

**UNIVERSITY OF NAIROBI**

**SCHOOL OF LAW**

**DEVELOPMENT AND NEO-COLONIALISM IN THE SMALL-SCALE TEA SECTOR**

**IN KENYA**

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## DECLARATION

I, KIPNGENO ERICK KORIR, hereby declare that this is my original work and that the same has not been presented to any institution of higher learning for the award of diploma, degree or postgraduate qualifications.

Signature .....

Date.....

KIPNGENO ERICK KORIR

This project has been presented for examination with my authority as the Supervisor.

Signature .....

Date.....

DR AGNES MEROKA

## **DEDICATION**

I dedicate this research project to my dad and mum, who inculcated in me the culture and importance of education, discipline and hard work. In their old age they continue to inspire and manifest their unwavering love, encouragement and support and this LLM Research Project and degree award is the reciprocation of my true love for them. I pray that they may live long to see their children conquer the academia. God bless you indeed.

To my dear wife (Carol) and children (Frida, Brian and Allan), for their love, encouragement and support during the hectic moments of this project especially when I had to travel and or sit for long hours to read, research and write this manuscript. To Carol, your time to pursue your doctorate degree is nigh. To Frida, the Civil Engineer, I encourage you not to stop until you attain the highest echelons of your academic field. To Brian, hard work is not negotiable and your performance in high school determines the person you shall be in your entire life. To Allan (in Grade Four) who perceives the study of law as hard and tiring, I remain as your mentor and daddy in your academic life.

To my sincere friends who encouraged and stood by me from the start to end of this project. May God bless you and your families abundantly.

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I acknowledge my Supervisor and Mentor for her time and immense contribution that brought forth this Research Project. Through her encouragement, guidance and clear deadlines, I worked hard to ensure that I successfully complete this project on time for my graduation. Through coursework and this research project, she expanded the scope of my research world and made me realise that my 1995 deferment of LLM degree programme was purposefully meant to be completed under her able hands in 2018. She inculcated a strong desire in me to make an attempt on my third degree which I intend to pursue as soon as this is over. I particularly appreciate her patience, guidance and ability to read and correct my manuscript. I am indeed grateful and indebted to her. Thank you and God bless you Dr Agnes Meroka.

## **TABLE OF STATUTES AND ORDINANCES**

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## DEFINITION OF TERMS

‘Agency’ means the Kenya Tea Development Agency Limited

‘Colonialism’ means the policy of a foreign polity seeking to extend or retain its authority over other people or territories, generally with the aim of opening trade opportunities.

‘Dependency’; means a state of relying on or being controlled by someone or something else.

‘Development’ means the act or process of developing, growth, progress, for example, economic development

‘Divestiture’ means the reduction of some kind of asset for financial, ethical or political objectives or sale of an existing business by a firm. It is the opposite of investment

‘Imperialism’ means a state policy, practice or advocacy of extending power and dominion especially by direct acquisition or by gaining political and economic control of other areas

‘Institutions’ are stable, valued, recurring patterns of behaviour or mechanisms of social order which give the behaviour of a set of individuals within a given community

‘Liberalization’ means the removal or loosening of something typically on economic or political systems

‘Liberalism’ means a political and moral philosophy based on liberty and equality

‘Neo-colonialism’ means the control of less developed countries by developed countries.

‘Neo-Liberal’ means ideas associated with laissez faire economic liberalism

‘Regulation’ means an abstract concept of management of complex systems according to a set of rules and trends

‘State’ means a compulsory political organization with a centralised government that maintains the legitimate use of force within a certain geographical territory.

## ABSTRACT

Despite legal and institutional reforms in the tea The Tea Act, Cap 343. Revised Edition 2012 (1960) sector between the 1930s to-date, the law has remained passive and regulatory. It has not actively spurred socio-economic development and or provided a voice to small-scale tea farmers against vicious and exploitative players and private entrepreneurs in the tea sector in Kenya. The tea sector's legal and institutional frameworks retained colonial relics and apparent gaps that have disenfranchised and inhibited socio-economic development of the small tea farmers in Kenya.

Though neo-liberal programmes and processes opened up the commercial economy in Kenya to the private sector, desired objectives of increase in shareholder value and better earnings to tea farmers are yet to be achieved.

Despite tea farmers owning sixty-two small-scale tea factories across Kenya and income on manufactured tea being rated highly, small-scale tea farmers have been relegated to labourers in their own farms owing to the un-regulated principal-agent relationship that exists within the management structures of the said tea factories.

The legal and institutional frameworks in the tea sector are regulatory and have not ascribed clear roles and responsibilities of the shareholders and other tea stakeholders. The tea industry in Kenya is monopolistic and colonial based with large chunks of land still being held by pre-independence multinationals corporations. Tea farmers are yet to benefit from the neo-liberalism programmes that are associated with divestiture.

Using the doctrinal research methods to analyze data sourced from the internet, sessional papers, and the law, this project establishes gaps in the tea sector's legal and institutional frameworks that have continued to cause tensions and underdevelopment amongst the small-scale tea farmers.

This project intends to prove the hypothesis that indeed there exist gaps in the tea sector's legal and institutional framework which ought to be addressed through legal reforms.

# CHAPTER ONE

## INTRODUCTION

### 1.1. Background of the Problem

Tea farming in Kenya is concentrated on the eastern, central and western highlands Kenya. Sri Lanka and India are ranked the leading tea producers in the world followed by Kenya. Tea planting in Kenya started way back in 1903<sup>1</sup> with the first seedlings from India having been planted in Limuru.<sup>2</sup> Commercial tea farming in Kenya was started in 1924 by the former first world-war I veterans who were allocated chunks of land by the Queen of England <sup>3</sup> in the aforesaid highlands across Kenya. The colonial government prohibited local Kenyans from planting cash crops as it feared that native Kenyans did not have the capacity to control pests and related diseases on their tea gardens hence could threaten the farms owned by the colonialists. Lack of labour and competition with colonialists' lucrative tea farming was also feared. These large farms became the current tea plantations dotting the eastern, central and western highlands of Kenya.

The development of tea farming in Kenya has similar underpinnings with the independence struggle by Kenyans in the 1950s. With the demands for land rights, Kenyans began to push for the right to grow tea and other cash crops as well. Through the Swynnerton Plan of 1954,<sup>4</sup> Africans were allowed to grow tea culminating in the construction of the first small-scale tea factory in Nyeri in 1957.<sup>5</sup>

Domestication of laws in Kenya started earnestly immediately after independence. Kenya Tea Development Authority Kenya Tea Development Authority<sup>6</sup> was formed on 20<sup>th</sup> January 1964 under the Agriculture Act.<sup>7</sup> Its objective was to manage and develop the small-scale tea sector in Kenya. The tea sector in Kenya fell into two categories at independence, the plantations and small-scale tea sectors. The plantations tea sector comprised of the expansive tea estates in

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<sup>1</sup> UK Tea & Infusions Association, "Out of Africa", tea.co.uk. retrieved 3 December 2017

<sup>2</sup> Limuru in the Central Province in Kenya in the central highlands.

<sup>3</sup> Queen Mary; nee Victoria Mary Augusta; The Queen of England

<sup>4</sup>Ann Thurston, "Small Holder Agriculture in Colonial Kenya" Cambridge African Monographs & African Studies Centre, 1987

<sup>5</sup>Rugati Tea Factory Limited, managed by the Kenya Tea Development Agency Limited

<sup>6</sup>Kenya Tea Development Authority, incorporated as a State Corporation

<sup>7</sup>Agriculture Act, Cap 383 of the Laws of Kenya (repealed in 2012 and replaced with Agriculture, Fisheries and Food Act)

Kenya that were owned and managed by multinational corporations who are members of the Kenya Tea Growers Association. The small-scale tea sector comprised of tea farmers who were allowed to plant tea in the late 1950s and whose tea business was managed by the Kenya Tea Development Authority from 1964 up to 2000 when it was privatized and replaced by the Kenya Tea Development Agency Limited.

## **1.2. Statement of the Problem**

Whereas more than sixty-two tea factories that have been constructed in Kenya are owned by the small-scale tea farmers numbering more than half a million, returns to farmers have not resulted in any meaningful social and economic impact.

Despite numerous legal reforms in the tea sector, farmers are yet to benefit from increase in shareholder value.

Though privatization programme brought in neo-liberal dimensions in the tea sector's management and control structures, this development ceded control and management of small-scale tea factories to the Kenya Tea Development Agency Limited, which has used the contractual relationship to economically advance its interests to the disadvantage of the small scale tea farmers.

Nonetheless, this research project recommends legal and institutional reforms for consideration that may help to improve economic wellbeing of the tea farmers.

## **1.3. Hypotheses**

- 1.3.1. Small-scale tea farmers who funded the construction of sixty-two factories across Kenya are yet to fully realize meaningful returns from their investments.
- 1.3.2. Legal and institutional frameworks in Kenya's tea sector are regulatory in nature and have no clear provisions aimed at improving the well-being of small-scale tea farmers.
- 1.3.3. Liberalization of the tea sector was geared towards opening it for further economic development, better governance and increase in shareholder value, however, tea sector in Kenya has remained monopolistic therefore exposing and disenfranchising tea farmers from realizing better return on their investments.

1.3.4. Land having been the cause of tensions and agitation for independence, the plantation sector continues to exhibit neo-colonialism tendencies against the principles of liberalization and good governance.

#### **1.4. Research Questions**

This project explores the challenges faced by small-scale tea farmers in Kenya and which have continued to impoverish them despite tea being a high foreign exchange income earner. At the end of this project the following questions will have been satisfactorily answered: -

- 1.4.1. How have the legal and institutional frameworks in the tea sector in Kenya developed from colonial era to-date?
- 1.4.2. How can the law regulating the tea sector in Kenya be reformed to increase socio-economic development, cushion the small-scale tea farmers from exploitation and provide clearer roles and responsibilities to stakeholders in the tea sector in Kenya?
- 1.4.3. Has the objectives of liberalization particularly in the governance structures and improved returns been realized in the Kenya's tea sector?
- 1.4.4. What can be done to help the small-scale tea farmers to improve their well-being under the existing legal and institutional frameworks?

#### **1.5. Research Objectives**

The objectives of this research project, are inter alia, to;-

- 1.5.1. Understand the historical development of the tea sector in Kenya, that is, from the colonial period, at independence and post-liberalization era.
- 1.5.2. Examine the legal and institutional frameworks that continue to exhibit neo-colonialism, bedevil development and socio-economic well-being of the small-scale tea farmer in Kenya.
- 1.5.3. Analyze the effects of liberalization and critique the existing neo-liberal management and governance structures in the tea sector in Kenya.
- 1.5.4. Make appropriate recommendations on the necessary legal reforms that aim at improving socio-economic development of the small-scale tea farmer in Kenya

## **1.6. Research Justifications**

This project examines tea development from colonial period-to-date and the impact on socio-economic development of the tea farmers in Kenya. When white settlers commenced tea planting, local Kenyans were not allowed to plant tea, were eventually deprived of their agricultural lands. These former natives' agricultural lands were eventually vested on the current multinational tea plantations.

During the clamour for independence, the land tension was the epicentre of the liberalization struggle, at independence, Kenyans were allowed and encouraged to plant tea and through government guaranteed loans, tea farmers constructed their own tea factories (currently sixty-two tea factories) across Kenya. Before independence, some crops were protected in law as Scheduled Crops as they could be planted by the white settlers only. To-date legislation on crops contains this colonialist provision, despite Kenya's independence and such crops being able to-do well across the country. These glaring gaps make the current legal framework inadequate in giving proper safeguards to the small-scale tea famers in Kenya.

Land question during the independence struggle forced colonial government to develop and roll out plans that enabled small-scale tea farmers to plant scheduled crops. Despite land tensions being the basis for independence struggle, tea plantations have occupied prime land yet their impact on the underlying communities is yet to be felt.

Concepts of liberalization and good corporate governance are positive practices meant to alleviate poverty and improve socio-economic welfare of citizens' world-over; however, this has not been the case in the tea sector in Kenya. Liberalization ended up as a tool to continue colonial practices by elite Kenyan bourgeoisie class and corporate governance principles have been abused to the disadvantage of the tea farmers.

## **1.7. Literature Review**

This research project examines provisions of the Constitution, Crops, Privatization and Companies Acts, in relations to the tea sector development, tensions and rooted neo-colonialism that continue to be experienced in the tea sector in Kenya. To ensure that the tea

farmers are not disinherited, this research project identifies the following glaring gaps in the afforested statutes.

### **1.7.1. Provisions of the law in the tea sector**

The Act has not provided clear roles of the shareholders, management agents and other stakeholders in the tea industry hence exposing the small-scale tea farmer to speculative corporate management by the Agency. Secondly, classification of crops to-date into scheduled and non-scheduled categories is a colonial relic in our laws which has transcended independence and formalized in our laws for the sole role of regulation.<sup>8</sup> Thirdly, the Act needs to be made less regulatory and to set processes and programmes that spur development and facilitate the achievement of set objectives, specifically, rationalizing taxation system, reducing current high tax regimes and enhancing development, productivity and incomes of the rural population. Fourthly, being the highest exchange earner, the government needs to enhance the institutional framework so as to cushion tea farmers from the effects of liberalized trade.

### **1.7.2. Liberalized tea sector**

When the government embarked on liberalization programmes, desired benefits and objectives were noble. This change in the government policy brought in exploitation and under-development of tea farmers through a warped and un-regulated relationship between the Agency and tea farmers. Facts espoused in the County Government of Kericho law suit against the Agency, multinationals tea companies and tea brokers over un-consented deductions on the farmers' dues amounting to billions of shillings is a pointer of exploitative relationship that currently exists between tea farmers and the Agency.

Secondly, the Kenyan government needs to empower small-scale tea farmers through further liberalization of the tea sector<sup>9</sup> by enumerating development as posited by Amartya Sen on the

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<sup>8</sup> The Crops Act, No 13 of 2013, Section 7

<sup>9</sup> Kones Bill, 2010, a Private Member Bill introduced in Parliament by Hon J Kones in 2010 on further liberalization of the Tea Sector in Kenya



process of expanding the real freedoms.<sup>10</sup> The government's regulatory regime on farmers' choices of tea processors against liberalized tea sector exposes government dualism and neo-colonialists<sup>11</sup> tendencies when dealing with tea farmers concerns.

Thirdly, negotiated independence and liberalization did not consider tensions on communal land interests over investors' interests when it ceded large chunks of agricultural land to multinational corporations and privatized small-scale tea sector. Currently, Kericho and Nandi County governments have threatened to file suits to seek reparations on behalf of their citizens from the British Government in regards to displacements caused to the locals by the multinational tea companies. This is a continuing conflict and tensions on the land question between investors' rights and the local communities.

For purposes of the development and improvement of the small-scale tea farmers' earnings and avoidance of tensions, existing gaps as noted above ought to be addressed in Privatization Act.

### **1.7.3. Corporate Management**

National values and principles of governance and public participation are set out in the Constitution.<sup>12</sup> The Companies Act<sup>13</sup> sets the standards of good corporate management for both private and public companies. The Agency and the small-scale tea factories are private companies as described in the Act.<sup>14</sup> The Companies Act sets powers and general duties of directors based on common law and rules of equity and company constitution for conferred purposes only.

Directors work towards improved shareholder value and are obligated to consider long-term consequences of their decisions on employees, stakeholders, community and environment. The law requires of directors, good repute and high standards of business conduct replete of conflicts of interests and exercise of independent judgment, care, skill and diligence at all times.<sup>15</sup>

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<sup>10</sup> Amartya Sen (1999) Development as Freedom, Anchor Books, New York (chapter 2: "The ends and means of development.").

<sup>11</sup> Ibid, 33

<sup>12</sup> The Constitution of Kenya, 2010, Article 10

<sup>13</sup> The Companies Act, No 17 of 2015

<sup>14</sup> Ibid, 39

<sup>15</sup> Ibid 40, Sections 140 to 147

The Agency being a corporate body ought to comply and ensure strict adherence with constitutional and company law provisions. The government through the tea sector regulator, various tea taskforces and tea farmers' union has voiced concerns on the Agency's failure to uphold the principles of good management practices. Secondly, construction of the small-scale tea factories was financed by tea farmers, were to own, manage, govern and enjoy accrued benefits associated with vertical integration<sup>16</sup> but this has not been achieved as the Agency has lacked transparency in its dealings.

In a nutshell, provisions on tea under the Crops Act, Tea Regulations on Licensing of Agents, privatization Act and Companies Act provides an opportunity for reforms which this research project addresses in its recommendations. This project also finds justifications and facilitates proposals towards law reforms on enhanced enforcement and implementation of existing law, especially on the conflicts of interests by directors and the requirement of public participation by the shareholders on matters that have a direct and material effect on their enterprises.

### **1.8. Research Methodology**

This research project has been undertaken using the doctrinal research methodology and a mixture of other methods of research to establish apparent gaps in small-scale tea sector's legal and institutional development. The methodology adopted sets out the challenges and benefits that have accrued to the tea farmers from legal reforms in the tea sector since colonial time to-date. The methodology used brings out glaring neo-colonialists relics that continue to inhibit development in Kenya and suggest recommendations that will help to alleviate disenfranchisement of tea farmers across Kenya.

