

⁵⁵ PricewaterhouseCoopers, Playing to win; The Outlook for the global Casino and Online Gaming Market 2014, Available at http://www.com/gx/en/com/en&m_entertainment-media/pdf/pwc-playtowin. (Accessed on 14th May 2011) at Pg 4.

⁵⁶ Raymond D. Sauer, *The Political Economy of Gambling Regulation*, Clemson University, November 2000 at pg 2.

industry. For instance in Bolivia, a country with a population of nearly nine million people, it has eighty casinos and about ten thousand gambling machines.⁵⁷

This growth has been attributed to its weak legal framework. It is noted that once a gambling company has been licensed to operate one casino, there are no limits on the number of sites it can operate branches. This is contrary to other gaming jurisdictions, which limit the number of casinos that can be operated in proportion to population size.⁵⁸ For instance in South Africa a country with a population of over 50 million,⁵⁹ the number of casinos is capped at 40 and out of this only 37 casinos are in operation. The situation in Bolivia is almost replicated in Kenya with 40 operating casinos in a population of 43 million.⁶⁰ As argued elsewhere in this study, the number of casinos in Kenya is too high for a struggling economy.

Peter Kestens, in *Gambling Policy-The EU Dilemma*, observes that most regulators appear to be caught in the triangle formed by the need to control excesses, the need to enable non-problematic supply and demand and the desire to preserve the role of gambling and games of chance as a basis for financing social objectives, charities, sports, the arts amongst other social causes.⁶¹ He further observes that there has been a question over the recent decades on why and how gambling should be regulated. He notes that this has led into different approaches on how gambling is regulated and further observes that all gaming legislations have common threads on the reasons why they regulate gaming. The author further argues that if any current laws fail to capture some of these reasons or objectives, then legal reforms must be carried out.⁶² The author identifies protection of minors, controlling addiction and compulsive behavior, financing the public purse or tax objectives, financing charities, arts, culture or sports, proper supervision,

⁵⁷ Jean Friendman, *Casino Gambling: Russia's Export to Latin America*, The Time Magazine, Saturday, Dec 26, 2009, Available at <http://www.time.com/time/world/article/0,8599,00.html>. (Accessed on 26th February 2010).

⁵⁸ *Ibid.*

⁵⁹ Republic of South Africa, Statistical Release, Mid Year Population Estimates 2011, Available at <http://www.statssa.gov.za/publications/PO302/P022011.Pdf>. (Accessed on 15th May 2012).

⁶⁰ Central Intelligence Agency world fact book on Kenya; Available at <https://www.cia.gov/library/publications/the-world-factbook/geos/ke.html> (Accessed on 12th August 2012).

⁶¹ Peter Kestens, *Gambling Policy-The EU Dilemma*; In Allan Littler et al, *The Regulation of Gambling: European and National Perspectives*.

⁶² *Ibid.*

fairness and transparency in the gaming rules fighting illegal activities such as Money Laundering and Control of advertising amongst other reasons for regulation of gambling.⁶³

From the foregoing, it is evident that review of gaming legislations is critical. The objective of this study will be to examine the current legislation relating to Casinos with a view of establishing whether there is any need to revise the law to incorporate the demands of the Constitution of Kenya 2010, the changing technological advancements, social attitudes towards gambling and the current public policy considerations towards casino gaming and increase the state gains from the industry. It is apparent that the issue of examining the effectiveness and reform of the provisions of the law regulating casino gaming in Kenya has never been addressed. This study therefore seeks to fill the gap on examination of effectiveness and reform of the law regulating this industry in Kenya.

1.7 RESEARCH METHODOLOGY

Research at the outset has been considered as a voyage of discovery and a movement from the known to the unknown.⁶⁴ Methodology on the other hand refers to methods a researcher employs to conduct his research. This study uses a combination of both primary and secondary methods of data collection. However, this study was designed to rely on review of secondary literature. Literature review as a method of data collection is a systematic search of published work to find out what already is known about a research topic. It serves many important purposes such as establishing the need for the research; broadening the horizon of the researcher; and preventing the researcher from conducting research which already exists.⁶⁵ The method also familiarizes the researcher with the latest developments in the area of study, identifies gaps in knowledge as well as weaknesses in previous studies.⁶⁶ The secondary data reviewed in this study is contained in various government publications, print and online journals, and reports by researchers, public records including those in archives, statistics, books, magazines and newspapers. This is data

⁶³ supra note.

⁶⁴ CR Kothari, *Research Methodology*, 2nd Edition, Wiley Eastern Limited, New Delhi, 1992 at pg 1.

⁶⁵ David Robinson & Val Reed, *A-Z of Social Research*, Ashgate Publishing Group, Aldershot, 1998 at Pg 58.

⁶⁶ Bless C. and Higson-Smith C., *Fundamentals of Social Research Methods: An African Perspective* 3rd edn, Juta Education, Lusaka, 2000 at pg 20.

which already exists and has been analysed while primary data is defined as data collected afresh. The review used in this study was basically carried out to provide information relating to the general background and context of the study.

The primary method of data collection used in this study is the interview method. This method is divided into structured and unstructured interviews. This method involves presentation of oral verbal stimuli and reply in terms of oral-verbal responses.⁶⁷ This study used personal unstructured interview because it is flexible and does not use a predetermined set of questions and complex techniques of recording. This method does not use any structured format. It is flexible as to what to ask with an option of omitting certain questions. An interviewee in this method is allowed to ask questions to the interviewer. The method is advantageous because the researcher personally collects the information and verification of data from other sources is possible. The method is used to acquire additional information on the issues under investigation. However, it is limited because it is time consuming and requires a deep understanding of issues under investigation. It also offers no comparability between two interviews. This study interviewed ten current and retired gaming inspectors at random with gaming experience of over fifteen years as regulators. The basis of the selection was an assumption that they were able to identify the existing regulatory weaknesses. The selection was random and depended on experience. The information collected was reliable, suitable and adequate to undertake the study.

1.8 SCOPE AND LIMITATIONS OF THE RESEARCH

This study will restrict itself to the study of the provisions of the law dealing with the regulation of casino gaming in Kenya but will use comparative studies conducted elsewhere in this area. The study was limited by lack of secondary materials at the University library and therefore it cannot claim to have covered all the relevant literature and arguments on regulation of casinos in this country.

⁶⁷ Supra note 64 at Pg 120.

CHAPTER 1: INTRODUCTION

This Chapter outlines the background of the study, the statement of the problem, the Justification of the research topic, the conceptual framework and the general and specific objectives of the study. This chapter also enumerates the hypothesis of the study, the literature review, the research methodology, the scope and limitations of the study and discusses the breakdown of the Chapters.

CHAPTER 2: THE LEGAL FRAMEWORK REGULATING THE CASINO INDUSTRY IN KENYA

This Chapter examines the legal framework regulating Casinos in Kenya. The examination looks at the provisions of the Constitution of Kenya 2010 that places the operations of gaming in the concurrent jurisdiction of the National and the County governments. It also examines the provisions of the Betting, Lotteries and Gaming Act Chapter 131 Laws of Kenya in relation to regulation of Casinos in Kenya. It further looks at the provisions of the Standards Act Chapter 496 Laws of Kenya in relation to the applicable Standards of gaming equipments and devices. It also examines the provisions of the Proceeds of Crime and Anti-Money Laundering Act No.9 of 2009 relating to Casino regulation and prevention of Money Laundering and Terrorist Financing. The Study further examines the provisions of the Contract Act Chapter 23 Laws of Kenya and the position of the Common Law relating to gaming contracts and the aspects of casino gaming which require regulation.

CHAPTER 3: THE GROWTH AND REGULATION OF THE CASINO INDURSTRY IN KENYA

The Chapter examines the growth and regulation of the casino industry in Kenya. It briefly identifies the objectives of legalizing the industry in Kenya. It further examines the reasons behind the increased number of casinos in the country in the early 1990's and the attendant consequences of the proliferation to the existing regulatory regime. It also attempts to set out the challenges posited by the promulgation of the Constitution of Kenya, 2010 to the regulation of casinos. Finally, it examines the regulation and the adequacy of the control of casino operations in Kenya.

CHAPTER 4: REGULATION OF CASINOS IN OTHER JURISDICTIONS

The Chapter looks at how the Republic of South Africa and the State of Nevada in the United States of America (U.S.A) regulates their casino industry. The insight covers licensing procedures and the overall regulation of gaming in these two jurisdictions with a comparable analysis of the Kenyan position. It also examines the strengths and any weaknesses obtaining in these two regulatory regimes. The observation on the adequacy of the regulatory regime in Kenya concludes the chapter after assessing its strengths and weaknesses in comparison with the above two gaming jurisdictions.

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS.

This Chapter contains the conclusions and recommendations of the study.

CHAPTER TWO

2.0 THE LEGAL FRAMEWORK REGULATING THE CASINO INDUSTRY IN KENYA

INTRODUCTION

The Betting, Lotteries and Gaming Act, Chapter 131 Laws of Kenya has set out the gaming regulatory order since 1966. This regime has now been shaken by the Constitution of Kenya 2010, which has placed the regulation of gaming activities into the concurrent jurisdiction of both the National and the devolved County governments. Other statutes that afford and offer regulatory services to the gaming industry in regulation of gaming include the Standards Act Chapter 496, The Proceeds of Crime and Anti-Money Laundering Act No.9 of 2009, the Contract Act Chapter 23 Laws of Kenya and Common law principles on Gaming.

2.1 ASPECTS OF CASINO GAMBLING WHICH OUGHT TO BE REGULATED

The regulation of gaming over time has established that all forms and aspects of commercial gaming demand strict oversight. The policy consideration behind this oversight is to prevent manipulation of gaming activities and devices to the detriment of the state and the gambling public. It is a fundamental public need that the licensing, ownership, transfer of casino license, location, operating hours, approval and integrity of casino games, standards and movement of gaming equipments and devices, handling of casino chips, tokens and counting of cash, casino records, taxation of gaming revenues and general casino operations such as casino layout, games and gaming machines are some of the many aspects of casino gaming which require regulation. Others in this chain include ensuring casinos remain free from organized crime; preventing use of casinos for money-laundering, protecting the young and the vulnerable from adverse effects of gaming, regulation of stakes, credits, gambling debts, fraud, cheating, illegal gambling amongst

other aspects which are and ought to be regulated in any gaming jurisdiction. Most of these aspects are not adequately provided for in the operative law.

2.2 THE CONSTITUTION

The theme of devolution and access to services runs through the provisions of the Constitution of Kenya, 2010. Under Article 6 (1), the Constitution states that “the territory of Kenya is divided into the counties specified in the First Schedule.”⁶⁸ It goes further in sub-article (2) to state that “the governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation.”⁶⁹ The Constitution further demands in sub-article (3) that “a national state organ shall ensure reasonable access to its services in all parts of the Republic, so far as it is appropriate to do so having regard to the nature of the service.”⁷⁰ The concept is also recognized under Article 10 (2) (a) of the Constitution as one of the national values and principles of governance.⁷¹

Under Article 174 (f) of the Constitution, some of the objects of devolution include promotion of social and economic development and the provision of proximate, easily accessible services throughout Kenya. The other objectives under sub-article (h) are to facilitate the decentralization of state organs, their functions and services from the capital of Kenya.⁷² Further on the transfer of functions and powers between levels of government, Article 187(2) (b) of the Constitution provides that “constitutional responsibility for performance of the function or exercise of the power shall remain with the government to which it is assigned by the Fourth Schedule.”⁷³ The respective functions and powers of the National and County governments are set out in Article 186 of the Constitution as earlier indicated.

This Article in sub-article (1) provides that “except as otherwise provided by this Constitution, the functions and powers of the national and the county governments, respectively, are set out in

⁶⁸ See Article 6 of the Constitution of Kenya, 2010.

⁶⁹ *Ibid.*

⁷⁰ *Supra* note.

⁷¹ See Article 10.

⁷² See Article 174.

⁷³ See Article 187.

the Fourth Schedule.”⁷⁴ Under sub-article (2) it states that “a function or power that is conferred on more than one level of government is a function or power within the concurrent jurisdiction of each of those levels of government.”⁷⁵ It further under sub-article (3), state that “a function or power not assigned by this Constitution or national legislation to a county is a function or power of the national government.”⁷⁶

The specific concurrent functions are set out in function number 34 of Part 1 of the Fourth schedule of the constitution. The powers include the control of “*National Betting, Casinos and other forms of gambling.*”⁷⁷ The functions of the County governments are set out under function number 4 (a) and (b) of Part 2 of the same schedule as “*betting, casinos and other forms of gambling*” and “*racing.*”⁷⁸ The Constitution of Kenya 2010 embraces gambling unlike in the replaced Constitution that was silent on the gambling industry. This new regime has complicated the manner in which gambling will be regulated. Presently gaming is a function of the national government. The Constitution does not differentiate which gambling activities, would be conducted at either levels of government. The focus is on the similarity of these functions.

The functions are differentiated by alphabetical emphasis of the functions of the National government. The Constitution does not emphasize the same functions at the County level. The devolved governments are expected to initiate their own gaming regulatory structures in their regions. This new regime is borrowed from the South African regulatory order, which is devolved in character where Gaming is regulated at the National and at the Provincial level.

⁷⁴ See Article 186(1).

⁷⁵ See Article 186(2).

⁷⁶ See Article 186(3).

⁷⁷ See function number 34 of Part 1 of the Fourth schedule of the constitution of Kenya, 2010.

⁷⁸ See function number 4 (a) and (b) of Part 2 of the Fourth schedule of the constitution of Kenya, 2010.

2.3 THE BETTING, LOTTERIES AND GAMING ACT, CHAPTER 131

Since its enactment in 1966, the Betting, Lotteries and Gaming Act, Chapter 131 Laws of Kenya (herein the Act) has provided the overall regulatory regime governing gaming activities in Kenya. The objectives of this statute is to control and license premises on which betting and gaming activities are carried out, impose and recover a tax on these and other related activities and authorization of public lotteries and other connected purposes.⁷⁹ The Betting Control and Licensing Board (herein the Board) established under Part 2 of the Act is the body permitted by law to scrutinize applications, demand for security, issue at its prescribed fee, suspend gaming operations, prohibit transfer, demand display and surrender of gaming licenses and permits. It also sets out the terms and conditions of licenses, the books of accounts to be kept by an operator and the submission of accounts as well as keeping a look out on behalf of the Kenya public the conduct and operations of gaming operators and take the necessary action to protect them from their actions. Its role is executory. It executes the regulations set out by the Act.

The fifth Part of the Act legislates gaming, creates offences and penalties, and specifically outlaws illegal gaming. It also creates offences relating to licensed gaming premises and criminalizes gaming in public places. The Act outlaws gaming with young persons and provides for taxation of gaming activities. It also provides for small gaming parties, gaming in clubs and at entertainments not held for private gain and finally, it also confers the Board with powers to authorize the use of gaming machines. This Act has underpinned the operations of gaming in Kenya since the first Casino opened its doors to the gaming public in 1969.

2.4 STANDARDS ACT CHAPTER 496

The Betting, Lotteries and Gaming Act, Chapter 131 Laws of Kenya is silent on the application of the Standards Act Chapter 496 Laws of Kenya (hereinafter referred to as the Standards Act), or application of any Standards on gaming equipments and devices. The Standards Act requires all equipments and devices used, manufactured or imported into Kenya to meet certain local and International Standards. Gaming equipments are central to gaming operations. These Standards

⁷⁹ See the Preamble of the Betting, Lotteries and Gaming Act (Chapter. 131) Laws of Kenya.

ensures the security and integrity of gaming equipments, which in turn protects the interests of the players, operators and the government. Standardization of gaming equipments and devices ensures the government realizes its revenue by sealing operational loopholes and impoverishment of gamers from unscrupulous operators.

The Standards Act apart from establishing the Kenya Bureau of Standards (KBS) seeks to promote commodity and codification Standards. The functions of the Bureau are set out in Section 3 of the Act and includes amongst others providing facilities for testing and calibration of precision instruments, gauges and scientific apparatus, for determination of their degree of accuracy by comparison with Standards approved by the Minister on the recommendation of the Standards Council, and for the issuance of certificates. This is critical to the functions of the gaming industry where testing of gaming equipments and devices is mandatory. However, the specifics of testing gaming equipments are yet to be developed in Kenya.

The Bureau is mandated to assist and co-operate with the government, local authorities other public bodies, representatives of any industry or any other person, to secure the adoption and practical application of Standards. It is pertinent to mention in this study that gaming equipments and devices are subject to the Standards Act. The Bureau is also granted powers to test at the request of the Minister, and on behalf of the government, locally manufactured and imported commodities with a view to determining whether such commodities comply with the provisions of the Act or any other law dealing with Standards of quality or description. The Standards Act also establishes a Council to provide policy guidelines to the Minister and the Bureau.

The powers of the Council amongst others include carrying out any study, examination or test in respect of commodities of different makes or brands or of different specifications whether produced in Kenya or elsewhere. The Council is also mandated to declare any specifications or code of practice framed or prepared by the Bureau to be a Kenya Standard and notify the public of amendments or abolition of a Kenya Standard previously declared. The Act also authorizes, the Minister on the advice of the Council where Standards have been declared to prescribe a date after which no person shall manufacture or sell any commodity, method or procedure to which

the relevant specification or code of practice relates unless it complies with specifications or code of practice. The Act also grants the Minister on advice of the Council, power to exempt a person, industry or trade generally or for the purposes of a particular transaction(s) from compliance with the order for such period and subject to set out conditions specified in the Notice.

The exemption can only be effected if the Council is satisfied that it is temporarily impossible or impractical for a particular order to be complied with or its desirable in the interest of the public, an industry or a person should be permitted to manufacture or sell any commodity, method or procedure. The Act states that in cases of conflict of Standards declared as Kenya Standard and specification made or declared under any other written law in Kenya, the Standard Act shall prevail. The prescriptive authority granted to the Minister by the Standards Act, augers well for the gaming industry equipment control and standardization. The regulatory impact of such standardization cannot be overemphasized. Policy implementation and execution mandated to the Standards Council can be positively operated to regulate the importation, movement, sale, marketing and use of gaming equipments and devices in Kenya. Since Standards, specifications create some uniformity in all aspects; they eliminate to a great extent operations or abuses that can occur in the Casino industry if this aspect is not well policed.

The concern of regulators in gaming equipments is to ensure gaming equipments and devices are not manufactured, imported, exported, supplied, sold, moved from gaming floors or used without their approval. The application of the Standards Act is therefore central in regulating the gaming industry. To this extent therefore, the Standards Act impacts greatly on gaming activities in Kenya. This study shall recommend that the standards applicable to gaming machinery and or equipments be included in the new legislation.

2.5 THE PROCEEDS OF CRIME AND ANTI-MONEY LAUNDERING

ACT NO.9 OF 2009

This piece of legislation was enacted to provide for the offence of money laundering and introduce measures for combating the offence, provide for identification, tracing, freezing, seizure and confiscation of the proceeds of crime, and for connected purposes.⁸⁰ The enactment of this law as in all other gaming jurisdictions brought in the operations of the gambling industry into the scope of Anti-money laundering regulation. The law amongst others enhances the regulation of the gaming industry by ensuring the industry is not used either for or to further criminal activities. The Commencement date of the Act was on 28th June 2011. However, since its commencement date little has been put in place to actualize its intentions.⁸¹

Money laundering was formally recognized as a problem to the financial sector by the Group of Seven (G7) in 1989 in their Summit in Paris. This was in response to large amounts of drugs money which were being laundered.⁸² The United Nations (UN) a decade later in 1998 estimated the turnover from drugs trafficking at \$ 400 billion, of which only \$100 million was known to be recovered by law enforcement agencies each year.⁸³ The Summit established the Financial Action Task Force (FATF) as an Intergovernmental body to develop and promote policies and concrete standards to combat Money Laundering and Terrorist financing.⁸⁴ This organization was entrenched and recognized by the UN through the adoption of Resolution 1373 of 2001.⁸⁵

⁸⁰ See the preamble of the Act.

⁸¹ Since the commencement date of the Act, only two institutions have been established to operationalize the Act. These include the Anti-Money Laundering Advisory Board established under Sec.49 and the Financial Reporting Center (FRC) under Sec. 21 of the Act. The function of the Board is to advise its Director on the performance of his functions and the exercise of his powers under the Act and to perform any other duty as prescribed. Meanwhile, the objective of the FRC is to assist in the identification of the proceeds of crime and the combating of money laundering.

⁸² Briefing to the United Nations Security Council Committee, New York, 26th October 2009 by the President of FATF Available at <http://www.un.org/en/sc/docs/statements/2> (Accessed on 30th January 2012).

⁸³ United Nation Releases Report on Financial Havens, Bank Secrecy and Money Laundering, Press release on 8th June 1998, Available at <http://www.un.org/News/press/docs/1998/19980608.socna784.html> (Accessed on 20th December 2011).

⁸⁴ *Ibid.*

⁸⁵ UN Resolution1373(2001) on 28th September 2001, Available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN> (Accessed on 14th, September 2011).

The Resolution was adopted by the Security Council on 28th September 2001. The Council reaffirmed resolution 1269 of October 199 and 1368 of 12th September 2001 which unequivocally condemned the terrorist attacks which had taken place in the United States on September 11th, 2001.⁸⁶ States were further required to ensure their nationals and persons within their territories do not make any funds, financial assets, economic resources, financial or other related services available, directly or indirectly, for the benefit of persons who attempts, commits, facilitates or participates in commission of terrorism acts.⁸⁷

The Council in the Resolution noted with concern the close connection between international terrorism and transnational organized crime, illicit drugs and money laundering amongst other underground activities.⁸⁸ The resolution was basically to address the threat of terrorism to the International peace and security. FATF acts on the basis of a mandate set by member jurisdictions at Ministerial level which⁸⁹ Kenya is a member.⁹⁰ This was reflected in the revised FATF 40 Recommendations in 2003. The recommendations requires Casinos to significantly enhance their customer due diligence, record keeping, reporting of suspicious gaming activities and comprehensive regulation and supervision of the gaming industry.⁹¹

The Proceeds of Crime and Anti-Money Laundering Act No.9 of 2009 do not expressly define Money laundering but sets out activities which constitute money laundering. The concept as an expression is recent. The original sighting of the term was in newspapers reporting the Watergate scandal in the United States in 1973.⁹² In its simplicity, the term denotes the manner in which

⁸⁶ See *Ibid*. The resolution requires States to prevent and suppress the financing of terrorist acts and criminalize the willful provision or collection, by any means, directly or indirectly of funds by their nationals in their territories with the intention and knowledge of the funds being used to carry out terrorist activities.

⁸⁷ *Ibid*.

⁸⁸ *Supra* note.

⁸⁹ *Supra* note 85.

⁹⁰ Central Bank of Kenya Prudential Guidelines For Institutions Licensed Under the Banking Act, Available at http://www.centralbank.go.ke/downloads.acts_regulations/prudentialguidelines2006.pdf. (Accessed on 27th July 2012).

⁹¹ FATF Report, Vulnerabilities of Casinos and Gaming Sector, March 2009, found at <http://www.fatf-gafi.org/dataoecd/47/49/42458373.pdf> (Accessed on 14th May 2011).