I have undertaken a textual analysis of data on the tea sector in Kenya sourced online and from various statutes, publications, other written manuscripts and tea company profiles. That has been possible through the use of direct internet browsing, use of library materials, trade associations and published reports. I have used published data, that is, current industry law and

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<sup>16</sup> Kevoi M & Owuor P (2007), "A Measure of Economic Rationality in Small Holder Tea Sector in Kenya" A Journal of Agriculture, Science and Technology, Nairobi, Kenya

regulations, case law, Kenya Legislative Council<sup>17</sup> and the first national parliament Hansard on tea and agricultural development in Kenya. These include the Agricultural Ordinances, the Tea Act of 1960, the Special Crops Development Authority and the Sessional Papers of between 1960 and 1965.<sup>18</sup> I have analyzed data from the law books and statutes to establish theoretical frameworks and applications and the regulatory regimes in the tea sector. Use of secondary data for my research work has been sufficient, less costly and efficient and the chosen research method identifies well with my research questions above. Secondly, in my literature review, I have identified gaps that this research needs to fill, especially on the legal and institutional framework development. Recent events on the tea sector in Kenya and the initiative by the legislators in the country through a proposed Tea Bill provided a good basis in terms of use of secondary data in my research. There exists qualitative research already on the gaps in the law on the tea sector and this data can be relied on to conduct a further quantitative investigation.

Thirdly I have evaluated the secondary data to ensure appropriateness for my research purposes, to ensure format, reliability and validity, answer my research question and ensure that the information thereon is sufficient. Finally, I have critically examined, prepared, analyzed secondary data and used it in my research. I have cautionary ensured that my data is reliable, suitable and adequate for my purpose.

### **1.9. Theoretical Framework**

Since 1945, there has been a struggle across the world to improve living conditions in the developing countries with few queries on the causes of underdevelopment. The Independent States, UN bodies and industrialized countries promote development by use of experts, improvement of education systems and infrastructure. The focus on symptoms and not causes of underdevelopment as the gap between developed and less developed countries gradually widened.<sup>19</sup> During the cold war period theoretical considerations explained situations of underdevelopment and development from the western or socialist axis. In recent times,

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<sup>17</sup> Kenya National Assembly, Official Record (the Hansard) books.google.ce.ke.

<sup>18</sup> Ibid

<sup>19</sup> Dr. Frithjof Kuhnen; An Introduction To Development Theories; The Journal of Institute of Development Studies, Studies, NWFP Agricultural Vol. VIII, 1986,1987 University, Peshawar.

development theories have been used to explain and compare underdevelopment and development in the world.

In 1950s and 1960s, development was seen as economic growth or improvement in national income and an effort to relieve populations in developing countries<sup>20</sup> of prevalent poverty and reduce economic gaps between developed and developing countries.<sup>21</sup>

Development emphasized key non-economic values and elements that enhanced human life, such as political participation, right to property, rule of law<sup>22</sup> and protection from abject poverty. This holistic development is noble in its aspirations but does not adequately address social and economic challenges that hinder achievement of development as a freedom. In order to promote non-economic values, a society needs economic and technical resources in form of a reliable and professionally manned enforcement systems and mechanism.

Economic resources are key and necessary to promote non-economic values because constituent elements of development are un-realistic. It is necessary for countries without sufficient resources to simultaneously promote both economic and social development goals thus securing necessary resources to promote non-economic values.<sup>23</sup>

### **1.9.1. Theoretical Approaches to Development**

Firstly, modernization theory is an economic theory that arose after World War II and was rooted in capitalism.<sup>24</sup> It described the transformation of traditional society on dimensions to become modern with development viewed on linear growth.<sup>25</sup> Proponents of modernization theories viewed development as an inevitable evolutionary process that had the potential to increase societal disparity and ultimately produce economic, political and social institutions similar to those of developed western countries.<sup>26</sup>

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<sup>20</sup> World Bank, *infra* note 146

<sup>21</sup> David M. Trubek, the “Rule of Law” in Development Assistance: Past, Present, and Future, in *The New Law and Economic Development*, *supra* note 1, at 75.

<sup>22</sup> Brian Tamanaha, *On the Rule Of Law: History, Politics, Theory* (2004).

<sup>23</sup> Songok Han Thornton & William H. Thornton, *Development without Freedom: The Politics of Asian Globalization* (2008).

<sup>24</sup> *Supra* n 1

<sup>25</sup> W.W. Rostow, ‘The Stages of Economic Growth’ (1960) Cambridge University Press, 4-16

<sup>26</sup> *Supra* n 2

However, modernization theory was criticized on the basis that the linear concept of development was too theoretical and stages of development overlap each other with third world countries remaining under the mercy of developed States.<sup>27</sup>

It associated development with economic growth ignoring aspects of political and social factors<sup>28</sup> and was based on the American and European history with the assumption that developing countries would go through the same process.<sup>29</sup>

Secondly, economic growth theories posit that development is a process of economic structural transformation that involves continuous technological innovation, diversification and improvement in infrastructure, wealth creation and institutional arrangements. Modern economic development may not be assisted by mechanisms associated with markets but by State's decisive ideological orientation, effective institutions and policies underpinned by adequate bureaucratic and organizational capacity and economic transformation processes. Under-development in a State is associated with internal factors such as illiteracy, traditional agrarian structure, a low division of labour and poor communication and infrastructure. Change of international dependencies and historical origins is a developmental strategy for development and developing countries are assisted by capital aid and transfer of know-how to develop and be efficient.

Thirdly, dependency theory came about in the 1950s and 1960s to explain the state of underdevelopment of many nations. Dependency theorists attributed underdevelopment to the past history and continuing economic relations between underdeveloped and developed States.<sup>30</sup> The theory shared a common assumption with the Marxist theory of imperialism which can be related to colonialism and contemporary neo-colonialism. This was visible when developing countries supplied minerals, agricultural commodities and cheap labour to the dominant states which determined the allocation of these resources, often to their own advantage. In Africa, the end of colonization did not bring to an end the exploitative systems as

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<sup>27</sup> J. Matunhu "A critique of modernization and dependency theories in Africa: Critical Assessment" (2011) ISSN 2141-6672 [www.academicjournals.org](http://www.academicjournals.org) accessed on 3rd December 2017.

<sup>28</sup> Stephen Golub, 'Beyond the Rule of Law Orthodoxy: The Legal Empowerment Alternative' (2003) Carnegie Endowment for International Peace Washington.

<sup>29</sup> Supra, note 2

<sup>30</sup> Andre Gunder Frank, 'The Development of Underdevelopment'

developing countries were incorporated into the world market at a distinct disadvantage they lacked established industrial base, and up-to-date technology, transportation and communication. In order to improve these features, it involved attracting foreign investors, borrowing capital and purchasing western produced industrial equipment and technology.

The theory provided a narrow framework leaving out the impact of religion, national, ethnic and clan rivalry (tradition and culture) on the development and does not recognize developing countries contribution to underdevelopment such as contemporary African governments' mismanagement of public resources at their disposal.

Lastly, the principal-agent theory, a standard neo-classical theory in economics, is an act of delegation by one actor of the performance of a task to another actor. The theory presupposes conflict of self-interest because the agent has access to more information than the principal, resulting in a discrepancy between the two.<sup>31</sup> The heart of the problem is that agents will attain information about the assigned task and may have individual goals which they may be unwilling to disclose to the principals.

Dualism theorists assume economic and social structures of sectors that differ in organizations' goals and levels of development. The concept of economic dualism<sup>32</sup> distinguishes traditional subsistence small-scale agricultural sector from modern capital-intensive industry or plantation agricultural firms whose produce is destined for global market.<sup>33</sup>

These two sectors do not relate and each develops according to its own patterns and standards. The modern sector is an economic enclave of industrial countries with several authors stressing dualism of labour and financial intensiveness.<sup>34</sup>

Regional dualism has portrayed a legacy of colonialism as it lacks communications and exchange by regions.<sup>35</sup>

### **1.9.2. Under-development and Neo-colonialism in the Tea Sector**

The colonial economy which had been structured to yield high incomes for the small white minority was inherited and adopted at independence in its intact form. This was reinforced by

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<sup>31</sup> Klitgaard, R. 1988. Controlling corruption, Berkeley, University of California Press.

<sup>32</sup> Boeke, J.H. Economics and Economic Policy of Dual Societies, New York 1953

<sup>33</sup> Ibid, p78

<sup>34</sup> Eckaus, R.S. The Factor Proportion Problems in underdeveloped Areas, American Economic Review, 45, 1955, 539-565

<sup>35</sup> Gannage, E. Economic Development, Paris 1962.

the colonial school system, government spending pattern, tax and monetary systems and investment policies.<sup>36</sup>

Collins Leys,<sup>37</sup> while looking at under-development and neo-colonialism in Kenya immediately upon attainment of independence noted that there was an urgent need for major changes in legal regime and institutions, development strategy, effective wealth distribution policy framework and high absorption of income by a minority. He notes that a "high degree of income inequality is a characteristic feature of private enterprise economies in an early stage of development but this will tend to be intensified with the growth of the economy over long periods of time. There are reasons to believe that such dynamic factors tend to perpetuate and intensify inequalities may be operative in the Kenyan social and economic system".<sup>38</sup>

Under-development that begun on the advent of colonialism and continued after independence (as neo-colonialism), limited and polarized classes and exploitation of masses became more apparent in Kenya. Incomes re-distribution and dismantling of domestic monopolies at independence to improve on sustainable internal demands in Kenya was needed. Growing domestic and auxiliary bourgeoisie encouraged and sustained the colonial status quo, business monopolies and economic nationalism with various populist programmes which were aimed towards securing the support of the peasants.<sup>39</sup>

Collins Leys analysis of underdevelopment in Kenya in the early 1970s is still clear to-date despite many changing legal regimes and attempts to distribute and involve small-scale farmers in the corporate management of the tea sector. His hypothesis of monopolistic systems by the small but rich bourgeoisie and populist policy programmes hoped at hoodwinking the masses into believing on re-distribution and ownership programmes is equally true. In the 1990s, the privatization programmes attempted to undertake this but its effects have not been felt to-date. Colonial structures in the tea sector have informed economic growth and development of tea farmers and Kenyanization racially changed the country's leadership but have had limited effect on colonial dominance, wealth creation and distribution amongst the populace.

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<sup>36</sup> The Underdevelopment in Kenya, the Political Economy of Neo-Colonialism' Heinemann Educational Books,

<sup>37</sup> Ibid, p45

<sup>38</sup> Ibid, p46

<sup>39</sup> Ibid, 32

The small-scale tea farmer has largely remained at the bottom of the tea manufacturing and production mechanism, earning meagre monthly pay for his green leaf whereas the bourgeoisie has continued to take hefty returns. In the tea sector in Kenya, colonial masters left but in its place capitalists registered as agents, tea multinational companies and the modern private tea companies have taken over the management, manufacture and governance of the tea industry and have left the small-scale tea farmer as the supplier of the raw materials and labour for the tea industry. Whereas the government through structural adjustment programs liberalized and privatized the tea industry, the small-scale tea sector has been taken captive by neo-colonialists who ride on tea farmers' fierce struggles to develop and make money.

Colonization imposed on African communities' alien legal, political and administrative institutions and systems. Upon attainment of independence, most African countries got into the contradictions between liberalized politics and socialist policies in the world that culminated authoritarian regimes headed by strong men. Institutions that promote representation, participation in governance and public administration did not grow to cause institutional decay rather than socio-political and economic development,<sup>40</sup> hence precipitating second liberation movements.

Development is seen in various policy intervention measures, for instance, acceptance of structural adjustment programmes which were concerned with macroeconomic stabilization through the use of trade liberalization and economic deregulation. Sadly, the proponents of these programmes did not pay attention to market failures and weak socio-political institutions, human capital and physical infrastructure.

Though many African countries achieved macroeconomic stability, economic growth and social development in the late 1990s significant number of developing countries remained heavily dependent on commodity production, export and external aid. Freeing and privatizing of markets and public enterprises did not generate adequate investment to could expand output, exports and employment but a weakened capacity of States to design and implement

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<sup>40</sup> A neo-patrimonial system develops when political actors do not recognize the state as an institution and the power to rule resides in a person rather than an office. Rather, politics is practised as a zero-sum game with a winner-take-all, something that perpetuates violent conflict and power struggles



appropriate policies or alter structures of their economies to accelerate progress towards achieving social development goals.

The main rationale of privatization of State Corporations in the 1980s and 1990s was to articulate national development goals through democratic public deliberation and forging relations that encompassed national and regional private-sector stakeholders. The role of stakeholders was to participate in decision-making and provide public monitoring and oversight.<sup>41</sup> In the case of the tea sector, whereas privatization's goals were achieved, the law was not properly amended then to help small-scale tea farmer to assert his position as shareholder and owner of the enterprise over the Agency. Under-development in Kenya commenced during colonial period through the development of metropolitan powers and policy frameworks that colonialists used in extracting Kenya's rich physical, human and economic natural resources, through the introduction of monetized the economy, extraversion and monoculture of the Kenyan economy by insisted on production of certain goods through zoning while discouraging production of indigenous crops. The products fit the Colonialist industry, African interests disregarded. Export-oriented economic policy-developments such as railways connected the interior to the coastal lines so as to form a gateway for exportation of resources from Africa and importation of brutish economic policies and monopoly of violence, land alienation and taxation. The result is that Kenya's underdevelopment led to colonial masters' development.

In the post-colonialism era, aspects of constitutionalism, land reforms and resettlement and protection of minority's property rights have led to policy frameworks that endeared the post-colonial elitists to pursue neo-colonialism tendencies. Was entrenching these minority property rights in the new constitution a development strategy for post-colonial Kenya? Colonial domination has continued with the third world versus north-south dichotomy<sup>42</sup> whereas dependency theorists imbued this dichotomy with economic and social imperatives to denote periphery and core nations.

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<sup>41</sup> Privatization Act, No 2 of 2005

<sup>42</sup> French Economist, Alfred Sauvy; Under the Three World Model

Stages of development as advocated by the development theorists leads to some consensus on third world countries as underdeveloped economically, technologically and socially due to their inability to take-off. The theory of geographical differences that accounted for differing levels of economic opportunity and prosperity attempted to avoid the negative connotations attached to prior development models while providing a broad domestic, regional, and international terminology to refer to levels of development.<sup>43</sup>

Collins Leys<sup>44</sup> looks at the critical issues of under-development and structures of neo-colonialism in Kenya immediately after independence that remained intact. These included school models, government spending, monetary and tax regime and investment policy that reinforced economic structures.<sup>45</sup>

He posits that such dynamic factors tended to perpetuate and intensify inequalities in the social and economic system within the country.<sup>46</sup>

Collins Leys analysis of underdevelopment in Kenya in the early 1970s is still clear to-date despite many changing legal regimes and attempts to distribute tea as a resource and involve tea farmers in corporate management. His hypothesis of monopolistic systems by the small but rich bourgeoisie and populist policy programmes hoped at hoodwinking the masses into believing on re-distribution and ownership programmes is equally true. In the 1990s, the privatization programmes attempted to undertake this but its effects have not been felt to-date. Since independence economic growth and development in tea sectors have largely continued on colonial structures and Kenyanization radically changed the leadership and government policies and not wealth creation and distribution.

### **1.9.3. Application of development theories in Kenya's Tea Sector**

The above theories of development apply to the Kenyan situation; with the dualism theory in the tea sector manifesting itself in the small-scale and plantations sectors. Whereas the plantations have margins under the economies of scale, the small-scale tea farmers are over-burdened by the low earnings leveraged against the Agency relationship that exists. This is a

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<sup>43</sup> The North-South Typology was nurtured by Thomas Sowell

<sup>44</sup> 'The Underdevelopment in Kenya, the Political Economy of Neo-Colonialism' Heinemann Educational Books, London by Collins Leys

<sup>45</sup> Ibid, 44

<sup>46</sup> Ibid, 45

social dualism wherein there is a lack of economic or technological relationship between small-scale tea sector and the plantations and this is a legacy of colonialism.

The principal – agency relationship that exists between the tea farmers and the Agency-run tea factories has deteriorated human development and created a dependency syndrome. Whereas the factories on paper are owned by the small-scale tea farmers, in reality, the management agent is the master whom the farmer depends on for his green leaf returns

Modernization of Kenya's law which includes the new constitution, consolidation of the laws on agriculture and the general reforms that have gone into the agricultural sector in Kenya has not assisted in closing the gaps that exist in the legal and institutional frameworks. This has led to under-development and continuation of the neo-colonialism in Kenya, thereby causing tensions amongst the Kenyan communities.

#### **1.9.4. Chapter Breakdown**

This Research has been split into five broad chapters. Chapter one introduces the concept of development in the tea sector and the general overview of the research study that is, the research objectives, hypothesis, justification, the methodology of research, statement of the problem and theoretical framework. Chapter two of this study highlights the historical development of the tea sector in Kenya. It traces tea planting to 1930s and the development and law reforms that have gone into the tea sector since then. It delves into the legal provisions that include colonial ordinances, the various constitutions and privatisation. Chapter three tackles the legislation and institutional frameworks in the tea sector in Kenya. Chapter four examines and critiquing the case law and studies in the tea sector in Kenya. In Chapter five this research makes recommendations on legal reforms needed to safeguard the small-scale tea farmer in Kenya.

## CHAPTER TWO

### HISTORICAL DEVELOPMENT OF THE TEA SECTOR

#### 2.1. Introduction

This chapter examines the historical legal and institutional frameworks on tea and land in Kenya. It delves into the colonial and post-independence law on tea development and the independence and 1969 constitutions of Kenya. It broadly discusses the land question in the colonial era, at independence and how the land law has continued to exhibit tensions and colonial tendencies on land in Kenya.

This chapter explores the link between the law, institutions and the legal framework in Kenya's tea sector and the poverty that has continued to inundate the small-scale tea farmers despite tea being one of the lead foreign exchange earners in Kenya. It delves into the colonial and post-colonial Kenya, law and development, institutions and legal framework and the tea development in Kenya. By the end of this chapter, the concept of tea, legal and institutional framework and its development from the colonial time to-date would be set up and the concept of disenfranchisement of the Kenyan tea farmer through rooted colonialism and pass-over of the legal regime that ensured neo-colonialism.

This chapter examines critically the social, economic and political set-ups that were destroyed in an attempt by colonialists to entrench themselves. The colonialists did not consider the Kenyan natives' administrative, economic and political systems as worth, thereby introducing their modern systems which included Christianity, new agricultural crops which they restricted by scheduling them and eventually caused a dependency syndrome owing to the creation of the native reserves. The law on crops and agriculture has continued to have scheduled and non-scheduled crops despite Kenya attaining independence more than fifty years ago.

The advent of colonialism too saw the emergence of the agent-principal system of governance, which colonialists implemented arbitrarily without any due regard to the Kenyan natives. This type of rule developed elites who were imparted with Christianity values and education and

upon attainment of independence this clique negotiated and ascended to power thus perpetuating the principal-agent relationship to-date. The legal framework that came in place during the colonial era was a replication of the common law laws, systems and institutions which Kenyans had to depend on in the place of their backward cultural practices.

## **2.2. Legal Foundations of the Tea Sector in Kenya**

By 1934,<sup>47</sup> commercial tea production in Kenya at Limuru by Brooke Bond Tea Limited had taken root; however, tea production in the Colony was restricted to Europeans only<sup>48</sup> as tea was one of the Scheduled Crops. Tea farming in Kenya is as old as the struggle for independence, which struggle started in the 1940s and it involved agitation for land rights, freedom from forced labour, hut and poll tax and freedom of movement and against the Kipande system. However, by mid-1950s peasant farmers had started to grow tea in very small scale around Nyeri, which event aroused concerns and fears of major tea growing firms; that tea production by the local farmers would compete with plantations on the local market. Brooke Bond (K) Limited, tea multinational in Kenya.

Slowly development of tea farms in Nyeri and Embu was witnessed and by 1958 approximately six hundred and ninety-one acres had been planted. The Tea Board of Kenya then had doubted smallholders' ability to plant, pluck, and prune and weed their tea gardens, however, African smallholding tea was good and for the first time in 1957 at Nairobi Tea Auction, the small-scale holding tea fetched the highest tea prices in Kenya.<sup>49</sup> Gradually emphasis shifted to large-scale production by tea farmers and the opening of the first tea factory on Embu-Nyeri border in 1957, serving approximately five hundred acres of tea, reinforced this development.<sup>50</sup>

Directorate of Agriculture was responsible for control of tea production through the issuance of planting licenses and permits to farmers until 1950 when Tea Board of Kenya was established

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<sup>47</sup> In 1934, the Tea Ordinance, 1934 (No 46 of 1934) and revised in 1948 (No 52 of 1948)

<sup>48</sup> Annual report on the social and economic progress of the people of the Kenya colony and protectorate, 1934, his majesty stationery office, H.M Stationery Office, Crown Copyright Reserved, No 1722

<sup>49</sup> Kenya Agricultural Department Annual Report, 1957 pp12, 1958, pp6

<sup>50</sup> M. Gowen, the British State and Agrarian Accumulation in Kenya, Industry and accumulation in Africa, pp 161-162.

to regulate the industry and Special Crops Development Authority (SCDA) was formed in 1960 to promote cultivation of cash crops.<sup>51</sup>

Kenya Tea Development Authority, whose objective was to assist the small-scale tea growers in Kenya to process and market their tea leaves replaced the Special Crop Development Authority.

### **2.2.1. The Tea Ordinance, 1934**

The first legal instrument to govern the production of tea in Kenya was the Tea Ordinance of 1934 (No 46 of 1934). This ordinance was revised by the Tea Ordinance of 1948 (No 52 of 1948) which became effective on 25th August 1948. The objective of the Tea Ordinance, 1948 was to control tea production in the colony by the issuance of permits and licenses to growers by the Directorate of Agriculture. In 1950, the Tea Directorate of Kenya was established to regulate the tea industry and its stakeholders. Despite many amendments to this Act, its main focus remains that which is espoused on its preamble, that is, to implement requirements of Tea Directorate of Kenya Tea Board of Kenya,<sup>52</sup> as created under the Act. The Tea Act as amended was finally repealed in 2013 and in its place the Crops Act,<sup>53</sup> was promulgated.

### **2.2.2. The Colonial Land Ordinances**

In 1897, the Indian Land Act applied to the colonial territory thus facilitating the appropriation of lands beyond Mombasa for public use i.e. land within one mile of either side of the railway line. The Commissioner of the Protectorate (the Governor) was conferred with powers to dispose of all public lands.<sup>54</sup>

The Crown Land Ordinance (1902) defined Crown land as that which was not under the occupation of the natives and it conferred powers to the Commissioner who could dispose of and or grant leases at will. The 1908 Crown Land Ordinance applied the principles of the

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<sup>51</sup> Upon promulgation of the Kenya Development Order of 1964, Kenya Tea Development Order, 1964

<sup>52</sup> A State Corporation created under the Tea Act, Cap 343

<sup>53</sup> Crops Act, No 13 of 2013

<sup>54</sup> The East Africa Lands Order in Council, (1901)

previous Ordinance to the entire Country and its effect caused cause displacements of persons from their ancestral lands thus the emergence of landlessness and squatter problem in Kenya.

The Crown Lands Ordinance (1915) redefined land as that which was reserved by the Crown for occupation and use by native Kenyan tribes. From the 1915 definition of Crown lands, Kenyans were rendered as mere tenants because all land in Kenya belonged to the Crown. There was no more community land<sup>55</sup> after the Commissioner was empowered to grant nine hundred and ninety-nine-year leases. In 1927 a Commission<sup>56</sup> recommended for separate reserves, that is, for the natives and the Europeans which were to be free from encroachment. This report led to the 1930 Native Lands Trust Ordinance which required the Governor to compensate the inhabitants of the reserves whenever parts of the reserves' land were set aside for public purposes. In the 1938 law,<sup>57</sup> a dual policy was implemented where Europeans were to occupy high potential areas better known as the 'White Highlands' and Africans were to occupy marginal lands better known as 'African Native Reserves'. Africans only had interests and rights within the reserves and could not claim any rights or interests outside their reserves.

The Swynnerton Plan<sup>58</sup> commenced reforms on the African land tenure system and this became the blueprint for many land tenure reforms that were subsequently implemented by the post-independence regime. It led to the process of land adjudication, consolidation and registration thus the destruction of African land tenure system and ensured the conversion of land systems to individualized land tenure arrangements. At independence, the UK government applied pressure on Kenya to accept "a willing buyer, willing seller" approach towards sale and purchase of the white settler farms and ranches. In 1962, a programme christened as a 'one-million-acre scheme' was established to purchase 1.2 million acres from the departing settlers. It was designed to accommodate 35,000 landless African families. The nationalists and independence militants opposed this land buying policy arguing that there was no justification for the native Kenyans to buy land that had been forcefully taken away from them by

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<sup>55</sup> The landmark ruling in *Isaka Wainaina v Murito* where the Chief Justice, Barth, held that whatever rights indigenous inhabitants may have had to the land had been extinguished and every Kenyan was a tenant at the will of the Crown.

<sup>56</sup> The Hilton Young Commission, 1927

<sup>57</sup> The Crown Lands (Amendment) Ordinance 1938

<sup>58</sup> The Swynnerton Plan, 1954

colonialists. The colonial government argued for protection of the white settlers' land hence entrenchment of property rights in the Independence Constitution.

Independence government retained the colonial land tenure system including subjugation of customary tenure and unaccountable executive powers over land. Crown lands became Government land under the Commissioner of Lands while the Native Reserves became Trust Lands administered by County Councils.

The independence constitution of Kenya<sup>59</sup> majorly comprised of provisions made by the Lancaster House Conference. Registered Lands Act<sup>60</sup> ensured better registration of title for Africans with its main achievement being the element of individual ownership. Land Control Act enacted in 1967 directed activities on agricultural land including subdivisions, sale, transfer, lease and mortgage.

As noted above, colonialists in Kenya used the Law (Ordinances) to grab the natives' land and distort cultural and communal land ownership in Kenya and eventually dispossessed native Kenyans from their ancestral lands. Through the same law, the colonial government denied Kenyans the opportunity to cultivate and or deal in agricultural products, that is, tea, dairy, coffee or pyrethrum but instead created a law that protected these crops as Scheduled Crops. During the colonial period, these protected crops could only be planted by the white settlers and Kenyans were to provide labour, which labour was procured forcefully through the use of provincial administration.

To-date, tea is one of the Scheduled Crops under the Crops Act. The restriction on Kenyans not to plant and or deal in the protected (scheduled) crops was closely tied to ownership of land. At independence and upon allowing Africans to plant the said cash crops, land had already been forcefully taken away from native Kenyans. Under the Swynnerton Plan, land consolidation and adjudication programmes did not restore Kenyans back to their ancestral lands but continued to dispossess those who were perceived to be members outlawed independence

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<sup>59</sup> The Constitution of Kenya, 1963 (Independence Constitution)

<sup>60</sup> Registered Land Act, Chapter 300 of the Laws of Kenya



struggle groups, while it benefitted the collaborators. The collaborators ended up being the elites that the Independence Constitution facilitated to acquire the white highlands and settlement schemes at cheap credits from the UK government. It is the same elites that ended up being beneficiaries of liberalization of the state corporations including the tea sector in Kenya. Kenya's neo-colonial tendencies and under-development policy programmes were set up before and after independence. This was a systematic and deliberate move by the UK government to continue its domination and dependency syndrome upon the Kenyan population. After the 2010 constitution, <sup>61</sup>all laws that dealt with land were consolidated into comprehensive statute known as the Lands Act, 2012.<sup>62</sup>

### **2.2.3. 1963 (Independence) and 1969 Constitutions of Kenya**

Chapter two of the Independence Constitution of 1963, provided for the protection of fundamental rights and freedoms of individuals. Part One of Chapter Twelve, Articles 197-201, of the Constitution created a Central Land Board. Part Two in Articles 202-214 provided for land tenure and Part 3 in Articles 215-222 provided for controls over transactions in agricultural land. Article 14 c) and Article 19 provided for protection of private property and outlawed deprivation of private property without compensation. Functions of the Central Land Board were to select agricultural land that was to be set aside as settlement schemes, assess land prices and purchase land from the owners. The Independence constitution, therefore, set the pace for the control and disposition of agricultural land. The 1969 amendments to the Constitution retained the protection of fundamental individual property rights.<sup>63</sup>

Basically, the constitution of Kenya at independence was a replica of the west-minister model and it retained all the negotiated and agreed terms of the Lancaster House Conferences that preceded independence.

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<sup>61</sup> The Constitution of Kenya, 2010

<sup>62</sup> The Lands Act, No 17 of 2012

<sup>63</sup> The Constitution of Kenya (1963), Articles 70 and 75

## **2.3. State and Development of the Tea Sector**

### **2.3.1. The State and Development**

To fully appreciate the effects of colonialism on development in Africa, it is important to have an overview of Africa's state before colonialism. The continent experienced an indigenous political and social structure distinctive and unique of and by itself. There existed quasi-monarchical or aristocratic polities that sought to safeguard the welfare and interest of the community from external interference. The societies had established economies not only for sustenance but traded in their surplus produce. Many African States and societies were materially wealthier than the European states until the 1700s. The stimulus for state formation in pre-colonial Africa was mainly economic activities. In West Africa, for instance, states like Ghana and Mali were built on the proceeds of the trans-Saharan trade, the Ashanti Kingdom on mining. In East Africa, the Baganda Kingdom was established on trade and the rail lines were mainly established following the trade paths. In the north, the ancient Kingdom of Egypt was established on agricultural surpluses from the Nile River. The Zulu Kingdom in the south was built on military prowess. There was a wide range of multiple, overlapping and alternative collective identities in Africa before colonization,<sup>64</sup> which euro-centric historical thinkers thought was backwardness, however, these were institutions that depicted sufficient administrative and regulatory capacities exclusive over their jurisdictions that was patrilineal in nature and instilled unity with centralized authority.

Under the State theory, body politic becomes a State when it claims a monopoly of violence over a defined territory, <sup>65</sup>is a union of families and villages with perfect and self-sufficing happy and honourable life. A State is a community of persons who permanently occupy a definite portion of territory and is independent of external control of an organized system that inhabitants render habitual obedience. In international law, a State 'should have a permanent population, defined territory and capacity to enter into relations with the other States'.<sup>66</sup>

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<sup>64</sup> Adrian Leftwich; *Theorizing the State* Oxford University Press

<sup>65</sup> Article 1 of Montevideo Convention on the Rights and Duties of States; <https://www.ilsa.org/jessup/jessup15/Montevideo%20Convention.pdf> accessed on 9/6/2018

<sup>66</sup> *Supra*, 50

Private sector is a key and important player in development process of a State mainly because of its critical role in mobilization, management and organization of resources,<sup>67</sup> policy formulation, the creation of enabling environment and injection of financial aid into the economy. In the realm of political science, public development and administration, Africa has unique challenges of how to develop and eradicate and get its people from claws of poverty. The role and composition of the State were generally viewed as formations to serve and reproduce capitalist interests and structure through its economic, legal and political regimes.<sup>68</sup>

Kenya as a State has set up its legal framework in the tea sector since 1934 when it enacted the Tea Ordinance. From the colonial era, when tea was introduced as a cash crop to-date, there has been a marked development in the law, legal systems and institutional framework in the tea sector. At independence, for example, the State nationalized all the corporations including the Kenya Tea Development Authority. Its basic aim was to provide the enabling environment and inject financial aid into the economy. The other purpose was the retention of the status quo of the agricultural sector in line with the negotiated independence hence through the post-independence State, Kenya agricultural sector ended serving the capitalists interest, with the tea sector rolling over to an elitist private sector currently acting as managing agents of the small scale tea factories across Kenya.

### **2.3.2. Law and Development in the Tea Sector**

Great importance has been placed on the meaning of law with so much literature available from theoreticians ascribing to either natural or positivist or sociological schools of thought with each theoretician placing a different meaning to the nature and source of law. Law is a system of social rules that regulate the conduct of the members of a given society<sup>69</sup> and is derived from the practices of a society<sup>70</sup> over the years hence viewed as an instrument of economic development. This explains the rise of movements in the 1960s on law and development that emphasized economic growth as the hallmark for development. However,

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<sup>67</sup> Yash P. Ghai (1993) "Constitutions and governance: A prolegomenon," in Sammy Adelman and Abdul Paliwala (eds) *Law and Crisis in the Third World*, Hans Zell Publishers, pp. 51-74

<sup>68</sup> Article 1 of Montevideo Convention on the Rights and Duties of States; <https://www.ilsa.org/jessup/jessup15/Montevideo%20Convention.pdf> accessed on 9/06/2018

<sup>69</sup> H.L.A Hart, *The Concept of Law*, 1961

<sup>70</sup> Brian H. Bix. 2009. *Jurisprudence: Theory and Context* 5th ed. (Sweet & Maxwell).

economically developed countries such as the US continue to struggle with issues such as racism and inequality amongst other social and political challenges. The meaning of development to incorporate real freedoms has been redefined by scholars.<sup>71</sup>

### **2.3.3. Legal Frameworks in the Tea Industry**

Legal framework means regulatory organizations, structures and legal systems. It determines regulatory impact and its implementation depends on it being a single statute with its own monitoring and enforcement mechanisms or it being a subject to the control of a high-level statute. The importance of legal frameworks has also been emphasized by the works of La Porta and others<sup>72</sup> as it presents challenges for the adoption of laws, legal norms and concepts that originate in another jurisdiction and not in the receiving jurisdiction.<sup>73</sup> Legal systems have different underlying ideologies and cultural traits that lead to varying development outcomes.<sup>74</sup>

### **2.3.4. Role of Institutions in Development**

Institutions are organizations' norms and practices that relate to adoption, implementation and enforcement of the law. Institutions have played a great role in the development and ethnocentric assumptions have ignored local realities and denied this field a functional theory.<sup>75</sup>

### **2.3.5. Regulations and Development in the Tea Sector**

Regulation has been defined both narrowly and broadly to mean government intervention in the affairs of the society. The idea of using regulation as a tool for development in developing countries is a deep-rooted practice which can be traced back to the 1960s. While the rule of law can be an effective instrument for development, its implementation has proven to be a challenge and despite the costs associated with regulation, the role of effective regulation in developing countries cannot be over-emphasized because without regulation certain sectors of

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<sup>71</sup> Amartya Sen (1999) *Development as Freedom*, Anchor Books, New York (chapter 2: "The ends and means of development.").