⁹² See Jeffery Robison, *The Laundrymen, Inside Money Laundering, The World's Third Largest Business*, Available at <http://www.amazon.com/Laundrymen-LaunderingLargest-Business-ebook>. (Accessed on 4th July 2012).

illegally earned monies are subjected into multiple of transactions to conceal its source. The UN has defined the term as:

...the process of making illegally –gained proceeds, or “dirty money” to appear legal or clean. Typically; it involves three steps: placement, layering and integration. First, the illegitimate funds are furtively introduced into the legitimate financial system. The money is thereafter moved around to create confusion, sometimes by wiring or transferring through numerous accounts. Finally, it is integrated into the financial system through additional transactions until the “dirty money” appears “clean.” Money laundering can facilitate crimes such as drugs trafficking and terrorism, and can adversely affect the global economy.⁹³

The Financial Action Task Force (FATF) has indicated that the aggregate size of money-laundering in the world could be between two and five per cent of the world’s Gross Domestic product.⁹⁴

Casinos are the only form of gaming or gambling explicitly covered by the FATF Standards, however, the Standards do not define Casinos or gaming nor do they set out the activities they undertake. It therefore leaves each jurisdiction to determine the forms of gaming included in its coverage of Casinos.⁹⁵ The Act criminalizes any activity performed either independently or with other persons whose effect is to conceal or disguise the nature, source, location, disposition or movement of property or the ownership or any interest that any one may have in any property laundered.⁹⁶ Some of the reasons why casinos are subjected to these regulations are “casinos are known to provide an atmosphere that many organized crime figures seem to enjoy”⁹⁷ because of the huge amounts of cash they handle, and deposit for their clients. It is an offence under the Act to assist any person conceal, enable, disguise the nature, source, location, disposition or movement of property or the ownership or any interest, remove or diminish any property acquired directly or otherwise as a result of the commission of an offence to avoid prosecution.⁹⁸

⁹³ *Ibid.*

⁹⁴ Financial Action Task Force -website www.fatf-gafi.org (Accessed on 8th, September 2011).

⁹⁵ Supra note 91.

⁹⁶ Sec.3 of the Proceeds of Crime and Anti-Money-Laundering Act No.9 of 2009.

⁹⁷ Peter Ferentzy & Nigel Turner, Gambling and organized crime –A Review of the Literature, Journal of Gambling Issues: Issue 23, June 2009 at Pg 130.

⁹⁸ Sec. 3 of the Proceeds of Crime and Anti-Money Laundering Act No.9 of 2009.

The Act criminalizes possession and use of proceeds of crime.⁹⁹ It also requires reporting institutions¹⁰⁰ to establish and maintain internal reporting procedures of suspicious transactions and monitor on a going basis all complex, unusual, suspicious transactions completed or not which have no apparent economic or lawful purpose.¹⁰¹ Alongside the above, they are also required to file reports of all cash transactions equivalent to or exceeding the amount set out¹⁰² whether the transactions appear suspicious or not.¹⁰³ This should be immediately or within seven days of the date of the transaction or activity.¹⁰⁴ The reports filed must be accompanied by documentation directly relevant to the suspicion and the grounds on which it rests.¹⁰⁵ The Act allows a person who is a party to, or who acting on behalf of a person who is engaged in a transaction, in which he forms a suspicion which in his opinion should be reported may continue with and complete the transaction but is required to keep all records relating to the transaction and ensure that all reasonable steps are taken to discharge the reporting obligations.¹⁰⁶

The institutions are required to take reasonable measures to satisfy themselves as to the true identity of any applicant seeking to enter into a business relationship with it or to carry out a transaction or series of transactions by requiring the applicant to produce an official record reasonably capable of establishing the true identity of the applicant, such as a driving license or a passport amongst other official means of identification.¹⁰⁷ The Act stipulates that upon its coming into force; reporting institutions will be required to undertake customer due diligence on the existing customers or clients.¹⁰⁸ As observed elsewhere in this study this demand will offer the Board an opportunity to conduct due diligence on most its licensees who were issued with public gaming licenses in the 1990's or took over casinos from existing operators without determining their suitability as fit and proper persons to hold gaming licenses.

⁹⁹ Sec. 4 of the Act.

¹⁰⁰ The Act defines reporting institution as financial institution and designated non-financial business and profession.

¹⁰¹ Sec. 44(1) of the Act.

¹⁰² The Forth Schedule of the Act requires reporting institutions to file reports of all cash transactions exceeding US \$ 10,000 or its equivalent in any other currency carried out by it.

¹⁰³ Sec.44 (3) of the Act.

¹⁰⁴ Sec. 44(2) of the Act.

¹⁰⁵ Sec. 44(4) of the Act.

¹⁰⁶ Sec. 44(7) of the Act.

¹⁰⁷ Sec. 45(1) of the Act.

¹⁰⁸ Sec. 45(2) of the Act.

The linkage between gambling and Money Laundering is that Casinos are cash intensive businesses which handle large amounts of cash in their gaming transactions. These transactions; if not policed can be used to launder illegally earned monies. Casinos like banks open and hold customer accounts or offer safe keeping facilities which are not either disclosed or regulated by any financial or gaming regulator. Casinos can also issue and transfer cash to their players and other parties. In many gaming jurisdictions; this activity is not regulated or declared to gaming or banking regulators. To address this problem; The Proceeds of Crime and Anti-Money Laundering Act No.9 of 2009 defines accounts in Section 2 of the Act. They include either any facility or arrangement by which a reporting institution accepts deposits of monetary instruments, allows withdrawals of monetary instruments or transfers into or out of the account, pays cheques or payment orders drawn on a financial institution or collects cheques or payment orders on behalf of any person or supplies a facility or arrangement for a safety or fixed term deposit box.¹⁰⁹

The Act establishes the Anti- Money Laundering Advisory Board under section 49 and a Financial Reporting Centre.¹¹⁰ The Act also provides for designated non –financial businesses or professions. These include both the internet and the brick and mortar Casinos. This category also includes real estate agencies, precious metal, stone dealers and such other business or professions in which the risk of money laundering exists as the Minister may on the advice of the Financial Reporting Centre declare. The Act further defines financial institutions to mean any person or entity which accepts deposits and other payable funds from the public, deals in foreign exchange, safekeeping and administration of cash or liquid securities on behalf of other persons and money and currency changing amongst other activities.

It also defines a reporting institution to mean a financial institution and designated non-financial business and profession. The Act sets out supervisory bodies, which include The Betting Control and Licensing Board amongst other bodies. In the upshot, the Act criminalizes transport, transmittal, transfer, receipt, and attempt to transport, transmit, transfer or receive a monetary instrument or anything of value to furtherance of Money Laundering. The provisions of the Act

¹⁰⁹ Sec. 2 of the Act.

¹¹⁰ Sec.21 of the Act.

override any obligations as to secrecy or other restrictions on disclosure of information imposed by any other law or otherwise except the client advocate relationship. At the moment the demands of the Act as relates to its enforcement in the gaming industry are yet to be operationalised.

2.6 THE CONTRACT ACT CHAPTER 23

This law introduces the English Common Law of Contract to Kenya. The substantive sections contain the major modifications. The major modification is removal from application in Kenya of the Indian Contract Act of 1872. It is the severity of the Act which is removed by the modifications. In Kenya, the Contracts Act Chapter 23 Laws of Kenya and the Common law of England relating to contract as modified by doctrines of equity, other Acts of Parliament of the United Kingdom to the extent and subject to certain modifications govern all contracts. The statute requires certain contracts to be in writing.

RELEVANCE OF THE CONTRACT ACT TO GAMING TRANSACTIONS

The relevance of this legislation to the subject under study is an appreciation of the contractual obligations created by a gaming transaction. A gaming contract refers to the implied contract that exists when a player participates in a game against the house or against other players.¹¹¹ In a casino game the player is required to put the stake upfront before the game begins. Then pending on the outcome, the player either wins or loses. If the player wins, she or he should be legally entitled to collect his bet and the winnings in the same way the operator has a right to take the money first staked.¹¹² The interaction between a punter and a casino owner therefore creates a myriad of contractual obligations. These contractual obligations are tailored to certainty and are geared towards consumer protection.

Basically games of chance are played against two opposing sides; the house and the gambler. For instance a player on a roulette table knows the payouts for a straight up bet and the consequences

¹¹¹ Department of Justice ,Equality and Law Reform; Regulating Gaming in Ireland , Report of the Casino Committee, Dublin, 2006 at Para 4.15.2.

¹¹² *Ibid.*

of losing the bet. This contractual obligation ensures casinos pay a winning bet and collect all losing bets from players. Both parties are bound by conditions and game rules which are known before the game starts. These conditions bind both parties. However any gaming transaction as observed earlier must satisfy the element of consideration, chance and prize to legally bind either party. If any of these elements are absent the activity is not regarded as gambling. On the other hand, gaming contracts are vitiated if fraud and cheating are involved. It is a criminal offence in all gaming legislations to cheat at lawful gaming. Contract law in gaming is therefore significant in ensuring gaming contracts are honored.

2.7 COMMON LAW

Sources of Kenyan law, in order of superiority are to be found in the Constitution, Kenya Acts, and certain United Kingdom (U.K) Acts of general Application, the Common Law and equity as developed by Courts in England. It is what the Courts have done in the area of gaming and contract law, which proves to be of paramount importance.¹¹³ Under the Common Law; gaming transactions were deemed unenforceable. The origin of this principle is traced to the U.K Gaming Act of 1845. The Act's principal provision was to deem a wager unenforceable as a legal contract. The Act made the actual contract of gaming or wagering null and void, so that no action could be brought upon it against the loser, or against a stake-holder, for the recovery of winnings.¹¹⁴

The Act received Royal Assent on 8th August 1845 and sections 17 and 18 of the Act although amended remained in force until 1st September 2007. The background of the Act was to address the damaging social effects of gambling which gave rise to a Select Committee of the House of Commons whose recommendations were implemented by the Act. The overall policy of the Act was to discourage betting.¹¹⁵ Under section 18 of this Act, the law prevented the Courts from examining accounts of gaming operators. It provided that:

¹¹³ Hodgkin R.W, Law of Contract in East Africa, Kenya Literature Bureau, 1997 at Pg 2.

¹¹⁴ Supra note 18 at pg 11.

¹¹⁵ *Ibid.*

...all contracts or agreements, whether by parole [verbal] or in writing, by way of gaming or wagering, shall be null and void; and no suit shall be brought or maintained in any Court of Law or equity or recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made: provided always that this enactment shall not be deemed to apply to any Subscription or Contribution, or agreement to subscribe or contribute, for or toward any plate, prize, or sum of money to be awarded to the winners or winners of any lawful game, sport, pastime or exercise.¹¹⁶

In contract law; there are contracts which over the years have been regarded or classified as void as opposed to being classified illegal or void. Gaming contracts are thus classified as void. A gaming contract was defined in *Carlill V. Carbolic Smoke Ball Co.*¹¹⁷ “as an agreement between two parties that one shall win from the other a sum of money or other stake upon the happening of an uncertain event, past or future, in which neither party has an interest except that created by the wager.”¹¹⁸ The effect of a gaming contract arises in enforcing payment of gambling contracts. Under the common law gaming contracts were unenforceable.

There are very few cases on enforcement of gaming contracts reaching the Kenyan Courts. However, this was addressed in *Nathanlal Lakhani V. Vaita*¹¹⁹ where the loser of a game of dice gave the winner a cheque and two promissory notes. The loser then wanted to prevent the winner from further negotiating the instruments. The Court held that he could not ask for its assistance. It was an action brought on bills that were payment for a gaming debt.¹²⁰ The effect of the Gaming Act 1845 is threefold. In the first place recovery on the basis of a gambling contract is impossible. Secondly, collateral contracts associated with gambling contracts are also unenforceable. Thus a contract to pay gambling debts in return for not being posted as a defaulter, although not itself a gambling Contract is unenforceable since any suit would be brought to recover a sum alleged to have been won.¹²¹

¹¹⁶ Section 18 of the UK Gaming Act, 1845.

¹¹⁷ [1892] 2 Q.B 484.

¹¹⁸ *Ibid.*

¹¹⁹ [1965] A.L.R. Comm. 475.

¹²⁰ *Supra* note 113 at pg 157-158.

¹²¹ T. Antony Downes, Text Book on Contract, May 1987 at pg 151.

The UK Gaming Act 1968, legalized some form of gaming with cheques which were not post dated, and which were given in exchange only for the face value of the same.¹²² Where they were accepted in exchange for cash or tokens for use of gaming, the licensees were required to cash the cheques within a period of not more than two banking days after acceptance.¹²³ However, the Sir Allan Budd Committee in 2001 proposed to the U.K government that all gambling debts should be enforceable in law through the Courts in the same way as other consumer products.¹²⁴ The Committee felt that the provisions of the Gaming Act 1845 prevented both the operators of gaming establishments and gamers from recovering gaming debts and vice versa.¹²⁵

The Provisions of this archaic statute of general application is still applicable in Kenya. In U.K; the provisions of section 18 of the Gaming Act 1845 were repealed by section 334 of the U.K Gambling Act 2005. The section also repealed section 1 of the Gaming Act 1710, (voiding of security for winnings or for repayment of gaming loan).¹²⁶ It also repealed section 18 of the Gaming Act 1892 (voiding promise to repay) and section 412 of the Financial Services and Markets Act 2000 on gaming contracts.¹²⁷ These provisions prevented enforcement of gaming contracts. Section 335 provides that the fact that a contract relates to gambling shall not prevent its enforcement. This legalizes the enforceability of gambling contracts in U.K. The mutual promises which players make, when gaming, expressly or impliedly, form a gaming contract.¹²⁸ The strictures prior to the enactment of the UK 2005 Act are still applicable in Kenya and should be done away with.

¹²² Sec.16 of UK Gaming Act 1968, Chapter 65.

¹²³ *Ibid* section 16(3).

¹²⁴ The UK Department for Culture, Media and Sport, A Safe Bet For A Better Success –Modernising Britain’s Gambling Laws, at pg 14.

¹²⁵ *Ibid*.

¹²⁶ See section 334 of the UK Gambling Act 2005.

¹²⁷ *Ibid*.

¹²⁸ *Ibid* note 111.

CONCLUSION

The legal framework governing Casinos has been enhanced by the Constitution of Kenya, 2010. The running of Casinos will be within the concurrent jurisdiction of the National and the County governments. This will require a formulation of a well-considered legal framework which will balance the concerns of the devolved governments as well the Constitutional demands of the National government. To achieve this balance, there is need to review the existing regulatory framework as set out by the Betting, Lotteries and Gaming Act Chapter 131 Laws of Kenya. The new legal regime must clearly and carefully make a distinction of which specific Casino and other gaming functions will fall within the jurisdiction of each level of governance. Since gaming is associated with the big five vices and thus prone to Money-laundering; the demands of the Proceeds of Crime and Anti-Money Laundering Act No.9 of 2009 should be put in place to ensure the gaming industry in Kenya is not used to facilitate criminal activity. Since gaming transactions give rise to contractual obligations between the players and the House; the Contract Act Chapter 23 Laws of Kenya even though not expressly cited in Cap. 131; it offers gaming contracts in licensed gaming premises the requisite legal status. Its application is thus critical. With the repeal of section 18 of the Gaming Act 1845 by the U.K Gambling Act 2005, there is a dilemma on the application of the same in the Kenyan Courts. In order to develop or liberalize and strictly harness the benefits accruing from this industry with its attendant consequences; the government must reconsider whether to apply the provisions of Section 334 of the U.K gambling Act 2005 in Kenya as relates to enforcement of gaming debts.

CHAPTER THREE

3.0: THE GROWTH AND REGULATION OF THE INDUSTRY IN KENYA

INTRODUCTION

There has been a marked growth in the number of Casinos and Jurisdictions legalizing gambling worldwide. The global trend is pro gambling with minimal prohibition of the industry. Since the 1980's, many countries have embraced Casinos for either economic or political considerations. Since the growth of the industry is contentious for diverse reasons, individuals as well as global gaming enterprises are more than willing to spread their interests to jurisdictions they believe to be profitable. Their unsatisfied thirst which is fueled by perceived economic benefits, do not address the negative social impacts the industry exposes to its consumers. This growth is restricted by limiting the number of gaming licenses available or the amount of financial investments the Mega Gaming Enterprises (MGEI's) are ready to invest in a particular gaming jurisdiction amongst other restrictions. Since little documentation of the Casino industry in Kenya is available, this chapter will briefly examine objectives for its legalization, regulation, reasons and consequences of its explosion since the nineties to the overall regulation of the industry and an examination of the impact of the Constitution of Kenya, 2010 to the regulation of the industry. It will also cite the areas that require regulation and how adequately they have been addressed by the current legislations.

3.1: THE OBJECTIVES OF LEGALIZING THE CASINO INDUSRTY IN KENYA

Gambling in its varied forms is a deeply- rooted characteristic of the human race which, although a source of pleasure for many and not inherently immoral, can cause harm to individuals and

society through immoderate indulgence.¹²⁹ To protect society, and individuals who on account of infancy are deemed incapable of safeguarding themselves adequately from the effects of their self-indulgence, is the principal basis on which parliament has interfered from time to time with the conduct of gambling transactions. However, the protection of the state and individuals has not been the only object of gambling legislation. Another motive for such legislation has been to obtain revenue.¹³⁰ The 1949 U.K Royal Commission on Betting, Lotteries and Gaming 1949-51, considered that the object of gambling legislation should be to interfere as little as possible with individual liberty to take part in the various forms of gambling but to impose such restrictions as are desirable and practicable to discourage or prevent excess.¹³¹

The objective of legalizing gambling in Kenya was to control, protect the young and the vulnerable from gambling and tax people who were interested in conducting, betting, lotteries and gaming in the Country. The core objective of legalizing gambling in Kenya was mainly to control and protect the society from the activity. This was clearly set out during the second reading of the Betting, Lotteries and Gaming Bill as:

The control of this human weakness is more desirable than turning a blind eye to it. At the moment, all that is required is a blackboard and a piece of chalk and a bookmaker can operate. He opens his books quite happily one morning with little or no capital at all, and waits until a punter, that is some member of the public wins a large sum of money. He then closes down and disappears, leaving the disappointed and unpaid client. The aim of this Bill Mr. speaker is to eliminate these unscrupulous persons from the scene of gambling in order to enable the public to have a fair deal. This will also apply to every form of gambling, betting and lotteries...¹³²

The mind of the legislators was to channel gambling activities through a properly organized and responsible body so that revenue could accrue to benefit the Country. It was also intended to ensure that all sections of the community were safeguarded inasmuch as the operating of betting, lotteries and gaming machines, were carried out in a fair manner, and to see to it that the public

¹²⁹ Supra note 7 at pg 6.

¹³⁰ *Ibid.*

¹³¹ See *Ibid* and also The Royal Commission on Betting, Lotteries and Gaming 1949-51, Modern Law Review Volume 14 Issue 3 January 2011.

¹³² Republic of Kenya, Official Report, House of Representatives, Third Session, Vol. VII, Nairobi, Government Printer, January 1966 at Column 27.

were not persuaded to spend their money on activities from which they had little chance to gain from.¹³³ The intention of the government was to regularize the running of gaming in the country to prevent unscrupulous business people from cheating the public participating in gambling. The problem was ably set out by the then Attorney General during the second reading of the Bill to introduce the legislation where he noted that:

This Bill has come at a time when we have a problem in this Country with regard to betting ,lotteries and gaming ... one has only to go to Victoria street [now River Road], to see a number of unscrupulous shops which are being run by a certain number of Asians in Nairobi, who keep no books of accounts, businesses are not registered, the operations they run in that part of Nairobi are unknown, but we know that quite a number of people, particularly Africans, go there usually at the end of the month and use all their money gaming and hoping that their horse will come first, and therefore they will become millionaires over night. Then they find that not only is their horse last but, in some cases their horse does not run. We want, Mr. Speaker, to regularize the running of gaming in this country so that our people are not cheated by these unscrupulous people...it is therefore important that this Bill should come at this particular time so that these people who are making money quickly in Victoria Street should be put out of business.¹³⁴

The legislation was also to regulate the use of gaming machines whose proliferation was beyond control in many urban areas. During the debate it was alleged that:

The Asians have come to indulge themselves in forgetting other businesses when they discovered that installing a few machines in a room could give them more money, tax free, than wasting their time in having shops like ration stores, or grocery stores or anything. There they rob, and it seems as if the robbery is legal. These machines ... are never checked. Nobody bothers to find out if they are rigged; nobody cares to find out if they are working properly. Unlike the scales where we have a Department of Weights and Measures whose officials go and check the scales to make sure that they are working properly; these people have been left to go Scott free...¹³⁵

¹³³ *Ibid*, at Column 29.

¹³⁴ *Ibid*, at Column 33.

¹³⁵ *Ibid* at Column 34.

On noting about the way the machines were being operated without protecting the interests of the players while enriching the operators; the legislators further observed that:

...They can do anything with the machines. Even when the machine goes out of order it can continue for one week robbing people. You put in fifty cents, or one shilling, you never get any response from the machine. The shilling is lost, and you cannot even see a manager standing there to protest to, that I have put in a shilling and nothing has happened. You do not even know who the proprietor is. You just go there and find customers putting in money and the owner comes probably at night, closes the shop and collects his booty. Nobody cares how much he has, and the income tax, the machines do not show any account that yesterday this machine took so many coins, so that you can charge the proprietor income tax...¹³⁶

On the consequences of this unregulated gambling enterprise on its consumers; the legislators noted that:

...whenever you go there you can never see any smiles on any ones face leaving these gambling establishments. Everyone is angry and cursing... no wonder many are smashed by angry players who lose, and the only thing to do is to give it a kick and the thing is out of order for two days, and the second day or third day it goes on robbing people... we the people feel that the government is doing nothing about this thing, and when the Bill came we were so happy, and I tell you that there is no single defender of these robbers. Not a single one except themselves.¹³⁷

It is evident the Bill was set out to legalize gaming activities in the country by licensing gaming operators and their premises. This was to ensure gaming activities were conducted in a transparent and accountable manner. Further, on the protection of the public, the legislators observed that the unscrupulous machine operators had formed an operators association which presented a cheap memorandum to the House¹³⁸ This memorandum was rejected because parliament could not afford to have people robbed, and only two to three people benefitting... to them that was not African socialism.¹³⁹

¹³⁶ *Ibid.*

¹³⁷ *Supra* note.

¹³⁸ Pinball men fear to go out of business, Daily Nation, Wednesday, November 9, 1966, Pg 17.

¹³⁹ *Ibid* at Column 35.

The association; which was known as “*The Kenya Amusement Traders Association*” was composed of dealers, hirers and operators of pinball and gaming machines in Kenya. The main objective of the organization was to prevent parts of the Betting, Lotteries and Gaming Act, 1966, from becoming law and putting them out of business.¹⁴⁰ The Association which claimed to embrace 35 member organizations had submitted proposals on gaming machines which it hoped would receive a favorable hearing from the government.¹⁴¹ The fears of the legislators were the Country was:

Becoming a dirty Las Vegas, a country where gambling and public cheating is allowed wholesale, where very tricky machines have been introduced by very tricky people, with the sole purpose of extracting the few pennies which the Citizens of this Country, the poor citizens, need badly for other, very important, things. Now the growth of these machines and gambling halls has reached such an alarming stage that the public was starting to wonder whether the government was allowing this mass exploitation and also mass rotting of the people’s behavior and all sorts of dirty habits. The persons operating the machines were monopolizing these machines¹⁴²... They were the mechanics, and everything else...¹⁴³

The fears and the sentiments of the legislators were addressed by the enactment of the Betting, Lotteries and Gaming Act Cap. 131 Laws of Kenya which is an Act of parliament to provide for the Control and licensing of betting and gaming premises, for imposition and recovery of a tax on betting and gaming, for authorizing of public lotteries and for connected purposes.¹⁴⁴

3.2: TRACING THE STEPS: ACTUALIZING THE OPERATION OF CASINOS IN KENYA

The idea to operate a Casino in Kenya was not new at the enactment of the Betting, Lotteries and Gaming Act Cap.131 Laws of Kenya. A number of various groups had tried to obtain a franchise from the Colonial government without success. With the law in operation; the question which lingered in the minds of gaming enthusiasts was where the Casino would have been located.

¹⁴⁰ Supra note 138.

¹⁴¹ *Ibid.*

¹⁴² Republic of Kenya, Official Report, House of Representatives, Second Session, Vol. VI, Nairobi, Government Printer, October 1965, Column 1238.

¹⁴³ *Ibid* note 114 at Column 1240.

¹⁴⁴ Preamble of the Betting, Lotteries and Gaming Act Cap.131 Laws of Kenya.