<sup>72</sup> See Raphael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, & Robert Vishny (La Porta et al.), *Law and Finance*, 106 *J. Pol. Econ.* 1113 (1998)

<sup>73</sup> Katherina Pistor, *The Standardization Of Law And Its Effect On Developing Economies*, 50 *Am. J. Comp. L.* 97 (2002)

<sup>74</sup> Paul G. Mahoney, *The Common Law And Economic Growth: Hayek Might Be Right* 30 *J. Legal Stud.* 503 (2001)

<sup>75</sup> David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies In the United States*, *Wis. L. Rev.* 1062 (1974).

economy and society cannot function effectively.<sup>76</sup> Overregulation should neither be viewed nor confused with the number of regulations in a given sector but should be said to occur when regulation becomes a hindrance in that the cost of implementation for both the regulator and the consumer outweighs the intended benefits.<sup>77</sup>

At a time that resources are scarce, there is need to assess the cost and benefits of regulation through regulatory impact assessment, which in policy and regulation formulation helps in identification of the costs versus the benefits which contributes to effective and efficient regulatory practices.

## **2.4. Conclusion**

Development of the legal and institutional frameworks in Kenya's tea sector commenced upon the arrival of colonialists in Kenya. Little or no recognition was given to indigenous systems that existed across communities. The colonial ordinances paved way for the easy conclusion of negotiations at independence and the colonial law that existed formed the basis of handing/taking over. As Kenyans prepared to usher in independence many formal plans and policies were put in place and these were to set a stage for the country's direction. A good example is the Swynnerton Plan which though driven by the colonial government, the natives embraced it as it was concerned with the land issue and was viewed as a tool to reduce existing land tensions. In retrospect, the colonial government was validating their early theft of land through the adjudication, consolidation and registration process.

The building of infrastructure, institutions and legal frameworks offered the colonial dominated agriculture to develop. 1950/60s saw the emergence of developmental schools of thoughts and theoretical frameworks. These went a long way to shape the current legal provisions and institutions into what they are at the moment.

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<sup>76</sup> Hossein Jalilian, Colin Kirkpatrick & David Parker. 2006. "The impact of regulation on economic growth on developing countries: A cross-country analysis (Centre on Regulation and Competition. Institute for Development Policy and Management, University of Manchester, UK

<sup>77</sup> Ibid

## CHAPTER THREE

### LEGISLATION AND INSTITUTIONS IN THE TEA SECTOR

#### 3.1. Introduction

This chapter examines several pieces of legislation in the tea sector, more-so, the relevance of the law on land ownership, crops, privatization, companies and the constitution on the tea sector and how the said laws have been applied. The independence constitution provided for reparations over colonial injustices on Kenyans. These injustices were felt in the land sector after the colonialists appropriated rich agricultural lands and banished Kenyans to reserves where there would be taxed and required to hold passes wherever they wanted to leave the reserves. The natives would remain as pools of cheap labour for the colonial farms and industries. In the advent of independence, the colonialists put in place and administered development policies and plans that would help in consolidating their interests in Kenya, for example, the Swynnerton Plan, which was used by colonialists to reform the land sector in Kenya at independence by ensuring that the white highlands' leases continued unaffected by the declaration of independence. Other critical developments in Kenya during this period were the negotiation for Kenya's independence through the Lancaster Conferences. At independence and after, the small-scale agriculture based Kenyans were disadvantaged as they did not get their rich agricultural parcels of land back and the programmes that were put in place favoured the elite public servants who took advantage and amassed wealth.

The Crops Act and its regulations provide for the development of scheduled and non-scheduled crops in Kenya. This Act consolidated various statutes and it regulates and controls the production of tea in Kenya. This is the Act that the government uses to license players in the tea sector including brokers, agents and tea factories.

Privatization Act was enacted to provide for government divestiture and offloading of its stake in state corporations through the sale of shares to the public. The tea sector in Kenya was one of the entities that were privatized and hence management of small-scale tea sector was ceded to the Agency.

This chapter looks critically at the provisions of the Companies Act which provides for corporate structures and categories and registration of companies in Kenya. The small-scale tea sector is deemed as private yet it hosts thousands of tea farmers as members and shareholders.

This chapter critiques the statutes that operationalize, manages and regulates the tea sector in Kenya and critically examines the adequacy of these laws in safeguarding tea farmers' interests.

Institutions such as the Tea Directorate of Kenya, the Tea Institute of Kenya, the Agriculture Fisheries and Food Authority and Privatization Commission are created under these statutes for implementation of mandates and or regulation of the industry under which the Act operates.

### **3.2. The Crops Act and Tea Industry Regulations**

The Tea Act,<sup>78</sup> 1960 as repealed by the Crops Act,<sup>79</sup> regulates and controls the production, manufacture and trade of tea in Kenya. The Crops Act<sup>80</sup> consolidated and repealed various statutes relating to crops and was to provide for growth and development of agricultural crops. This will augment the foreign exchange earnings of the country, through promotion, production, processing, marketing and distribution of crops in suitable areas of the country.<sup>81</sup>

The Act lists tea as one of the Scheduled Crops for which Authority was set up to; facilitate, establish, develop, promote and market, train farmers, enforce standards and advise on value addition amongst other functions.<sup>82</sup> The Act also creates a Commodities Fund Section 9 of the Crops Act to provide sustainable and affordable credit advances for farm improvement, inputs, operations, price stabilization and any other purpose approved by Authority. This Fund is financed through license and agency fees, commission and fees that accrue to the Authority in the course of the exercise of its functions.

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<sup>78</sup> Tea Act, Chapter 343 of the Laws of Kenya repealed in 2013

<sup>79</sup> The Crops Act, 2013, commenced on 1st August 2014

<sup>80</sup> Ibid 6

<sup>81</sup> Crops Act, 2013, Section 3

<sup>82</sup> Crops Act, 2013, Section 7 & 8

The Crops Act, in a nutshell, gives the roles of the County and National Governments in the development of crops, sets the registration requirements for the Scheduled Crops, licensing and tax provisions and appointment of county officers and crop inspectors.

The Tea Industry Regulations<sup>83</sup> under the Crops Act provide for the registration and licensing of tea industry players, development, processing, marketing and market research, trade promotion, compliance, standards and food safety for the tea industry.

### **3.3. The Constitution of Kenya, 2010**

The Independence Constitution, the 1969 Constitution and the 2010 Constitutions are the three major constitutions which brought in marked changes in Kenya and specifically land ownership, disposition and use. The Constitution of Kenya, 2010 introduced many safeguards on land, property rights and individual freedoms.

#### **3.3.1. Good governance and national values**

Shareholders and stakeholders continue to question lack of good governance practice in operations and management of small-scale tea factories. These are provisions enshrined in the supreme law and the Agency is obligated to implement sustainable, transparent and accountable management systems and practices in their operations.<sup>84</sup>

#### **3.3.2. Socio-economic rights and fair administrative action**

From the foregoing, the Constitution<sup>85</sup> seems to have been flagrantly abused by the Agency. Farmers do not get access to information and or enjoy the specified rights and freedoms from the Agency despite these rights being entrenched in the Constitution of Kenya. Law reform is required to address this glaring gap.

#### **3.3.3. Land ownership in Kenya**

The underpinning concern over land in Kenya is the continued tensions that built in Kenya before and immediately after independence. These land tensions have gradually

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<sup>83</sup> Tea Industry Regulations, 2015, under Section 40 of the Crops Act, 2013

<sup>84</sup> The Constitution, 2010, Article 10 1), 2) c) and d),

<sup>85</sup> The Constitution Article 25



metamorphosized into commercial tensions in the tea sector where tea farmers in western Kenya feel that those in the eastern part are favoured and assisted by the market players to get good prices for their tea produce.

### **3.3.4. Leadership and integrity**

This law as enshrined in the Constitution should apply across all sectors in Kenya, both private and public. In the quest for good leadership that is transparent and accountable, tea farmers across Kenya elect their tea directors through a competitive process this chapter of the Constitution needs to be the basis and aspirants too must meet the constitutionally set thresholds.

### **3.3.5. Law and public interest**

The Constitution gives the right to any Kenyan to sue over any aspect touching on public interest, especially rights to equality and freedom from discrimination, economic and social rights and fair administrative action.<sup>86 87</sup>

As enumerated above, the Constitution of Kenya 2010 has comprehensively dealt with various provisions that directly impact on the tea farmer. It goes further to lay the principles on governance, leadership, integrity and management, which have been of concern to the tea sector as will be enumerated in the next chapter.

Despite clear constitutional provisions, Kenyans who had been deprived of property and land were never compensated. Whereas the Independence Constitution<sup>88</sup> provided for a safeguard to private property and protection against deprivation of property without compensation, most of the large-scale parcels of land (that were rich and good for agricultural development) were still being owned by white settlers. To-date, big multinationals that deal in tea, that is, Unilever Tea (K) Limited (Brooke Bond (K) Limited), George Williamson (K) Limited and James Finlays (K) Limited (African Highlands Produce Company Limited) have continued to own expansive land planted in tea and generally running the colonial systems to-date. Kenyans who were

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<sup>86</sup> The Constitution 2010, Article 35

<sup>87</sup> Ibid, 92 Articles 27 to 47

<sup>88</sup> The 1963 Constitution, Article 19

deprived of the said parcels of land were never compensated. To-date injustices meted on Kenyans by colonialists are yet to be classified by independent Kenya as constituting historical injustices worth of reparations, yet the Constitution decrees it.

The Constitution 2010 has clearly marked out human rights and freedoms that Kenyans must enjoy and it is ironical that despite the Government Select Taskforces having made far-reaching recommendations and proposed reforms on governance and management in the tea sector, nothing has been implemented. Some of the Taskforces Reports are yet to be tabled in Parliament for discussion and adoption.

### **3.4. Agriculture, Fisheries and Food Act**

The Agriculture, Fisheries and Food Authority Act,<sup>89</sup> creates the Authority (AFFA)<sup>90</sup> which is a successor to institutions established by Acts repealed under Section 41, existing immediately before the commencement of the Crops Act<sup>91</sup> The Authority administers Crops and the Fisheries Acts, regulates best practices in production, processing, marketing, grading, storage, collection, transportation and warehousing of agricultural products, collects and collates data, monitors agriculture through registration of players as provided for in the Act, responsible for determining the research priorities in agriculture, advise the National and County Governments.<sup>92</sup>

The Authority is made up of a Board of eighteen (18) members; nine (9) of whom represent various government departments, eight (8) represent small-scale sector and Director General who is a Secretary to the Board.<sup>93</sup>

The Board as to-date licensed sixty-two (62) smallholder owned factories managed by the Agency and thirty-nine (39) private estate owned factories. The Cabinet Secretary for Agriculture is mandated to make rules for the election of farmers' representatives (the eight

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<sup>89</sup> The Agriculture Fisheries and Food Authority (AFFA), State Corporation formed in 2011.

<sup>90</sup> Ibid

<sup>91</sup> The AFFA Act, No 13 Of 2013, Section 3 (3)

<sup>92</sup> Ibid, Section 4

<sup>93</sup> Ibid, Section5

persons) to represent major crop subsector in Kenya.<sup>94</sup> The Act also sets the qualifications, recruitment process and term of office of the board members.<sup>95</sup>

The Act provides for organizing of its secretariat into directorates with the approval of the Cabinet Secretary for Agriculture. In this respect, Tea Directorate of Kenya Tea Directorate of Kenya replaced the Tea Board of Kenya after the repeal of the Tea (Amendment) Act, 2011 and Tea Institute of Kenya The Tea Institute of Kenya, replaced the Tea Research Foundation of Kenya after the repeal of the Tea (Amendment) Act, 2011 are two directorates in Authority Secretariat that work closely with organizations in tea subsector which include the Agency, Kenya Tea Growers Association and East African Tea Trade Association, which organizations and their respective interests are represented in the Board. Legal and institutional framework is more regulatory and does not provide meaningful safeguards to scale tea farmer against competition, transparency and accountability.

This Agriculture, Fisheries and Food Act (AFFA) consolidated laws on regulation and promotion of agriculture generally and relevant provisions of the Constitution.<sup>96</sup> It repealed the Agriculture Act and its former institutions including the Tea board of Kenya.<sup>97</sup> The Authority is a body corporate that administers the Crops Act.

The Crops Act was meant to; accelerate growth and development of agriculture, enhance productivity and incomes of tea farmers and rural population, circumvent unnecessary levies, taxes and regulatory bureaucracy in crops sector and reduce barriers to free movement of crop products.<sup>98</sup>

This act applies to the Scheduled Crops as specified in the Act and agricultural land privately or communally owned. It sets out the roles of the National Government which include licensing and charging levies and County Government is tasked to implement policies of the national government. Jointly, National and County Governments will; provide an enabling

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<sup>94</sup> Ibid 5 (2) (3)

<sup>95</sup> Ibid, 5 (4)

<sup>96</sup> The Constitution of Kenya, 2010, the Fourth Schedule

<sup>97</sup> The Crops Act, No 13 of 2013, First Schedule (S. 3 (4)) Transitional Provisions 1.

<sup>98</sup> Ibid, Section 3

environment, determine and promote the implementation of agricultural policies and measures in a manner designed to support and enhance crop productivity.

The authority shall promote Scheduled Crops by regularly obtaining information on current and future production and recommending general industry agreements between farmers and processors of Scheduled Crops. The Act enables proper planning through a need to maintain necessary statistical information and guidelines for registration of dealers in Scheduled Crops. The Act provides tea growers and plantations to register with a tea factory that receives their green leaf, by supplying such particulars as the Authority may prescribe. The Authority will maintain a register of smallholder growers and dealers in Scheduled Crop using a prescribed format.

Whereas the Crops Act is a consolidation of the various pieces of legislation in Kenya, it may not have achieved its overall objective as noted above. It is the mandate under the Act for the Authority to oversee any form of agreements entered by tea farmers with processors. The dependence of farmers on the management Agency's piecemeal information system could have been helped if the regulator took up its role expeditiously.

### **3.5. Privatization Act**

The Privatization Act<sup>99</sup> provides the process on how public assets, including those that are held by the State Corporations, are privatized by the Privatization Commission<sup>100</sup> who implements government-approved privatization programmes. In Kenya, privatization is a progressive effort aimed at promoting transparency, accountability, productive efficiency, strengthening competitive forces in the economy and supporting entrepreneurial development.<sup>101</sup>

The Act describes privatization as transactions that result in the transfer of assets and shares of a public entity but excludes the sale of new shares to existing shareholders through a rights issue or any balance sheet reorganization which may lead to dilution of the percentage of shares held by a public entity. Privatization Commission is a body corporate charged with the

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<sup>99</sup> Privatization Act, No 2 of 2005, Assented on 13th October 2005

<sup>100</sup> Ibid, 92

<sup>101</sup> Ibid, 78

formulation, management and implementation of specific proposals in accordance with the privatization programme.<sup>102</sup>

Methods of privatization are approved by Cabinet and include public offering and negotiated sale of assets including liquidation.<sup>103</sup> Privatization programmes can result in an unregulated monopoly and on such, Privatization Commission is mandated to provide an agreement to regulate such resulting monopoly.<sup>104</sup>

In Kenya, structural adjustments programs took effect from 1999 when the government put in place the legal and institutional frameworks towards liberalization. The privatization was as a result of the 1991 Parastatals Reform Strategy Paper<sup>105</sup> that listed Kenya Tea Development Authority as one of the parastatals that ought to be privatized. The Sessional Paper noted that major restructuring of Kenya Tea Development Authority would be undertaken thereby ceding respective small-scale tea factories to a private entity owned by tea farmers through their respective tea factories and to fully face modern management techniques, challenges of new international financial lending requirement and competitive tea markets. The Paper further noted that privatization would eliminate limitations on tea production and enhance the role of agriculture in poverty alleviation. Through privatization programme, equity and shares of small-scale tea factories would be purchased by the tea farmers and elected directors<sup>106</sup> were to manage the tea factories. Kenya Tea Development Authority ceased operations as a State Corporation vide Revocation Order of 1999<sup>107</sup> Management and operations of fifty-two (52) small-scale tea factory companies were taken up by the Agency, a private limited liability company that was incorporated on June 15, 2000.<sup>108</sup>

The relationship between the new entity and the farmers' owned tea factories would subsequently be governed by management agreements signed between the Agency and each of

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<sup>102</sup> Ibid,

<sup>103</sup> Ibid, Section 25

<sup>104</sup> Ibid, Section 35

<sup>105</sup> Ministry of Agriculture, Sessional Paper on the Liberalization and Restructuring of the Tea Industry, Reforms of the Tea Board of Kenya and Privatization of the Kenya Tea Development Authority (The Ministry 1999)

<sup>106</sup> A comparative study of the tea sector in Kenya, <https://www.khrc.or.ke>; assessed on 17/7/2018

<sup>107</sup> The Kenya Tea Development Authority (Revocation) Order, Legal Notice No. 44, Kenya subsidiary legislation, 1999.