Some suggested the ideal location would have been the area under the grandstand at the Ngong Racecourse.¹⁴⁵ It was proposed that the Jockey Club of Kenya apply for a license to operate a Casino an evening before and after racing and afterwards either operate or sub-let it to a syndicate. It was further suggested that the club would either take all the profits of the Casino or obtain a percentage for the lease of its premises. The government was to benefit through levying a tax on the turnover. The casino was expected to benefit horse racing.¹⁴⁶

Since many countries with large tourist industries often have an additional attraction to increase their popularity, casino gaming was seen as one of the additional attractions.¹⁴⁷ The plans to open at least two casinos in Kenya was mooted by November 1966, when the initial Chairman¹⁴⁸ of the Betting Control and Licensing Board in an interview¹⁴⁹ indicated that there was a very long list of applications for licenses for Casinos, mostly from Europe and some from the local groups¹⁵⁰ which were to be considered by the Board.¹⁵¹ The companies which were to be granted the licenses to operate the two casinos were expected to commence their projects; which would have facilities to draw in the increasing number of tourists in East Africa.¹⁵² It was suggested that not more than two Casinos were required in Kenya, one in Nairobi and another in Mombasa.¹⁵³ The Casinos were expected to benefit the economy considerably both directly and through direct revenue for the Kenya Treasury on a percentage basis, with possible future benefits for the Country's socialist services.¹⁵⁴

While the Board was willing to license Casinos; gaming machines operators were against the idea. They argued that the Country's per capita income still left much to be desired and

¹⁴⁵ Casinos would be a good bet for Kenya, Sunday Nation, and February 28, 1966 at page 29.

¹⁴⁶ *Ibid.*

¹⁴⁷ Supra note.

¹⁴⁸ The Chairman was Mr. Josiah Mwangi Kariuki, popularly known as J.M.

¹⁴⁹ Kenya to have two Casinos, Sunday Nation November 6, 1966 at pg 1.

¹⁵⁰ Mombasa scheme for casino, Daily Nation, Saturday, December 23, 1967 at Pg 32. [Mr. Tam Wing, the Proprietor of New Florida Night Club revealed plans to convert the premises into a thriving entertainment Complex by applying for gaming license to operate a casino in Mombasa. It took him nineteen years to operate the casino. He had entertained the idea of operating a casino in Mombasa since 1961 and he was among the first four operators who had applied to operate casinos in Kenya in 1967].

¹⁵¹ Supra note 149.

¹⁵² *Ibid.*

¹⁵³ Supra note.

¹⁵⁴ *Ibid.*

consequently the country was not ready for casinos.¹⁵⁵ They further argued the economy three years after independence had not stabilized and casinos would ruin the business of small –time operators.¹⁵⁶ This line of reasoning has persisted particularly on whether the current number of casinos can be supported by the country’s economy. This study opines that a study ought to be carried out to determine whether the current per capita income can support the high number of casinos in operation.¹⁵⁷

While others were against the licensing of casinos other applicants moved to court to compel the Board to consider their application for a public gaming license after their application was turned down.¹⁵⁸ The Board as indicated below had invited interested parties to apply for two public gaming licenses to operate two casinos one in Nairobi and another in Mombasa.¹⁵⁹ Justice Singh in his Judgment observed that the Board had send a letter to the applicant in response to his application informing him that it had decided that only one Casino would be operated in Nairobi by a company known as the Afro-Italian Limited,¹⁶⁰ whom it had granted a license. The Judge appreciated the Board’s decision but noted the applicant’s application had not been considered by the Board because there was no record of the applicant’s application in the Board minutes.¹⁶¹ The two licenses were eventually issued by the government to Tourist Paradise International to operate the casinos for a period of fifteen years from 1967.

3.3: REASONS BEHIND THE PROLIFERATION OF CASINOS IN THE 90’S

Since the opening of the first licensed Casino in Kenya on the 18th December 1969,¹⁶² the number of Casinos remained seven until 1990 when the number of Casinos rose to more than ten. Between 1969 and 1985, there were only two Casinos in Nairobi which were maintained at a

¹⁵⁵ Supra note 138.

¹⁵⁶ *Ibid.*

¹⁵⁷ See also note 175.

¹⁵⁸ Casino License Application Referred Back, Daily Nation, Saturday June 10, 1967 at page 4.

¹⁵⁹ See note 149 for more details.

¹⁶⁰ From the information gathered this was not the company which was ultimately granted the two Licenses.

¹⁶¹ Supra note 158.

¹⁶² Putting Nairobi On The Map, Daily Nation, Thursday December 18, 1969 at page 19 , see also Daily Nation, Saturday December 20, 1969 at page 4.

distance of twenty kilometers. This is traced to a concession that the government had signed with the Tourists Paradise Investments Limited the company which operated the first Casino in Kenya and the first in the East African region. This company was awarded the concession by the Kenya government to provide Nairobi and Mombasa with a Casino each following an advertisement by the Betting Control and licensing Board on 15th June, 1967 inviting applications for the operation of the Casinos. In the advert, the Board advised the applicants that its operative law, the Betting, Lotteries and Gaming Act No. 9 of 1966, was being amended and that the amount payable for license fees and taxation in respect of Casinos was under consideration by the government. The applications were to be received by the Board by 30th September, 1967.¹⁶³

The company which was ultimately issued with the licenses had successfully operated Casinos in Cairo, Alexandria, Tripoli and Lagos. The agreement to provide the entertainment facility had been reached in 1968.¹⁶⁴ The agreement authorized the company to operate Casinos in Nairobi, Mombasa and Diani in the South Coast for a period of fifteen years from 1969 and surrender at the expiry of the agreement the gaming premises and all the equipments. Clause No. 2 of The agreement between the company and the government of Kenya provided that “The said license shall be valid for a period of fifteen years from the date of signature of the present agreement and the government hereby undertakes not to issue any other license or licenses for the operation of a Casino in the territory of Kenya for a period of fifteen years.¹⁶⁵”

From the inception of the Casino industry in 1969; the exponential growth of the industry is traced to contents of a letter from Tourist Paradise Investment Limited to the Betting Control and Licensing Board on 9th January 1973 which in part read:

...We understand that certain persons, bodies and or clubs have been established to intend to establish and operate in their premises gaming devices contrary to the provisions of the Betting, Lotteries and Gaming Act 1966. We also understand that the said interested parties have applied or intend to apply to your Board for the relevant

¹⁶³ See Daily Nation, June 15th, 1967 at Pg 20.

¹⁶⁴ Supra note 162.

¹⁶⁵ The details of the letter are available at the Kenya National Archives.

licenses. It would appear that those parties ignore or disregard the terms and conditions specified in our exclusive licenses which were issued by your Board in pursuance of the agreement existing between the government of Kenya and our company. More so they seem to ignore that the exclusive concession granted to us covers in fact all games of chance played with instruments of gaming and other devices, mechanical or electrical, for winning of money or for money's worth as normally played in International Casinos ...”¹⁶⁶

The contents of the above letter was a complaint by the company that certain personalities were gaming under a name and style of “Casino” which was against the agreement between Tourist Paradise Investments and the Government of the Republic of Kenya.

On 6th December 1973, Paradise Investment Development (K) Limited applied for a public gaming license to operate a Casino at a Country Club approximately 20 kilometers east of Nairobi. The application prompted the Board to request for a legal opinion from the Attorney general on whether granting the applicant a public gaming license would be in breach of the agreement signed between the government and the Tourist Paradise Investments Limited on 7th June, 1968. The Attorney General assured the Board that the grant of the license would not expose the government to any action for breach of the agreement.¹⁶⁷

The application had the government support.¹⁶⁸ From the documents available it indicates that when the agreement between the government and Tourist Paradise Investment Limited was executed; Casinos were not adequately catered for in the Betting, Lotteries and Gaming Act Cap.131 Laws of Kenya. When the agreement was signed, a Bill pertaining to the operations of the Company was signed but the Cabinet directed that the Bill be kept in abeyance.¹⁶⁹ In granting the license the Board was seized by the fact that all the directors of the applicant company except one were foreigners which was against the then government policy to Africanize any investments

¹⁶⁶ *Ibid.*

¹⁶⁷ *supra* note.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.* This study assumes the nature of the Bill was to further legitimize the agreement by way of enacting a Specific legislation to operationalise the agreements between the government and gaming company.

in the Country at the time. It also seems that five years after the commencement of operations by the International Casino in Kenya, its operations were not clear.¹⁷⁰

This prompted the Board to initiate a move to approach the government with a view of presenting a Bill for operation and the appropriate control of International Casino which was as noted not adequately covered by the Act. Before the issuance of the license; the government had objected to the establishment of another Casino in Nairobi an objection which was withdrawn and the gaming license issued to the company for five consecutive years on payment of appropriate fees.¹⁷¹ The Casino commenced its operations in March 1974¹⁷² and was later relocated to the present location at the Safari Park Hotel and Casino. It was closed down after fire gutted the premises in mid 80's. It was reopened again 1988.¹⁷³

The explosion of Casinos in Kenya and in the United States of America in the 1990's has been termed as surprising given the little research performed on the industry.¹⁷⁴ With the first multi party elections looming in 1992, there was a remarkable rise in the number of Casinos in Kenya and particularly in Nairobi. This period marked the biggest growth in the industry when in 1990; the turnover from Casinos in Kenya rose from Kenya shillings 667 million in 1991/2 to 1.1 billion Kenya shillings in 1992/93.¹⁷⁵ This was the time when the Goldenberg scandal, in which at least 70 billion Kenya shillings is estimated to have been siphoned from the Treasury was exposed.¹⁷⁶

It has been argued that this scandal fuelled the number of Casinos in Nairobi amongst other reasons. The effect of the Goldenberg scandal in Casinos in Nairobi is argued to have lasted until 1997. The question for future scrutiny which this study raises is whether and to what extent was the industry involved in the scandal. The ending of the scandal did not stop the scramble and

¹⁷⁰ Supra note 165.

¹⁷¹ *Ibid.*

¹⁷² South Korea Loses "godfather" Available at <http://www.Casinocompendium.com/archive/chun.html> (Accessed on 16th July 2012).

¹⁷³ See, Over 100 Expected at Casino Opening, Daily Nation Friday, February 26, 1988.

¹⁷⁴ Douglas M. Walker and John D. Jackson, Do Casinos Cause Economic Growth?, American Journal of Economics & Sociology, Vol. 66 No.3.PP 593-607, July 2007.

¹⁷⁵ See, Kenyans Gripped by Gambling Craze as Questions Asked About Too Many Casinos, Sunday Nation, April 1, 2007, at page 4.

¹⁷⁶ *Ibid.*

unsatisfiable demand for Casino licenses in Kenya. The effect of the Casinos licensed in the 1990's has continued to be felt. The increase led to a directive in 2007 to have the number of Casinos which stood at 50 reduced because they were too many when comparing the size of the local economy with other major economies.¹⁷⁷ In addition to the 50 operating licenses; 10 more licenses were reported to have been dormant.¹⁷⁸

In an attempt to deal with these licenses; the Betting, Lotteries and Gaming Regulations were amended in 2007 to address the problem of holding licenses for speculative purposes.¹⁷⁹ There was no reason to justify why they were holding the licenses.¹⁸⁰ The amendment brought in a condition that the Board would not renew a license more than two times where the holder fails to open a gaming premise or where a holder of a license allows his gaming premises to remain closed for a period of three or more years after issuance of the license. The conditions however gave licensees who would be affected by the regulation to apply for fresh licenses after the expiry of their licenses.¹⁸¹ Since then; the number of Casinos in Kenya has remained high with Nairobi hosting twenty two, Mombasa eleven, Malindi three , Kisumu and Nakuru two, Thika and Eldoret one each.

Since information to support the exact reasons for the explosion of this industry in Kenya is scanty; this study however, attributes the growth to political, legal and governance issues. On political factors associated with the growth, the study attributes this to political interference with the licensing process of public gaming licenses to the political class.¹⁸² This interference is traced back to 1973¹⁸³ and further to a Presidential directive on February 28th, 1989 banning the use of

¹⁷⁷ See, Awori Wants Casinos to Be Reduced, Daily Nation, Tuesday, March 27, 2007, at pg 5.

¹⁷⁸ Ibid.

¹⁷⁹ See L.N 154/07.

¹⁸⁰ supra note 180.

¹⁸¹ Suppra note 179.

¹⁸² A perusal of the initial Directors of gaming establishments in Kenya indicates they were operated or owned by well linked personalities. See Kubai Sons Claim City Hotel Land, Daily Nation, Tuesday April 13, 2010. Fred kubai was one of the freedom fighters in Kenya and a founding Director of the International casino. The Casino in Njiru was operated by a Korean business magnate the late Chun Rak Won whose family operates Casino De Paradise at the Safari Park Hotel & Casino, Nairobi and five other Casinos in the Republic of South Korea. See also note 172 where Mr. Chun was in 1989 appointed by the Republic of Kenya to be its Honorary Consul General in Korea.
Kenya.

¹⁸³ Supra note 165.

Kenyan currency to gamble in the Kenyan Casinos.¹⁸⁴ The directive banned the use of the local currency to gamble in the Kenyan Casinos. The directive was effected on 29th February 1989.¹⁸⁵ The reason advanced for the ban was that gambling in the Kenyan currency had allowed some foreigners to siphon out foreign exchange. Gamblers were to use their nation's currency while gambling in any casino in Kenya.¹⁸⁶

The directive caught many gamblers as well the Casino operators by surprise. For the operators; the order caused panic as it did to their patrons and workers. It led into a meeting which suspended gambling for a week¹⁸⁷ to enable the Central Bank of Kenya to outline details on foreign currency issues.¹⁸⁸ The standing regulations contained in the Kenyan laws at the time; required all people entering the Country to declare the amount of foreign currency in their possession at the entry points.¹⁸⁹

Foreign currencies at the time were supposed to be surrendered to dealers, who only included banks and some Hotels in exchange for the local currency. Foreigners were also required to settle their bills in these currencies.¹⁹⁰ This directive affected both Kenyan returnees and foreigners alike. The Casino directive raised several questions to both the operators and players as it was not clear whether foreigners were able to repatriate their winnings in currencies of their choice and whether foreign residents in Kenya would apply for foreign currency to gamble in the Casinos.¹⁹¹

With the strict foreign currency handling regulations at the time, which criminalized possession of foreign currency without the approval of the Central Bank of Kenya; ordinary Kenyans were not able to gamble. Only a few tourists were. The majority of the local gamblers who included Asians kept away from gambling. The decree also led into layoffs at the Casino's and affected

¹⁸⁴ See, New Cash Rule for Casino Gamblers, Daily Nation, February 28, 1989, at pg 32.

¹⁸⁵ *Ibid.*

¹⁸⁶ *Supra* note.

¹⁸⁷ See, Gambling Put off for a Week, Daily Nation, March 1, 1989, at pg 40. The decision was reached in a meeting between the officials of the Betting Control and Licensing Board, the Vice-Presidents Office and Ministry of Finance and the Central Bank of Kenya.

¹⁸⁸ See, How Will the Betting Order Affect Foreign Gamblers, Sunday Nation, March 5, 1989, at pg 6.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Supra* note.

¹⁹¹ *Ibid.*

the operations of all the five operating Casinos in the Country. It was withdrawn on 6th June 1989¹⁹² after seriously crippling the industry for four months. Only Casinos located in hotels were able to attract minimal businesses. In lifting the ban Casino's were directed to reinstate employees who had been laid off or sent on leave during the period.¹⁹³

This study observes that this directive was arbitrary and was not grounded on any policy. The directive lacked mechanisms for its operationalization. In that era of foreign exchange controls, Casinos had to obtain foreign currency from the Central Bank and during the lifespan of the directive; they were forced to procure bank cashiers to handle the foreign currency because casinos were not licensed to do so. Players in the industry trace the motive of the directive to a bid to take over the Tourist Paradise Investments Limited,¹⁹⁴ the company which had been operating Casinos in Nairobi and Mombasa since 1969 by well placed business magnates.¹⁹⁵ Some of the Casinos licensed in this period, were issued to persons who had no means to invest and operate Casinos.¹⁹⁶

This increased the demand and value of a Casino license. The licenses issued within this period are known to have been acquired for speculative purposes with the holders bidding for the right time to sell them for a fortune.¹⁹⁷ Some of the licenses are alleged to have been sold for as high as Kenya shillings 20 million.¹⁹⁸ Most of these licenses were disposed off or transferred to foreign Casino operators without conducting background checks on the new license holders. The proliferation of Casinos in Kenya is attributed to political interference of the operations of the industry than on economic sense.

¹⁹² See, Casinos Resume Business after Lull, Daily Nation, June 7, 1989, at pg 1.

¹⁹³ *Ibid.*

¹⁹⁴ An interview with those involved in the industry allege that the directive was an attempt by well connected persons to take over the Casinos operated by the Italian owned company through frustrating the operations of the business. It is further alleged that by the time or immediately after the directive was Withdrawn; the company had already been taken over by Asian business magnates well placed in the existing regime.

¹⁹⁵ See also Somaia Denies Take –Over Reports, Daily Nation, January 26, 1990, at pg 40.

¹⁹⁶ Supra note 175.

¹⁹⁷ *Ibid.*

¹⁹⁸ Supra note 177. According to the former Vice-President Moody Awori, in 2007, the cost of obtaining a Casino License from the Board was Kshs.5 Million in a sector worth shs. 1.5 billion.

On governance issues, the proliferation of Casinos has been blamed on bribery and extortion within the regulatory agency.¹⁹⁹ In most gaming jurisdictions; acquiring Casino licenses is not easy. Entrepreneurs willing to obtain these licenses are known to go to great lengths to corrupt or attempt to compromise the regulators. For instance, in 1969, a director of a Hotel in Nairobi was charged for offering cash to an official of the Betting Control and Licensing Board as an inducement to the Chairman of the Board to grant him a public gaming license.²⁰⁰ This study will be recommending that the licensing procedure be overhauled and the growth of the industry be left to the economic determinants rather than political considerations.

This study further attributes the proliferation to under taxation and under – regulation²⁰¹ of the industry. This has made casinos lucrative businesses to operate in Kenya. During this period no tangible amendments were effected on the law since its inception to cure its deficiencies except on the fees schedule. It is was evident that after the foreign currency rule was withdrawn; there was no will to effect any amendments to the law leave alone to mount major reforms in the industry. During this period, payment of the gaming tax which stood at ten percent of the net gambling revenue and a two and half percentage training levy was under the Ministry of Home Affairs. The Minister was the appointing authority of the Board members and at the same time the one supervising the accounting officer. There was no oversight to ensure the industry was properly regulated.

¹⁹⁹ *Ibid.*

²⁰⁰ See, Hotel Director Accused of Bribes, Daily Nation, Monday, March 24, 1969. Also see [£ 200 Bribe Offered for License](#), Daily Nation, and Tuesday June 10, 1969 at Pg 3.

²⁰¹ Linda Hancock, Risky Business: Why the Commonwealth needs to take over gambling regulation, Deakin University, Alfred Deakin Research Institute, Working Paper No.11, August 2010. Where she argues that the two main problems currently affecting the regulation of gambling in Australia are that the Industry is under –taxed and under- regulated. She recommends that in order to transform the industry into a recreational rather than today’s clearly harmful activity, significant reforms which is the question under study in this project; needs to be made. She also identifies the benefits of implementing the reforms as raising significant amounts of revenue, reduction of the enormous harm that gambling imposes on a Significant percentage of the population and helping to build more resilient and inclusive communities.

3.4 THE CONSEQUENCES OF THE EXPONENTIAL GROWTH TO THE EXISTING REGULATORY REGIME

Since growth of any industry has both positive and negative consequences; it is well recognized that increase in number of gambling establishments in a jurisdiction can lead to harmful consequences to gamblers and the public. This happens through exposure and un-warranted stimulation to gambling. It is acknowledged that these activities can lead to problem gambling and addiction. Since the 1990s the number of gamblers in Kenya grew. Previously the government had ensured casinos were located away from its populace. As a control measure; Casinos charged patron's entry fees in form of un-redeemable chips. The traffic to Casinos increased with the opening of gaming establishments in this period on almost every major street of Nairobi and Mombasa.

This increase left a big blow to the existing regulatory regime because it could not control majority of the Kenyan middle class from accessing casinos. There was no way the regulator would control the poor from accessing gambling establishments because no amendments were effected in the legislation to address the explosion. Initially casinos were designed for entertainment²⁰² of tourists [the name of the initial casino operator was Tourist Investments Limited to emphasize the targeted clients] and the rich. The principle of control of gambling establishments was therefore compromised.

With the cut-throat competition for customers and space to operate the Spartan casinos, this dented the regulatory regulation of gaming premises and protection of vulnerable players. This was worsened by absence of an exclusion clause in the existing law to bar persons whom the regulator would have identified as unsuitable, poor or playing beyond their means from the casinos. This explosion left a negative impact on many players who were hooked to this new form of entertainment. The quality of gaming establishments was also compromised. Apart from the initial casino developed in 1969, there has never been any major investment of similar nature. The current casinos in Kenya can not match those of South Africa and in other leading gaming

²⁰² See sec.46 (4) of the Act on Entertainment Tax.

jurisdictions. Further, the revenue generated in these establishments is not adequate to cover the regulatory cost. This study opines that the current number of casinos in Kenya numbering over forty cannot be supported by the current economy.

The growth also exposed the industry to regulatory challenges relating persons operating these businesses. Previously, persons running these casinos were known but with the transfer of public gaming licenses to persons other than those who were licensed by the Board brought in a new challenge to the regulator. As observed elsewhere in this study; owing to the negative consequences associated with casinos; the public policy is against ownership of casinos by unsuitable persons. This is because un-regulated gaming [Casinos] is known to be the gateway of criminal activities such as drug trafficking, prostitution and money laundering.

The growth of casinos is associated to a weak regulatory regime. In jurisdictions where the regulatory regimes are effective the number of casinos is limited to a number which the local economy can support and obtain benefits from as well as the number which a regulator can effectively regulate. Proliferation of casinos without a corresponding increase of the number of high-rollers, offers no increased benefit to a Country in form of taxes except a few poorly paid employment opportunities created by these establishments. Generally proliferation of casinos has no benefit to the local communities if the target is the local customers. The only visible effect is the negative devastation they leave to the players, their families and the local social network.

The impact of the proliferation made it easier for operators to easily enter and exit the industry without assessing the regulatory impact of such activity. The regulatory regime was overwhelmed by the number of casinos which seemed to be operated for other reasons than gaming. There is no data to link an increase in the amount of government revenue with the increased number of casinos in the country. The un-explained questions which this study would not address are whether the proliferation was linked or associated with mega corruption or used as a safe haven for money -laundering and other illicit activities. There is no evidence that the expansion of the industry was guided by any policy. This study holds that the proliferation compromised the regulation of the casino industry which further resulted into a regulatory capture.

3.5: THE CHALLENGES POSED BY THE CONSTITUTION 2010 TO THE REGULATION OF CASINOS IN KENYA

With the implementation of the Constitution of Kenya 2010 on course, challenges are expected to emerge in implementing the provisions of Article 186 and the demands of functions 35 of part 1 and function 4 (a) and (b) of part 2 of the Fourth Schedule of the Constitution as relates to regulation of gaming activities. As stated elsewhere in this study it is not clear how these functions will be devolved and regulated under the two tier regulatory system. This two-tier system as stated in this study is an area of concern to regulators in states with two or more levels of governance. For instance, it has posed regulatory challenges in South Africa where the system is borrowed. This challenge is not new. For instance, some of the issues that have not been adequately addressed are which level of government in a concurrent jurisdiction (federal, state or local) is best suited to bear the regulatory responsibility which guarantees honesty and integrity of the gambling industry.²⁰³

Even though Kenya is not a Federal state, the National and the County governments are expected to be distinct and inter-independent.²⁰⁴ The Constitution also demands that state organs ensure reasonable access of its services to all parts of the Republic, so far as it is appropriate to do so having regard to the nature of the service. The question is whether gambling activities should be devolved considering their destructive nature. The regulation of casinos in devolved systems or in federal systems poses challenges due to the differing and competing agendas of Federal (Central) and State (County) governments.²⁰⁵

In some instances, the overarching role of federal government appears to be ignoring regional or local dynamics such as revenue considerations by acting in the public interest through

²⁰³ Mark W. Nichols, Regulation of Casino Gaming at the Federal, State or Local Level: Which is the Best? Gaming Law Review, Vol. I Number 3, 1997, Mary Ann Liebert, Inc.

²⁰⁴ See Article 6 of the Constitution of Kenya, 2010.

²⁰⁵ International Study of Gambling Jurisdictions, Report Gambling Review Commission 2010, Available at <http://www.dti.gov.za/news2011/Appendix.pdf> (Accessed on 7th January 2012), at pg 14.

prohibitive measures that seek to curtail gambling or the proliferation thereof.²⁰⁶ Federal states are known to leave States to handle the day-to-day regulation of all forms of gambling with the federal government having responsibility of generating policy. The cross cutting issues are left to the central governments because of the need for uniformity, centralized planning, scarcity of resources and economies of scale.²⁰⁷

However, some of the overarching roles of federal governments have become a source of conflict between the federal and State governments. These include for instance, the Wire Act in the United States and Internet gambling Act in Australia, which prohibits varying degrees of online gambling.²⁰⁸ These challenges are expected to occur in Kenya where many of the counties are expected to regulate gambling to generate revenue. This might result into a conflict between the National and the County governments in regulation of casinos and other forms of gambling. The challenges which are likely to be replicated in Kenya are well examined and set out in the next chapter. This study recommends that the regulation and the setting up of the new regulatory structure be designed to reduce regulatory and functional conflicts between the National and the County governments.

3.6: THE REGULATION OF CASINOS IN KENYA

The legal framework to regulate Casinos in Kenya is contained in Part five of the Betting, Lotteries and Gaming Act Chapter 131 Laws of Kenya. The law neither defines nor cites the word Casino. However, it defines a gaming premise to mean premises kept, used for more than one occasion for gaming, and to which the public has or may have access for the playing therein of a game of chance whether unlawful or otherwise.²⁰⁹ A Casino is defined as an arrangement whereby people are given an opportunity to participate in one or more casino games.²¹⁰ The license to operate a Casino or gaming premises is referred to as a Public Gaming License.²¹¹

²⁰⁶ *Ibid.*

²⁰⁷ *Supra* note.

²⁰⁸ *Ibid.*

²⁰⁹ See Section 2 of the Betting, Lotteries and Gaming Act, Chapter. 131 Laws of Kenya.

²¹⁰ Halsbury's Laws of England (5th edn) Volume 9 at pg 349.

²¹¹ See Form 13A of the Act.

The concept of Casinos as places that governmental authorities formally sanction to allow people to play games of chance against each other or against the operator [house], developed in more recent Centuries.²¹² Current Casinos can trace their roots to the principalities and City-States of the Central Europe in the 17th and 18th centuries where gambling houses took on features still recognizable today.²¹³ Governments granted limited concessions to private parties to offer games of chance under certain conditions. It is during this period that Taxation and regulation of gaming emerged.²¹⁴ Casinos unlike other types of businesses are strictly regulated. This form of regulation is historical and it is traced to the known impact Casino games impart on the lives of players. Casinos are considered by some to be harmful to communities by causing crime, business failure and problem gambling.²¹⁵

Defining Problem Gambling

The definition of Problem gambling adopted by the Gambling Problem Research Australia is a behavior characterized by difficulties in limiting money and time spent on gambling which leads to adverse consequences on the gamblers and others. The concern of regulators on this subject is a focus on how to reduce harm on players.²¹⁶ This is achieved by improving the efficacy of gaming laws and policies to protect citizens from overindulging themselves in gaming. The term also refers to a condition where gamblers are unable to control their gambling habits by gambling wildly despite caution of the dangers involved.

In North America it is used to denote a level of gambling, which is at an earlier stage or which leads to fewer problems than the later stage or more severe problems experienced or caused by those gamblers who are clinically diagnosed as pathological gamblers.²¹⁷ For purposes of this study problem gambling denotes or refers to people who are experiencing problems associated

²¹² Preface in Anthony N. Cabot et al , International Casino Law, Published by the Institute for the Study of Gambling and Commercial Gaming, University of Nevada, Reno, 1993.

²¹³ *Ibid.*

²¹⁴ Supra note.

²¹⁵ Marc.W.Etches, The Politics of Casino Gambling, Iea Economic Affairs March 2011, at Pg 1.

²¹⁶ Gambling Research Australia, Problem Gambling and Harm: Towards a National Definition, Available at www.gamblingresearch.org.au , at pg 5 (Accessed on 5th July 2013).

²¹⁷ *Ibid* at pg 9.

with gambling. This includes periodic or continuous, uncontrollable, irresistible urge to gamble, have problems with the amount spent, time and resulting into harm on the person amongst others. For others it is a mental problem which emanates from and or results from excessive uncontrollable gambling behavior. There is a plethora of terms used to describe problem gambling. These include terms such as pathological, compulsive, addicted, excessive, disorderly or at risk.²¹⁸

There is no known society which encourages any form of gambling. However, in the recent years gambling has been accepted and marketed as a socially acceptable form of entertainment. Gambling in most societies is lumped together with prostitution, alcohol and narcotic drugs amongst other detestable vices. This is because it is highly addictive and devastating to the players and their families. However, despite its negative effect, it generates employment opportunities and revenue for governments thus necessitating the need for its licensing and regulation.

3.7 LICENSING OF CASINOS IN KENYA

The legal status of gambling is not the same as other businesses. It is said to be a “privileged” business²¹⁹ whose operation cannot be left to the whims of free enterprise.²²⁰ There is no right to conduct a gaming business.²²¹ Those who conduct most common types of business have a “right” to do so. They operate by right, not by privilege. It is a well-established principle that where a business in itself is harmless and legitimate, the power of the state to regulate it is not the equivalent of the power to suppress or destroy. Non-dangerous businesses cannot be legislated out of existence and the Courts have not found gaming to be such a business.²²²

Gaming as a business has been placed in the same class as selling of intoxicating liquors in respect to deleterious tendency thus it is settled that the government may regulate or suppress it without interfering with any of those inherent rights of citizenship, which it is the object of

²¹⁸ *Ibid.*

²¹⁹ Shannon Bybee, The Legal Status of Gaming and Its Impact on Licensing, Gaming Research & Review Journal –Volume 2, Issue 1-1995, University of Nevada Las Vegas International Gaming Institute, at Pg 61.

²²⁰ Nairobi, High Court Misc. Application No. 1023 of 2005.

²²¹ *Supra* note 219.

²²² *Ibid.*

government to protect and secure.²²³ Licensed gaming is thus a privilege conferred by the state and does not carry with it the rights inherent in useful trades and occupations.²²⁴ Since gaming is classified as one of those businesses that are deemed by law to be, inherently harmful to society, it is subject therefore to strict regulation. It is this long tradition of close government supervision, which any person who chooses to enter such a business must already be aware that the business requires stringent licensing procedures and continuous close personal supervision and inspection of conduct and the internal controls of his business.²²⁵

An applicant for a casino license in all gaming jurisdictions must be of good character, reputation and financial standing.²²⁶ For instance on receipt of any application for a license, the Board is required to make such investigations, require the submission of such declaration, or further information as it may deem necessary in order to be able to examine the application.²²⁷ It is mandatory that no license or permit is issued unless and until the Board has satisfied itself that the applicant is a fit and proper person to hold a casino license. The premises in respect of which the application is made are also required to be suitable for the purpose.²²⁸

Before embarking on an examination of the licensing of Casinos in Kenya, it is worth noting that it has been established that the regulatory control of gaming rests on three legs.²²⁹ The first, and which many argue as the most important, is the licensing process. The second is the law and regulations that govern gaming operations. One of the most important aspects of this leg is the internal controls on handling and recording of cash and other assets in the casinos.²³⁰ Since gambling has been viewed as hard to regulate and prosecute in comparison to other criminal activities;²³¹ the third leg is the enforcement of the regulations amongst other activities such as auditing and review of internal controls.²³²

²²³ Supra note.

²²⁴ *Ibid.*

²²⁵ Supra note.

²²⁶ Nelson I. Rose, The Legalization and Control of Casino Gambling, Fordham Urban Law Journal, volume 8, Issue 2 1979, Article 1, at pg 291.

²²⁷ See Sec.5 (2) of the Act.

²²⁸ Sec 5(3) of the Act.

²²⁹ Supra note 219 at pg 63.

²³⁰ *Ibid.*

²³¹ Peter Ferentzy & Nigel Turner, Gambling and Organized Crime-A Review of the Literature, Journal of Gambling Issues, Issue 23, June 2009 at pg 137, Available at <http://jgi.camh.net/doi/pdf/10.4309/jgi2009>.

It has been argued that even though all the three legs are important, the licensing process, if working properly, helps to ensure the success of the remaining two legs by screening out the highest risks for potential regulatory violations.²³³ It also enables the regulators to bar entry to the industry persons whose reputation would cause a lack of public confidence in the regulatory process and in the honesty of the gaming industry. It is unlikely that the public would have any confidence in the integrity of gaming if unsavory persons were routinely receiving gaming licenses.²³⁴ Since licensing is critical in regulation of casino gaming, this study opines that for any gaming jurisdiction to benefit from the industry; it must ensure that the pre-licensing procedures are watertight in identifying and carrying out due diligence on individuals and enterprises seeking gaming licenses.

For any legal casino operations to take place in Kenya, the gaming premises must be licensed. The licensing of casinos legalizes the playing of games of chance within these premises. It is an offence to offer for play games of chance outside a licensed gaming premise.²³⁵ A gaming premise includes a vessel.²³⁶ It is also an offence for a person to game in unlicensed premises.²³⁷ The Act defines unlicensed gaming premises as gaming premises in respect of which no license is issued.²³⁸ It is also an offence unless the contrary is proved to permit premises to be kept, used, and occupied whether on temporary basis as unlicensed gaming premises.²³⁹ The games offered must also be authorized and provided for in the license.

The Act prohibits owning, occupying, keeping, permitting, assisting premises owned, managed or occupied for unlicensed gaming.²⁴⁰ It is an offence to advertise gaming or solicit gaming in unlicensed premises.²⁴¹ The Act also prohibits persons from advancing, furnishing or receiving

23.6. (Accessed on 14th May 2012).

²³² *Ibid.*

²³³ *Supra* note.

²³⁴ *Ibid.*

²³⁵ Sec.45 (1) (e) of the Act.

²³⁶ See section 2 of the Act

²³⁷ Sec.45 (2) of the Act

²³⁸ Sec.45 (4) of the Act.

²³⁹ Sec.45 (3) of the Act.

²⁴⁰ Sec.45 (1) (a),(b), and (c)of the Act.

²⁴¹ Sec.45 (d) of the Act.

money for the purpose of establishing or conducting the business of unlicensed gaming premises.²⁴² The power to issue licenses and permits is provided for by section 4(a) of the Act. This is a general licensing section which gives the Board powers to issue licenses and permits in accordance with the Act. The specific power to license public gaming premises (Casinos) is provided for by section 46(1) of the Act. This section gives the Board the discretion to license public gaming premises. The Board is granted the power under this section to issue a license subject to any regulations made under the Act, authorizing a person to organize and manage gaming, on premises to which the public may resort to for purpose of playing lawful games of chance.²⁴³

The law demands that a license shall be issued in respect of each gaming premise. The licenses issued are required to state the game or games which the licensee may on the premises licensed organize and manage.²⁴⁴ The application for licenses and permits is provided for by section 5 of the Act. The section requires a person who desires to obtain, renew or vary a license or permit under the Act to make an application to the Board in the form and manner prescribed.²⁴⁵ The manner prescribed is provided for in Form 13A of the first schedule of the Act. The form requires the applicant who is duly authorized by a partnership, body corporate to apply for the license to state his name, address the physical address where the casino would be operated, the name under which the business will be conducted, the date and place of registration of the enterprise, the full names of all partners, directors and the secretary of the body corporate and names of managers if any.²⁴⁶ The applicants are also required to state their positions in the company.²⁴⁷

The law requires the applicants to state whether they have ever been convicted of any criminal offence involving fraud or dishonesty, declared bankrupt or entered into any agreement with creditors and if so the applicant is required to provide the particulars.²⁴⁸ They are also required to

²⁴² *Ibid* Sec.45 (e).

²⁴³ Sec.46 (1) of the Act.

²⁴⁴ Sec.46 (2) of the Act.

²⁴⁵ See Sec.5 of the Act.

²⁴⁶ See form 13A of the First Schedule of the Act.

²⁴⁷ *Ibid*.

²⁴⁸ *Supra* note.

give particulars and the manner in which the games they propose to conduct will be organized and managed. The law also requires the applicant to state whether they have previously furnished the Board with any security which is a requirement under section 6 of the Act in respect of any other license issued by the Board. If not, they are further required to state the sum of deposit or any other security which they would be prepared to furnish the Board with.²⁴⁹

In addition, an applicant is required to pay a non refundable application fee²⁵⁰ and ensure the gaming premise meets international standards. The applicant is also required should need arise provide free accommodation to the Boards gaming inspectors in the applicants hotel to enable daily effective supervision of the activities of his Casino. This was a requirement when the board in the 1980's issued licenses to hotels operating in the game parks. However none of the hotels operated casinos. Further, licensees are required to deposit a continuous indemnity or bank guarantee²⁵¹ before the commencement of his operations. Applicants are further required to liaise with the police to ensure enough security for clients and gaming inspectors in their premises.

They are also required to provide an office for gaming inspectors and submit a list of all games and all the slot machines to be offered or installed for play in their gaming premises. The operators are also required to remit to the Kenya Revenue Authority on a monthly basis a Value Added Tax (VAT) at a current rate of sixteen per cent of the gross monthly revenue.²⁵² The Board does not allow employment of more than four expatriate personnel for the initial three years provided an operator obtains the necessary entry permits from the immigration department. Operators are further required to train indigenous Kenyans to take over from the expatriates. Apart from paying the requisite annual license fees, operators are also required to maintain sufficient staff and equipment in the casinos at all times to ensure members of public entertain themselves in an orderly manner.

²⁴⁹ *Ibid.*

²⁵⁰ The application fee is Kshs. 1,000,000 which is non refundable.

²⁵¹ Currently Kenya shillings five hundred thousand shillings.

²⁵² See Sec.12 of Finance Act 2012 which requires the operators to deduct 20 per cent withholding tax from Winnings from gaming.

They are also prohibited from permitting the under the age from accessing their premises, place conspicuous notices setting out rules, regulations and charges, if any to be made for persons to enter and participate in gaming. All licenses from other state agencies are required also to be obtained. These include liquor licenses amongst others. Further, they are also not required to involve or allow other persons to participate in unlawful activities or be a nuisance and injurious to the health and comfort of persons residing in their neighborhoods. For amusement machines located in the casinos; operators are also required to obtain and maintain the requisite licenses. They are also required to operate all such international casino games and amusement provided that the operations shall be strictly in accordance with the Act. They must also ensure that their operations accord decency, are conducted with dignity and good taste. The operators are required to provide ample parking for their clients and install surveillance cameras²⁵³ in the strategic areas of the casino such as at the entrances and at the cash desks.

In addition, the provisions of Section 6 of the Act demands that whenever a license is issued, the Board shall impose as a condition a requirement that the applicant furnishes the Board with security by means of a deposit,²⁵⁴ or such other security as the Board may approve, of a sum not exceeding forty thousand shillings²⁵⁵ and that security is refunded or canceled on expiration or cancellation of the license in respect of which it had been deposited unless it is forfeited under section 64 of the Act. In determining the amount of security, the Board is required to take into account, the known business of the applicant and the amount, if any which the business may reasonably be expected to increase in the ensuing year if the application is for renewal of a license.²⁵⁶ The Board can also vary at any time the amount of any security after considering the known scale of business of the licensee if the variation is reasonable.²⁵⁷

²⁵³ This is Because of the large sums of money transacted or held by casinos. since almost all transactions in casinos revolves around money in form of casino chips, tokens and actual currency; this prompts casinos to guard their operations by use of very sophisticated surveillance systems to record all the transactions.

²⁵⁴ See Sec.6 (1) of the Act.

²⁵⁵ Even though no amendments have been effected on this section in respect to the security, the Board demands a security in form of a bankers cheque of five hundred thousand Kenya shillings from operators of Casinos annually. The securities for new operators are deposited after the approval of the licenses.

²⁵⁶ See Sec.6 (3) of the Act.

²⁵⁷ *Ibid.*

In exercising this discretion, the Board may either enhance or reduce the security depending on the performance of the business.²⁵⁸ However, the law does not expressly state the purpose of the security. The objective of the security should be expressly provided. This study opines that the security should be used to settle any unpaid winnings when a casino ceases its operations for any reason without notice to its customers to redeem their tokens, chips or collect their deposits. Also, the deposit should be applied if grounds are established to compensate a player after lodging a complaint²⁵⁹ with the Board that a casino has refused to pay or refund a winning bet. Players are known to be left holding worthless chips and tokens, when a casino closes down without notice to either the regulator or the customers. They are also known to lose their deposits held in their casino accounts.

The law must expressly come up with a requirement that a casino cannot be allowed to close shop without giving a fourteen-day notice to the regulator and its customers. This will ensure that the operator pays all outstanding winnings and settle all gaming debts before closing down and if the operations are wound up; either temporarily or permanently; the operator should ensure for a considerable period of time either the casino premises or such other authorized premises remain open for purposes of settling any gaming claims. A six-month notice should be issued for this purpose and it is after all the claims have been settled that the security can be returned. If the law does not expressly state the objective of the security, it places the regulator in an awkward position to demand security which it cannot apply to settle any gaming dispute.

The security deposited with the Board can only be forfeited either if the licensee is convicted of an offence under the Act or an offence involving fraud or dishonesty. The onus of ordering for the forfeiture of the security is left to the Court before whom a licensee is convicted.²⁶⁰ It may also order that the license be forfeited and cancelled. If the licensee is convicted of an offence under the operations of control and licensing of betting and gaming, the Court may make a further order as to the forfeiture of his security or part of it as it deems fit.²⁶¹ The provisions of the Criminal Procedure Code relating to forfeiture of recognizances are applicable on the

²⁵⁸ See Sec.6 (4) of the Act.

²⁵⁹ Under section 4(1) (c), the Board has powers to inquire into complaints against licensees or permit holders.

²⁶⁰ Sec 64 of the Act.

²⁶¹ *Ibid.*

deposit.²⁶² However, no security or part of it shall be applied in settlement of any betting or gaming entered into by that person.²⁶³ This provision does not protect the interests of the players.

The law further provides that a licensee whose license is forfeited and cancelled in pursuance of a Court order, shall by virtue of that order, be disqualified from holding or obtaining a license or a further license for a period of five years.²⁶⁴ This begins with the date of the conviction where it appears to the Court making of such an order to be just in all the circumstances.²⁶⁵ A licensee on notification that his license has been cancelled or suspended is required to forthwith surrender his license or permit to the Board.²⁶⁶ The Court may also include in the order a direction that the period of disqualification be shorter than five years.²⁶⁷ It is an offence to employ a disqualified person in any betting or gaming business in Kenya.²⁶⁸

The Other disclosure required from the applicant is to estimate the amount of the gross turnover for the first twelve months of the gaming business in respect of which the application is made. This disclosure is meant to fulfill the requirements of section 6 of the Act in regard to deposit of security. The last disclosure required by the Board in its application form is to state the name and address of the accountant the applicant would appoint for the purpose of auditing their statement of accounts under section 11 of the Act.²⁶⁹ This Section mandates the Board to demand for properly audited statement of accounts from its licensees at any time.

The operators are further required to submit audited accounts for their gaming businesses once every year. However, the Board may require the submitted accounts to be subjected to an audit by an accountant, whose appointment must be approved by the Board. It is an offence for any person to refuse, fail or submit false or a misleading statement of accounts as demanded by the Board. The penal consequence for this is an imprisonment for a term not exceeding one year or

²⁶² See Sec.131 of the Criminal Procedure Code Cap. 75 Laws of Kenya.

²⁶³ See sec.64 (1) of the Act..

²⁶⁴ See Sec.64 (2) of the Act.

²⁶⁵ *Ibid.*

²⁶⁶ See Sec.8 (2) of the Act.

²⁶⁷ *Ibid* note 240.

²⁶⁸ See Sec.64 (3) of the Act.

²⁶⁹ See Sec.11 of the Act.

to a fine not exceeding a paltry ten thousand shillings or both.²⁷⁰ This and other fines and sentences in the Act should be enhanced to reflect the current economic position and oust them from the constitutional rights of arrested persons under Article 49(2) of the constitution which prohibits remanding in custody of any person for an offence punishable by a fine only or by imprisonment for not more than six months. An applicant is required to file a separate application in respect of each premises on which the applicant wishes to organize and manage gaming.²⁷¹

The Board requires applicants to deposit a non-refundable fee of Kenya shillings one million for a foreign applicant and a sum of Kenya shillings five hundred thousand shillings for a local investor. The investigations are conducted on all applicants. The investigation is assigned to one or two officers of the Board. After conducting the investigations and considering any information or declaration as may have been required by the Board, the Board may either grant, renew or vary a license or permit or refuse a license or permit renewal or variation without giving out any reason.²⁷² However, no license shall be issued unless the Board has satisfied itself that the applicant is a fit and proper person to hold its license and that the premises if any in respect of which the application is made are suitable for that purpose.²⁷³

Also, the law demands that no gaming license shall be issued to any applicant if the Board has not sent a copy of the application to the local authority within whose area of jurisdiction the applicant proposes to conduct his business. They are required to be accorded reasonable opportunity to either object to or make recommendations with respect to the application.²⁷⁴ It is an offence to make a false statement or declaration in an application for, or a renewal or variation of a license. The penalty for this is a fine not exceeding five thousand shillings or an imprisonment term not exceeding six months or to both.²⁷⁵

²⁷⁰ *Ibid.*

²⁷¹ Sec 46 (2) of the Act.

²⁷² See Sec.5 (3) of the Act.

²⁷³ See Sec.5 (3)(i) of the Act.

²⁷⁴ See Sec.5 (3)(ii) of the Act.

²⁷⁵ See Sec.5 (4) of the Act.

The law demands that every gaming license state the precise location and the extent of the premises to which it relates.²⁷⁶ The Board has to satisfy itself that the premises if any in respect of which the application is made are suitable for running a casino business. The premises are not allowed to be near schools, churches, mosque, hospitals or any military establishment. Historically, casinos in Europe and America had been geographically isolated from population centers at least partly because of a belief that casinos are deleterious for urban working class. Legal American casinos in operation as of the end of 1992, in Nevada, Atlantic City, or in mining towns, on riverboats, or on Indian reservations, had all held to that general pattern. However, in 1992, the New Orleans became the first American jurisdiction to legalize an urban casino, with the passage of a law authorizing a monopoly casino for that city.²⁷⁷

The location of casinos in most jurisdictions is an important policy question. In some jurisdictions such as Cambodia, the government requires casinos to be located along its borders.²⁷⁸ At the inception of casinos in Kenya in 1969 to 1985; the distance which was required to be maintained between one casino and the other was fifteen kilometers. The licenses issued by the Board must contain the conditions of issuance.²⁷⁹

A licensee, who wishes to transfer the conduct of his gaming business from the initial licensed premises to a new location, may apply to do so. If approved the licensee is required to pay a transfer fee.²⁸⁰ Licensees are also required to display prominently their licenses in their gaming premises.²⁸¹ It is an offense to display an expired license. This attracts a fine not exceeding three thousand shillings or an imprisonment term of three months.²⁸² All gaming licenses expire annually on 30th June of each year unless otherwise provided.²⁸³ The lifespan of these licenses should be extended to a period of between five and fifteen years depending on the level investment. This would attract serious investors in the Industry.

²⁷⁶ See Sec.7 of the Act.

²⁷⁷ William R. Eadington, *Ethical and Policy Considerations in the Spread of Commercial Gambling*, Institute for the Study of Gambling and Commercial Gaming, University of Nevada, 1993.

²⁷⁸ For instance, Casinos in Cambodia are located on the borders with Vietnam (Bavet), Thailand (Poi Pet) The government allows only one casino to operate in its capital city, Phom Penh.