<sup>108</sup> The Companies Act, Chapter 486 of the Laws of Kenya (Currently the Companies Act, 2015)

the then fifty-two (52) tea factories. The Agency's role was to offer management services to the individual small-scale tea factories and charge a management fee based on a minimal percentage of the net value of the proceeds. The management would include advisory services on tea husbandry, tea collection, manufacture and marketing and provide sound technical, financial and managerial infrastructure. In 1991, through this contractual relationship, the Agency took over the management of the fifty-two (52) tea factory companies across Kenya and with time, it put in a complex and unique corporate governance structure that ordinary small-scale tea farmers cannot comprehend. Report by the Task Force

Privatization of management and operations of the tea sector provided for modernization when government weaned and relinquished its control to the private sector. This had desired goals but emerging elite Kenyans took advantage and monopolized Kenya's tea sector. Management agents are monopolists for sometimes now in Kenya, courtesy of privatization, a gap that has not been rectified despite the tea regulator being aware. This runs contrary to section 35 of the Privatization Act, which though it suggests a regulatory framework, nothing seems to have happened in the tea sector.

### **3.6. The Companies Act**

With the liberalization and the change of management and governance of the small-scale tea sector from the Corporations Act,<sup>109</sup> the entire legal framework of the small-scale tea sector changed as the Agency is a private company under the Companies Act.<sup>110</sup> Effectively, having come under the purview of this Act, the Agency is expected to operate and manage small-scale tea factories in accordance with the law The Constitution of Kenya and the Companies Act and related legislation and the directors must uphold and practice good governance.

The Agency and fifty-two small-scale tea factories are each registered as private companies with limited liability. The Act provides that membership in private companies should not exceed fifty (50). Privatization programme opened up the purchase of shares to tea farmers thereby contradicting the limit of membership of a private liability company, as provided in the

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<sup>109</sup> Corporations Act Chapter 446 of the Laws of Kenya

<sup>110</sup> Companies Act; No 17 of 2015, Laws of Kenya

law. On the other hand, whereas farmers elect directors, the same directors never form the board of the small-scale tea factories since there are registered shareholders and directors of each of the small-scale tea factories. These and many other governance and management conflicts and complexities that inform the tea sector in Kenya.

The Act provides a distinction between private and public companies. Through the Articles of Association<sup>111</sup> a private company:-

- a) restricts the transfer of shares by members,
- b) limits membership at fifty and
- c) Prohibits invitation to subscribe for company shares or debentures.
- d) Is not a company limited by guarantee and its certificate of incorporation states it as a private company?

A public company<sup>112</sup> in its Articles of Association:-

- a) allows its members to transfer company shares,
- b) do not prohibit invitations to subscribe for company shares or debentures and
- c) States it a public company in its certificate of incorporation.

The Act sets out duties of directors of a company <sup>113</sup>and requirement for directors of a company to declare their interest in existing transactions or arrangements to avoid conflict of interest.<sup>114</sup> Small-scale tea factories managed by the Agency on behalf of the shareholders have been registered as private limited liability companies, despite the huge membership base. Such a gap creates room for the Agency to deal for its benefit under the principal-agent theory, a fact that has been highlighted by the tea regulator. The development of many subsidiary companies by the Agency without consultation with the farmers is an affront to strategic and principle guidelines of the Agency agreement as farmers were never consulted nor are

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<sup>111</sup> The Companies Act, No 17 of 2015, Section 9

<sup>112</sup> Ibid, Section 10

<sup>113</sup> Ibid, Articles 140 – 148

<sup>114</sup> Ibid, Articles 150 – 154

shareholders (these being registered as private entities) yet the funding of such projects are by the tea farmers.

The Agency adopted a sophisticated structural system and institutions which cannot be effectively regulated by the government since they hide in the disguise of private limited liability companies but in reality practice the concepts of public companies. With its complex structural design, the Agency set up extractive subsidiary companies that are monopolistic and harmful to shareholders.

### **3.7. Kenya Agricultural and Livestock Research Act**

This Act created Kenya Agricultural and Livestock Research Organization (KARLO), a premier national research institution that brings together the Tea Research Institute (formerly the Tea Research Foundation of Kenya) and other sixteen agricultural research institutions and foundations. Its role is purely research on Scheduled Crops. The Tea Research Institute promotes research and investigates problems related to tea throughout Kenya. The Tea Research Institute replaced the former Tea Research Institute of East Africa following the breakup of East Africa Community

Dualism ineffective law and regulatory framework cause lapse in coordination and implementation of key projects and research designs which end up causing harm to the intended recipients of the research results. Consolidation of the law ended up separating key institutions from their respective research institutions making coordination more complex.

### **3.8. Critique of the Legal Framework in the Tea Industry**

Collins Leys advanced the dependency theory to explain under-development in Kenya within the agriculture and manufacturing sectors which were attributable to and was controlled by foreign multinational corporations. As a result, Kenya was tied in a dependent relationship with foreign capital which stunted its wholesome economic progress. Leys noted that at independence in 1963 settler capital was largely eliminated as an independent fraction of capital in Kenya and the formation of and importance of an African fraction of the capitalist



class, constituted out of agents of accumulation in both trade and agrarian production in the colonial and immediately post-colonial period begun to be recognized.

Leys in his book cites the address by the Executive Director<sup>115</sup> of Industrial Commercial Development Corporation (ICDC) to the Kenya Association of Manufacturers in 1967 in which he stated clearly that Kenya believed in free enterprise that was designed to solve the basic economic problems with the greatest efficiency. He urged Kenyans to help in the Africanization of the economy through the conversion of private enterprises into public companies and offering substantial shareholding to Africans. His speech was explicit recognition that what was needed then was to persuade 'the man in the street' to accept the existing economic system by promoting the growth of the Kenyan petty-bourgeoisie and admitting Kenyan graduates into lucrative positions in top management. This assisted in the acceleration of underdevelopment of this country as the economic tools ended up being vested on the elites and the rich.<sup>116</sup>

Leys,<sup>117</sup> notes that after independence African capital accumulators advanced with speed to have exclusive control of the economy. This pointed to neo-colonialism tendency and confirmed a prior process of accumulation which was comparatively unusual in African degree of political and ideological hegemony. It must be noted that foreign capital that was availed immediately after independence provided the much-needed Africanization programme as asserted by the independent government in its 1965 statement of economic policy

At independence, the government retained the colonial land tenure system that subjugated the customary land tenure systems. It provided un-accountable executive powers over land in which the crown lands became Government land while the native reserves became the current Trust lands. The administration of new land systems was vested on County Councils and Commissioner of Lands respectively and former traditional institutions was not recognized. A Settlement Fund managed by Trustees was established under the then Ministry of Lands and

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<sup>115</sup> Maina Wanjigi, Record of KAM Annual General Meeting, 30th March 1967

<sup>116</sup> Under-development in Kenya; The Political Economy of Neo-colonialism 1964-1971; University of California Press

<sup>117</sup> Ibid, 86

Settlement to purchase and distribute settler farms to landless Kenyans. This arrangement benefitted few Kenyans with financial means to buy land, while those with customary interests generally lacked the capital or simply refused to buy the land which they considered theirs. Ethnic and political favouritism characterized the new land acquisitions. Various laws were enacted to ensure better registration of title for Africans with its main achievement being the element of individual ownership. In the tea sector, the clique of post-independence civil servant bourgeoisie that had been facilitated economically by the government to work and own businesses readily positioned themselves during the privatization period and bought enterprises that included the Agency hence continuing colonial mentality of investment and labour-wage economy of the masses, in this case, the small-scale tea farmers.

### **3.9. Conclusion**

The Constitution explicitly provides for national values and principles of good governance, integrity, transparency and accountability<sup>118</sup> and Tea farmers cannot access information from the Agency despite it being entrenched in the Constitution. The underpinning concern over land ownership in Kenya are continued tensions that built in Kenya before and immediately after independence and have within time turned into commercial tensions in the tea sector pitting western and eastern Kenya's tea farmers. The constitution of Kenya too provides the minimum requirement on leadership and integrity for the state officers, and as such, the Agency ought to embrace this as a factor for accountable and transparent leadership within its board of management.

Despite clear constitutional provisions at independence and improvements thereto resting with the 2010 Constitution, historical injustices have continued to thrive mostly on land ownership and deprived property that has left multinationals running developed parcels of land against small holdings that are purely undeveloped across Kenya. This being the supreme law, the Agency should implement systems that are accountable and transparent from the shareholders' view.

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<sup>118</sup> The Constitution of Kenya 2010; Article 10 1), 2) c) and d)

Development (or underdevelopment) is influenced by the state, the law, the legal systems in place and the institutions charged to effect regulations on behalf of the state or body corporate that does oversight and regulations. The tea sector in Kenya has developed over the time and as noted above, there is a big divide between the small-scale tea sector and the plantations in Kenya. The development theories have enumerated causes of underdevelopment in a state and corporations to include backwardness, structural systems, dual institutions and set of contracts like the principal/agent relationships that end up undermining and causing the small-scale farmers to reel in poverty. Notable is the interface between the theoretical frameworks from State's perspective to the under-development that has been witnessed in the small-scale sector in Kenya. Institutions charged with regulating the industry lack the capacity to basically exert its force on the tea sector players, i.e. the Agency or the law has several gaps that have allowed the bourgeoisie within the tea sector to undercut and or exploit the small-scale tea sector. In as much as the goals for privatization were clear, it has yet to achieve its broader objective of helping the small-scale tea farmers to leverage on the private sector and maximize his profits in tea. Instead, the Agency has continued its monopoly on the face of the law and the tea regulator has remained a passive player in this unfolding scenario.

Through the above-noted under-development, poverty amongst small-scale tea growers continues to grow unabated more-so after the agent took over and has continued to manage the small-scale tea factories to its advantage rather than that of the principal, the shareholder.

## **CHAPTER FOUR**

### **GOVERNANCE, LIBERALIZATION, NEO-COLONIALISM AND UNDER-DEVELOPMENT**

#### **4.1 Introduction**

This chapter examines and covers a review of the contractual relationship between tea farmers, Agency and management of small-scale tea factories and whether the parties to this relationship have strictly performed their roles as required. This chapter enumerates how the Agency has operated since privatization in 1992 and highlights its practices, implementation and limitations of the corporate governance and leadership. Whereas the Agency under its contractual relationship with the small-scale tea factories has formulated a Board of Governance Manual, Directors' Code of Conduct and Elections Manual to guide the company in its corporate governance practices, has these served to fulfil the requirements of the Constitution and Companies Act?

This chapter analyses attempts that the Agency has made towards implementing best management practices, how this relates and satisfies myriad of concerns of the tea farmers and whether the legal framework in its current form has helped in entrenching good management practices across the tea sector. The tackles what other entities, bodies, the tea farmers, Parliament and the tea regulator have had to say in respect of corporate governance and general management of the tea sector.

Effects of liberalization of the tea sector have been discussed and the concerns of the stakeholders across the tea industry. The current management of the tea sector exhibits colonial tendencies. This section discusses the semblance of neo-colonialism and its underdevelopment of the tea sector in Kenya.

#### **4.2 Management Systems in the Tea Sector**

There exists a liberal system of management that encompasses the principal (tea farmer) - agent (the agency) relationship between the small-scale tea farmers and the Agency. In this relationship, the Agency signed a management contract with the tea farmers wherein the Agency manages the small-scale tea factories and markets tea produced across Kenya on

behalf of the tea farmer. It must be noted that this relationship is the result of liberalization programmes commenced by the government in the 1990s that saw the government ceding its management of corporations to the private sector with the aim of improving efficiency and profits in the liberalized sectors.

Contractual, property and agency theories have strikingly dominated approaches to corporate governance<sup>119</sup> and has effectively reduced conflicts of interest among shareholders and managers<sup>120</sup> hence the shareholders' value has been maximized.<sup>121</sup>

Since the 1970s, acceptable practice and conquered research<sup>122</sup> on good corporate governance standards in anchored on the agency theory has progressively developed notwithstanding critiques articulated by several scholars. This has influenced conceptual assumptions and empirical observations which have been formulated into law and policy on aspects of investor and shareholders' protection,<sup>123</sup> fair-value accounting and extensive disclosure,<sup>124</sup> high-powered equity-based executive compensation<sup>125</sup> and control structures through independent or non-executive directors<sup>126</sup> for example, UK Corporate Governance Code<sup>127</sup> which corporations and regulators have internalized for fear of repercussions.<sup>128</sup> Corporate governance typically supports<sup>129</sup> shareholder primacy and adheres to shareholder value as the overall goal of

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<sup>119</sup> Blair, M.M. and L.A. Stout (1999) 'A team production theory of corporate law', *Virginia Law Review*, 85(2): 247-328.

<sup>120</sup> Jensen, M.C. and W.H. Meckling (1976) 'Theory of the firm: Managerial behavior, agency costs and ownership structure', *Journal of Financial Economics*, 3(4): 305-360.

<sup>121</sup> Hansmann, H. and R. Kraakman (2001) 'End of history for corporate law', *Georgetown Law Journal*, 89: 439-478

<sup>122</sup> Aguilera, R.V. and A. Cuervo-Cazurra (2004) 'Codes of good governance worldwide: What is the trigger?' *Organization Studies*, 25(3): 415-443.

<sup>123</sup> La Porta, R., F. Lopez-de-Silanes, A. Shleifer and R. Vishny (1998) 'Law and finance', *Journal of Political Economy*, 106(6): 1112-1155. Lele, P.P. and M.M. Siems (2007) 'Shareholder protection: A leximetric approach', *Journal of Corporate Law Studies*, 7(1): 17-50.

<sup>124</sup> Pesqueux, Y. and S. Damak-Ayadi (2005) 'Stakeholder theory in perspective', *Corporate Governance: The International Journal of Business in Society*, 5(2), 5-21.

<sup>125</sup> Ezzamel, M., H. Willmott and F. Worthington (2008) 'Manufacturing shareholder value: The role of accounting in organizational transformation', *Accounting, Organizations and Society*, 33(2): 107-140.

<sup>126</sup> Gordon, J.N. (2007) 'the rise of independent directors in the United States, 1950-2005: Of shareholder value and stock market prices', *Stanford Law Review*, 2007: 1465-1568.

<sup>127</sup> Veldman, J. and H. Willmott (2015) 'the cultural grammar of governance: The UK Code of Corporate Governance, reflexivity, and the limits of "soft" regulation', *Human Relations*, online first.

<sup>128</sup> Westphal, J.D. and E.J. Zajac (1998) 'the symbolic management of stockholders: Corporate governance reforms and shareholder reactions', *Administrative Science Quarterly*, 43: 127-153. Yoshikawa, T. and P.H. Phan (2001) 'Alternative corporate governance systems in Japanese firms: Implications for a shift to stockholder-centred corporate governance', *Asia Pacific Journal of Management*, 18(2): 183-205. Rose, C. and C. Mejer (2003) 'The Danish corporate governance system: From stakeholder orientation towards shareholder value', *Corporate Governance: An International Review*, 11: 335-344. Bednar, M.K. (2012) 'Watchdog or lapdog? A behavioural view of the media as a corporate governance mechanism', *Academy of Management Journal*, 55(1): 131-150.

<sup>129</sup> Aglietta, M. and A. Reberioux (2005) *Corporate governance adrift: A critique of shareholder value*. Cheltenham: Edward Elgar Publishing.

institutions and companies. With major corporate scandals worldwide discussions on governance have taken centre stage in corporations. From the legal standpoint and the theoretical concerns, the Agency should ensure that shareholder value is enhanced and totally safeguarded through improved corporate governance systems. It must also guard against impropriety that can easily cause financial losses especially if standards and codes on corporate governance are not set.

Corporate Governance means how corporations are directed, managed and controlled.<sup>130</sup> It refers to how stewardship, power and authority of a corporation are exercised in relation to its assets and resources, an increase of shareholders and satisfying stakeholders' interests in the context of the company objects.<sup>131</sup> The Companies Act sets out the types of companies and duties of directors in companies. The Constitution of Kenya covers the concepts of national values, integrity, transparency, accountability, sustainable development and leadership.

In a nutshell, whereas privatization and concepts of good governance are modern tools of service provisions worldwide, the Agency is yet to embrace and put in practice open systems that allow monitoring and evaluation programmes to be put in place. From the foregoing, the agency should domesticate Codes of Corporate Governance to guide it in its implementation process.

## **4.2. Critique of the Corporate Governance in the Tea Sector**

### **4.2.1. Effective Board**

Successful companies have effective, responsible and collective board<sup>132</sup> that exercises leadership, enterprise, integrity and judgement and desires to add value and prosperity to its shareholders by being transparent, accountable and responsible.<sup>133</sup>

As enumerated above, the ideal situation is arrived at when there is an effective board of directors. The Agency lacks an effective board that can improve the economic and commercial

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<sup>130</sup> Report of the Committee on the Financial Aspects of Corporate Governance,(the Cadbury Report) 1992, para 2.5.

<sup>131</sup> CACG Guidelines: Principles of Good Governance in Kenya and a Sample Code of Good Practice for Corporate Governance (Private Sector Corporate Governance Trust, 1990)

<sup>132</sup> Financial Reporting Council, the UK Combined Code on Corporate Governance, 2008

<sup>133</sup> Supra 7

viability of their respective companies. Directors have limited knowledge of tea and new industry development and in most cases do not attend board meetings and pieces of training. Directors too are not conversant of regular changes and development on the sector's statutory and regulatory frameworks that may have an impact on the direction and economic well-being of the small scale tea factories.<sup>134</sup>

The Governance Manual of the Agency provides for twelve non-executive, one independent (in recognition of affirmative action in the Constitution of Kenya, 2010)<sup>135</sup> and two executive directors (managing director and director for finance and strategy). A non-executive director chairs the Board and twelve directors are independent of management and have a wide and diverse range of expertise and experience. This board may meet the corporate standards as independent, however, the Agency's Board is large and cumbersome hence not effective. Tea farmers have time and again in the annual general meetings called for the reduction of board members. The Parliamentary Task Force on Tea of 2017 also noted the size of the board and recommended for a slim and effective board of directors for both the Tea Directorate of Kenya and the small-scale tea factories.

#### **4.2.2. Conflict of Interest**

Good corporate practices ensure that directors disclose possible areas of conflict and abstain from voting during discussions on items of interest. In the Agency conflict of interest persists especially on tenders/contracts and employment matters where next of kin are given preferences, tenders to repair roads and construct buying centres, the supply of transport lorries, the sale of tea waste, sale of boarded items, tenders and bids for supply and provisions of services and goods. There has been hue and cry amongst tea farmers, especially in employment wherein directors influence employment of their next of kin on permanent basis whereas other members of staff are retained on a seasonal basis and their retention on the payroll depends largely on the availability of green leaf. Tea farmers too have raised concerns

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<sup>134</sup>Corporate Governance and Principles in Commonwealth' [http://www.ecgi.org/codes/code.php?code\\_id=24](http://www.ecgi.org/codes/code.php?code_id=24); accessed 18 March 2018

<sup>135</sup> Constitution of Kenya, 2010

of directors having contracts to transport own green leaf to the tea factories whereas the green leaf of other tea farmers lies in the tea buying centres for days. Tenders too have been shrouded with discreetness amongst directors with most of them buying boarded items at very low prices. Tea farmers have boldly raised these concerns in the annual general meetings but no clear resolutions have been forthcoming.

#### **4.2.3. Appointment of Directors**

Best corporate governance principles demand that procedure for appointment of new directors must be on merit, formal, rigorous and transparent<sup>136</sup> and the process should be well managed and effective to ensure a mix of skills and professions thus enhanced value in decision-making processes<sup>137</sup> and a marked increase in returns.

The internal corporate governance and a control system of a company are exhibited in the role of the board of directors<sup>138</sup> who are fully equipped with professional competences in finance, marketing, legal, information systems that assist in overall decision making in the company. Effectively, the professional proficiency and quality of each director have marked a significant and positive impact on the company's performance.<sup>139</sup> The minimum education qualification for election as a director in the small-scale tea factories is form four level. This kind of threshold has ensured the continued election of directors with minimal or nil strategic and management skills. Some tea factories have had to contend with directors who do not even have the set education qualification threshold which has led to the failure to understand industry dynamics and risks hence the poor performance of the tea factories.

Competitive elections of directors in the small-scale tea industry, as per the Election Manual, brings a challenge to the skills and professional expertise mix because at the end it is that director who is popular, wealthy and possesses a large number of tea plants are the basis and is

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<sup>136</sup> Ibid 13,

<sup>137</sup> Ibid 14

<sup>138</sup> Fama and Jensen, (n 143)

<sup>139</sup> Gavin J Nicholson & Geoffrey C Kiel, 'A Framework for Diagnosing Board Effectiveness' (2004) Corporate Governance 442.



able to convince other farmers with bigger farms to vote for him or her. Whereas the Election Manual lays out the procedure, minimum qualifications for the directorship position and an elaborate dispute resolution process, it totally fails to provide for a process of a mix of skill and professional expertise. This, therefore, leaves this critical parameter of good governance practice to chance and coincidence.

#### **4.2.4. Transparency and Accountability of the Board**

The Board must always work diligently to secure shareholders' value and interests by manifestly understanding financial and business basis of the enterprise against shareholders' expectations. It is imperative that shareholders' get a fair value of their investment and are regularly informed on the performance, challenges, risks and opportunities that face and or are available to the company. The code of conduct of the Agency covers aspects of conflict of interests and the attendant requirements of full disclosure by directors, however, in reality, conflicts of interests on contracts, tenders and related works and services have been witnessed, specifically where directors use proxies to attain the ends that are covered by the conflict of interest.

#### **4.2.5. Independence of the Board**

In Kenya, the Code of Governance<sup>140</sup> forbids an individual or group of persons in a board from having unlimited powers in management and control of a company. It provides for non-executive directors who exercise independence and objectivity in board decisions and judgements. Non-executive directors have two characteristics, that is, their independence and reputation in the external labour market, which enables them to effectively offer the needed monitoring of a company board. Scholars on corporate governance have taken note of the importance of independent directors in deterring and controlling insider dealings by employees, suppliers, contractors and directors.

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<sup>140</sup> CACG Guidelines: Principles of Good Governance in Kenya and a Sample Code of Good Practice for Corporate Governance (Private Sector Corporate Governance Trust, 1990)

In the Agency set up, it is noteworthy that the calibre of directors elected and their ability to understand complex issues like accounts, engineering, audit, taxation and financial statements is lacking hence the management team usually have their way. Secondly, most decisions are run from the top hence it is an exercise in futility for individual directors to sustain serious objections at their level. In the case of the Agency, directors are always enticed to make critical decisions by being booked into high-class hotels in the big cities where payable allowances and honoraria surpass their ability to make rational and independent decisions. Though in theory non-executive directors should improve performance but in the Agency's board, it is difficult to ascertain the presence, the role and responsibilities and the impact of the non-executive directors.

#### **4.2.6. The Management of Risk**

A company must have the ability to identify key risks by establishing internal risk indicators and controls for it to achieve its budgetary profit and growth forecasts. Appreciating and responding to key risks and ensuring robust internal controls assures the company of sustainability and development. Regular risk audits and assessments must be done with clear mitigation measures having been put in place.

Company boards should establish internal sub-committees to oversee the audit process, appoint external auditors, review the company's financial statements and advise on tender advisory opinions on significant findings of audit investigations.<sup>141</sup>

The audit committee should have at least three non-executive members and independent directors.<sup>142</sup>

Though the Agency has undertaken regular risks audits and assessments, have put in place risk management frameworks to guide mitigation processes and identified risk champions in each of the tea factories, this has not closed glaring grey areas such as loss of fuel-wood, reported cases of theft of made teas en-route to the markets and theft across the outdoor sale shops. The

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<sup>141</sup> UK Cadbury Report, Committee on the Financial Aspects of Corporate Governance (London (n 159)).

<sup>142</sup> Committee on the Financial Aspects of Corporate Governance (London), (n 159)

Agency has a Risk Assurance and Governance Committee which is made up amongst other, the executive directors thus making it fail the test of independence and could be the cause of high risk of losses reported overtime by the company.

#### **4.2.7. Participation of Stakeholders**

Identifying various stakeholders within and without the company and adopting an inclusive and participative stakeholder programme is in itself a good governance practice.<sup>143</sup> Such action by the company ensures positive societal approaches, industry reputation, public confidence and general acceptability by the community and other stakeholders. Such companies would ensure job creation, sustainability of a financially robust institution and ability to recognize, respect and protect the stakeholders' rights.

Though the Agency's Board Manual mentions stake-holders satisfaction, nothing in its strategic plan indicates how such stakeholders' interests are addressed and or satisfied. Corporate social responsibility aspects too never feature much within the Agency's stakeholder framework, yet this could be the best platform where tea farmers, employees, suppliers and other stakeholders could participate in company strategic policy programmes and reach out to that shareholder who never attends annual general meeting but constantly hope to inquire about the performance of the company.

In conclusion, it is worth noting that the small-scale tea sector faces serious corporate governance challenges which have been canvassed and reported through the Task Force Reports, Parliamentary interventions and several court cases. These include; poor board management structure, inexperienced and unqualified directors, apparent and serious conflicts of interests amongst directors, inadequate and incompetence of independent directors and inability to understand risk factors hence poor risk management frameworks.

The above have exposed the small-scale tea farmer to continued conditions of waste and greater risks of loss and there is an urgent need to address these shortcomings in corporate governance as enumerated above.

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<sup>143</sup> The King Report, South Africa

### **4.3. Effects of Liberalization on the Tea Sector**

Small-scale tea farmers through their Union, members of the national assembly and tea stakeholders have voiced concerns over the management of the small scale tea sector in Kenya. There have been several court cases against injustices and shortcomings of the Agency operations. Courts have tendered rulings and interpretations on operations, ownership and management of the small-scale tea factories by the Agency. The government in reacting to farmers' complaints has set up several Taskforces whose findings and recommendations are similar to those by tea farmers' union and the legislators. Tea Directorate of Kenya too has raised concerns on the operations and financial management by the Agency of farmers' finances through investments that are not approved by the shareholders. These are apparent effects of liberalization of the tea sector in Kenya.

#### **4.3.1. Tea Farmers' Voice**

Tea farmers registered a Union to agitate for their rights and reforms in the tea sector known as Kenya Union of Small Scale Tea Owners (hereinafter referred to as the "Union"). It was registered as a trade Union so as to fight for the rights of the tea farmers and agitate for fertilizer subsidies from the national government. The Union has time and again raised its concerns on the size of the Agency's board and has constantly asked for the reduction of the number of directors to the board so as to reduce costs<sup>144</sup> borne by the tea farmers. The Union has called for the dissolution of the Agency accusing it of gross mismanagement of the farmers' assets, poor returns to farmers and higher allowances paid to the directors.<sup>145</sup> The Union has sought other partnerships for tea farmers including holding meetings with multi-national tea companies in an effort to improve farmers' earnings from their green leaf<sup>146</sup> through the alternative sale of green leaf, processing and marketing schemes.

The Union capacity and ability to retain sizeable membership and numbers is doubtful given that it has not managed to marshal the entire small-scale farmers to join in as members and or

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<sup>144</sup> 'Farmers Plan Tea Picking Boycott in Price Dispute' <<http://mobile.nation.co.ke/counties/Farmers-plan-tea-picking-boycott-in-price-dispute/-/1950480/2548192/-/format/xhtml/-/t0hu2jz/-/index.html>> accessed 7 February 2018.

<sup>145</sup> 'KTDA Directors' Perks Now Queried | People Daily' <<http://mediamaxnetwork.co.ke/peopledaily/131199/ktda-directors-perks-now-queried/>>.

<sup>146</sup> 'Farmers eye multinationals after KTDA withholds bonus' Business daily 22/4/2001, Pg. 6.

to have the small-scale tea farmers to support the union financially through the usual check-off system. This coupled with low education levels of Union leadership has caused Union in the tea industry not to make a real and sound impact on issues affecting tea farmers.

#### **4.3.2. Court Cases Filed by Tea Stakeholders**

Several court cases have been filed challenging the corporate structure of the tea sector in Kenya. In 2014, Governor of Kericho filed a suit in Court Kericho High Court<sup>147</sup> seeking the release of Kenya Shillings Eighty-Seven Billion (Kshs 87 billion) from the Agency, being monies allegedly deducted from small-scale tea farmers without their consent by the Agency to fund its expansion programmes. In the case, the Governor accuses the Agency of inefficiency, enrichment and corrupt practices by directors. The governor has publicly noted that from the time the tea sector was privatized in 2001 small-scale tea farmers have languished in abject poverty<sup>148</sup> with no future hope for better returns from their tea gardens. This matter is yet to be determined and it will be interesting to see its outcome given the interest that it has elicited amongst the small-scale tea farmers and the investor community that deals in the tea sector products.

In another High Court suit,<sup>149</sup> the applicants petitioned the Court to appoint competent inspectors who would investigate the Agency which they accused of financial misappropriation. They alleged that the shareholder of the respondent company had been defrauded and prejudiced by actions of the directors of the respondent. They queried the performance, role, duties and competencies of the directors of the respondent and that the company was destined to lose substantially. This is one case where shareholders, that is, small-scale tea farmers have clearly expressed their dissatisfaction with the Agency.

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<sup>147</sup> The Governor Kericho County versus KTDA & 27 Others, Petition No. 18 Of 2014

<sup>148</sup> 'Kericho Governor Sues KTDA over Alleged Exploitation of Tea Farmers, Seeks Sh87bn' <<http://mobile.nation.co.ke/counties/Kerichogovernor-sues-KTDA/-/1950480/2544644/-/format/xhtml/-/126f9b0/-/index.html>> accessed 11 February 2018

<sup>149</sup> 'Misc. Cit. Case 937 of 2006 - Kenya Law' <<http://kenyalaw.org/caselaw/cases/view/37899/>> accessed 17 February 2018

In *Republic versus the Minister of Agriculture & 52 others*,<sup>150</sup> a Judicial Review application filed through a notice of motion sought a review of regulations made by the Minister for Agriculture vide Legal Notice No 43.<sup>151</sup> In this matter the court held and confirmed that the Agency was a private company. The applicants sought to quash these regulations and the entire elections' program that had been prepared by the Minister. The Court held that while corporations in Kenya were governed by the Companies Act, the freedom of contract cannot be abridged arbitrarily and that though the government's desire is to promote and protect the tea industry, the law could not allow a Minister to do an illegal act that was beyond his authority and that the Agency was a private company and the Minister for Agriculture could not interfere in the affairs and management of a private company.

#### **4.3.3. Government Task Forces (2007 and 2016)**

Owing to hue and cry from tea farmers and other stakeholders on the inefficient and exploitative nature of the small-scale tea factories contractual relationship with the Agency, the Ministry of Agriculture set up a Task Force in 2007. During field meetings with tea farmers, the Tea Task Force noted calls by farmers for changes in the Agency's shareholding structure. The Tea Task Force<sup>152</sup> made key recommendations that could enhance shareholder value.

It noted that there was a need for clear separation of functions of the factory board and those of the Agency. A review and amendment of the Articles of Association of the tea factories to provide for separate roles and functions of directors and the management, reduce number of directors in tea factories, provide for level of education for directors, provide for a mix of skills at the board level with at least a third having no direct relationship with the factory, director elected to the board of management Agency to cease to be a director of the factory and two independent directors with skills in the field of agriculture, engineering, accounts, marketing and finance being elected to the board.

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<sup>150</sup> *Republic-versus- the Minister of Agriculture & 52 Others*, HC Misc. Application No. 621 of 2000,

<sup>151</sup> The Kenya Gazette Supplement No 32 of 2000 is the Tea (Elections) Regulations 2000

<sup>152</sup> Ministry of Agriculture Task Force Report on the Tea Industry, August 2007.

To carry out regular training of directors on their role as policymakers and develop and adhere to the code of conduct of best practice that will bind directors and the management. It further suggested that meetings of the board should be held quarterly and instead of the use of standing board committees and ad hoc committees to handle specific issues. It noted the need for a clear and transparent policy on staff recruitment and limits the tenure of directors to two terms of three years each. It suggested that the dual role of the Agency; that of investors of farmers' returns on investments and management agents should be addressed and removed. That the Agency as it is should be restructured into a holding company and its shares floated in the stock exchange so as to give value to its shareholders. Owing to the complex structure of the Agency, an independent detailed study needs to be undertaken by the Ministry of Agriculture to come up with an appropriate structure.

The Task Force recommendations have been implemented in piecemeal with the key recommendations on separation of functions of the factory and the Agency boards, mix of skills at the board and reduction of directors having not been implemented. This has continued to draw criticism; with shareholders still feeling short-changed and not getting value for their green leaf, let alone the tea factories which are farmers' "investments" in the paper. Lack of transparency, conflict of interest by directors, poor flow of information to the small-scale tea farmers on the role, functions and performance of the factories, accountability and integrity in the board management and low representation and involvement of the small-scale tea farmers in decision making have dodged the Agency to-date.

The Task Force was commissioned<sup>153</sup> in 2016 with the sole aim of establishing ways on how to improve tea farmers' earnings. It Mr Kagiri Kamatu, Chairman, the Tea Taskforce on the Tea Industry in Kenya came with radical proposals that could change the way the highest foreign income earner operates. These proposals include the restructuring of the Agency, review of its contracts with tea farmers, reduction of levies and establishment of a regulator for the small-scale tea sector, many years after a similar body was scrapped. This Task Force Report of

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<sup>153</sup> H.E. Uhuru Kenyatta, The President of the Republic of Kenya

2016<sup>154</sup> is yet to be tabled in parliament and the MP for Gem<sup>155</sup> wants the Government compelled to table the Report in Parliament for debate and adoption. If adopted, this Report shall have far reaching implications in the tea sector in Kenya.