²⁷⁹ *Ibid* note 196.

²⁸⁰ See Sec.7 (2) of the Act.

²⁸¹ See Sec.8 (1) of the Act.

²⁸² See Sec.8 (3) of the Act.

²⁸³ See Sec.9 of the Act.

3.8

INTERNAL CONTROLS OF CASINOS

It is widely acknowledged that the backbone of casino regulation is centered on compliance of internal controls. Since casinos are operated to generate revenue for operators and the government in form of gaming taxes, most of the internal controls guard against the integrity and compliance of these controls. These controls are imposed because casinos handle colossal amounts of cash. Internal control practices especially those which concern cash revenue flows are important.²⁸⁴ The reason why they are important is that they protect the state's share of revenue, protect the consumers and the casinos, assure public perception of propriety, and eliminate the criminal element; regulations therefore have been developed to establish strict accounting procedures.²⁸⁵ They help ensure accountability and thus the profitability of operation.²⁸⁶

On these controls, the gaming Act requires licensees to keep and enter or cause to be entered regularly in a book kept for that purpose all such particulars as the Board may prescribe.²⁸⁷ It is an offence to recklessly keep and enter falsified information in the record book.²⁸⁸ This being the backbone of the revenue generated in this industry, this study recommends that the penal consequences be enhanced, to prevent any attempts either by casino operators or in collusion with others from falsifying any figures or data required to be entered in the statutory books. The current sentences and fines require amendments because they are not deterrent. The transfer of gaming licenses to persons not authorized by the Board is prohibited by section 12 of the Act. This section is designed to ensure un- licensed persons do not operate gaming establishments. However this provision inhibits the rights of directors and shareholders of gaming companies to

²⁸⁴ DeFranco Agnes and Worhnan, James(1997), "Internal Control Practices in Casino Gaming," Journal of Hospitality Financial Management Volume5:Iss.1, at pg 33, Available At: <http://scholarworks.umass.edu/jhfm/vol5/issue1/5>.

²⁸⁵ *Ibid.*

²⁸⁶ *Ibid* at pg 34.

²⁸⁷ See Sec.10 of Cap.131.

²⁸⁸ The offence attracts a fine not exceeding ten thousand shillings or to imprisonment of a term not exceeding one year or both.

dispose off their shares. This provision is impracticable and impossible to enforce hence need for amendments.

For purposes of control of the operations of its licensees; the Board positions its gaming Inspectors in the casinos to track and report all the gaming transactions and the revenue generated by casinos on daily basis. In the eighties their role was ably noted as:

.... faceless men in the house, racing and Casino crowds, who check on cheats on both sides of the fence...These undercover agents do not earn big salaries - average pay is around pound 1500 a year –and they have to work long hours alertly watching the big punters lose as much as their yearly salaries on one roll of the dice, turn of the card or spin of the roulette wheel.....²⁸⁹

Their main function in the casinos is to police all the gaming operations from the opening of the gaming to closure and computation of the revenue generated by the casinos. However their powers and duties need to be enhanced and provided for in the legislation because currently they are limited to the conduct of the games. Their work has been reduced to observing and reporting of violations within a casino. They have no powers to arrest or even prosecute. In other jurisdictions gaming inspectors have wide ranging powers and duties. These are necessary to ensure enforcement and compliance of gaming laws.

3.9 CONDITIONS FOR OPERATION OF CASINOS

Amazingly, after being exposed into the intrusive process of obtaining a casino license; the regulators do not offer operators a free hand to operate their businesses. They direct how they carry out their businesses. Since its legalization casino operations have been highly conditional. The conditions are imposed by gaming laws and are mandatory. To those new and even some within the industry find these conditions very invasive and in some instances they challenge them. However; these conditions are normal for those who have a background in gaming. In principle, the conditions are meant to enhance the integrity of the gaming and protect the society from the deleterious consequences attached to gambling. The operations of a casino are required

²⁸⁹ See, The People who Stake their Money on a Money Making Machine; Daily Nation Friday, May 29, 1981 at pg 13.

to be transparent to the regulator, the operator and the player. This is the reason why gaming operations are “watched” by vey many people. Gaming activities in a casino whether a gaming inspector is present or not are required to be recorded by surveillance cameras and disclosures have to be filed. Casinos are required to disclose their daily losses and winnings amongst other disclosures to the gaming regulator as well as other government agencies.

Some of the conditions for operation of casinos in Kenya are set out by Section 46 of the Act. In this section; the Board has specific powers to impose conditions providing for the manner in which a person may conduct his business and the suitability, condition and conduct of the premises and the hours during which the premises may be open for business.²⁹⁰ For instance; the power to regulate the operating hours of gaming premises has been questioned by casino operators. However, the exercise of this power was upheld by the High Court in *Charles Shikanga & Stephen Ndichu Vs. The Betting Control and Licensing Board* where the Court held:

... that the law empowers the Board to regulate the timing of gaming premises. As correctly submitted by the respondent, the public interest would require that the timings of casinos be regulated to protect would be weak and compulsive members of society from exploitation through addiction which may result in lots of time spent in gambling which would have negative economic, social and cultural effects in our country...there has to be a measure of control which does not amount to total prohibition...²⁹¹

The other conditions which may be imposed include those geared towards the protection of persons taking part in the gaming against fraud²⁹² and the payment of admission fees for persons resorting to the premises.²⁹³ However, where an admission fee is charged; it is subject to the payment of tax under the Entertainments Tax Act.²⁹⁴ By setting out the conditions on the manner in which an operator may conduct his casino business as set out above ensures an operator operates within the realm of the regulator.

²⁹⁰ See sec. 46(3)(a).

²⁹¹ Nairobi, High Court Misc.Application No.1023of 2005.

²⁹² See sec. 46(3) (b).

²⁹³ See sec. 46(3) (c).

²⁹⁴ Entertainment offered by persons registered for Value Added Tax under the VAT Act 1989 are exempted from paying this tax. Casinos are grouped in this category.

These powers are exercised by all gaming regulators to contain²⁹⁵ the operations of casinos and other commercial gaming establishments. On offences relating to licensed gaming premises, the law prohibits licensed operators from offering or allowing playing of games not approved by the Board. If the games are played this is termed as unlawful gaming. The only games which can be offered for play in a legalized casino are those approved by the Board. Public advertisements on gaming without the approval of the Board are also prohibited. This prohibits any person who operates a licensed gaming premises and without approval to hold themselves out either by advertisement, notice or public placard as willing to provide members of the public with premises for the playing of games of chance. In conclusion, the law provides that it is an offence to contravene or fail to comply with any condition imposed by any regulation made under the Act.

3.1.0 GAMING WITH YOUNG PERSONS

Gaming with a young person is prohibited by section 48 of the Betting, Lotteries and Gaming Act chapter 131 laws of Kenya. This is replicated in all other gaming jurisdictions. This is to protect children from the negatives effects associated with gambling. The law prohibits playing games of chance with, or permits the playing of a game by a young person or allows a young person to enter a licensed gaming premise whether for the purpose of gaming, as an employee or to manage gaming activities. Those who contravene the demands of this section are likely to be found guilty of an offence and liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months or to both. The penal consequence should be amended because it does not reflect the seriousness of the exposure on a child.

3.1.1 SMALL GAMING PARTIES

The Board has powers under section 50 of the Act to authorize persons to conduct gaming for entertainment in premises other than the licensed gaming premises. However, the Act does not define what small gaming parties are. This type of gaming is only lawful if the chances of the

²⁹⁵ David Miers, Regulation and the Public Interest: Commercial Gambling and the National Lottery, *The Modern Law Review*, Volume 59, No.4 July 1996 at pg 516.

games conducted are equally favorable to all the players, and no money or money's worth is put down as stakes, or payment by way of losses, or exchanges for tokens used in playing the game is disposed of otherwise than by payment to a player as winning and no other payment in money's worth is required for a person to take part in the gaming.²⁹⁶

The law prohibits inclusion of persons under the age of eighteen among the players unless the gaming takes place in a private dwelling- house or in the presence of a parent or guardian or with the permission of a guardian. The law provides that where ten or more persons are present in such gaming and the game played therein is a variant of or similar to a game which is capable of being played in accordance with the ordinary rules. The chances of the games are required to be equally favorable to all players and a payment of money's worth is required in order to obtain access to the premises where the games are played. Where these conditions are not met, such gaming is held as unlawful gaming unless it is proved that the gaming was conducted as required by the law and the person charged neither knew or had reasonable cause to suspect that any of the players was under the age of eighteen years.²⁹⁷

Persons in any premises who organizes, procures the assembly of players, present or are involved in the management or present to operate any gaming instrument of small gaming parties or have reasonable cause to suspect that unlawful gaming would take place on those premises allows the premises to be used for the purposes of gaming or lets such premises or otherwise makes the premises available to any person by whom an offence in connection with the gaming has been committed shall be guilty and liable to a fine not exceeding five thousand shillings or to imprisonment for a term not exceeding six months or to both.

3.1.2 GAMING IN CLUBS

Gaming in clubs is provided for by Section 51 of the Act. This section gives the Board powers to authorize gaming for a specific period of time in permanent clubs. However, the conditions for authorizing gaming in clubs demands that the persons anticipated to take part in the gaming are

²⁹⁶ See sec. 50 (3) (b).

²⁹⁷ See section 50 (2) (c) of Cap. 131 of Laws of Kenya.

the bonafide members of the clubs who have paid their annual club membership fee more than twenty - four hours before the commencement of the activity or are guests of a member of the club. Only two invited guests per member are authorized to participate in the gaming. However, non members can take part if they pay a fixed sum of money determined before the gaming takes place. The conduct of gaming is only lawful and authorized if it is carried on as an activity of the club and that gaming is not the only or the substantial activity of the club.

3.1.3 GAMING AT ENTERTAINMENTS NOT HELD FOR PRIVATE GAINS

This is provided for by Section 52 of the Act. It permits games of chance and skill combined to be conducted in entertainment functions. However, these games should be incidental to the functions and they should not be meant for private gain. Entertainment is defined to include a bazaar, sale of work, fete dinner, dance, sporting or athletic event or other entertainment of a similar character whether limited to one day or extending over two or more days. The conditions for conducting these games require that the chances in the games conducted be equally favorable to all players or be conducted in such a manner that the chances therein are equally favorable to all players. Also not more than one payment whether by way of entrance fee or stake is made by each player in respect of all games played at the entertainment and no such payment is supposed to exceed five Kenya shillings.

The total value of all prizes and awards distributed in respect of the games is not expected to exceed four hundred shillings and the whole of the proceeds of the payments after deducting sums lawfully appropriated on account of expenses or for the provision of prizes or awards in respect of the games must be applied for purposes other than private gain. Persons under the age of eighteen years must not be included among the players unless the gaming takes place in the presence of a parent or guardian or with their permission. It is an offence for any person to conduct such unlawful gaming at any entertainment.

The law holds responsible any person(s) who manages organizes, procures the assembly of players, or knows or having reasonable cause to suspect that unlawful gaming would take place at the entertainment and allows such premises to be used for purposes of such gaming or lets

premises or otherwise makes the premises available to a person by whom an offence in connection with the gaming was committed. This offence attracts a fine of not exceeding five thousand shillings or to imprisonment for a term not exceeding six months or to both.

3.1.4 PROHIBITION OF GAMING IN PUBLIC PLACES

Gaming in public places is prohibited by Section 55 of the Act. Public places include a street or other place which whether on payment or otherwise, the public have or may have access. Gambling in public places attracts a fine of not exceeding three thousand shillings or to imprisonment for a term not exceeding three months or to both.

3.1.5: POWER TO ARREST WITHOUT WARRANT

The Act gives powers to a police officer to arrest without warrant anyone whom he finds gambling in a street or other unlicensed premises.

3.1.6: GAMING MACHINES

Gaming machines or slot machines are electronic or electromechanical gaming devices for playing a game of chance, being a game which requires no action by a player other than the actuation or manipulation of the machine. They come in two main types, where the player makes no strategic decisions after starting the game, and where the player can make strategic decisions such as draw card machines. The history of regulation of gaming machines which were popularly known as “fruit machines” or “one armed bandits” goes back to the period before the enactment of the Betting, Lotteries and Gaming Act Cap.131 of Laws of Kenya. As set out elsewhere in this study; one of the reasons for the enactment of this legislation, was to regulate the proliferation of these machines which were found in almost all major social places of the time in many Kenyan towns in the 50’s and early and 60’s.

The regulation of these machines was one of the first major assignments of the newly set up Betting Control and Licensing Board. The interests for the regulation and operation of these machines was a concern as well as controversial.

The notice of the initial regulation of these machines was explained as:

The greedy thirst of the fruit machine, with its slot always open for more and more “sumunis” [sic-fifty cents] - and the big profits made by its owners, is to come under Government control in Kenya from the beginning of next year. And the Government has also organized feedback of some of these profits from the nations gambling urge, into the national coffers: a yearly permit for each gaming machine will cost £100. This is by no means squeeze on the operators when you consider that profits can run at about £50 a week.²⁹⁸

The Law to regulate gaming machines is contained in sections 53 and 54 of the Betting, Lotteries and Gaming Act Cap.131 of Laws of Kenya. The law does not provide for a framework to govern the importation, sale and use of gaming machines and other devices except an informal requirement which is not backed by any law which requires casino operators to obtain clearance before importing slot machines to the country. At the enactment of this legislation and as set out elsewhere in this study, the Country was faced with an explosion of gaming machines. It is for this reason that the legislators criminalized the use of unauthorized gaming machines. It is an offence under section 53 of the Act to use or permit the use of an unauthorized gaming machine or knowingly allow premises to be used for the purpose of gaming by means of an unauthorized machine. These machines are defined by section 2 of the Act as machines for playing a game of chance, being a game, which requires no action by a player other than the actuation or manipulation of the machine.

The Act also defines unauthorized gaming machines as gaming machines in respect of which a permit has not been issued under section 54. The Board has discretion under this section to issue subject to any regulations made under the Act a permit authorizing the use of gaming machines on premises approved by it. The law places the conditions for issuance of a permit to operate these machines. Some of the conditions imposed prevent not more than two gaming machines to be made available or placed in any one building whether the building is occupied by two or more different persons.²⁹⁹ The stakes to be hazarded are required to be applied either in payment of

²⁹⁸ See Gambling Control, Sunday Nation, November 6, 1966 at page 6.

²⁹⁹ Section 54 of Cap. 131.

winnings to players or for purposes other than private gain. The stakes hazarded per play is limited to one shilling. This makes the operation of the machines outside Casinos un-profitable. In some Casinos; the amount hazarded per game can go up to one thousand shillings or more per spin. The premises authorized to place these machines should not be used by persons under the age of eighteen.³⁰⁰ It is an offence to contravene any of the above conditions.³⁰¹

In Kenya, gaming machines or slot machines are only operated in Casinos. At the enactment of this legislation, these machines were found in bars, clubs and in other social places. The operation of the machines was big business and controversial. The permission for importation of these machines was temporarily withdrawn by the Board in 1967.³⁰² This directive resulted into seizure of the machines by the Customs department. Importers of the machines were advised by the Board to cancel such orders pending its further consideration.³⁰³ The licensing of these machines was temporarily banned³⁰⁴ in January 1968.³⁰⁵ The ban caused a sensation in the Country.³⁰⁶ Before the ban, there were more than 200 gambling machines in Nairobi at the time. The ban was lifted in the mid August of the same year when Garden Hotel in Nairobi was allowed to license their premises for use of gaming machines for £ 150.³⁰⁷

The news of the reprieve followed a rush for licenses which swamped the Board with hundreds of applications. This resulted to the issuance of six other licenses to operators in Nairobi, Mombasa and Nyeri.³⁰⁸ In Mombasa these machines were operated by a an enterprise known as the “Pools Arcade” which was the towns first gambling house to reopen since the lifting of the gambling ban. The nineteen new and reconditioned five pence gambling machines which included the then popular “*Atlantic City*,” “*Acapulco*” and “*Showtime*” models amongst other older versions of the

³⁰⁰ *Ibid.*

³⁰¹ *Supra* note.

³⁰² See, One Armed Bandits, Daily Nation, Monday, February 13, 1967 at page 5.

³⁰³ *Ibid.*

³⁰⁴ See, Betting Board to Issue Licenses Only on Directive; Daily Nation, Tuesday, September 17, 1968 at pg 3.

³⁰⁵ They were banned by the retired President Moi who at the time was the vice- President and the Minister in Charge of gambling.

³⁰⁶ See, Bandits Are Back-In Force! , Daily Nation, Monday, December 16, 1968 at pg 1.

³⁰⁷ *Ibid.*

³⁰⁸ *Supra* note.

machines such as the “*Cypress Gardens*,” were operated by the business owned by Nairobi and Mombasa shareholders.³⁰⁹

Arising from the lifting of the ban; the Board resolved not to issue any more licenses for the operation of these machines, unless directed to do so by the Minister.³¹⁰ This suspension of issuance of these licenses went to the floor of National Assembly on 11th February 1969; where a Member, wanted an explanation on whether a club known as the “starlight club” in Nairobi had not satisfied the conditions for licensing to operate gaming machines because its application was yet to be approved by the Board.³¹¹ In responding to the question on what conditions the Betting Control Board required before issuing a license for a gaming machine, the Minister for Home Affairs hinted that all gaming machines licensed would be withdrawn by the end of June ,1969; set out the conditions for licensing as:

Before a license can be issued for gaming machine, it has to be considered whether the applicant is a fit person to hold such a license...preference was given to well-run private clubs whose membership included people who could afford to pay for the amusement they derived from the machines. The second consideration was whether the premises were suitable for the installation of such machines. Preference was also given to premises which were situated in areas ywhere Africans formed the majority of the population.³¹²

The operation of these machines was for the second time banned by the government on July 1, 1969³¹³ and the ban has never been lifted even though the provision to license these machines has remained in the legislation. After the machines had been banned; the Controller and Auditor-General in his 1968/69 report noted as follows concerning the gaming machines:

Between April, 1968 and March, 1969 a total 1,759 gaming machines were licensed. I am not satisfied with the manner in which the administration of the Betting, Lotteries and Gaming Act (1966) was carried out in that, although the Act provides for all gaming licenses to be approved by the Betting Control Board, none of the licenses

³⁰⁹ *Ibid.*

³¹⁰ *Supra* note.

³¹¹ See, Gaming Machine Conditions, Daily Nation, Wednesday February 12, 1969 at pg 4.

³¹² *Ibid.*

³¹³ See, Gambling at Casino only, Daily Nation, Wednesday, and September 10, 1969 at pg 4.

issued for the 1,759 gaming machines appears to have been considered by the Board. Further, since the licenses appear to have been issued for machines for purposes of private gain in contravention of section 54 of the Act, government forfeited revenue estimated at K£ 147,000.³¹⁴

This explains the challenges of licensing and administering these machines. Today, applicants of these machines are required to pay an application fee of fifty thousand Kenya shillings per machine and an equivalent amount as the annual license fee per machine, a license fee of two hundred thousand shillings per each location, a license renewal fee of Kenya shillings ten thousand per machine and an investigation fee of one hundred thousand for local entrepreneurs and one million shillings for a foreigners. This reflects the prevailing public policy on these machines since the 1960's. There are no gaming machines licensed outside the casinos.

CONCLUSION

Even though the regulation of gaming differs in different jurisdictions, the basic tenets of its regulation have been globalized. What is of concern is how the actual regulation is conducted. In most of the gaming jurisdictions; the level of enforcement and compliance and the continuous amendment of outdated laws and regulations is what matters. Basically, the regulation starts with the identification and approval of identified locations as suitable for gaming. If the identified location is found appropriate, the actual licensing process which include due diligence investigations to establish whether the applicants are fit and proper persons to hold a gaming license is commenced. It is public policy that casino operators must be honest. Why this requirement is emphasized is because gambling in all societies is not encouraged and cheating is prevalent. The operators must be persons of integrity to ensure they protect the young, the vulnerable and the taxes generated by the industry. This study opines that the two sections of the Act which provide for licensing and operation of gaming machines do not lay a proper regulatory framework to regulate the machines.

Upon the examination of the current regulation of casinos in Kenya, it is evident that the

³¹⁴ Republic of Kenya, The Appropriation Accounts other Public Accounts and the Accounts of the Funds For The Year 1968/69, Controller and Auditor General, pg VI.

statute has not been reviewed recently to address the emerging needs and trends of the industry. There are no sufficient regulations in the legislation to effectively regulate the casino industry or to guide the Board in assessing the suitability of its applicants. It is evident that the law does not offer sufficient internal controls to regulate the industry which is a major weakness. The regime does not regulate the chips and tokens which are used in the industry and neither does it provide for approval; and authorization for movement of slot machines and other gaming devices within and from the designated gaming premises.

There are no provisions to ensure casino licenses do not change hands. This compromises the regulatory framework because the changes are made without the knowledge and approval of the Board. The transfers should be legalised to allow directors of gaming licenses to transfer licenses to new operators. Poor internal controls also assist and offer operators opportunities to indulge in unlawful activities such as money -laundering and related criminal activities. Since slot machines are known to generate over fifty per cent of the casino revenues, the existing regulatory framework must be reviewed to capture the regulation, standards and testing of gaming equipments and devices. These standards are not provided for in the current law. Since most of the aspects discussed have been established to be wanting and inadequate, this study proposes a review of the existing legal framework.

CHAPTER FOUR

4.0: REGULATION OF CASINOS IN OTHER JURISDICTIONS

INTRODUCTION

The history of legalization of casino gambling is traced to the medieval times. It is a multi billion industry which is now accepted as one of the many forms of social past time. Different gaming jurisdictions license casinos for a variety of reasons. For instance in South Africa, it is operated to control its proliferation by ensuring strict regulation as well as promoting the Black Empowerment Program amongst other objectives. In Nevada it was legalized to stimulate the state economy and generate taxes. For other jurisdictions it is operated to promote tourism, revive declining cities, control gaming negatives, protect citizens from unlicensed operators while for many others, although silently to generate revenue. Despite different objectives advanced by different jurisdictions for legalizing this form of entertainment, the upshot of regulating gambling is based on the following public policy considerations. This is to ensure gaming is conducted in a verifiably fair and open fashion to protect the interests of the consumer, ensure to the greatest extent possible children and other vulnerable persons are protected from harm or exploitation by gaming operators and prevent gaming in casinos from being or becoming a source of crime or disorder.³¹⁵ These principles are reflected in Statutes of different gaming jurisdictions.

For purposes of comparison, this chapter briefly examines the Nevada and the South African gaming regulatory regimes to understand how they evolved, operated and their challenges. It is after this examination that the study would borrow the best practices and comment on the challenges as relates to the Kenyan regime. These gaming jurisdictions are hailed as the leading gaming jurisdictions in their continents. The former is regarded as the mother of the current gaming legislations while; the latter even though a relatively new regulatory regime is viewed as

³¹⁵ Department of Justice ,Equality and Law Reform, Regulating Gaming In Ireland, Report of the Committee of the Casino Committee, Dublin, 2006 at Pg 5.

the best in Africa. Some African jurisdictions have adopted the South Africa model without addressing themselves to its attendant challenges. The future Kenyan regulatory regime is expected to replicate this model. This was meant possible by the drafters of the Constitution of Kenya 2010, who replicated the functions of the National and the County governments as contained in the function number 34 of part 1 and number 4 of part 2 of the Fourth Schedule of the Constitution of Kenya 2010 from the South African Constitution. This chapter will examine the two regulatory regimes and identify any challenges, which have been identified within the regulatory regimes. It will examine the South African gaming regulatory regime because of its close relationship with the envisaged concurrent regulatory regime envisaged in the Constitution of Kenya 2010. On examination of the Nevada gaming regulatory regime the Chapter will examine briefly its salient features and borrow its strengths.