#### **4.3.4. Intervention by the National Parliament**

Seven years after small-scale tea sector was privatized legislators sought to reverse the privatization of Kenya Tea Development Authority through a motion that was passed on 4th July 2007.<sup>156</sup> The motion asked the Minister for Agriculture to rescind the Revocation Order of 1999 contained in Legal Notice No 44 of 22/3/1999, which established the Agency. The reasons advanced was that the changes to convert Kenya Tea Development Authority from public state corporation to private company was rushed, no transition to put in place requisite structures and the Agency could not purport to be a limited company against the provisions of the law, serving thousands of farmers. Through a revocation order by the national assembly, the government could regain control of the tea industry in Kenya.<sup>157</sup> Upon passing of the motion the Agency sought clarification from the Attorney General on the legality and attendant ramifications of such a motion. The Attorney General gave a legal opinion<sup>158</sup> that the Resolution passed by Parliament did not bind the Government and that a mere revocation of the Legal Notice No 44 of 1999 could not merely revive the Kenya Tea Development Authority.

Interestingly, there is a similar Bill <sup>159</sup>in the current parliament (2018), which is advancing similar discontent and urging the members of parliament to pass a Private Members' Bill to reform the tea sector and return the small-scale tea sector to pre-1999 when Government appointed directors. This motion may have a big impact on the tea sector given that the management structure and the complex relationship between tea farmers and the Agency are yet to come out clearly. Secondly, the Bill has come immediately after the release of the

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<sup>154</sup> Member of Parliament for Gem Constituency, March 21, 2018, wants the government compelled to submit the 2016 Government Taskforce Report into the tea industry for debate and adoption by Parliament. <https://www.capitalfm.co.ke>.

<sup>155</sup> Ibid, 182

<sup>156</sup> Kenya National Assembly Official Record (Hansard) Wednesday, 23/5/2007 and 4/7/2007.

<sup>157</sup> Kenya National Assembly Official Record (Hansard), (2007)

<sup>158</sup> Section 20 of the Interpretation and General Provisions Act Chapter 2, Laws of Kenya

<sup>159</sup> The Kenya Tea Development Authority Bill, 2018, sponsored by Hon Elisha Odhiambo, MP for Gem



Taskforce Report on the Tea Industry that was commissioned by President Uhuru Kenyatta in 2016 to look into how to improve tea farmers' earnings. The Taskforce, chaired by Mr Kagiri Kamatu came with radical proposals that could change the way the highest foreign income earner operates.

The new Bill seeks to reform the tea sector, and give farmers more say in decision making, restore the defunct Kenya Tea Development Authority, The Kenya Tea Development Authority Bill, 2018 achieve farmers' returns to operational cost ratio target of 75:25 through production of best quality tea and match production to demand, reduction of ad valorem levy from one (1%) percent to naught decimal seven five (0.75%) percent in line with Section 10 of the Crops Act<sup>160</sup> and enhanced regulation of tea brokers<sup>161</sup> and review of brokerage fees from time to time.

The Bill seeks to vest the proposed Authority with the role of expanding and developing new markets through review of the value chain to maximize earning to the small-scale tea farmers. It also proposes to promote value addition through the establishment of common user blending and packaging facility and the establishment of a two-tier; Kenya Tea Council, under the Agriculture Act at the county and National governments level as a forum for the tea industry to promote tea markets and exports.

The Bill proposes a review of governance in the small-scale tea sector to ensure directors and employees of the management agents and the Authority are not directors of tea company factories that the agents manage. The Bill also seeks to develop a fertilizer subsidy for tea farmers through sustainable mechanisms and the strengthening of the tea development and research institutions like the Tea Directorate of Kenya<sup>162</sup> and the Tea Research Institute of Kenya<sup>163</sup> both under Agriculture Fisheries and Food Authority (AFFA), a State Corporation that was formed in 2011.

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<sup>160</sup> The Crops Act, 2013, commenced on 1st August 2014

<sup>161</sup> The Agriculture Fisheries and Food Authority (AFFA), State Corporation formed in 2011.

<sup>162</sup> Tea Directorate of Kenya, replaced Tea Board of Kenya after the repeal of the Tea (Amendment) Act, 2011

<sup>163</sup> The Tea Institute of Kenya, replaced Tea Research Foundation of Kenya after the repeal of the Tea (Amendment) Act, 2011

#### **4.3.5. Concerns by Tea Directorate of Kenya**

The Tea Directorate of Kenya<sup>164</sup> is the body mandated under the Agriculture, Fisheries and Food Authority to license, regulate and market the tea industry in Kenya raised its concerns in 2014 and blamed the Agency on low tea prices, use of farmers resources to develop its seven subsidiary businesses and which subsidiaries did not benefit and or pay any form of dividends to the small-scale tea farmers despite their money having been used to finance these projects. The Directorate noted concerns on the management of the small-scale tea farmers' resources by the Agency. "The organization has subsidiary companies that have an established over time which farmers from the grass root seem to be contesting that their involvement in initiating these businesses are poorly represented by way of what the elected directors sensitize them to understand. It is emerging that the accruing benefits from these subsidiaries are not fully felt at farm level"

It concluded that the Agency had involved itself on business that ran parallel to those of the small-scale tea farmers, for example, the credit taking societies, which the Agency had an upper hand as it deducted loans from the said farmers at source thereby crippling operations of credit taking societies managed by the said tea farmers. That the tea factories corporate structure have a negative impact in terms of unnecessary burden to the tea farmers who have continued to finance the elaborate subsidiary businesses of the Agency, diminished incomes to the small-scale farmers and the conduct of business is not accountable to the farmers as operations and relationship that exist is that of the principal rather than the agent as stipulated the initial privatization and contracts in place.

In conclusion the relationship between small-scale tea farmers and the Agency was meant to be that of the Agent-Principal as espoused by proponents of the agency theories<sup>165</sup> where an agent acts for and on behalf of the other; designated as principal.<sup>166</sup> Tea farmers and the Agency

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<sup>164</sup> Tea Industry Status Report compiled at The Tea Research Foundation Of Kenya 29th April 2014 – 2nd May 2014

<sup>165</sup> Michael C Jensen and William H Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (Social Science Research Network 1976) SSRN Scholarly Paper ID 94043 <<http://papers.ssrn.com/abstract=94043>>

<sup>166</sup> Stephen A Ross, 'The Economic Theory of Agency: The Principal's Problem' (1973) 63 American Economic Review 134.

anticipated the following problems of the Agency relationship<sup>167</sup> which seemed to have set in, that is:-

- a) Risk sharing - this arises when the parties to an agency agreement have different attitudes towards risk<sup>168</sup>and
- b) The apparent conflict of the principal and agent' desires or goals.

In this instance, the Agent has taken advantages on the gaps that exist in the law on corporate governance and the available information on profits to engage in activities that have enhanced its personal goals, for example, getting the principal to finance seven (7) more subsidiaries without any due benefit to a principal. An agent has withheld a principal of information thereby putting the principal, the small-scale farmers, not to fully comprehend or understand or accurately evaluate and determine the value of the decisions of the agent. This has left the principal, the shareholders, always at the mercy of the agent in as far as information affecting their factories and tea sale performance and profits accrued. Opportunism by the agent has been so glaring even despite the small-scale tea farmers having accepted the Agency's costs and attempts to monitor directors' self-interests and conduct.

Restructuring of the Agency and the small-scale tea factory companies' boards to take in independent directors may rid the rot of conflict of interests and the eventual reduction of directors as suggested by the Task Force in 2007 will ease the challenges faced by small-scale tea farmers in Kenya.

Theoretically, a clear conflict between the principal and the agent, in this case, has emerged. Confidence amongst the tea farmers is quickly waning and soon the farmers will clamour for change. The shareholder ownership and value are on focus based on the above challenges faced by the Agency and sooner than later, the government may listen to the concerns of the small scale tea farmer.

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<sup>167</sup> Eugene F Fama, 'Agency Problems and the Theory of the Firm' (1980) 88 Journal of Political Economy 288.

<sup>168</sup> Kathleen M Eisenhardt, 'Agency Theory: An Assessment and Review' (1989) 14; the Academy of Management Review 57.

#### 4.4. Neo-Colonialism and Under-Development in the Tea Sector

Liberalized tea sector, pre-independence land reforms and ownership and the legal and institutional frameworks continue to shape and impact tea development in Kenya. Neo-colonialism is the cause of underdevelopment in the small-scale tea industry perpetuated through the Agency arrangement and the landholding system adopted at independence. Neo-colonialism is linked to land laws and relate closely to legal and institutional frameworks in the small-scale tea factories.

Kwame Nkurumah, a prominent author on neo-colonialism coined neo-colonialism, to mean 'continued relationships by European countries with their former colonies in Africa that had been liberated'.<sup>169</sup>

In his book, Kwame Nkurumah posits that "In the place of colonialism, as the instrument of imperialism, we have today neo-colonialism ...which like colonialism, is an attempt to export the social conflict of the capitalist counties.... The result of neo-colonialism is that foreign capital is used for the exploitation rather than for the development of the less developed parts of the world."<sup>170</sup>

In 1961, in reference to the economic mechanism of neo-colonial control Argentine Revolutionary Leader said "we, politely referred to as 'underdeveloped', in truth are colonial, semi-colonial or dependent countries. We are countries whose economies have been distorted by imperialism, which has abnormally developed those branches of industry or agriculture needed to complement its complex economy. Underdevelopment brings a dangerous specialization in raw materials, inherent in which is the threat of hunger for all our peoples. We are also with a single crop, single product and a single market. That is the great formula for imperialist economic domination".<sup>171</sup>

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<sup>169</sup> Neo-Colonialism, the Last Stage of Imperialism, Kwame Nkurumah, International Publishers Co. Inc 1966

<sup>170</sup> Ibid, 47

<sup>171</sup> Cuba: Historical Exception or Vanguard in the Anticolonial Struggle; speech by Che Guevara on 9, April 1961

The root of under-development was begun earnestly by colonialists who sustained monopolies around their agricultural and commercial enterprises through investment and use of forced labour obtained from African economy.<sup>172</sup>

This continued during the colonial period where poverty of rural African economy continued to increase on one hand<sup>173</sup> contrasted with a dual economy of foreign capitalist investment and westernized consumption patterns in tea plantations and trading companies on the other.<sup>174</sup>

At independence, elite Kenyans were enrolled in the capitalist sector and gradually drawn into the philosophy of owning property, commercialized farming and industrial employment. Elite Kenyans comprised the ruling group in civil service and grasped opportunities to become large capitalist farmers.<sup>175</sup>

Formal pulling out of colonial power was apparent since its commercial agents could work in harmony with new African ruling groups and settlers could enter and operate profitably in Kenya. Elite Kenyan successors, a class of black civil servants were allowed to own land and businesses thereby creating a wealthy group of the bourgeoisie who had succeeded in taking power from colonialists.<sup>176</sup>

Before the end of three decades in Kenya and just like other independent African States, there arose the need to reduce government-debt<sup>177</sup> Kenya was one of the third world countries that needed to undertake structural programs<sup>178</sup> implemented by US-based financial institutions<sup>179</sup> if it was to continue getting monetary support. Effectively, in 1999 Kenya commenced the legal and institutional programmes towards complying with this new requirement amongst other key reforms were:-

- a) Sale of public and state enterprises,

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<sup>172</sup> Collins Leys; Political Economy of Neo-colonialism

<sup>173</sup> Ibid, 76

<sup>174</sup> Ibid, 223

<sup>175</sup> Ibid, 77

<sup>176</sup> Ibid, 78

<sup>177</sup> Williamson John, What Washington Means by Policy Reform, Institute for International Economics, 1989

<sup>178</sup> Supra 70

<sup>179</sup>McGregor S; Structural Adjustment Programmes and Human Wellbeing; journals2.scholarsportal.info.

- b) Elimination of trade barriers that impeded market entry or restrict competition, trade liberalization through the elimination of quantitative restrictions (licensing) and
- c) Legal security for property rights.

Programs implemented across third world countries by the US financial institutions<sup>180</sup> have been viewed by post-colonialists scholars as modern day colonization. This resulted in trade liberalization and privatization of state enterprises hence minimal government role and entrance of multinational corporations.<sup>181</sup>

Collins Leys in his book<sup>182</sup> advanced the dependency theory to explain development whose central research project was economic activity and development in Kenya, particularly within the agriculture and manufacturing sector which was attributable to and was controlled by foreign multinational corporations. As a result, Kenya was tied in a dependent relationship with foreign capital which stunted its wholesome economic progress.

Subsequently, in an article published in 1980<sup>183</sup> Colin Leys noted that at independence in 1963 settler capital was largely eliminated and a capitalist class constituted out of agents of accumulation in both trade and agrarian production in the colonial and immediately post-colonial period begun to be recognized.<sup>184</sup>

Neocolonialism was perpetuated in the land sector in Kenya after it attained independence. The negotiated constitution ensured that the large agricultural land and ranches remained in the hands of the British owners and where it was sold, the small clique of independence bourgeoisie would benefit. The 1963 Constitution of Kenya was the West-minister prototype constitution and it ensured that the provisions as agreed in the Lancaster Conference were upheld. Overriding interests and rights over land and property were created including

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<sup>180</sup> Margaret H and James H, 1999; Neocolonialism and Neoliberalism in South Africa and Zambia; Political Science Quarterly, 114 (3) 479

<sup>181</sup> Supra, 80

<sup>182</sup> Colin Leys, Underdevelopment in Kenya, (Heinemann, London, 1975).

<sup>183</sup> Leys, "State Capital in Kenya: A Research Note", (1980) 14.2 Canadian Journal of African Studies, 307.

<sup>184</sup> M.P. Gowen and K. Kinyanjui; Some Problems of Income Distribution in Kenya; UNESCO 1975

mechanisms for compulsory acquisition with no avenues to seek remedy when proprietary rights were infringed.

A Settlement Fund Trustees System was established under the then Ministry of Lands and Settlement to purchase and distribute settler farms to landless Kenyans. However, it was based on the market system and only benefitted the few with financial means to buy. Those with customary interests generally lacked the capital or simply refused to buy the land which they considered theirs. Ethnic and political favouritism characterized the new land acquisitions. This has continued to cause tensions across communities in Kenya.

Various laws were enacted to ensure better registration of title for Africans with its main achievement is the element of individual ownership, to directing activities on agricultural land including subdivisions, sale, transfer, lease, and mortgage, to cater for group rights of especially nomadic and pastoral communities which were ill-suited for individualization and to ensure that group rights were upheld and such communities have land to graze their animals. The Land Control Act, 1967, the Land Adjudication Act, Cap 284, Land (Group Representative) Act, Cap 287

All these were done in the behest of Kenyanization but it targeted the wealthy clique that had taken power in Kenya. Land tensions in Kenya have finally turned into commercial tensions with tea earnings taking the focus of a tension of the eastern and western sides of Kenya.

In the tea sector, the clique of post-independence civil servant bourgeoisie that had been facilitated economically by the government to work and own businesses readily positioned themselves during the privatization of various sectors and bought the said enterprises. The Agency is one of such groups which ensured that it took over the colonial mentality of investment and labour-wage economy of the masses, in this case, the tea farmers.

A court case filed by the Kenya Tea Development Agency Limited Kericho High Court<sup>185</sup> against the competition authority of Kenya over a report<sup>186</sup> on cartels and price manipulations

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<sup>185</sup> Petition No 18 of 2015 and Judicial Review No 3 of 2015

and seeks to quash the Report and its findings that accused the Agency and its subsidiaries of manipulating prices of highest tea grade (PF1) which is mainly produced by tea farmers. This case filed by the Agency comes after a court case in Kericho High court was filed seeking to recover more than Kshs 93 billion allegedly syphoned without the consent of the small-scale tea farmers by the Agency. This is a matter that shows that the Agency working contrary to the terms of the Agency contract and divesting funds from tea farmers without their consent and undercutting the same principle that it should be working for.

In Litein Tea Factory Limited and another Versus David Kiplangat Mutai and five other, the court dismissed a suit filed by farmers who objected to registration of the satellite tea factory known as Chelal Tea Factory Limited in the name of the first plaintiff. Though the Justice F. Gikonyo issued an injunction against the defendants, it noted that ownership of the satellite tea factory was in doubt. This matter goes to confirm the tensions that underlie the relationship between the small scale tea farmers and the agent.

In Court in Muranga, tea farmers/shareholders of Kiru Tea Factory Limited were stopped by Lady Justice Teresia Matheka from seceding from the Kenya Tea Development Agency, while noting that such action will affect more than 8000 tea farmers. This was after the Agency influenced election of directors who were not in favour of the tea farmers. The Court proceeded to order for an Annual General Meeting which was held on 17/11/2017. This brings to fore the corporate concerns in the small scale tea sector and how the Agency has continued to underdevelop and impoverish the small scale tea farmer.