4.1: REGULATION OF CASINOS IN STATE OF NEVADA

It is acknowledged that almost all leading gaming jurisdictions have borrowed some form of regulations from the State of Nevada. This is why regulators and state agencies consult the Nevada Gaming Board before drafting or reviewing their gaming legislations. The Nevada gaming regulatory regime is regarded as the leading gaming regulatory regime in the world. The regulatory regimes in Australia, South Africa, New Jersey and many other States are grounded or are a hybrid of Nevada's regulatory structure. The States regulatory regime is based on its public policy on gaming which is set out in its revised statute 463.0129 (1). These policies must be reflected in all regulatory decisions of the state. The policy demands that gaming industry is vitally important to the state.³¹⁶

Gambling in Nevada is connected to the discovery of silver and gold deposits on Mt. Davidson, near Virginia City in the 1850's. This discovery, which was the richest silver and gold deposit in United State, caused a rapid growth in population from 200 people to 20,000 in two years.³¹⁷

³¹⁶ Gaming Regulation In Nevada ,An Update State Gaming Control Board and Nevada Gaming Commission July 2006 found at http://gaming.nv.gov/documents/pdf/gaming_regulation_nevada.pdf. (Accessed on 5th 2012).

³¹⁷ Lionel Sawyer & Collins, Nevada Gaming Law, Lionel Sawyer & Collins, Las Vegas, Nevada, 1991, at Pg1.

Along with the people and money came gambling as an alternative recreation in the mining towns. With the mining boom and proliferation of casinos in these emerging towns, came the first debates over propriety of legal gambling.³¹⁸ In the mid -1800's, miners passed rules to govern their conduct. One rule adopted by miners prohibited the game of poker or faro. These rules were however not enforced by legal authority, and the public generally ignored them.³¹⁹

In 1861, Nevada came under territorial rule and convened a territorial legislature. However the governor, James Warren Nye was a strong opponent of legal gaming. The territorial legislature shared his view and prohibited gaming and offered prosecutors a bounty of hundred dollars for each successful gaming prosecution. The lawmakers however, did not anticipate that local prosecutors would not share their views. Despite the financial incentives, gaming flourished in Nevada's mining camps and towns without any prosecutions.³²⁰ Nevada become a State in 1864 and in 1869 public sentiments favoring legal gaming led to the introduction of a gaming legislation. The logic behind the legislation was the only effectual method of restricting gambling was to license it heavily. The prevailing attitude at the time was gaming was a vice to be tolerated, but not encouraged. However, what was viewed as "heavily restricted gaming was not because anyone could obtain a gaming license."³²¹

The only regulation at the time prohibited professional gamblers from operating without a license. The sheriff of each county issued gaming licenses upon the payment of requisite fees. These fees were shared by the two on an equal basis. To uphold the appearance of propriety, the law barred gaming from the front rooms of buildings and prohibited gaming by persons less than 17 years of age. This age was raised to 21 in 1887. The application for licensing required only a description of the room where the applicant proposed to conduct the gaming.³²² Since its statehood in 1864, Nevada has always tolerated some form of gaming. Gaming was prohibited between 1909 and 1931.³²³ However, full – scale casino gaming was not legalized until 1931.

³¹⁸ *Ibid*, Pg at 2.

³¹⁹ *Ibid*.

³²⁰ *Supra* note.

³²¹ *Ibid*.

³²² *Supra* note 317 at Pg 3.

³²³ *Ibid* at Pg 5.

In that year, the height of America's Great Depression, Nevada's new, wide-open gaming laws were seen as a means to stimulate the economy and raise taxes. The Nevada Legislature also believed the anti-gambling laws at the time were unenforceable, and the officials charged with enforcing the laws were being corrupted by illegal gamblers.³²⁴ The 1931 Act placed gaming regulation in the hands of the local authorities. The State's involvement was limited to the collection of taxes. Because of the nature of the State's involvement, the Nevada Tax Commission was given jurisdiction over gaming.³²⁵

Despite the 1931 legislative enactments, gaming did not become a major industry in Nevada until after World War II. Before the war, gaming essentially was a social diversion for local residents and workers, and for soldiers on leave.³²⁶ The industry boomed after the Second World War for many reasons. These included the rising population of its neighbor State, California, the popularity of the automobile, use of air conditioning in southern Nevada casinos, the expansion of commercial air traffic, and new marketing and entertainment policies. Gaming in the post-war years also attracted the attention of persons involved in illegal activities.³²⁷

In 1950, a United States Senate Committee popularly known as the Kefauver Committee³²⁸ was critical of Nevada's regulatory system and its regulatory apparatus. The Committee noted in its report that the licensing system at the time had not resulted in excluding the undesirables from the state, but merely served to give their activities a seeming cloak of respectability.³²⁹ The Committee concluded that numerous casino owners in Nevada were members of organized crime or had histories of close associations with underworld characters who operated those syndicates.³³⁰ Even though not many agreed with the Committee; many Nevadans felt that that

³²⁴ Anthony Cabot, *International Casino Law*, Institute for the Study of Gambling and Commercial Gaming, University of Nevada, 1993 at pg 92.

³²⁵ *Supra* note 317 at Pg 5.

³²⁶ *Supra* note 324 at pg 93.

³²⁷ *Ibid* at pg 92.

³²⁸ United States Congress, Senate Special Committee to Investigate Organized Crime in Interstate Commerce, Washington, U.S. Government Printing Office, 1950.

³²⁹ *Supra* note 325 at pg 13.

³³⁰ *Ibid*.

their regulatory system needed improvement.³³¹ This was followed by many media exposes, which contributed to the cloud over the reputation of Nevada and its gaming industry.³³² With the message to either clean up the gaming industry or the federal government on the verge of imposing a tax on the gross receipts of all gaming transactions, which was aimed at closing down, the industry, the state had to rid the industry of its undesirables. Under the threat of federal intervention that would outlaw casino gaming, Nevada began a progressive campaign to bolster its regulatory system.³³³

The State Gaming Control Board was created within Nevada Tax Commission by the legislature in 1955 to inaugurate a policy to eliminate the undesirable elements in Nevada gaming and to provide regulations for the licensing and the operation of gaming. It was also to establish rules and regulations for all tax reports that were to be submitted to the State by gaming licensees.³³⁴ The Board was also to serve as a full-time administrative agency charged with enforcement of the gaming laws and its corresponding regulations. The Board was to delve into all applications, and report them to the Nevada State Tax Commission, which would then have a final approval.³³⁵ The Board is a combination of policeman and tax collector of the industry as well the prosecutor and adjudicator in disciplinary and customer dispute matters. The Tax Commission also adopted a comprehensive system of regulatory controls.³³⁶

In 1959, authority over licensing and regulation was shifted from the Tax Commission to the newly-formed Nevada Gaming Commission³³⁷ which was created by the passage of the Gaming Control Act which laid the foundation for what would become a modern gaming regulation.³³⁸ The enforcement responsibilities remained with the State Gaming Control Board.³³⁹ The Commission is a part-time agency that serves as a dispute resolver and it is the final authority on

³³¹ Supra note.

³³² Supra note 326 at pg 93.

³³³ Supra note 331 at pg 14.

³³⁴ *Ibid* at Pg 4.

³³⁵ Supra note 327.

³³⁶ Supra note 334 at pg 23.

³³⁷ *Ibid*.

³³⁸ Supra at Pg 5.

³³⁹ Supra note 332 at pg 94.

whether to issue licenses. It also serves as judge in tax disputes and in disciplinary actions.³⁴⁰ The two regulatory agencies began employing a very rigorous application and investigation process designed to deter and detect unsuitable persons.³⁴¹ One of the mandates of the Commission then was to conduct exhaustive investigations to the licensees at that time to ascertain as humanly as possible, that criminal elements, mobs, or syndicates had neither interests nor control of existing businesses.³⁴² The Commission is also charged with the responsibility of adopting, amending and repealing the gaming regulations consistent with the states policies, objectives, and statutory purposes.³⁴³

The 1950's and 1960's saw the emergence of the Las Vegas strip. During this period the conventional wisdom at the time viewed Las Vegas as a city controlled by organized crime, a place filled with transients, low lifers and opportunists.³⁴⁴ In the late 1960's the Nevada's legislature adopted a Corporate Gaming Act that allows public companies to own casinos without having each shareholder licensed. As a result, many respected companies, including Hilton, became casino owners.³⁴⁵ The toughened regulatory system, and the addition of respected companies and individuals, eliminated the threat of federal intervention, and contributed to the growth and respectability of the industry.³⁴⁶

Gaming in Las Vegas for instance is limited to areas designated as "gaming enterprises districts."³⁴⁷ Each district is established by the local government having jurisdiction over the area. A local government can also prohibit or restrict gaming within its city or county limits. In most areas of the state, a small business can receive a restricted license to operate up to 15 gaming devices. The gaming authorities may deny a license for any place deemed unsuitable because of its proximity to a church, school, hospital, playground, or military base, or because the location is difficult to police.³⁴⁸

³⁴⁰ *Ibid* note 338 at Pg 23.

³⁴¹ *Ibid* note 339.

³⁴² *Supra* note 340 at pg 18.

³⁴³ *Ibid* at pg 6.

³⁴⁴ *Supra* note 37 at pg 254.

³⁴⁵ *Supra* note 339.

³⁴⁶ *Ibid*.

³⁴⁷ *Supra* at Pg 95.

³⁴⁸ *Ibid*.

Gaming licenses are granted to private enterprises. The licensing and regulation of gaming is bifurcated between state and local governments having concurrent jurisdiction. The process of acquiring a Nevada gaming license is long, time consuming and consists of several procedures with each step defined by statute and precedent. These processes flow logically from the one before.³⁴⁹ The state delegates its authority to license and regulate gaming to two agencies, the State Gaming Control Board (“the Board”) and the Nevada Gaming Commission (“the Commission”). The Three – member Board is charged with the full-time administration of the gaming laws and regulations, and makes recommendations on licensing matters to the Commission. The five-part-time members of the Commission are charged with the responsibility of licensing, administering discipline to licensees, and adopting regulations. Local governments have concurrent authority to license and regulate gaming. However, local governments seem to perceive licensing as primarily a method of taxation, and rarely utilize their powers in a regulatory fashion.³⁵⁰

In Nevada, a casino can only offer games specified by statute or approved by the Commission. The state defines gambling games by characteristics and by specific games. Pursuant to Nevada statutes, a gambling game is “any game played with cards, dice, equipment or any mechanical, electromechanical or electronic device or machine for money, property, checks, credit or any representative of value, including, without limiting the generality of the foregoing, roulette, twenty-one, blackjack, craps, poker, wheel of fortune, baccarat, slot machine, any banking or percentage game or any other game or device approved by the Commission...”³⁵¹ The Nevada Gaming Commission can also approve a new game after a short field test.³⁵² Generally, a casino sets the rules of the games which lead to variations among casinos.³⁵³ However the rules must be approved before the games are offered for play in the Casinos by the Commission.

³⁴⁹ Robert D. Faiss and Gregory R. Gemignani, “Nevada Gaming Licensure: Qualifications, Standards, and Procedures,” Occasional Paper Series 11. Las Vegas: Center for Gaming Research, University Libraries, University of Nevada Las Vegas, 2011, (Accessed on 2th January 2012) at pg 1.

³⁵⁰ Supra note 348 at Pg 95.

³⁵¹ Supra note 349 at Pg 1.

³⁵² supra note 350 at Pg 95.

³⁵³ *Ibid* at Pg 96.

The licensing regime of gambling activities requires licensing of operators and persons engaged in operation of gaming. There are three types of operator licenses in Nevada, the restricted, non-restricted and slot route operator. In regulating Casinos, the state licenses certain casino employees. There are two types of employees. The first is the “key employee.” This is an employee who can influence operations, receive compensation of \$ 75,000 or more, can grant complementarities, credit, hire or fire other casino personnel, serves as a casino shift supervisor, regular member of a count team, or manages a key department, such as accounting, food and beverage, cage, credit and collections, personnel, audit, security surveillance, entertainment, or sales.³⁵⁴

The law also requires Labour organizations representing gaming employees, to file a list of key personnel with the Board. Their key employees include those who adjust grievances, negotiate wages, hours, and working conditions or solicit, collect, or assess fines and dues. The list also includes officers and business agents and those acting in a policymaking capacity. Each listed key employee must submit biographical information, a personal criminal history, and a description of union dues.³⁵⁵

The gaming authorities can conduct investigations and disqualify an individual if he is found to have been convicted of a crime involving moral turpitude, unethical business practice, has lied to or misled the Board, is a member of an organized group, or he is of unacceptable moral character or integrity. If a disqualified person continues to perform his duties after disqualification, the Commission can bring a court action for an injunction or enjoin and fine the labour organization and a fine of up to \$10,000 for each day it violates the Commission’s order.³⁵⁶ Each employee must file an annual key employee report, and each is subject to being called forward for a finding of suitability or licensing.³⁵⁷

The second type of employee is the “gaming employee.” This type includes dealers, box men, cashiers, floor men, casino hosts, independent agents, keno runners and writers, mechanics, odd

³⁵⁴ *Ibid.*

³⁵⁵ *Supra* note at Pg 99.

³⁵⁶ *Ibid.*

³⁵⁷ *Ibid* at Pg 96.

makers, security personnel, shift bosses, pit bosses, shills, supervisors, mangers, and all other persons who operate or work on the games. The Licensing and issuance of a work permit to work in the casinos may be denied on the grounds for failure to comply with the gaming laws at a prior job, the commission of a crime involving dishonesty, identification by a government agency as a member of an organized crime, being on probation, or having been previously denied a work permit. An employee who is denied a work permit may appeal the decision to the Commission and, if denied to the Courts.³⁵⁸

The State also demands junket representatives or known as independent agents under the 1991 law and 1992 regulations to be registered by the State Gaming Control Board before they can be paid for bringing a high roller to a Nevada casino. A high roller is a player who receives over \$1,000 in complementary in a given seven-day period. The authorities can require persons working for independent agents, operators of bus programs, tour and travel operators, and those who collect casino debts to file applications for a finding of suitability. If the gaming authorities find a person to be unsuitable, no casino in Nevada can do business with them. The state also requires persons doing business on the premises of a licensed gaming establishment to be found suitable by the Commission.³⁵⁹

On gaming devices, the State requires every manufacturer, seller, or distributor of any gaming device or other piece of equipment or equipment components whose function determines the outcome of a game must be licensed. Moreover, before a manufacturer or distributor of gaming devices can offer to distribute, operate, or sell a new gaming device, the device itself must be inspected and approved. The device must meet mathematical tests for randomness, not be susceptible to cheating, demonstrate resistance to electrical phenomena, and properly account for all gross handle.³⁶⁰ However, in Nevada, a person who manufactures distributes, or sells associated equipment is not required to be licensed. Associated equipments are defined as

³⁵⁸ Supra note.

³⁵⁹ *Ibid.*

³⁶⁰ Supra note.

equipment used in gaming or a component in a gaming device that does not determine whether the person playing the device will win or lose.³⁶¹

These equipments includes gaming tokens, dice, playing cards, systems which link slots machines, keno systems, coin weighing devices, player tracking systems and accounting systems. Associated equipments must be approved prior to its use or installation. A manufacturer, distributor or a seller of associated equipment may be called forward for a finding of suitability.³⁶² Lenders or holders of indebtness need not obtain a license, but is subject to being called forward for licensing when in the opinion of the Commission, he has the power to exercise significant authority over the licensee or when the public interest would be served by such licensing. Casinos must report loans, mortgages, trust deeds capital contributions, lines of credit, certain accounts payable, debts forgiven, guarantees received, capital leases with an option to buy, and certain accrued salaries if such transactions exceed set thresholds. After an investigation, the Gaming Commission may order the transaction rescinded if it would be inimical to the public good, or discredit Nevada or its gaming industry.³⁶³ Under Nevada gaming law, security interests in certain items associated with casino gaming cannot be enforced without the prior approval of the Nevada Gaming Commission and compliance with its regulations.³⁶⁴

In Nevada, gaming licenses may be issued to individuals and as well to private corporations. However, if a private corporation applies for a license, then all officers, directors, and shareholders of that corporation must also apply. If licensed, the Corporation must maintain an office on the casino premises, comply with the Nevada corporate law, and maintain its stock ledger in its principal Nevada office. The stock of the corporation can not be sold, assigned, transferred unless approved by the Commission.³⁶⁵ Officers and directors appointed after the initial licensing of the corporation are not required to be licensed prior to the appointment, but must file an application within 30 days after becoming an officer or director.³⁶⁶

³⁶¹ *supra* at pg 98.

³⁶² *Ibid.*

³⁶³ *Ibid.*

³⁶⁴ *Supra* note at Pg 98.

³⁶⁵ *Ibid* at Pg 99.

³⁶⁶ *Ibid.*

A privately – traded holding company of a corporate gaming license and all of the holding company’s shareholders must be licensed. However, only certain officers and directors of a private holding company need to be licensed, including the chairperson of the board, any director owning more than 1% of the stock, any director involved in supervision of gaming, and the president, chief executive officer, chief accountant, and a secretary.³⁶⁷ The Commission must approve any dealings in the stock of all private corporations.

Publicly- traded corporations cannot hold a gaming license, but may own a private corporation that does. A publicly –traded corporation is a corporation required to be registered under the United States federal law and regulated by the federal government. Foreign corporations can qualify if the foreign country has adequate regulatory control. A public corporation approved to own the stock of a corporate gaming license must be registered with the Commission.³⁶⁸ The law generally regulates almost all dealings in stocks and ownership of gaming related corporations including their subsidiaries in other countries. These dealings and their anticipated decisions are required to be filed with the Commission.³⁶⁹

The stocks of any registered public company must contain a legend stating that the stock interest is subject to Nevada gaming regulation and if any beneficial owner found unsuitable by the Commission must be disposed off and that the Nevada law may restrict dividends, voting rights, and remuneration.³⁷⁰ The commission also regulates public offerings of its licensed public companies. Public offerings where the proceeds are to be used to pay for construction of, or to acquire any interest in, gaming facilities, to finance gaming operations, or to retire obligations incurred for one of these purposes must be approved in advance. All partnerships must be licensed in Nevada.³⁷¹ On foreign investment, there are no restrictions on foreign investment in Nevada gaming operations. However, the Commission will not grant a license to a corporation that is not incorporated in Nevada.³⁷²

³⁶⁷ Supra note at Pg 100.

³⁶⁸ *Ibid.*

³⁶⁹ Supra note.

³⁷⁰ *Ibid* at Pg 100.

³⁷¹ *Ibid.*

³⁷² Supra at Pg 101.

The modern system for assessing the qualifications of applicants enables gaming regulators to exercise discretion within guidelines established by law, regulation and precedent. While serving the interest of the state, this system sometimes creates problems for a potential applicant because the criteria are not quantified and there is no definite method to assess whether a particular applicant is “licensable.” Before filing an application, the potential applicant and his attorney should assess the applicant’s character and past before filing for licensure or suitability.³⁷³ Since the issuance of a bulletin listing the criteria under which an applicant might be found unsuitable for a gaming license in Nevada in 1973, the Commission places a lot of emphasis on the character of applicants of its licenses.³⁷⁴

The criterion which is still applicable today demands that an applicant of the States gaming license be of good character.³⁷⁵ The practice of considering an applicant’s conduct is traced to an opinion by the Nevada Attorney General at the request of the Tax Commission after the murder of one of pioneer gaming developers in Las Vegas known as Benjamin Siegel or popularly known as “*Bugsy*” in June 1947 by unknown gunman.³⁷⁶ The State laws then contained no explicit provisions allowing the Tax Commission to consider the character of an applicant. The Tax Commission could pass regulations necessary to administer the gaming laws.³⁷⁷

The Attorney General Allan Bible opined that these provisions allowed the Tax Commission to adopt regulations requiring “inquiry into the antecedents, habits and character of applicants in order to satisfy the Commission that they will not violate the gambling laws... prohibiting thieving and cheating games...” he opined that the Tax Commission if it finds reasonable ground to apprehend that the grant of a license would be against the public interest, it was within the powers delegated to the Commission to refuse the license.³⁷⁸ The mandate of the Commission was to administer the law for the protection of the public interest and enact regulations necessary to carry out that goal.³⁷⁹ The Commission wasted little time in exercising

³⁷³ Supra note 349 at pg 2.

³⁷⁴ *Ibid.*

³⁷⁵ Supra note.

³⁷⁶ Supra note 317 at pg 11.

³⁷⁷ *Ibid.*

³⁷⁸ *Ibid.*

³⁷⁹ Supra at Pg 12.

its new-found authority by denying five license applications in January 1948.³⁸⁰ In testimony before the Kefauver Committee in 1950, both the Nevada's lieutenant governor and its tax Commissioner admitted that the state made little or no effort to screen applicants before 1949.³⁸¹

Generally the Board and the Commission considers whether an applicant has been convicted of a felony or misdemeanor involving violence, gambling, or moral turpitude, unexplained patterns of arrests which indicates a lack of due regard for the law, association with membership in organized crime, association with any unsuitable person, prior unsuitable gaming involvement, conduct constituting a threat to the state or its gaming industry, conduct tending to discredit the state or its gaming industry and failure of the applicant to prove his good character, honesty, and integrity.³⁸²

On the financial qualifications; an applicant's source of funds must be from a suitable source and adequate for the proposed operations.³⁸³ The applicant must satisfy the Commission that prior associations "do not pose a threat to the public interest of the State of Nevada or to the effective regulation and control of gaming, cause or enhance the danger of unsuitable, unfair or illegal practices in the State."³⁸⁴ On the business of running gaming establishments, an applicant is required to have the necessary business competence or have sufficient qualified personnel to operate the gaming establishment.³⁸⁵

The state further regulates the location of gaming premises. It considers locations that are unsuitable for gaming to include premises near a church, school, hospital, military base, or public playground and areas not zoned for gaming or where gaming is difficult to police. In some parts of the state it requires issuance of non-gaming license, of more than fifteen slot machines to resort hotels. The legislation defines a resort hotel as any facility held out as a hotel with more than two hundred guest rooms, a bar for more than thirty patrons, and a twenty four -hour

³⁸⁰ *Ibid.*

³⁸¹ *Supra* at Pg 13.

³⁸² *Supra* note 324 at Pg 101.

³⁸³ *Ibid* note 375 at pg 4.

³⁸⁴ *Ibid.*

³⁸⁵ *Supra* note 382 at Pg 101.

restaurant with at least sixty seats.³⁸⁶ An applicant of a casino license in Nevada must fill an application form identifying the applicant. The applicant must provide basic personal details such as marital history, identification of family members, educational background, criminal record, civil litigation, employment history, character references, and licensing history.³⁸⁷

An applicant is also required to fill a personal financial questionnaire, which is ten page documents which requires the applicant to disclose the amount and source of his investment in the operation, his most recent federal income tax filing, any bankruptcy disclosures, his salary and his financial statement, and supporting schedules. The applicant must also sign an affidavit affirming that he is fully disclosing all information requested and a release of the state of Nevada from its gaming authorities from all law suits or other claims arising out of the investigation, and a request to third parties to release any information requested by the gaming authorities. The applicant is also required to file figure print cards.³⁸⁸

After filing the application, but before the start of the investigation, an individual applicant must provide his birth certificate, savings passbooks, bank statements, cancelled checks, deposit slips, escrow documents for all real estate purchases and sales, and other records to substantiate or verify income for the past five to fifteen years. A business may be required to produce its ledgers, cash receipts and disbursements journals, minute books, stock certificate books, cancelled checks, accounts payable and receivable ledgers, payroll records, financial statements, loan agreements, loan notes, banking information, income tax returns, accountant work papers, and escrow documents. Generally, these documents are required for a five- year period.³⁸⁹

The applicant is also required to pay for each investigative agent's time at a rate of thirty dollars for each hour the agent is working on the investigation, as well as the agents travel expenses and any other expenses related to the investigation. Investigative fees must be paid in advance, based on the Board's projection.³⁹⁰ The investigations are conducted by the Board and generally consist

³⁸⁶ *Ibid.*

³⁸⁷ *Supra* note 382 at pg 102.

³⁸⁸ *Ibid.*

³⁸⁹ *Supra* note.