In Chinga Tea Factory Limited in Othaya, the High Court sitting in Nairobi nullified the election of Arthur Mukira, a director whose elections had been influenced by the Agency. Justice Lady Roselyn Aburili ruled that the elected director did not have the requisite educational qualifications to be elected as a director. This case confirms that the Agency has abdicated its core mandated and was keen to influence weak members of the board for its mischievous ends.

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<sup>186</sup> Marketing Inquiry for the Tea Sector in Kenya, the Tea Industry Status Report, May 2014



#### **4.5. Conclusion**

In conclusion, it is imperative that the law regulating tea development and marketing in Kenya ought to be reformed so as to close the apparent gaps that have undermined economic development of the small-scale tea farmer and not to benefit adequately from the tea proceeds. The pieces of legislation need to be consolidated and amended so that firm constitutional provisions on integrity and leadership and concepts of good corporate governance can be spelt out prominently in the legislation regulating the tea sector. The relationship of the tea farmer and the Agency that manages the small-scale tea factories need to be properly anchored in the law that regulates the tea sector so as to become items of regular audits by the tea regulator.

Benefits of liberalization are yet to trigger to the small scale tea farmer since the style and operations of the Agency relationship is replete with neo-colonial practices that do not foster development. A review of the legal regime in the tea sector is necessary for the tea farmers to be cushioned from the vagaries of exploitation. This will help in ensuring that the farmers are not exploited through poor corporate governance structures and apparent gaps in the laws that govern the tea sector in Kenya. Secondly, this will help in developing simple organizational structures that small-scale tea farmers could easily assess information and pricing for the tea leaves. Lastly, the objectives of privatization are yet to be achieved yet Scheduled Crops in Kenya, like tea and coffee, are the leading foreign exchange earners for this country but the primary product of the raw material is seriously disadvantaged.

In the foregoing chapter, the historical and current legal, corporate governance principles against the liberalization programme, social responsibility and neo-colonialism in land ownership and the agriculture sector basing it on the 1980-1990 structural adjustment programme in Kenya has been discussed in depth.

The laws in the colonial period and subsequent amendments thereto have more or less not changed the status quo in the agricultural sector, owing to the nature of land tenure that was adopted immediately after independence. The Constitution has brought desired changes in the agricultural sector in Kenya. Laws have been consolidated and international practices have

been embedded in the constitution and much is expected from private and public sector in as far as leadership, integrity, good governance and accessibility to information by members of the public. The Crops Act and the Agriculture, Fisheries and Food Act remain as the two major laws that regulate agriculture development in Kenya. In this chapter whereas these two pieces of legislation are good as they have consolidated the previous sectorial laws, reforms are needed so that through these two laws the glaring gaps can be closed.

Whereas the Constitution gives the basis on leadership, integrity and corporate governance, no mention of these has been made on the two statutes, yet they are the interface between the end users and the provisions in the supreme law. Secondly, these two statutes need to set the role of all the actors in the agriculture sector, especially the Crops Act when its role includes licensing of players in the tea sector, but no roles and responsibilities have been ascribed in the law or in the regulations. Shareholder value is yet to be realized despite reforms that have gone into the industry. Free flow of information between the tea farmers and the Agency is wanting yet the Constitution makes it a right for every Kenyan to have free access information.

The chapter also has taken note of the tea farmers' voice in the tea sector, the attempts by the national assembly to re-look at liberalization and its effect on the tea sector in Kenya, the role that the courts have played in defining the Agency's ownership and roles and the admission by the tea regulator that the Agency has unfairly worked against the small tea farmer whose tea proceeds have been channelled to other projects that are solely owned by the Agency. From the foregoing, it comes out clearly that there is a dire need for reform in the liberalized tea sector in Kenya.

Lastly, through analysis of the structural adjustment programs and the land question, it is apparent that Kenya is still dependent on its former colonial laws and concepts through the neo-colonialist liberalism that is being experienced across the third world countries. The tea sector in Kenya is reeling under a new breed of the capitalist bourgeoisie who took over after independence and who upon liberalization have taken up as agents, private investors,

consultants, technocrats and are perpetuating neo-colonialist tendencies leaving the tea farmer more disadvantaged owing to lack of government controls.

The relationship that has existed between tea farmers and the Agency has remained that of dependency. Tea farmers do not get access to any information from the Agency and are not aware of the pricing policy of their green leaf by the Agency. The ownership chain ends on receipt of the green leaf by the Agency and the tea farmers do not know the real dynamics, costs and effects of their relationship with the Agency to the extent of funding projects that they have no beneficial value and which are fully owned by the Agency. In this state, the tea farmers are on the periphery as labourers and suppliers of raw materials to their own enterprises while the Agency exports and enjoy the returns thereto in total exclusion of small-scale tea farmers. In this context, the Agency has enriched itself at the expense of the tea farmers, under the glaring watch of the directors elected by the tea farmers, who fail to articulate the farmers' concerns owing to being easily manipulated, are not independent, not well endowed with the dynamics of the tea sector and seriously captured by the aspects of conflict of interest. The rates of the Agency agreement should have been reviewed owing to the increase of the tea factories from thirty-nine at liberalization stage and now at sixty-two.

Negative effects of liberalization and structural adjustment programs in Kenya and the tea sector in particular created a stratified and a complex system of governance and management in the tea sector with the Agency being the biggest beneficiary at the expense of the tea farmers (the enterprises' owners). Liberalization was a government program, but it is illogical when the courts hold that government should not interfere with private enterprises that help to create even if the said private enterprises are hurting the intended beneficiary, the small-scale farmers.

I opine full implementation of the recommendations by the members of the public, the national parliament and the various task forces will herald a new beginning for the tea sector. Out of this, gaps in the legal and institutional framework will be sorted out, farmers' representation and voice through their Union will be revamped as this remains the best check and balance mechanism in this vast industry and the corporate management concerns shall be addressed. In

my view, productivity by the small-scale tea farmers has not been fully rewarded and opening up of the licensing of more agents could spur competition in terms of tea pricing through better marketing, hence improved earnings to the tea farmers and reduction of the agency fees.

Whereas there are challenges to the production of tea in Kenya, namely, the rising cost of labour, volatility of tea prices on world markets and re-valuation of the shilling against the dollar, there is no key justification by management of small-scale tea factories not to set policies on corporate social responsibility yet shareholders come from same communities which ordinarily would benefit from such social programs. Use of firewood from the community leads to serious environmental degradation and for small-scale tea factories to fail to be socially accountable through the development of sustainable environmental programmes that boost re-forestation means that it is only keen on maximizing profits at the expense of the environment and its inhabitants.

In a nutshell, I am optimistic that legal reforms in the tea sector that will open up the tea sector, improve flow of information, have the sector to be more inclusive, change the qualification of the directors, more government control and give the small-scale tea farmer more say in management will rid the sector of the current perceived neo-colonial tendencies and will stem systematic exploitation of tea farmers. Multinational and private tea companies also play a pivotal role in the employment of youth from underlying communities and buying of the green leaf which otherwise could have gone to waste owing to lack of capacity within small-scale tea factories. These are part of the social corporate social responsibility programs that have always been taken note by ethical partners wherever they conduct audits within these companies.

The high cost of labour and provision of social amenities have pushed the multinational tea companies to invest heavily in innovations and re-engineering programs. Plucking machines both handheld and tea combine harvesters and firewood harvesting machinery <sup>187</sup>have threatened the very base that makes the corporate social responsibility meaningful, that is,

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<sup>187</sup> Ibid, Note 176, pg. 16

employment of youth from the neighbouring communities. Where a hundred employees would hand pluck tea, one hand held machine does the work effectively and efficiently without any loss in tea quality.

In effect, corporate social responsibility programmes within the multinational tea companies have been felt albeit not adequately. Policy and budgetary provisions have been maintained and steadily increased and it is a success story, especially on scholarship schemes that target brilliant and needy students from across the counties. Management of a successful out grower programs with farmers having been organized into cooperative movements has improved and helped in mopping excess green leaf that would otherwise go to waste.

Despite the Agency has been in existence from 1992 to-date there is nothing to write home about the corporate social responsibility programs by the small-scale tea factories. Whereas there has been an effort to create the Agency's Foundation, its abstract objective is good but its fundraising program does not look aggressive enough to meet the social, economic and environmental demands from the community.

Whereas there have been so many strides in the corporate social responsibility programmes in the plantation sector, these gains will be eroded and affected seriously by innovations and technological advances that are underway. Firstly, the number of workers in the tea sector will marginally decrease. This will be a negative impact given that the country is faced with the serious challenge of unemployment. This is, therefore, an economic impact which the government needs to address. Secondly, the social dimensions across the villages that underlie the plantations will be hit by idleness and the rate of social economic related criminal acts shall be on the rise. Demand for more health facilities will be on the rise with attendant costs since employees who were previously enjoying excellent medical services offered by employers will swim/congest the few government facilities that are poorly managed across the villages. Thirdly, the corporate social responsibility programmes, that is, school fees scholarships for needy students of employees in secondary schools and universities will marginally reduce and the facilities in form of employee housing, schools and health centres will be under-utilized.

Lastly, ethical programmes funded through premium support from organizations such as Fair-trade and Rainforest Alliance will diminish as these support funds were majorly directed to the employees. In effect, whereas the employers will have reduced their overheads costs of operations marginally, the community will have to contend with negative impacts that would not be easily mitigated by government interventions.

## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

#### 5.1. Conclusion

In Kenya, tea development has had a long history starting from the colonial era when native Kenyans were not allowed to plant tea, to the period of agitation for independence and land rights during the struggle for independence, to the high hopes and expectations at independence period and finally to the post-independent Kenya where challenges abound to-date.

The tea sector in Kenya has seen its milestones, achievements and challenges. Whereas it is one of the leading foreign exchange earners in Kenya, this benefit is yet to trickle down to the small-scale tea farmer. The small-scale tea farmer still hopes for that time when their tea gardens will bring forth better returns.

Before independence, tea and other crops were both controlled and restricted crops that were only planted by the settlers. The Swynnerton Plan comprehensively addressed this albeit the ulterior motives that underlay the entire process of creating systems that would preserve the land tenure and make it outlive the clamour for land rights at independence in Kenya. The development of a critical layer of civil servants in Kenya who would maintain the status quo and gradually take over the bourgeoisie system in Kenya had earnestly begun and this was fully manifested in the discussions and count-down to independence at the Lancaster Conferences in London. The independence constitution, the country social philosophy and the development plans that followed confirmed the path that this country was to take in relation to its citizenry and the imperial colonial government that just handed power. The nationalization programme was geared towards enabling the Kenyan elite to take over as soon as the social development plans had been implemented successfully.

The plantation sector in Kenya remained intact after independence and it continues to enjoy the negotiated independence to-date with no change in their style of management which is a replica of the pre-colonial era. Within two decades after independence and the successful

Kenyanization programme, the Kenyan bourgeoisie was now ready to take over the realm of power through liberalization of the state corporations. The tea sector was one of the sectors earmarked for liberalization and this happened with effect from 1992 when the Kenya Tea Development Authority was privatized and in its place, a private entity called the Agency took over the management of the then thirty-nine small-scale tea factories. The privatization of the tea sector meant that the small-scale tea farmers would be owners/shareholders of the small scale tea factories whereas the new outfit, the Agency will be the agent under the principal-agent relationship. It, therefore, would have meant that whereas thousands of peasant tea farmers are owners of the small scale tea factories, the provisions of the Companies Act would apply, that is, these entities would be public companies instead of being private companies, owing to the membership. This is a paradox that has dodged this sector with none in the national government wish to see it as a gap that requires urgent reform.

In the intervening period, tea farmers have been represented in the Agency by elected directors. The Agency too has massively invested the returns from managing the farmers' outfits in eight subsidiaries, which the tea regulator in Kenya opines that these investments have been done using the farmers' proceeds without their due consent. This has seen cases being filed by county governments and individuals challenging the relationship between the tea farmers and the Agency.

The farmers through their Union and Members of Parliament have challenged the corporate structure and management of the Agency which lack the culture and principles of corporate governance hence large, ineffective and replete with conflict of interest and only meant to serve the interests of the Agency.

Comparative studies between two tea sectors on development and social responsibility programmes it emerges that the Agency though managing asset portfolio of tea farmers is yet to make inroads in programmes tailored at meeting the corporate social responsibility demands, which fact continues to cause tensions between the Agency and the farmer. The flow of information alone impedes any meaningful corporate social responsibility programs that the



Agency has attempted to roll out. The plantation sector has less acreage of land under tea but has been able to provide well for its employees as well as the community yet the small-scale tea sector has the largest area under tea hence better earnings but it is yet to make an impact across the communities that grow tea.

Cost of labour and production threatens the development and communities' social order which include the health care and education programmes for the tea sector employees, employment from the community and the improved community-plantations relations through successful out grower programmes and premiums received from ethical partners who purchase made tea from the tea farmers. This is due to the planned use of mechanized plucking machines by the plantation sector that will see many locals from the underlying communities rendered jobless.

In conclusion, the tea sector in Kenya has steadily survived economic depression having been buttressed by the residence of the small tea farmers and the rather cheap labour. From independence, no effort has been put in place to develop and improve the welfare of the small-scale tea farmer. It has developed into a cartel system in its operations and management after liberalization and through the successive legal regimes. For the sector to provide better returns to the small scale tea farmer, the below highlighted legal reforms are necessary as they will close the grey areas wherein the small-scale farmer has been exploited thus making it possible for the small-scale tea industry to be sustainable

## **5.2. Recommendations**

The following are recommendations that the government should put in place so as to help the small-scale tea industry to develop and enable the small-scale tea farmers to realize returns on their investments albeit through their small-scale holdings. The state of affairs calls for radical legal reforms in the tea sector so as to help the tea farmers to realize the benefits of their investments in the small scale tea industry and for objectives of privatization to be fully implemented, I recommend the following:-

### **5.2.1. Compliance with the Companies Act by small scale tea factories**

The management and corporate structures of the Agency be reviewed to reflect its status under the Companies Act, 2015. Whereas the small-scale tea factories are registered as private entities under the Companies Act, it has more members as stipulated in the law. In effect, small-scale tea factories should be categorized as public companies under the Companies Act and some government role is stipulated in law so as to safeguard the public interest in the tea sector. This will effectively cause the public laws and the constitution provisions to apply on the tea sector, which include the Procurement and Disposal Act, Regulations of Meetings for Public Companies under the Companies Act, Public Officers' Ethics Act and the Constitution.

### **5.2.2. Amendments to Crops Act, 2013 and Tea Regulations**

Amendments need to be effected on the Crops Act, 2013 and other laws on food and agriculture in Kenya. The main aim for these recommendations is to elevate the Tea Directorate of Kenya into a vibrant regulator. Though tea is one of the leading foreign exchange earners, the office of tea regulator has been relegated to a level that is not felt across the industry. Government support for this body is critical for it to be effective and as the only body that oversight and regulate the industry for the benefit of the small-scale tea farmers. Further amendments need to be made on this Act to provide for clear roles of the government, tea agents, tea factories and tea farmers. This will assist in checking and balancing acts of impropriety and adherence to principles of good governance.

This is necessary so as to have prescribed formats of contracts guiding principal – agents, make it easy for tea farmers to understand, demand for an open flow of information between agents and the principals and to generally increase the scope of the tea regulator to undertake its role of policing and oversight.

The Crops Act should be amended and clauses that bind licensees to adhere and uphold principles of corporate governance, integrity and leadership as provided in the law.<sup>188</sup> Compliance of these provisions needs to form yearly audits by the tea regulator.

Scheduled Crops in Kenya is a colonial relic and has been used by private businesses to subjugate tea farmers. An amendment repealing scheduling of crops needs to be made.

The Act should be amended to provide for prescribed draft contracts and or agreements with minimum legal standards to guide and safeguard small-scale farmers from prohibitive and exploitative contracts.

### **5.2.3. Policy on Land Use in Kenya**

It needs to be re-looked at and the ever continuous sub-division of agricultural land should be checked. In some areas like Konoin in Bomet County, population boom is causing households to uproot tea so as to build houses and rear cows. This has been informed by poor returns and lack of a comprehensive government policy that protects the tea from being uprooted and or provide for communal set-ups so as to open more land for use in extensive and profitable agricultural ventures. Kenya requires a rigorous paradigm shift on its land use as done by Indian government sometimes back, that recovered land for agricultural use by providing communal set-ups to its population.

### **5.2.5. Review on the Tax Policy**

Investors wary of high costs of production and to leverage on this, many companies have downsized and some have closed and moved to countries like Ethiopia where the tax regimes are good and there are investment incentives including the provision of free government leaseholds on land. Unless Kenya re-looks at its tax regime, it may not be easy for it to achieve any of the set targets under the four pillar programme.

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<sup>188</sup> The Constitution and Companies Act, No 17 of 2015

### **5.2.6. Implementation of the Task Force Recommendations**

Secondly, owing to the gaps in the tea sector's laws and underdevelopment witnessed after independence, Tea Industry Task Force Reports should be implemented as the recommendations capture the core complaints by tea farmers and other stakeholders within the tea industry.

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