³⁹⁰ *Ibid* at Pg 101.

of interviews of the applicant, a review of his personal records, a check of his police records, a review of his civil and criminal records, interviews of his business and personal associates, and an examination of his methods of doing business. The background check also includes investigating the applicant's background, general reputation, and personal and business associates.³⁹¹ At the end of the investigation, the applicant is interviewed again to explain areas of concern. These areas of concern are included in a confidential report to the Board.³⁹²

Once the investigation is complete, the next step is the approval process. This is done through a Board hearing that is open to the public. The Board will recommend approval or denial of the application, make no recommendation, or refer the application back to the agents for further investigation. After the recommendation by the Board, the Commission will hear the application. The Commission has the final authority to approve or deny the license. If the Board recommends approval of the application, then a simple majority of the Commission is necessary for licensing. If the Board recommends denial, then unanimous Commission approval is required for licensing. A denial of a license by the Commission is final and there is no recourse to Courts.³⁹³ The licensing process in Nevada is one of the thorough aspects of Nevada's regulatory control. The objective was to keep the industry clean, even at a cost of excessive caution.³⁹⁴ This rigorous licensing procedure should be replicated in Kenya.

On casino accounting, licensees are required to keep accurate and permanent records of all transactions pertaining to taxable revenue and maintain statistical drop and win records for all casino games. These records must be maintained for five years and are required to provide them to the Board upon request.³⁹⁵ This is to ensure that casinos do not tamper with their winnings. The Board also requires casinos to record and report certain cash transactions. These requirements are set forth in the regulations. The States regulations prohibit a casino from exchanging cash with a patron in an amount greater than \$2,500. They cannot also issue a patron with a cheque for cash where the exchange is greater than \$ 2,500.³⁹⁶

³⁹¹ *Ibid* at Pg 103.

³⁹² *Ibid.*

³⁹³ *Supra* note.

³⁹⁴ *Supra* note 383 at pg 13.

³⁹⁵ *Supra* note 393 at Pg 104.

³⁹⁶ *Ibid.*

They are also required to report to the regulator redemption by the casino of more than \$10,000 worth of chips for cash, acceptance of a cash wager of more than \$10,000 in cash at any gaming activity at which chips are not customarily used. They are also required to report issuance of more than \$10,000 worth of chips to a patron for cash or receipt of more than \$10,000 in cash for safe keeping. And any redemption by a Casino of more than \$10,000 worth of another licensee's chips for cash, and payout by the Casino of a winning wager of more than the above amount with cash.³⁹⁷ They are also required to complete identification and record-keeping procedures, if a patron loses more than \$10,000 in cash at any game at which chips are customarily used for wagering. The casino then must make reasonable attempts to complete the identification and record keeping procedures. Casinos are also required to maintain cash transaction logs in the casino.³⁹⁸

The Nevada regulatory regime lays great emphasis on casino internal controls. Much of casino regulation in Nevada is concentrated on the day-to-day operations of casinos. Typically, each casino is required to adopt and adhere to a comprehensive set of state-designated procedures, commonly termed the "Minimum Internal Control Standards" (MICS). These MICS focus on the range of gambling-related activity, including the conduct of games, the movement and handling of cash and cash equivalents, and the accounting and record trail of all transactions. State regulators often rely upon the casinos to maintain logs that document irregularities and to "self-report" violations.³⁹⁹

This is the reason why an applicant of a casino license must also file a proposed internal control system, first -year cash flow projections, a statement of pre-opening cash, a pro forma balance sheet, a proposed surveillance system, a statement showing compliance with minimum bankroll requirements, and a contract, satisfactory to the Commission, assuring payment of all fees and taxes owed by the present operator of the casino.⁴⁰⁰ These internal controls are crucial in

³⁹⁷ Supra note.

³⁹⁸ *Ibid* at Pg 105.

³⁹⁹ Michael A. Belletire, *Regulating Casinos Gaming: A View from State Regulators*, document prepared for NGISC, found at <http://govinfo.library.unt.edu/ngisc/reports/3.pdf> (Accessed on 21st February 2011) at pg 1.

⁴⁰⁰ Supra note 105 at Pg 102.

determining the amount of taxes to be paid by a licensee. They also protect a licensee from mischievous activities of employees against the casinos. The state requires that each licensee follow written internal control procedures. These procedures are filed with the regulator during the license application stage.

These procedures are both administrative and accounting and are utilized to ensure accurate determination of the licensee's liability for taxes and fees, and to maintain effective control of the licensee's internal fiscal affairs.⁴⁰¹ The licensees must submit to the Board, and comply with a written internal control system that meets the minimum standards adopted by the Board. These standards apply to ten principal areas of casino operations: table games, slots, bingo, manual and computerized keno, manual and computerized race books and sports pools, card games cage and credit, entertainment, internal audit, and currency transaction reporting.⁴⁰²

The minimum standards are designed to specifically ensure casino assets are safeguarded, records are accurate, reliable, and transactions are performed only in accordance with management's general or specific authorization. They also ensure fees, taxes, and revenues are properly reported and access to assets is permitted only in accordance with management's specific authorization. For accountability purposes; the recorded assets are compared with actual assets at reasonable intervals. They further ensure functions, duties, and responsibilities are appropriately segregated and performed by competent and qualified personnel. Casinos are also required to submit annual audited reports by independent auditors annually. Each report submitted must detail the licensee's compliance with its internal control system.⁴⁰³

However, each licensee may be audited, reviewed, or investigated by the Board at any time. The Board also conducts periodic audits or reviews, and initiates surprise audits or reviews only in response to specific complaints.⁴⁰⁴ The Board's audit procedures may include reviews of

⁴⁰¹ *Ibid.*

⁴⁰² *Supra* note.

⁴⁰³ *Ibid.*

⁴⁰⁴ *Supra* at Pg 105.

accounting procedures, count procedures, cash, chip, token and credit instrument transaction procedures, statutory and regulatory compliance, and accounting and bookkeeping records.⁴⁰⁵

On gaming equipments, devices in gaming are appropriately segregated into the categories of associated equipment and gaming devices. A casino must receive the permission of the chairman of the Board before issuing chips or tokens. Chips and tokens must meet shape, thickness, and diameter specifications. They must bear the name and location of the casino, the name of the manufacturer, and their value (except roulette chips which do not need to have the denomination). Metal tokens are required to be in dollar denomination or greater and have a specified number of reeds or serrations, and not have metallic properties that allow them to be accepted by coin-operated machines other than slot machines. Chips and tokens cannot be used for any purpose other than gaming and a casino cannot use the chips or tokens of another casino.

There are also specified procedures for the discontinuation and redemption of chips and tokens and if a casino discontinues the use of chips or tokens, it must honor them for at least 120 days thereafter, during which time notice of the discontinuation must be given to the public.⁴⁰⁶ This is not practiced in Kenya. Once a casino closes down in Kenya, there are no mechanisms by the Board to ensure casino customers redeem any chips or tokens in their possession obtained prior to the closure of the house. There are no specifications for dice and cards in Nevada.⁴⁰⁷

On hours of operation, there are no restrictions on the number of hours a gaming establishment may remain open and most casinos are open 24 hours a day. The Board also requires approval of surveillance system to be used in a newly opened casino. On advertising, the Nevada gaming licensees must conduct advertising and public relations activities in a decent and inoffensive manner.⁴⁰⁸ On gaming with young persons, only persons of above the age of 21 years of age or older are allowed to play any licensed game or slot machine, or loiter in any casino.⁴⁰⁹

⁴⁰⁵ *Ibid* at Pg 106.

⁴⁰⁶ *Supra* note at Pg 107.

⁴⁰⁷ *Ibid* at Pg 108.

⁴⁰⁸ *Ibid*.

⁴⁰⁹ *Supra* note.

On mandatory exclusions, a licensed gaming establishment must deny entry to any person included in Nevada's list of excluded persons. This list is compiled by the Commission, and distributed to all casino licensees. This list contains names of persons associated with criminal activities. A licensee may not serve liquor to visibly intoxicated persons, or allow such persons to participate in any gaming activity. A licensee may also not serve or associate with persons of notorious or unsavory reputation.⁴¹⁰ Officers, directors or key employees are prohibited from gambling in their casinos or any other casino under common ownership except poker games. Casinos are also allowed to exclude card counters, suspected cheaters, unruly patrons, and suspected members of organized crime. These exclusions must not violate civil rights.⁴¹¹

Gaming contracts are enforceable in Nevada and extension of credit by a Nevada casino for purposes of gaming is strictly regulated. However, the regulations that govern the extension of credit do not affect the legal enforceability of a credit instrument. Before accepting a personal check, the casino must examine and record the patron's driver's license or other documentation normally accepted as a means of identification in cashing checks. A casino must not issue credit to a person to enable that person pay a debt owed to another person or licensee. Additionally, a casino must comply with its system of internal control governing the extension of credit.⁴¹² If a casino settles any debt for any other reason, it is required to pay taxes as if it collected the full amount of the debt.⁴¹³

The Board is responsible for resolving disputes initiated by a patrons claim to unpaid winnings. If a player claims unpaid winnings of less than \$500 or more, the casino must immediately notify the Board. On engaging in gaming in another jurisdiction, a licensee of the State must obtain the necessary approval of the Commission.⁴¹⁴ There are four types of foreign gaming approval: regular, expedited, preliminary, and continuous. In assessing an application for regular approval, the regulators consider whether the foreign operation endangers Nevada's right to collect fees

⁴¹⁰ *Ibid.*

⁴¹¹ *Supra* at Pg 109.

⁴¹² *Ibid.*

⁴¹³ *Ibid* at Pg 110.

⁴¹⁴ *Supra* note.

and taxes from the Nevada Operations.⁴¹⁵ In particular, the regulators look for assurance that the Nevada operator will not remove monies earned (and taxable) in Nevada to support an enterprise beyond Nevada's reach. They also consider whether conditions that may be placed on the approval can be met; whether a system for the exchange of information between the two gaming jurisdictions is adequate; and whether any associations by the Nevada operator in the foreign jurisdiction will threaten the interests in Nevada and the regulation of the gaming industry.⁴¹⁶

A continuous approval is available to a Nevada operator who is interested in foreign gaming, but who has not identified a specific jurisdiction. This approval allows the operator to engage in foreign gaming without having to seek specific approval for every new venture. On this approval, the Board and the Commission consider several factors in deciding whether to grant continuous approval. The most significant factors are the regulatory and business history of all licensees and the accessibility of the Nevada gaming authorities to information about any past, present, or future foreign gaming endeavors. It is because of this broad nature of the approval, that regulators grant it with the greatest caution.⁴¹⁷

The preliminary approval to engage in foreign gaming is available to a licensee who has identified a foreign jurisdiction where it intends to engage in gaming.⁴¹⁸ This approval is similar to the continuous approval. However, the licensee must advise the Board promptly of each material step concerning a specific transaction leading up to the execution of a definitive agreement to engage in foreign gaming. Expedited approval to engage in foreign gaming is available to a licensee who has identified an opportunity outside Nevada, and needs immediate approval. However, the applicant must deposit an investigative fee of \$ 10,000 with the application.⁴¹⁹

On the disciplining of its licensees, the Commission has full and absolute power to revoke, suspend, limit, or condition any gaming license, and to fine any gaming licensee for any cause

⁴¹⁵ *Ibid.*

⁴¹⁶ *Ibid.*

⁴¹⁷ *Supra* note at Pg 110.

⁴¹⁸ *Ibid* at Pg 111.

⁴¹⁹ *Ibid.*

deemed reasonable. During any proceedings for disciplinary action, the Board acts as prosecutor, and the Commission acts as judge and jury. If the Commission determines that a licensee has violated a statute or regulation, then it may impose a penalty of up to \$10,000 per violation and may suspend, revoke, limit, or condition the license. A licensee may seek judicial review in State Court for any penalty imposed by the Commission.⁴²⁰

In conclusion, due to its history with organized crime, the regulation of Casinos in Nevada covers entirely all aspects of running a business. The regulator requires its licensees to report their source of funds, loans, mortgages to ensure casinos are not funded by criminals and much more. The overall regulatory regime is geared towards protecting the image of the States gaming industry. This is evident from the many prohibitions and declarations. This study views these prohibitions and declarations as critical to development of the gaming industry in Kenya. Even though the Nevada regulatory regime is expected to have matured, it continues to evolve to regulate new gaming challenges and trends not envisaged in the past. The review of this regulatory regime is dynamic unlike in Kenya.

The Nevada regulatory regime covers all players involved in the industry from operators, their employee, labour officials amongst others. It also covers almost all operations in the casinos from the standards of a roulette table, the casino chips, opening of casino games, closing of table games and table assessment. Even though this might seem cumbersome, it has served the State well. Any transplantation of these seemingly cumbersome procedures must be selected to suit the local cultures and level of business. The regulatory regime oversees activities of its gaming corporations in Nevada and elsewhere. The corporations are required to file the necessary filings and seek approval to raise funds through public offering and operate in foreign gaming jurisdictions such as Macau amongst others.

The regime also considers a wide list of what it considers to constitute unsavory character for its applicants. It also looks at the source and adequacy of the applicant's finances and location of gaming establishments. For success of any gaming industry, a regulatory regime must be broad and thorough from the initial stages of application for the licenses as set out by the process in

⁴²⁰ *Ibid.*

Nevada. This meticulousness will reduce future regulatory costs and Court cases and losses to the industry if a casino operator is found to be an unfit to hold a gaming license. Even though the regulation is on two tiers, the Board and the Commission, it seems that the regulatory regime is highly connected and effective unlike the South African model, which is highly challenged. This regulatory regime is comprehensive and should guide any gaming reforms in Kenya and elsewhere.

4.3: REGULATION OF CASINOS IN SOUTH AFRICA

Prior to the establishment of full democracy, the government of the Union of South Africa had a firm ban on casino gambling.⁴²¹ Gambling was restricted in South Africa as early as 1673. The gambling Act of 1965 officially banned all forms of gambling except on horseracing. Gambling was legalized in the former Transkei, Bophuthatswana, Venda, and Ciskei (TBVC). By the late 1970s, Casinos had already started operating in Bantustans of Bophuthatswana, Ciskei, Transkei and Venda.⁴²² With the famous Sun City Resort, being operated in the Bophuthatswana by Sun International a Company that now owns casinos in New Jersey and in the Caribbean.

The prohibition of gambling was ineffective with an estimated 2000 Casino's operating illegally in South Africa by 1995. Some scholars have argued that illegal gambling was tacitly supported by mining Companies in order to keep black African workers locked in poverty and available as a cheap source of labour.⁴²³ In October 1994, the Lotteries and Gambling Board, published an interim report chaired by Prof NE Wiehahn which expressed a view that "the Gambling Act, 1965 (Act No. 51 of 1965) no longer reflected the true moral view point of the majority of South Africans and that the government should legalise lotteries and gambling in the Republic of South Africa."⁴²⁴

⁴²¹ William Thompson, *Gambling in America: An Encyclopedia of History Issues and Society*, 2001 at pg2.

⁴²² Preliminary Report of the Portfolio Committee on Trade and Industry on Review of the National Gambling Legislated on 11th March 2010, Available at http://www.pmg.org.Za/docs/2010/comreports/100331_pctradereport1.html (Accessed on 8th November 2010).

⁴²³ Sallaz, (2001) J.J ,*Gambling With Development: Casino Capitalism In South Africa and on Indian Lands in California*, working Paper No. 17, University of California Berkeley, Available at <http://www.iir.berkeley.edu/culture/conference/sallaz.pdf> (Accessed on 9th November 2010).

⁴²⁴ *Ibid* note 421.

The final Wiehahn Report on Gambling (1995) recommended that all forms of gambling be regulated. In 1996, the Wiehahn Report informed the National Gambling Act (Act No. 33 of 1996). The Act created the National Gambling Board which was empowered to draw up rules for the creation of forty new casinos.⁴²⁵ The Board was not established as a regulatory body, but rather a body to provide policy advice and to promote uniformity among provincial gambling regulators who had the responsibility for licensing and regulating gambling activities in their respective provinces. However, by then, the provincial lawmakers viewed casino taxation as one of the new forms of independent revenue generation available to them. For instance, in 2009, the gaming industry in South Africa generated R. 1.5 billion in tax revenues for provincial governments and it is the second highest generator of “*own revenues*” for provincial governments.⁴²⁶ The Licensing of the Casinos in South Africa began in 1999.

The first review of gambling policy and legislation occurred in 2002. This review was propelled by three matters namely, the ongoing disputes and contestation between Provincial gambling regulatory authorities (PGRA’s) and the National Gambling Board (NGB), the rising concerns about the potentially negative socio-economic impact of gambling, and thirdly to deal with forms of gambling that had not been dealt with or anticipated in the National Gambling Act; 1996 in particular Interactive gambling and horse racing.⁴²⁷ This resulted into series of amendments. The amendments resulted into a substantial policy review and a new piece of legislation, the National Gambling Act (No. 7 of 2004).⁴²⁸ This legislation repealed the National Gambling Act (Act No. 33 of 1996) which recognized the concurrent powers of the National and Provincial governments.⁴²⁹ The legislation sought to clarify and review the respective roles of the National Gambling Board and the provincial gambling Boards. It also sought to institutionalize co-operative governance in a statutory body called the National Policy Council (“Policy Council”).⁴³⁰

⁴²⁵ Supra at Pg 2.

⁴²⁶ *Ibid* at pg 9.

⁴²⁷ Supra.

⁴²⁸ *Ibid*.

⁴²⁹ *Ibid*, at Pg 4.

⁴³⁰ Supra note.

The role of the NGB was changed from being purely advisory to having an oversight function as well. The legislation further introduced new regulatory measures to mitigate the potential social harm of gambling.⁴³¹ Its other objectives are to regulate various forms of gambling activities through protecting the public against the adverse effects of gambling, limiting, control and monitoring possible proliferation of gambling and illicit gambling activities; enforcing responsible gambling operations by requiring operators to contribute to social development initiatives such as the Small Medium and Micro Enterprises development (SMME) and facilitate empowerment of Historically Disadvantaged Individuals (HDI's) and Broad-Based Black Economic Empowerment (BBBEE); and contribute to infrastructure development in rural communities.⁴³² The Act also provided uniform norms and standards applicable in South Africa and also established institutions responsible for coordinating and administering national gambling policy.⁴³³

For the purpose of this study, Casinos in South Africa are regulated by a two tier system, at the provincial level which is equivalent to Counties in Kenyan by the provincial gaming board's and at the National level by the National Gambling Board. Gambling in South Africa currently is regulated by eleven pieces of legislation. The regulatory framework is shaped by the fact that, other than lotteries and sports pools gambling is an area of concurrent legislative competence between National and Provincial governments.⁴³⁴ A review of the objectives of several provincial gaming legislations indicates their objectives are varied.

A review of the Western Cape Gambling and Racing Board which is one of the PGRA's established in 1997 by the Western Cape Gambling and Racing Act, No. 4 of 1996, its primary goal is to regulate gambling and racing activities in the province. The objective of the legislation as set out in its preamble are to provide for the establishment of a gambling and racing Board, provide for the licensing of persons engaged in gambling, manufacturing, sale of gambling machines, devices and to provide for the restriction, regulation and control of gambling. It is also

⁴³¹ *Ibid* at Pg 9.

⁴³² *Ibid*, at Pg 1.

⁴³³ *Supra* at Pg 4.

⁴³⁴ *Ibid* at Pg 13.

to provide for taxes on gambling and fees for applications and investigations, to repeal the horse racing and betting Ordinance, 1968 and finally to provide for matters incidental thereto.⁴³⁵

The preamble informs the policy decisions of the province. It concisely recognizes that gambling and racing can contribute to the economy of the province. However, it is dependent on public confidence and trust. It further recognizes that gambling and racing must be conducted honestly, competitively and free from criminal and corruptive elements. It also recognizes that public confidence, trust, health, safety, general welfare and good order of the inhabitants of the province are dependent upon the strict regulation of all persons, premises, practices, associations and activities relating to gambling and racing. It further acknowledges opportunities for gambling and racing entail particular risks and dangers to the inhabitants of the province which justifies the imposition of appropriate restrictions, regulations and controls. Finally it reiterates that no applicant for a license or for an approval in respect of gambling or racing has any right to a license or approval.⁴³⁶

Under Section 2 of the Act the Board is granted the exclusive right to carry out any gambling activities whether directly or indirectly within the province. The main object of the Board is to control all forms of gambling in the province subject to its operative legislation and any policy determinations of the executive control relating to the size, nature and implementation of the industry.⁴³⁷ The Board's other functions include inviting applications for licenses.

The licenses which the Board can invite applications for are listed as casino operator licenses, limited gambling machine operator licenses, limited gambling machine premises licenses, bingo licenses, junket agent licenses, manufacture licenses, totalisator operator licenses, and employee licenses amongst others.⁴³⁸ The Board may also issue national licenses as contemplated in the National Act. However, the provisions of the Provincial legislation shall apply in respect of any national license issued in terms of the National Act. The Act further states that, the holder of a

⁴³⁵ Western Cape Gambling and Racing Act, 1996 (Act No. 4 of 1996), Available at <http://www.wcgr.co.za/images/stories/wcgrb> (Accessed on 6th February 2011).

⁴³⁶ *Ibid.*

⁴³⁷ *Supra* Sec. 2 of the Act.

⁴³⁸ *Ibid.*

national license shall be entitled to conduct the activities authorized thereby in the province, as if such license had been issued in terms of the Act. The Board is granted powers by of its operative Act to levy an exclusivity fee to operate a casino by a successful applicant within an area for a period determined if it so requested prior to granting of such license.⁴³⁹

A similar examination of the North West Gambling Board reveals similar but expanded objectives of the Provincial Gaming Board. The operative legislation regulating gambling in North West Province is the North West Gambling Act of 2005. This was preceded by Provinces Act No. 2 of 2001 whose objectives were to provide for the regulation of gambling activities in the province, establish a Board to control and manage these activities, to set out the powers and functions of the Board and to repeal certain legislation pertaining to gambling and to provide for matters incidental thereto.⁴⁴⁰ In 2005, the provincial legislature made amendments to the 2001 Act to provide for certain powers of the Board, to the preamble.

This amendment increased the objectives of the legislation to include prohibition of possession of gambling machines without a license, to provide for payment of levies, taxes and license fees, to provide for application for consent for acquisition of financial interest in licenses and to provide for imposition of certain conditions relating to Black Economic Empowerment by licensees and to provide for matters incidental thereto.⁴⁴¹ The powers of the Board are to oversee gambling activities in the province and exercise such powers and perform such functions and duties as may be assigned to the Board in terms of the Act or any other law and in particular, invite applications for licenses in terms of the Act, grant, renew, amend, refuse, suspend or revoke licenses, impose conditions in respect of any license or revoke licenses among others functions.⁴⁴²

From the review of the above provincial gaming legislations, it is evident that some of their legislative objectives differ. However their obvious objective which cuts across these legislations

⁴³⁹ *Ibid.*

⁴⁴⁰ The North West Gambling Act, 2001. Available at http://www.nwlaw.co.za/images/provincial_acts, (Accessed on 7th February 2012).

⁴⁴¹ *Ibid.*

⁴⁴² Supra note.

is revenue generation. It is also evident that managing the nine different gaming legislations by the National Gaming Board is not easy. This poses a challenge to the overall regulation of the gaming industry in that country. These challenges led to the need to determine the effectiveness of the current gambling legislation within a casino environment in South Africa. Even though Casinos in South Africa are well run and comparable to others in the leading gaming jurisdictions;⁴⁴³ some of the challenges voiced by the operators included onerous compliance costs on national industry players, due to differing compliance standards between provincial gambling Boards and between National and Provincial Boards. There was also a challenge on municipalities and provincial gambling Boards to process the relevant license applications in a timely manner.⁴⁴⁴

Thirdly, not all forms of gambling received similar levels of regulation and these differences in legislative requirements lead to lost opportunities and unfair competition between different forms of gambling. Manufacturers of gaming machines raised concerns about being over legislated in terms of the Financial Intelligence Centre Act, the certification and distribution of gaming machines and devices. The Financial Intelligence Centre in South Africa is a statutory body established to identify the proceeds of crime and to combat money laundering and terror financing.⁴⁴⁵ On the regulation of gambling by the national gambling, the National Gambling Board in its submission to the 2009 Committee on Trade and Industry on Review of the National Gambling Legislation, focused on legislative impediment it was facing in executing their legislative mandate. Gambling being the concurrent legislative competency between the National and the Provincial governments, it resulted in lack of uniformity in regulating gambling activities and procedures. The unilateral amendments of the provincial gaming legislations is said to have created conflicts with the National Gambling Legislation.⁴⁴⁶

The objectives of the National Gambling Act 2004 are to provide for the co-ordination of the concurrent national and provincial legislative competence over matters relating to casinos, gambling and wagering and to provide for the continued regulation of these matters. It also has

⁴⁴³ Supra note 434 at Pg 10.

⁴⁴⁴ *Ibid.*

⁴⁴⁵ *Ibid* at pg 4.

⁴⁴⁶ *Ibid.*

the mandate to establish certain uniform norms and standards applicable to the national and the provincial regulation. It is also required to license certain gambling activities, retain the National Gambling Board and establish the National Gambling Policy Council amongst other incidental matters.⁴⁴⁷ The Act coordinates the concurrent regulation of casinos, racing, gambling and wagering as set out in the 4th Schedule of the Constitution of South Africa (Act No. 4 of 1996) as matters of concurrent national and provincial legislative competence.⁴⁴⁸ This schedule is the replica of the fourth schedule of the Constitution of Kenya 2010.

This concurrent jurisdiction which is envisaged in the Constitution of Kenya 2010 has raised a number of challenges for the regulatory framework in South Africa. Some of the regulatory changes being experienced in South Africa include the effective resolution of disputes between provincial and the National Gambling Board (NGB) and provinces, the effective implementation of co-operative governance requiring a co-operative and consultative approach to policy – making and a relationship between all parties that is based on mutual respect and trust and ensuring consistency and uniformity in regulation through the development and consistent implementation of national norms and standards.⁴⁴⁹

On co-operative governance, the National gambling Policy Council which is the statutory body established in terms of the National Gambling Act, is charged with providing consultation between the National and Provincial governments on matters of national gambling policy, the promotion of uniform national and provincial levels, norms and standards.⁴⁵⁰ It is also mandated to deal with the management or monitoring of gambling and to deal with the resolution of disputes that may arise between the provincial gambling regulations.⁴⁵¹ The Policy Council has not been effective in settling disputes or in reaching agreement on policy matters, especially where there is a conflict of objectives, usually between national and provincial government. It has been recommended that the structure and working of the Policy Council be reviewed.⁴⁵²

⁴⁴⁷ The National Gambling Act 2004.

⁴⁴⁸ *Ibid.*

⁴⁴⁹ *Ibid* note 426 at pg 13.

⁴⁵⁰ *Supra* at pg 14.

⁴⁵¹ *Ibid* at pg 10.

⁴⁵² *Ibid* at pg 14.

As earlier stated, the regulatory framework in South Africa consists of nine provincial gaming regulators and two national regulators, for gaming and lotteries. The National Gaming Board is responsible for investigation and issuance of national gaming licenses by the provincial Boards. It also monitors compliance with the National Gambling Act, 2004 and has the responsibility to establish and maintain a number of registers and a national central monitoring system. It is also responsible for monitoring the socio-economic impact and the causes of problem gambling, advice the national gambling policy council on norms and Standards, as well as monitor competition in the industry.⁴⁵³

It is reported that the National Gambling Board has struggled to fulfill key areas of its mandate, such as exercising oversight over provincial regulators and the establishment of registers. This is attributed largely to fact that the organization depends on co-operation and support of provincial gaming board's which is often not forthcoming. The provincial regulators tend to default to provincial legislation, where there is a difference between the national norm or standard and the provincial law. This undermines efforts to achieve uniformity. The report by the Department of Trade recommends that other ways of ensuring accountability of provinces and promotion of uniformity must be found.⁴⁵⁴ Kenya by inheriting a similar regulatory framework might find itself in the same dilemma.

There is also lack of uniformity in the application of the licensing criteria and compliance with the norms and standards set out in the National Gambling Act, 2004. Since each province has its own gambling regulatory authority responsible for issuing both the national and provincial licenses, there appears to be a challenge of monitoring compliance to the national legislation by the provincial boards.⁴⁵⁵ It is also evident that one area of distinct weakness in the current regulatory framework is the ability to ensure proper uniformity, consistency, and accountability between the two levels.⁴⁵⁶ It is also evident that the provincial and the national laws are sometimes not harmonized. This has resulted into lack of uniformity in the legal framework. These inconsistencies impact negatively on the industry and create weak spots which are likely

⁴⁵³ *Supra* note.

⁴⁵⁴ *Ibid.*

⁴⁵⁵ *Ibid.*

⁴⁵⁶ *Supra* note at Pg 16.

to be exploited by unscrupulous operators. The current mechanisms have not been successful, despite the efforts by the National Gambling Board to rectify the situation. There appears to be lack of accountability by the provincial regulators in terms of the overall policy. This has led to fragmentation of the gambling policy because policy decisions are not made with sufficient speed and when made are disregarded with no effective sanctions.⁴⁵⁷ This should be avoided in the Kenya's new regulatory regime.

The other concern with the current framework in South Africa is the conflict between the objectives of regulating gaming in the two levels of governance. The provincial governments and their regulators seem to be largely driven by revenue generation, while the National government is concerned with setting standards, controlling accessibility of gambling services and monitoring the social impact of gaming. It has been suggested that to rectify this problem, a balance between these objectives must be struck in the national policy framework with participation of all regulators in the formulation process but with accountability in terms of those policy objectives.⁴⁵⁸

CONCLUSION

For Kenya to fully achieve the objectives of legislating gambling, it must evaluate how the gaming industry should be regulated. From the foregoing, it is evident that there are flaws in the current regulatory regime governing the entire gaming industry in South Africa. There are flaws in the legislations and lack of sufficient sanctions to regulate not only the industry but also the regulators. It is also evident that different provinces are regulating gaming for different reasons even though the overriding objective is revenue generation. It is also evident that the provincial gaming boards are in competition for these revenues without considering the implications of their policies to the overall regulatory framework. The disparity of the objectives is not explained. However, this study opines that the objectives of regulating gambling in the provinces or in the Kenyan case in the Counties should be uniform. The objectives of the national regulator

⁴⁵⁷ *Ibid* at Pg 14.

⁴⁵⁸ *Supra* note.

should be of a national character and should be guided by policy principles of each gaming jurisdiction.

It seems also that the drafters of the Constitution of Kenya, 2010 borrowed the new regulatory regime from South Africa without assessing its practicability in Kenya. The government in implementing the new regime should come up with a framework different from the current South African model. The Kenyan model should give the national gaming regulator more powers than any County regulator or retain with certain modifications the current framework after its reform. Finally, it seems there are more challenges facing the South African regulatory regime than this study was able to establish.

With the increasing demand for expansion of casino gambling outside the current locations, the legal framework to operationalise the provisions of Article 186 of the Constitution of Kenya 2010, and specifically the demands of function 34 of part 1 of the Forth Schedule of the Constitution, this must be designed in a manner that would reduce the expected proliferation, competition and reliance of gaming revenues by County governments. This would reduce the regulatory competition and other shortcomings exhibited in South Africa. However, despite the above challenges, the individual casino regulation in the provinces is comparable to the leading gaming jurisdictions with some of the casinos being operated by international gaming enterprises such as the Sun International which operates the famous Sun City Casino.

CHAPTER FIVE

5.0: CONCLUSIONS AND RECOMENDATIONS

5.1: CONCLUSIONS

This study posits that the gaming regulatory regime in Kenya is inadequate and needs immediate review. It has also established that in the last two decades, the casino industry has not only grown exponentially in Kenya but also in other parts of the world. In Kenya, the number of Casinos rose from one in 1969 to over forty in 2013. With this expansion, a concern has been raised on whether the current gaming regulatory laws and systems are adequate to regulate the industry so as to enable governments to reap substantial economic benefits from the industry while protecting the vulnerable from the negative effects attached to the industry. During the period of expansion which affected the local regulation of the industry, the study has established that Kenya remained dormant when other gaming jurisdictions were reviewing their gaming legislations. For instance in the United Kingdom where Kenya borrowed its legislation at inception, its gaming laws were reviewed severally, in 1968, 1975 and overhauled in 2005. The study has established other gaming jurisdictions constantly review their gaming legislations to address any emerging regulatory threats to their industries.

The study further concludes that the Constitution of Kenya 2010 poses a challenge on how to regulate Casinos in a concurrent regulatory arrangement. The new regulatory framework proposed by this study should keenly address the new Constitutional provisions which assign the regulation of gaming to both the National and the County governments. This would avoid further proliferation of the industry without addressing its externalities. The study has confirmed that this new regime is similar to the South African system which places the regulation of gaming into the concurrent jurisdiction of both the National and the Provincial governments. Further it has also established that this regulatory model has some inherent challenges which have posed great challenges to the regulation of gaming in South Africa. Further the study concludes that the framers of the Kenyan Constitution 2010 borrowed this model without addressing its attendant

challenges. This study predicts that if this regulatory model is implemented without addressing its inherent challenges, it will pose serious regulatory concerns in Kenya.

The study also established that the current Kenyan gaming regime was set up in the early 1960's to address the increasing demand of gaming when the Country did not have any Casino. It is clear that for Kenya to gain any substantial benefits from this industry, the same must be aggressively regulated. The study has also confirmed that the current gaming regime on gaming machines is not adequate because there are no minimum standards for manufacture, sale, use, supply, movement of gaming equipments and devices. It also confirmed that the existing Casino licensing processes are inadequate, internal control mechanisms wanting, the capacity of the board to regulate emerging gaming technologies was inadequate and public protection mechanisms against gaming were weak.

This calls for immediate reform, improvement and enhancement through legislation. The inadequacy of the current licensing procedures has exposed the industry to ownership and control to persons of questionable character, money- laundering and proliferation of day trip Casinos whose contribution to the generation of revenue does not reflect the number of the establishments. These establishments promote gambling addiction to the local populations unlike destination resort casinos which rely on foreign players. The study concludes that for the Country to increase its economic benefits from these gaming establishments, the new regulatory regime should consider adopting the above model through legislation.

This study further concludes that since the social and legal attitudes towards gaming keep on changing, the regulatory regime in Kenya should reflect this trend. This trend has been reflected in other gaming jurisdictions which in the past have conducted studies to review the status and efficacy of their gaming laws and the prevailing public policy views on the industry. For instance in 2006, Singapore a Country where chewing gum is prohibited, legalized Casino gaming and granted two casino licenses to two international gaming companies to operate Casinos in that Country. In other jurisdictions such as Russia, the government after realizing that it was unable to effectively regulate the industry; it reviewed its gaming law which prohibited casino gaming in major towns and gave operators a grace period of three years from 2006 to close down their

operations and move them to four special designated zones. This was to enable the government regulate the industry aggressively.

In conclusion, the study confirms that the regulation of gaming in Kenya is governed by the Constitution, the Betting, Lotteries and Gaming Act Chapter 131, the Proceeds of Crime and Anti-Money Laundering Act No.9 of 2009, the Standards Act Chapter 496 and by extension the Contract Act Chapter 23 Laws of Kenya. It has also noted that the Common law principle of unenforceability of gaming contracts should be reviewed to treat Casinos like any other business. It has also indicated that inadequate regulation of casino gaming can offer opportunities for unauthorized handling of gaming devices, money-laundering, infiltration of the industry by criminal elements, manipulation of a regulatory system by licensees to their advantage and propelling problem gambling. These and other inadequacies affect the revenue benefits to the government. The infiltration of criminal gangs can only be eliminated at the licensing process which is the bedrock of gaming regulation. If the process is flawed it can lead to a regulatory failure.

In instances where a regulatory regime is crippled, challenged, and seemingly controlled by players in the industry, the negative social cost of legalizing the industry is higher than the economic benefits. The beneficiaries of such a regime will be the gaming operators. The study further concludes there is need to ensure gaming regulators in whatever jurisdiction are fully independent from their licensees and insulated from political interference. Finally, this study concludes that the current gaming regulatory regime in Kenya is wanting and it needs urgent review to align it to the international best practices and to the demands of the Constitution of Kenya 2010.

5.2: RECOMMENDATIONS

In light of the above conclusion, this study recommends the following legislative reforms to the regulatory framework:

(a). Licensing

Since licensing of Casinos is the backbone of any successful gaming regulatory regime, this study recommends that the regime be overhauled. The proposed licensing framework must come up with an aggressive mechanism of vetting and licensing of Casino operators and their key employees. The licensing process must be opened to ensure public participation and scrutiny while the issuance of licenses must be done through a bidding process when gaming licenses are made available. The process of granting licenses should be supported by economic facts and must be based on the level of investment and the economic benefits an operator would be willing to invest amongst other pre-qualification conditions. This process would ensure only able investors are issued with these licenses. Further this would avoid possible conflicts of interest amongst other corporate governance issues. The process must also ensure criminals are not licensed to operate casinos or benefit from their operations. In addition, measures must be put in place to reduce the excessive demand for gaming licenses to reduce speculation. The amount of licensing fees should be enhanced or reviewed.

(b). Technology

Since casino gaming is driven by technology; this study recommends that the new regime must embrace and provide for the licensing and regulation of new forms of gaming which were not anticipated by the current legislation. These technology driven forms of gaming includes online gaming.

(c). Money Laundering

Since gaming offers safe opportunities for money laundering and other criminal activities due to large sums of cash handled on the casino floors, this study recommends that the provisions of the Proceeds of Crime and Anti-Money Laundering Act No.9 of 2009 and other applicable laws must inform any Casino regulation. The provisions must be incorporated in the new licensing regime to ensure the industry does not become a source of crime and disorder. This will ensure

criminals and allied operators do not own or gain from Casino gaming by abolishing proxy licensing. The compliance demands in regulation must of necessity, demand strict scrutiny and due diligence on all licensees. This study further recommends that gaming operators must ensure they apply the ‘*Know Your Customer*’ principle used in the financial sector to ensure all persons engaged in gambling are known and at least the sources of their gambling funds are identified. The application of this principle must involve the police and other state agencies. Further, this study recommends that shell Casinos or Casinos which do not reflect any business on their floors to warrant licensing should be closed down or investigated because they can be used for money-laundering and other criminal activities.

(d). Supply of gaming services

Since the study has established that the demand to operate casinos is unsatisfiable, the demand for Casino licenses must be curtailed by capping the number of Casinos the Country is able to economically sustain. For instance section 41(1) the Singapore Casino Control Act Chapter 33A (2007) limits the number of casinos in that country to two. The section provides that “the Authority (regulator) shall, during the period of 10 years commencing from the date on which a second site for a casino is designated by an order made under section 2(2), ensure that there are not more than 2 casino licenses in force under this Act at any time.”⁴⁵⁹

Similarly section 45 of the South African National Gaming Act 2004, authorizes the Minister to prescribe the maximum number of casino licenses which may be granted in that country. The number is currently divided amongst the provinces and it is capped at forty casinos.⁴⁶⁰ Section 45 of the Act provides that the Minister “may prescribe a maximum number of licenses that may be granted in the Republic, and in each province.”⁴⁶¹ Similar provisions of the law are recommended in the proposed framework to guard against the proliferation of casinos. As demonstrated in the study, Kenya currently has forty casinos in operation which have no correlation between the number and the revenue generated from the industry. The high number

⁴⁵⁹ See section 41(1) of the Casino Control Act Chapter 33A (2007) Laws of Singapore.

⁴⁶⁰ See Gazette No. 350 of 27th February 2006 which prescribed the maximum numbers of casino licenses as required by section 45(1) of the National Gambling Act 2004.

⁴⁶¹ See section 45 of the South African National Gambling Act 2004.

of casinos in this country has been previously questioned as indicated in the study but worse is expected to happen with devolution. It is expected that each county will license its own casinos once the function under the Fourth Schedule of the constitution is devolved.

(e). Proliferation harmonization and of gaming laws

Since county governments are mandated by the Article 185(2) of the Constitution of Kenya to make any laws that are necessary for, or incidental to the effective performance of functions and exercise of the powers of the county governments under the Fourth Schedule, it is expected that counties which would want to regulate casinos and other forms of gambling would pass such laws in order to satisfy the criteria set out by section 24 of the Transition to Devolved Government Act No.1 of 2012 Laws of Kenya. Generally, if all the counties apply for this function within the next three years, Kenya would have at least forty seven gaming laws. At the moment this study is unable to predict the contents of these legislations. However, this study recommends for development of a model county gaming law which all devolved governments should adopt. This would ensure harmonization of the National and the County gaming laws to avoid any conflicts between the National and the County gaming legislations as pointed out in the South African regime. The new regulatory framework must be able to ensure uniformity, consistency, and accountability in regulation of gaming in Kenya.

(f). Transfer of functions

The proposed regulatory changes, must also comply with the provisions of the Constitution and particularly the demands of the Fourth Schedule of the Constitution of Kenya 2010. The institutional regulatory framework must, of need, avoid any conflict between the devolved arms of regulation as evident in South Africa where the provision was borrowed. The review must ensure that the law and capacity of the national regulator are enhanced. The functional devolved structures of regulation must empower the different execution arms both in the National and County establishments to ensure uniformity and certainty of regulation. The need for uniformity in regulation of gaming is critical for it creates certainty

The National regulator must be empowered with sufficient powers and instruments to oversee the regulation of the industry. It should be granted more powers to oversee gaming both at the

two levels. This would ensure uniformity and protection of citizens from counties which would introduce gaming in areas not economically viable or culturally offensive. The County governments should not be assigned gaming functions that would negatively impact on their people. Devolved structures should not be allowed to license new gaming establishments without addressing the negative social consequences associated with the activity to their people. Economic benefits should not blind them to increase the accessibility of gaming services in their counties.

(g). Gaming policy

Since the country has operated gaming without a policy since 1966; this study recommends a policy or a sessional paper on gaming be prepared to guide the licensing and regulation of the industry. The absence of a policy as indicated has been complicated by the concurrent jurisdiction of gaming functions under the new constitutional dispensation. It is evident now that gaming is likely to be devolved to the county level without a proper policy framework.

(h). Minimum technical Standards of Gaming Equipments and Devices

Since Standards of gaming equipments form an essential part in gaming operations, this study recommends that the proposed framework should embrace the provisions of the Standards Act Chapter 496, and develop minimum technical standards for gaming equipments and devices. These standards must guide how gaming devices would be imported, sold and used in licensed gaming premises. The standards are critical because they reduce manipulation, loss of revenue, cheating, fraud, use of obsolete, defective devices and harm to players amongst other advantages. The technical standards stipulate constructional and operational requirements of these devices. They generally stipulate for memory, detection of corruption, last game information and system security amongst others. This study further recommends that, the importation, sale, marketing, movement, distribution of gaming equipments, devices, and software used in gaming devices should also be regulated. Gaming machines must be registered, inspected, certified and their movements documented. This exercise would involve the regulator and the Kenya Bureau of Standards.

(i). fraud and cheating

Since gaming is prone to fraud and cheating; this study further, recommends that the law should lay emphasis on the issue to protect the government and operators from local and international fraudsters. To ensure compliance, this study recommends for the enhancement of the penal consequences in the current regulatory framework.

(j). Player protection

Player protection must also be entrenched in the new regulatory regime. It is recommended that counseling centers and a self exclusion programs be put in place to help problem gamblers. The new regulatory regime must ensure the proposed measures are entrenched in law to detect and refer to counseling these players. Currently there is no framework to assist problem gamblers. The study further recommends that the new regime must protect the interests of players. It should have substantive sections to protect the rights of the players. The existing law under regulation 15C of Chapter.131 laws of Kenya gives players an opportunity to lodge a complaint with the regulator if aggrieved by the action of a licensee or permit holder. The law does not state the actions the regulator would take if it establishes that an operator has infringed on the rights of a player. The law further should protect Players from unpredictable operators who operate and wind-up their businesses without offering their customers an opportunity to cash chips in their possession. It is recommended that an independent tribunal be established to resolve disputes arising from the industry.

(k). Regulatory Levy

This study recommends that casinos apart from paying the annual license fees, and the monthly value added tax, the proposed framework must entail payment of a monthly levy to cater for the regulatory cost. This levy should not be more than two per cent of a casino monthly gross turnover.

(l). Uniform internal controls

The study also recommends that uniform internal controls to guide Casino operations be developed. This will ensure all gaming establishments employ similar control systems to govern their operations. Where different internal controls are used, different standards are applied to

regulate different operators. This as a result, fails the uniformity principle of regulation. Uniform Internal controls accords the regulator and the operator certainty of reportable transactions and declarations such as the daily revenue a casino generates amongst others. This being a core function of the regulator, the suggested framework must ensure the regulator is accorded powers of arrest and prosecution or levy administrative fines to enforce compliance. This study further recommends that the current and the suggested legal framework must be expanded to cover all possible angles of Casino operations. Since public policy demands strict regulation of Casinos, this study recommends a review of the operative legal framework to achieve this public expectation.

(m). Location

Casino establishments must be removed from the Central Business Districts in Kenya. Further a mechanism to either charge a fee or ban locals from accessing Casinos should be debated. Since most of the Kenyan Casinos are day trip Casinos, the new regulatory regime must ensure gaming operations are conducted in Hotels with a minimum of one hundred guest rooms. Gaming in rented premises must be abolished and investment incentives put in place to encourage Operators to invest in their own premises in the designated areas. As recommended earlier the country should discourage the day trip type of casinos and adopt a destination resort casino model where casinos are removed away from the public. It is known that Spartan or European modeled Casinos do not yield any benefits to the local communities apart from few employment opportunities they create because they rely on local customers. This is in contrast with tourist destination Casinos, which are known to be labor intensive and whose activities often lead to spin off effects to the local communities.

(n). Transfer of gaming licenses

On transfer of gaming licenses, the law should be stretched out to include circumstances when this can be done. This should be tied up with the provisions of the Proceeds of Crime and Anti-Money Laundering Act No.9 of 2009 which demands that regulators and banks must know their licensees and their customers. It is suggested that investigations to establish whether persons engaged in gaming are fit and proper persons to hold gaming licenses should not end with the

grant or renewal of licenses. The investigations must be a continuous exercise and particularly in instances where transfer of shares or change of ownership of gaming companies is sought.

(o). Enforcement of gaming debts

In addition, this study recommends reforms on enforcement of gaming debts. The law must reflect the changing circumstances in this area of law in other gaming jurisdictions. The law ought to recognize that gaming debts must be enforced like other debts.

(p). Separate laws

Since prominence at the enactment of the Betting, Lotteries and Gaming Act, Chapter 131 Laws of Kenya, was on betting and lotteries, The prominence of the two forms of gambling is evident from the title of the Act and the few sections of the Act which number less than ten which expressly deal with Casino gaming. These sections are not adequate to regulate this multi-billion industry in Kenya. Since Casino gaming has taken a leading role in gambling in Kenya, this study recommends that the three forms of gambling namely; betting, lotteries and gaming should be separated into three different legislations each dealing with a particular form of gaming. This would give prominence to the provisions of the law dealing with casinos. Since gaming laws are known to be complex, the separation would offer the regulator a chance to simplify the gaming laws.

(q). Regulator

It is also recommended that the current regulator should improve its human and technology capacities to adequately police the industry. It is also recommended that there is need to realign the regulation of the industry to the best and emerging regulatory strategies and practices available.

Conclusion

For a Country to benefit from gaming industries, it is recommended that the industry must be aggressively regulated. It is evident that the current Kenyan gaming regulatory regime is fragile and in need of a stricter regulation which will usher in a new beginning in the industry. This new beginning should produce more economic benefits to the country. This study therefore

recommends an immediate and exhaustive review of the gaming regulatory regime governing Casino gaming in Kenya. The proposed regulatory order must be a hybrid of the leading gaming jurisdictions of United Kingdom, New Jersey, Nevada, Singapore and South Africa. The regime however, must suit the Kenyan circumstances.

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